12-4-2002

Busse v. City of Golden

U23A356

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Appeal from Jefferson County District Court The Honorable Jack W. Berryhill, District Court Judge District Court Case No. 01-CV-2411, Division 9	
Appellants: KATHLEEN M. BUSSE, IRENE OLIVER, and VIRGINIA L. CUSACK **Appellees:** THE CITY OF GOLDEN, a Colorado municipal corporation, and THE CITY COUNCIL OF THE CITY OF GOLDEN	**▲COURT USE ONLY▲**
Attorneys for Appellees: **WINDHOLZ & ASSOCIATES** David S. Williamson, #8530 James A. Windholz #1253 1650 38th Street, Suite 103W Boulder, CO 80301 Telephone: 303-443-3100	Case Number: 02-CA-402

ANSWER BRIEF

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Defendants-Appellees, the City of Golden and the City Council of the City of Golden ("Golden"), respectfully submit this Answer Brief in accordance with C.A.R. 28(b).

STATEMENT OF THE ISSUES

1. Did the jurisdictional time limits on election-related issues preclude Plaintiffs'/Appellants' claims from being asserted almost one year after the election?

2. May the elected officials of Golden exercise judgment in applying bond proceeds to a voter-approved purpose?

3. Did the District Court correctly treat the Plaintiffs' claims as political questions?

4. Whether the courts can or should infer an estoppel from election publicity?

STATEMENT OF THE CASE

Plaintiffs/Appellants are seeking to challenge both an expression of the will of the electorate and an exercise of the discretion of elected officials. As the District Court concluded, they have raised issues that are neither timely nor appropriate for resolution in the courts.

In November 2000, the voters of Golden authorized, *by a margin exceeding 68%*, the issuance of sales and use tax revenue bonds to finance park and recreation improvements. The following year, two series of sales and use tax revenue bonds (the "Bonds") were issued by Golden for the authorized purpose. In September 2001, months after the issuance of the Bonds and the greater part of a year after the election, Plaintiffs filed this litigation, seeking to challenge the validity of the election or, in the alternative, the propriety of certain proposed expenditures of Bond proceeds.

The District Court correctly decided that it was without jurisdiction to consider the issues raised by Plaintiffs because those issues were either not raised in a timely manner or presented political questions. Its ruling dismissing the Complaint should be affirmed.

STATEMENT OF THE FACTS

On November 7, 2000, a municipal election was conducted in Golden wherein more than 68% of the voters approved the issuance of approximately $26,500,000 in municipal bonds for the purpose of the "acquisition and construction of park and recreation facilities". (Rec. 49, par. 8) That municipal election was conducted pursuant to City Council Resolution No. 1128, which referred the issue to the voters. The entirety of the title of Resolution No. 1128 reads:

> A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GOLDEN ESTABLISHING A BALLOT ISSUE AND REFERRING TO THE ELECTORS A QUESTION PERTAINING TO THE ISSUANCE OF SALES AND USE TAX REVENUE BONDS TO ACQUIRE AND CONSTRUCT PARK AND RECREATION FACILITIES AND OPEN SPACE. (Rec. 148-150)

The following year, in reliance upon the overwhelming voter approval of the ballot question, Golden's City Council adopted Ordinance No. 1538 on April 12, 2001 for the purpose of authorizing the issuance of the sales and use tax revenue bonds. Section 4 of the ordinance authorizes the proceeds of the bonds to be used to carry out "the Construction Project". The "Construction Project" is defined in the ordinance as meaning "the acquisition, development and construction of land, recreational facilities and open space". (Rec. 70, 67)

On May 17, 2001, the City issued $21,620,000 of the Bonds to finance construction of a golf course and aquatic park, and the purchase of open space land for the Golden park system. At that time City Council deferred the issuance of the remaining $4,800,000 of Bonds

authorized at the election. On June 14, 2001 City Council adopted Resolution No. 1210 directing that the remaining $4,800,000 in Bonds be issued and that the proceeds be utilized for parks and recreation purposes including enhancements to the existing community center, modifications and additions to the Tony Grampsas Gymnasium and enhancements/expansion of the new aquatic park and golf course. (Rec. 151-171)

