

District Court, Eagle County, Colorado 885 Chambers Avenue P.O. Box 597 Eagle, Colorado 81631	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No.: 2005 CV 580 Div.: 2
<p>FREDERICK WYMAN II TRUST, dated February 1, 2005 fbo Nicholas F. Wyman, ABBELINE G. WYMAN TRUST, dated February 1, 2005 fbo Nicholas F. Wyman, and ALL SEASONS CONDOMINIUM ASSOCIATION, INC. a Colorado nonprofit corporation, Plaintiffs</p> <p>v.</p> <p>REMONOV & COMPANY, INC., a Colorado corporation, Defendant</p>	
ORDER RE: MOTION FOR SUMMARY JUDGMENT AS MOOT	

Plaintiffs have asked that the Court make the preliminary injunction, entered on November 12, 2005, permanent. This request, however, is moot.

The preliminary injunction was entered to prevent defendant from constructing a deck that encroached onto land designated as open space. It is readily apparent that the building permit for this deck has expired in the five years since the preliminary injunction entered; defendant further represents that there are no plans to construct the deck given both the preliminary injunction and the Opinion of the Court of Appeals. Plaintiffs tacitly concede in their reply that any issue will arise in the future:

Without a final and permanent injunction, there is absolutely nothing preventing Defendant from going back to the Town of Vail tomorrow for any necessary approvals and carrying forward with its plans to construct the Outdoor Deck or a similar deck project that violates the Protective covenants. [] Consequently, the parties would be forced to relitigate the same issues over and over again as Defendant refiles applications for additional expansions. This lack of finality

poses an imminent threat of harm to Plaintiffs, as Defendant would have nothing preventing it from moving forward with plans to construct a deck in the immediate future.¹

It is well-settled that, in order for a court to render declaratory judgment, an actual controversy must exist. *See, e.g., Bd. of County Comm'rs v. Roberts*, 159 P.3d 800, 810 (Colo. App. 2006), *cert. denied*. Courts may not consider matters involving speculative injuries. *Id.*; *see also Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 105 P.3d 653, 656 (Colo. 2005) (“courts should refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur”). There must be an adjudication of present rights based upon established facts. *Cacioppo v. Eagle County Sch. Dist. RE-50J*, 92 P.3d 453, 467 (Colo. 2004), *citing Farmers Ins. Exch. v. Dist. Court*, 862 P.2d 944, 947 (Colo. 1993). The injury must occur to a legally protected right or cognizable interest. *Am. Civil Liberties Union of Colo. v. Whitman*, 159 P.3d 707, 709 (Colo. App. 2006), *cert. denied*. A court cannot render an advisory opinion, nor can a court enter declaratory judgment even if it may be assumed that some kind of actual controversy may arise in the future. *Id.*, *citing Farmers Ins. Exch., supra*. To issue a declaratory judgment, a court by its decision must be able to terminate uncertainty or controversy. C.R.S. §13-51-110; C.R.C.P. 57(f); *Constitution Assocs. v. N.H. Ins. Co.*, 930 P.2d 556, 561 (Colo. 1996). Summarized:

In the context of a declaratory judgment action, “jurisdiction exists only if the controversy contains a currently justiciable issue or an existing legal controversy, rather than the mere possibility of a future claim.”

Schwartz ex rel. Estate of Schwartz v. Schwartz, 183 P.3d 552, 553 (Colo. 2008), *citing Constitution Assocs., supra*, 930 P.2d at 561.

¹ Reply, pp. 3-4.

The Colorado Supreme Court has made clear that:

Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

Theobald v. Bd. of County Comm'rs, 644 P.2d 942, 950 (Colo. 1982), *citing Int'l*

Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222, 224 (1954).

In a later case, the Colorado Supreme Court reaffirmed this principle, stating:

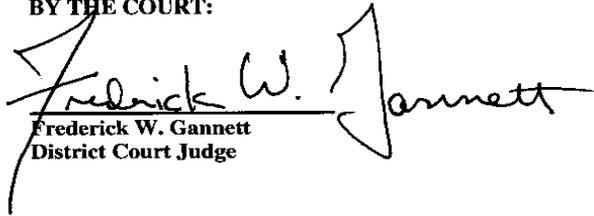
The declaration sought by the parties regarding the general powers of the sheriff and the Board to control personnel and budgetary matters in the sheriff's department is unavailable because it is not grounded upon any actual controversy concerning those matters. [] If these issues are to be adjudicated, they should be resolved within the context of an actual controversy between these parties.

Sullivan v. Bd. of County Comm'rs, 692 P.2d 1106, 1110 (Colo. 1984).

For these reasons, the Court finds the controversy between the parties to be moot. There is no relief that the Court could enter that would resolve any dispute between the parties; there is no remaining controversy. The Court therefore has no further jurisdiction of this affair. *Schwartz, supra*. The Court, however, declines to deny the motion for summary judgment. To do so would suggest that plaintiffs' claims failed on their merits, when: 1) plaintiffs received a preliminary injunction; 2) prevailed in the Court of Appeals on defendant's appeal; and 3) the matter only become moot after the appeal. Instead, the Court dismisses the request for a permanent injunction pursuant to C.R.C.P. 12(b)(1) for a lack of jurisdiction. *See, e.g., Meridian Ranch Metro. Dist. v. Colo. Ground Water Comm'n*, 240 P.3d 382, 385 (Colo. App. 2009) (courts address jurisdiction *sua sponte*), *cert. denied*.

WHEREFORE, after a full and fair consideration of the issues and arguments presented, it is **ORDERED** this 24th day of November, 2010, that the Motion for Summary Judgment is **DISMISSED AS MOOT** for lack of jurisdiction pursuant to C.R.C.P. 12(b)(1).

BY THE COURT:


Frederick W. Gannett
District Court Judge