City Council's decision to utilize a portion of the $4,800,000 issued for additions to the existing community center and the Tony Grampsas Gymnasium instead of the construction of a stand-alone satellite community center was not "unilaterally made" as is argued on page 6 of the Plaintiffs' Opening Brief. Rather, as is reflected in the entirety of Resolution No. 1210 (the resolution itself and the various documents which are attached and incorporated into the resolution), and as more particularly described in the uncontested affidavits before the trial court below (attached to the Motion to Dismiss) City Council paid particular attention to the language of the ballot question as it related to the expenditure of the bond funds. (Rec. 152-153) City Council's rationale and the significant backup documentation supporting its reasoning is specifically set forth in Resolution No. 1210. There was a very public and open planning process which continued over a series of City Council meetings in addition to the planning process that occurred through the City's Parks and Recreation Advisory Board. As indicated by the affidavit of the City Clerk, the public discussion of the planning process of City Council took place during at least half a dozen City Council meetings between the election in November 2000 and City Council's decision to build facilities that provided the functional equivalent of a satellite community center. (Rec. 108-109)

As directed by the electors, the City proceeded to construct a golf course and aquatic park. The necessary land was acquired as a component of the golf course and aquatic park project. Incidental to this land acquisition, the City undertook several tasks necessary to prepare the property for its intended use, including those tasks described on page 6 of the Appellant's Opening Brief. Each task, as is more fully described below, and in the affidavits to the trial court, was a necessary and essential part of the recreation facilities for which the bonds were issued. (Rec. 111-113) As of the date of the filing of this brief, the aquatic park has been completed and has been open to the public during the summer of 2002. The golf course has been constructed and grass is growing in anticipation of opening in the summer of 2003.

In late September 2001, the Plaintiffs filed their complaint in the District Court challenging the ballot title submitted and approved at the November 2000 election and questioning the authority of the City to exercise its discretion to expend the $4,800,000 of Bond funds as directed in Resolution No. 1210.

SUMMARY OF THE ARGUMENT

Golden does not question the political right of Plaintiffs to disagree with the decisions of the voters and City officials. However, none of the issues they raise are legal issues justiciable by a court because either (1) the issues were not raised in a timely manner or (2) they are essentially political questions and call for the courts to substitute their judgment for that of the electors or the legislative and executive branches of government.

ARGUMENT

I. PLAINTIFFS WOULD HAVE THE COURT IGNORE *MOLLECK V. GOLDEN* AND OTHER AUTHORITY APPLICABLE TO UNTIMELY

CHALLENGES TO BOND ELECTIONS. THE 2000 BALLOT QUESTION DID NOT CONSTITUTE A DUEL OR MULTIPLE QUESTION.

a. *Plaintiffs challenge to the November 2000 ballot title and election is untimely.*

Central to the District Court's Order, but not cited or discussed in the Opening Brief, was the precedent of *Molleck v. Golden,* 884 P.2d 725 (Colo. 1994), a case which involved an earlier sales and use tax revenue bonds of Golden and a challenge to the electoral authority under which they were issued. In that case the Colorado Supreme Court held that a challenge to a ballot title is subject to the statutory 5-day time limit running from the setting of the ballot title, and that all other challenges to ballot questions are subject in any event to the statutory 10-day time limit running from the canvass of the election.

Plaintiffs are contending that they may still challenge the form of the election question months or even years after the election, when Golden and others have taken numerous actions in reliance upon the adoption of the referred measure at the election and the expiration of the applicable challenge periods. A holding that they may do so would undo the limitations periods enacted by the legislature and expose all voter-approved borrowing of the State and local governments to an open-ended risk of challenge.

Plaintiffs' First Claim for Relief is a challenge to the ballot title established by the Golden City Council in 2000. Section 1-11-203.5 C.R.S. sets forth the procedure by which one may challenge a ballot title. The procedures in Section 1-11-203.5 C.R.S. are comprehensive and, pursuant to the provisions of subparagraph (5) of that statute, are the "exclusive procedures to contest ... the form or content of the ballot title" (emphasis provided). See, *Abts v. Board of Education*, 622 P.2d 518, 525 (Colo. 1980).

Section 1-11-203.5(2) C.R.S. requires that any contest to a ballot title be commenced by "verified petition" and that the petition be filed and served "within 5 days after the title of the ballot issue or ballot question is set by...the political subdivision". The subsection also provides a specific procedure with respect to the conduct of a trial in such a challenge. § 1-11-203.5(1) C.R.S. provides that a party wishing to contest the establishment of a ballot title "shall file with the clerk of the court a bond, with sureties, running to any contestee to pay all costs, including attorney's fees in case of the failure to maintain the contest". The complaint filed by the Plaintiffs in this case was not verified, nor did the Plaintiffs post the required bond. More importantly, the ballot title was set by City Council on August 27, 2000. The filing of the action more than one year later is clearly not within the 5-day period during which such a contest may be instituted. As held by the District Court, it is barred by the statute of limitations and the District Court was without jurisdiction to hear that issue. See *Molleck v. City of Golden, supra.*; see §1-11-213(4) C.R.S.

Further, even if the Plaintiffs characterize their First Claim For Relief as something other than a challenge to the form or content of the ballot language, the Plaintiffs' action is time barred by the failure to contest the action within 10 days of the official survey of returns. § 1-11-213(4) C.R.S. The official survey of returns was certified on November 9, 2000. The filing of this action in September 2001 came months after the 10-day period after filing of the election returns. As specifically set forth in the statute, election contests must be timely filed or the court is without jurisdiction to hear the same. § 1-11-213(4) C.R.S.; *Molleck v. City of Golden, supra.*

The necessity of timely resolution of election contests is apparent, particularly in cases involving the issuance of municipal bonds. In this case Golden has issued more than $26,000,000 in bonds in reliance on their election results, and has, to this date, expended the greater portion of those funds. More importantly, third parties have purchased those bonds in reliance upon the election results and the availability of the expedited election contest procedures set forth in the statute.

The Plaintiffs apparently concede that their First Claim for Relief is, in essence, a challenge to the ballot title. On page 10 of the Opening Brief, Plaintiffs' argument acknowledges that their challenge is premised upon the theory that the ballot title is flawed. The Plaintiffs, recognizing that they cannot challenge the ballot title, seek to do indirectly what they cannot do directly, that is challenge the ordinance that implements the election results. To allow the Plaintiffs to do indirectly what they cannot do directly would defeat the purpose of the legislation requiring a prompt challenge to election issues.

b. The ballot question does not present more than a single question.

The Plaintiffs argue that the ballot question in the November 2000 election contains four separate purposes in violation of the rule announced by the Supreme Court in *City of Denver v. Hayes,* 63 P.2d 31 (Colo. 1900). An analysis of the facts of the *City of Denver v. Hayes* decision, coupled with consideration of recent Supreme Court cases clearly indicates that the *City of Denver v. Hayes* rule was not violated by the ballot title in question.

The single purpose of the Bond issue and its proceeds is clearly and unambiguously set forth both in the ballot title and Council Resolution No. 1128 (wherein the ballot question is established). The trial court below found that the purpose of the Bonds was to "acquire and

construct park and recreation facilities and open space". (Opinion at page 4, Rec. 203) The entirely of the title of Resolution No. 1128 reads:

> A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GOLDEN ESTABLISHING A BALLOT ISSUE AND REFERRING TO THE ELECTORS A QUESTION PERTAINING TO THE ISSUANCE OF SALES AND USE TAX REVENUE BONDS TO ACQUIRE AND CONSTRUCT PARK AND RECREATION FACILITIES AND OPEN SPACE. (Rec. 148-150)

The same operative language is utilized in the ballot question itself.

While the words of the resolution and the ballot question describe, in general terms, the types of facilities City Council intended to acquire and construct, the plain language of both the resolution and the ballot issue indicate that those specific amenities are merely examples of the types of facilities that may be constructed and acquired with the bond proceeds. Those specific amenities are generally described following the stated purpose and are prefaced by the word "including". The word "includes" in the overwhelming majority of jurisdictions, including Colorado, as a term of extension or enlargement. *Colorado Common Cause v. Meyer,* 758 P. 2d 153, 163-4 (Colo. 1988); *Lyman v. BowMar,* 533 P. 2d 1129 (Colo. 1975); *Freedom Newspapers v. Tollefson,* 961 P. 2d 1150 (Colo. App. 1998). As stated by the Colorado Supreme Court in *Colorado Common Cause v. Meyer*:

> The use of "includes" ...connotates that something else is included by the definition beyond what was previously covered by the immediately proceeding language. *Supra* at 164.

In *City of Denver v. Hayes,* the eleven "separate and distinct purposes" for the bond issues were widely varied. The purposes included such things as the erection of public buildings including a public auditorium, construction and maintenance of public sewers, purchasing of land for parks, building and construction of viaducts, constructing reservoirs for

water storage and making improvements to the South Platte River Channel and Cherry Creek Channel. There was no question in *City of Denver v. Hayes* that there were multiple purposes for the bond issue. *City of Denver v. Hayes* is distinguishable on its facts.

The Colorado Supreme Court more recently applied and elaborated on the *City of Denver v. Hayes rule* in *Abts v. Board of Education, supra.* The *Abts* decision held that a bond issue for the stated purpose of constructing an elementary school on one site, constructing another junior high school at another site, for equipping and furnishing school buildings and for acquiring and purchasing school grounds and improving those grounds did not violate the rule of *City of Denver v. Hayes.*[1]

Abts v. Board of Education is controlling in this case. In *Abts* the Supreme Court clearly ruled that "the fact that multiple facilities are required does not mean that a project has more than one purpose". *id* at 524 The *Abts* court applied the following test to conclude that the bonds issued for the construction of two school buildings, equipping and furnishing school buildings and for the acquisition of additional school grounds and improvements was a single purpose:

> The test applied to determine the validity of a bond issue having more than one object or funding more than one structure is whether there exists a natural relationship between the various structures or objects united in one proposition so that they form but one rounded whole. *id* at 523

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[1] In the *Abts* case of the ballot question read:

Shall the Board of Education of School District No. RE-1, Valley, in Logan County, Colorado, be authorized to contract in one series or more, a bonded indebtedness of not exceeding $4,300,000 for the purpose of constructing a rural elementary school building, on the Caliche Junior/Senior High School middle site north of Proctor, of constructing a junior high school building in Sterling, of equipping and furnishing school buildings, but only in connection with a construction project for new buildings or for an addition to an existing school building, of acquiring or purchasing school grounds and of improving school grounds, all within and for the district, ...?

The single purpose that justified the bonds in *Abts* was "acquiring and improving school grounds and constructing and furnishing school buildings. *id* at 2523 The single purpose of the Bond issue challenged in this case is similar, and meets the test set forth by the Colorado Supreme Court in *Abts v. Board of Education.* That single purpose, as stated in the ballot title itself[2], is the "acquisition and construction of park and recreation facilities", as was found by the trial court below.

To interpret the language in the way suggested by Plaintiffs, the Court would have to ignore the specific language of the ballot question indicating that the purpose was "to acquire and construct park and recreation facilities". It is a well-established tenet of statutory construction that the Court should interpret language in a manner that gives effect to all of the language and not adopt a construction that renders one part superfluous. *Slack v. Farmers Insurance Exchange,* 5 P.3 280 (Colo. 2000). The language of the ballot issue does not state that the purpose of the bonds is to build a satellite community center and to build a family aquatic park and a golf course with clubhouse. To interpret the language in this manner would give no effect to the prefatory language "to acquire and construct part and recreation facilities". To interpret the language in that manner would transmogrify the word "including" to the word "meaning", which was specifically rejected by the Colorado Supreme Court in *Lyman v. BowMar, supra* at 1133. This Court must interpret the language of the ballot issue in a manner that presumes the legality of the question. The District Court quite properly

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[2] In *Abts* the Court held that a single purpose need not be specifically stated in the ballot title, but could be implied there from.

concluded that the single purpose of the bond issue was to "acquire and construct park and recreation facilities".

II. THE COURT SHOULD REJECT PLAINTIFFS SIMPLISTIC ASSERTION THAT ELECTED OFFICIALS HAVE NO DISCRETION IN APPLYING BOND PROCEEDS TO A VOTER-APPROVED PURPOSE.

So desperate are Plaintiffs to state a legal issue that they have, in their Opening Brief, all but denied that elected officials have any discretion in applying Bond proceeds. Adopting their approach would not only be manifestly impractical but would also run contrary to virtually all of the relevant case law. The trial court correctly ruled that there has been no illegal diversion of the Bond proceeds and that the City Council has appropriately exercised its discretion in expending those bond proceeds for the purposes authorized by the ballot question.

Plaintiffs first argue that the ballot question did not authorize use of the funds to acquire the real property upon which the golf course and aquatic park have been constructed. Such a narrow reading of the ballot question is manifestly unreasonable. Clearly a municipal golf course is a "recreational facility". The ballot question itself specifically defined a golf course as such. Plaintiffs appear to argue that acquiring and constructing a golf course is a permissible use of funds, but that, the Bond funds may not be used for the acquisition of the real property upon which the golf course is located. It is beyond comprehension how the City could acquire and construct a golf course without purchasing the land! The Property acquired by the City was essential and necessary to construct the golf course and aquatics park. (Auriemma affidavit par. 14, Rec. 113)

The Colorado courts have never so narrowly restricted the use of borrowed funds as to prohibit their expenditure for matters that are necessary and incidental to the authorized purpose. See *Johnson v. McDonald,* 97 Colo. 324, 346, 49 P.2d 1017 (Colo. 1935) wherein the Colorado Supreme Court ruled that the use of funds that were limited "exclusively for construction, maintenance and supervision of the highways of the state" could be used to pay bank charges and interest payments incurred in connection with the road projects. The bond question need not specifically authorize or designate acquisition of each parcel of the real property necessary to construct the recreation facilities any more than it would be required to contain detailed construction specifications.

Plaintiffs also complain about a number of other uses of Bond proceeds for tasks not specifically mentioned in the Bond question, asserting that they are an improper use of the bond proceeds. Plaintiffs have interpreted these tasks in a vacuum and taken them out of context to support their assertion that the items are not "parks and recreation related". In doing so, they have ignored the fact that each task they have identified and complained of is a necessary component of the overall project. The affidavit of the City's deputy public works director, Vince Auriemma (Rec. 111-140), places each task in its appropriate context, and shows that each was a necessary component of the acquisition and construction of the parks and recreation facilities approved by the voters. Further, it is clear from Mr. Auriemma's affidavit that at least one of those tasks was not funded with Bond proceeds. The affidavit of Mr. Auriemma in his regard was uncontroverted. Each task questioned by the Plaintiffs is briefly described below:

a. *Reclamation of solid waste dump.* A portion of the real property upon which Golden constructed the golf course was used by the previous owner as a solid waste dump. Prior to the City obtaining title to that property, the Colorado Department of Public Health and Environment imposed certain closure and environmental cleanup requirements on that portion of the property pursuant to an approved plan that would allow the property to be used as a golf course. In other words, in order to use the site for the golf course, it is necessary for the closure and cleanup requirements of the State of Colorado to be fulfilled. There are no plans for Golden to expend funds to reclaim any portion of the old waste dump that is not necessary to Golden's use of the property for its golf course.

In negotiating for this the golf course site, the City was aware of the closure and cleanup requirements and addressed them in its contract to acquire the property. The City agreed to take title to the property subject to the closure requirements and to undertake completion of the closure plan "as it affects the golf course parcel" only. (See Purchase Agreement, paragraph 3; Rec. 114-115) This undertaking was a part of the consideration given by the City to obtain the real property. Therefore, the activities of the City's closing and reclaiming the solid waste dump, as identified in the Plaintiffs' Amended Complaint, are directly related to, and necessary in conjunction with, the construction of the golf course. Use of the Bond proceeds to reclaim that portion of the golf course real estate previously used as a solid waste dump is basic to construction of the course. It is no different from using the proceeds for any other physical preparation of the property for its intended use as a golf course, such as clearing and grading of the land, seeding and landscaping.

b. *Flood Control.* Construction of the golf course and aquatic park required that Golden address storm drainage requirements the same as any other landowner contemplating construction. Storm drainage and flood control facilities were necessarily incorporated into the design and construction of Golden's recreational facilities.

In addition to accommodating storm water drainage generated from the project, regional storm drainage facilities were incorporated into the design and construction of the golf course and aquatic park facilities to accommodate storm drainage upstream and protect properties downstream from the project. It was reasonable, prudent and necessary in the design and construction of the golf course to resolve storm drainage and flood control issues.

Drainage improvements to serve the project would therefore clearly be a proper expenditure of Bond funds. However, dispositive of Plaintiffs' concerns regarding the regional drainage facility is that those storm drainage facilities were not constructed from funds from the Bond issue. Rather, separate funds from the Urban Drainage and Flood Control District were utilized to construct those improvements. While incorporation of regional storm drainage and flood control improvements into the design and construction of the golf course are a legitimate use, function and component thereof, in this instance there were no Bond proceeds utilized for that purpose. (See Auriemma affidavit, par. 10-12, Rec. 112-113)

c. *Rock stabilization on private property.* The design of the golf course is such that a portion of the course (the 12th fairway) is adjacent to steep slopes and cliffs consisting of unstable rock formations. Because of the public's use and access to those areas, construction of the golf course necessitated stabilization of the rock and slopes that would otherwise pose a

hazard to the public and users of the golf course. Stabilization of those rock slopes was a necessary component of preparation of the property for use as a golf course, just as is clearing and grading of property or other prepatory work. Contrary to the Plaintiffs' allegations, all rock stabilization in conjunction with the acquisition of the golf course has occurred on property owned by Golden, not on private property. (See Auriemma affidavit, par. 13, Rec.113) However, even if such rock stabilization activities were necessary on private property adjacent to the golf course, rock stabilization to protect the public and users of the golf course incident to construction would be a necessary part of the project.

d. *Relocation of power line across private property.* Plaintiffs argue that there was an unauthorized use of the Bond proceeds to relocate power lines across private property. Such an improper use is not alleged in the Amended Complaint. However, the affidavits and exhibits filed in the trial court make it unmistakably clear that the relocation of the power line was necessary to prepare the property for use as a golf course. As indicated in the Agreement to purchase the golf course property from Jefferson Clay and Investment Company, the existing power line traversed Parcel 2 and the golf course parcel. Accordingly, its relocation was essential to utilize the property as a golf course. The obligation to relocate or abandon the power line was invoked only if the City were to build a golf course, and only in conjunction with construction of the golf course (Rec. 115-116, paragraphs (f) and (g)).

Finally, Plaintiffs' complain that City Council improperly exercised its judgment and discretion when it determined that there would not be sufficient funding available to construct

and operate a "satellite community center" in the preliminary form as described in the *Golden Informer*.[3]

Assuming that all parties in October 2000 perceived that the bond proceeds would result in the construction of a "32,000 square foot satellite community center", as anticipated in the *Golden Informer*, that fact does not lead to the conclusion that the specific expenditures authorized by Council by Resolution No. 1210 are outside the purpose for which the bond has been issued. Golden is not required to complete the project exactly as contemplated at the time of its approval. City Council may adjust the project as deemed desirable under conditions prevailing as the project proceeds. *Denver v. Currigan,* 362 P. 2d 1060 (Colo. 1985); *Concerned Citizens of Hospital District No. 304 v. Board of Commissioners,* 897 P.2d 1267 (Wash. App. 1995); *Coggins v. City of Asheville,* 180 S. E. 2nd 149 (N. C. 1971); See *Friends of Chamber Music v. Denver,* 696 P. 2d. 309, 320 (Colo. 1985).

City Council Resolution No. 1210 provides the Court with sufficient factual background to allow the Court to understand and realize that the City Council expressly found that the expenditures proposed therein are equivalent in function to the proposed satellite community center and therefore, consistent with the authority granted by the voters, and that the expenditures proposed in the resolution are appropriate. As indicated in the text of Resolution No. 1210, the planning process that followed voter approval of the Bond issue

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[3] *The Golden Informer* is a periodic community newsletter "published and produced by the City manager's office". It has been routinely published for the past 5 years and is distributed by mail to every household and business within the City. The September/October issue of *The Golden Informer* (attached to Plaintiffs' Amended Complaint) included an article on "Frequently Asked Questions" regarding the Golden Recreation Campus Project. As those questions relate to the Golden Recreation Campus, the responses to the "Frequently Asked Questions" reflect the City manager's good faith description of the project as contemplated by the City manager at that time. *The Golden Informer* is not published or produced in response to specific municipal issues or elections and it is not a publication of the Golden City Council. Its contents are not approved by the Golden City Council in advance of publication. (Rec. 142-143)

indicated that the modification of the project would be economically and fiscally responsible and that the purpose of the project would be fulfilled by implementing the proposed modifications recommended by the City's Parks and Recreation Advisory Board.[4] Upon studying the recommendations of the Parks and Recreation Advisory Board, and following considerable public discussion of the issue[5] and after considering a detailed financial analysis by the City's staff Council determined that it would not be prudent or in the best interest of the public to proceed with the construction of a stand-alone satellite community center. Council determined that the same amenities could be provided to the citizens of Golden by modification and improvement of existing facilities. Accordingly, Resolution No. 1210 modifies the specifics of the project so that the same public amenities contemplated in the September/October *Golden Informer* would be provided in conjunction with the existing recreation facilities in the City. If the Court compares the description of the "satellite community center" in the *Golden Informer*, with the facilities that are the subject of Resolution No. 1210, the Court will readily ascertain that the same public amenities are being provided. For example, the racquetball courts referenced in the *Golden Informer*, are to be instructed at the City's existing community center. The gymnasium improvement mentioned in the *Golden Informer* will be incorporated into the Tony Grampsas facility. Locating these same amenities in the east and central part of town, as opposed to the south party of town (as

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[4] The Parks and Recreation Advisory Board is a citizen board whose function and purpose is to advise City Council on matters concerning parks and recreation. The financial concerns of the Parks and Recreation Advisory Board regarding the construction and operation of a stand-alone satellite facility were well documented by a detailed analysis from the City's finance director. See Memorandum dated May 31, 2001 attached to Resolution No. 1210. (Rec. 159-171)

[5] The City Council agenda and minutes indicate that the planning process was publicly discussed, considered and addressed by Council at numerous formal City Council meetings between November 2000 and the date of the adoption of Resolution No. 1210 on June 14, 2001, including Council meetings on January 18, 2001, March 1, 2001, April 26, 2001, May 10, 2001, May 17, 2001, June 7, 2001 and June 14, 2001 (Affidavit of Susan M. Brooks, Rec. 108-109).

was the Plaintiffs' wish) is within Council's discretion, particularly given Golden's relatively small geographic size, and thus the accessibility of its citizens to the amenities.

The facts of *Coggins v. City of Asheville, supra* are similar in this regard. In *Coggins* the voters approved two separate bond issues, one for the construction of a new city auditorium and one for the construction of a municipal civic art center. After the election, plans were drawn and it became apparent to the City Council that completion of the new city auditorium and the municipal civic art center would require funds in excess of those available. In order to save the project, and following input at many public forums, City Council made plans to merge the two projects by completely renovating and remodeling the existing city auditorium. The North Carolina court held that the City would not be required to construct the two new facilities with the bond proceeds, but was authorized to proceed with the modified plans. The court held that the combined complex provided substantially the same facilities and met the same general purpose of each of the respective bond questions. As in this case the approved plans by City Council constituted a savings, not a diversion or misapplication of Bond funds.

The Plaintiffs' suggestion that the City has utilized "bate [sic] and switch" tactics in the adoption of Resolution No. 1210 is without support (see Appellants' Opening Brief, pg 13). City Council's decision to expend the $4,800,000 of Bonds as directed by Resolution No. 1210 was well within the purpose for which the bonds were issued and the discretion of the City Council in directing the project. The facts of the two cases cited in the Plaintiffs' Opening Brief at page 13 do not even resemble the modification to the recreation project authorized by City Council in Resolution No. 1210.

In *McNichols v. City and County of Denver,* 120 Colo. 380, 209 P.2d 910 (Colo. 1949), bonds were issued "for the purpose of improving, extending and equipping the Denver General Hospital". The Supreme Court held that such a purpose would not permit Denver to utilize the bond funds to construct an office building solely for use in occupancy by the Denver Bureau of Public Welfare. The authorized purpose for the bond funds and the proposed use by the City and County of Denver were clearly separate and distinct. An office building is not a hospital.

In *Denver v. Currigan, supra.* the proposition provided that the bond funds were to be expended for a group of 15 specific public improvements. The authorizing ordinance went on to state that when the 15 improvements were completed, any excess funds could be expended on a group of 5 additional projects. The City of Denver completed 14 of the 15 primary projects but then determined that it would not be in the best interest of the City of Denver to undertake the 15th project. The Colorado Supreme Court, relying on *specific language of the authorizing ordinance,* held that City Council had the discretion to abandon the 15th project, but because completion of all 15 projects was a precondition to utilizing the funds on the secondary projects, the remaining funds could not be used for the secondary projects. The Supreme Court held that completion of all primary projects was a "condition precedent" that must have been met before the secondary projects could be addressed.

Neither case is analogous to the circumstances presented below in which the Golden City Council, after considerable study and public input, exercised discretion to modify the project in a manner that accomplished the same ends.

III. PLAINTIFFS CANNOT BE PERMITTED TO USE THE DISTRICT COURT AS A POLITICAL FORUM.

The District Court correctly recognized that all of Plaintiffs' claims not barred by limitations periods were essentially political in nature and not appropriately resolved by the judicial branch of government. This is consistent with a long line of cases decided in this and other States, cited by the trial court below, in which the courts have declined to second-guess either election results or the discretionary acts of elected officials.

City Council's actions in adopting Resolution No. 1210 were not taken without serious consideration of the public good and purpose and intent of the bond election, nor where they taken in a vacuum. After consideration of numerous sources of information, including extensive public discussion and input, and after having the benefit of detailed designs and financial planning, City Council made a reasonable and prudent decision to provide for a "satellite community center" by directing construction of the same public recreation amenities in connection with the existing facilities of the City. The expenditures authorized by Resolution No. 1210 are not being diverted for a purpose different from that approved by the over whelming majority of voters at the November 7, 2000 election. All Bond funds are being expended for the acquisition and construction of "parks and recreation facilities" and, as specifically found and determined by the City Council with extensive factual support, are being used to provide the same amenities as contemplated when the election in question was submitted to the voters. City Council's actions were well within its legislative authority and discretion in carrying out the purpose for which the Bonds were authorized. Council's actions, taken pursuant to its legislative and discretionary authority by the adoption of Resolution No. 1210, Council's actions are not subject to substitution by the judgment of

the courts. The trial court correctly determined that these matters constituted political questions, which were beyond the scope of the power of the judiciary. *McNichols v. Denver, supra.*

IV. NO ESTOPPEL ARISES, OR CAN ARISE, FROM ELECTION PUBLICITY.

It was established long ago that courts do not reinterpret election results based upon their reading of the publicity surrounding an election. This rule was inevitable, not so much because courts would not be able to evaluate election publicity if they chose as because doing so would soon require judicial intervention in every election where the losing side felt that the press coverage, campaign materials or advertising were deficient, biased or misleading. Plaintiffs' suggestion that there is an unresolved issue involving estoppel cannot be supported in light of either the case law or the District Court's extensive analysis of the political questions raised in this case.

Plaintiffs suggest that the Order of Dismissal has not addressed the Third Claim for Relief based upon promissory or equitable estoppel. First, to the extent that the Third Claim for Relief is based upon the *Golden Informer*, Defendants believe that the newsletter cannot legally be the basis of such a claim given the status of that publication. The *Golden Informer* is not a pronouncement of the City Council of the City of Golden. Even if it were, the circumstances of such a publication would not be sufficient to bind the actions of the City Council, or otherwise deprive it of discretion with respect to the expenditure of the Bond proceeds when it came time to make such actual expenditures. Secondly, the allegations of the Third Claim for Relief purport to allege what "the Voters" relied upon and what "the

Voters" were entitled to rely upon. There is no support for the proposition that the individual Plaintiffs in this case are entitled to assert claims on behalf of a class known as "the Voters".

The Plaintiffs' Third Claim for Relief does not specify whether Plaintiffs are asserting a claim for promissory estoppel or equitable estoppel. Regardless of the theory, neither is supported by the factual allegations of the Complaint. It is well established in Colorado that the doctrine of equitable estoppel will not be so freely invoked against governmental agencies as it may be invoked against private persons. The doctrine should only be invoked against governmental entities if necessary to "prevent manifest injustice". *Jafay v. Board of County Commissioners*, 848 P. 2d 892, 903 (Colo. 1993).

To establish a claim of equitable estoppel "the party to be estopped must know the facts and either intend the conduct to be acted on or so act that the party asserting the estoppel must be ignorant of the true facts, and the party asserting estoppel must rely on the other party's conduct with resultant injury". *Berg v. State Board of Agricultural*, 919 P. 2d 254, 259 (Colo. 1996). An equitable estoppel claim is fundamentally a tort and the Colorado Governmental Immunity Act applies to all such claims. *Berg v. State Board of Agricultural*, supra. The Plaintiffs in this action have made no attempt whatsoever to comply with the Colorado Governmental Immunity Act and this Court is without jurisdiction to entertain such a claim.

The doctrine of promissory estoppel states:

> A promise which the Promissor should reasonably expect to induce action or forbearance on the part of the Promissee or a third party and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *Board of County Commissioners v. DeLozier*, 917 P. 2d 714, 716 (Colo. 1996).

Any such reliance must be justifiable. *Cherry Creek Aviation v. City of Steamboat Springs*, 958 P. 2d 515, 522 (Colo. App. 1998).

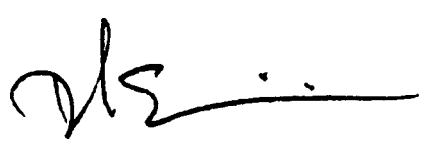
Plaintiffs factual allegations, coupled with the uncontroverted information contained in the Motion to Dismiss and associated affidavits, will not support applying either the doctrine of promissory estoppel or equitable estoppel. No promises were made. No misrepresentations were made. Colorado law has long recognized that City Council ultimately has discretion with respect to the details of the expenditure of public funds so long as that discretion is exercised within the purpose for which the funds have been authorized. To invoke the doctrine of either equitable or promissory estoppel based upon preliminary planning documents would unduly hamper discretion of the municipal government in the exercise of its obligations to the public at large. The only injustice that would result would be the injustice to the citizens of Golden if their duly elected representatives are not free to exercise discretion on public expenditures as facts and circumstances change.

CONCLUSION

The District Court's Order was correct and should stand as rendered.

Respectfully submitted this 9th day of September 9, 2002.

WINDHOLZ & ASSOCIATES



David S. Williamson

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2002, a true and correct copy of the foregoing **ANSWER BRIEF** was served via first class mail, postage prepaid on the following:

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