IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 06-0839

VIRGINIA CITY, A Municipal Corporation
and Political Subdivision of the State of Montana,

Plaintiff and Appellee,

vs.

THE ESTATE OF *GREG OLSEN* and PHILLIP MASON, JR.,

Defendants and Appellants.

On Appeal from the Montana Fifth Judicial District Court,
Madison County

APPELLANTS' REQUEST FOR REHEARING

APPEARANCES:

ANDREA J. OLSEN
622 Rollins Street
Missoula, MT 59801
Telephone: (406) 543-2666

ATTORNEY FOR APPELLANTS

WILLIAM A. HRITSCO
DAVIS, WARREN & HRITSCO
P. O. Box 28
Dillon, MT 59725
Telephone: (406) 683-2363

ATTORNEY FOR APPELLEE

PETITION FOR REHEARING

STATEMENT OF COUNSEL

Defendants-Appellants' (hereinafter Olsen) respectfully submit this petition for rehearing. Rehearing is appropriate when a fact material to the decision, a question decisive to the case was overlooked by the Court, or its decision conflicts a controlling decision not addressed by the Court. In the judgment of counsel, this case meets the appropriate standard for rehearing as provided in Rule 20. Olsen's counsel has contacted the attorney for Appellee (hereinafter City) who declined to consent to rehearing.

Introduction

This Court issued an Order affirming the District Court on January 6, 2009. In its decision, this Court affirmed the District Court's Order, which granted summary judgment. In addition, this Court affirmed the dismissal of Olsen's defenses and counterclaims, including its counterclaim for liability of the City and Third Parties for their conduct, which was not before the District Court on Summary Judgment, and therefore there were not Finding of Facts to support the Conclusion of Law of the District Court, which summarily dismissed them. In addition, in its Order dated 2001, this Court had specifically found that the District Court had failed to address the facts found in Olsen/Mason's evidence, most notably the Affidavit of Carl Donavan, City's Historic Preservation Officer, which contained evidence to support the defenses and counterclaims raised by Olsen/Mason. It was proper that the District Court did not have Findings of Fact to address Olsen/Mason's evidence regarding the defenses of estoppel, waiver, and failure to exhaust administrative remedies and the counterclaims of liability for City's conduct because these issues were not before the District Court on Summary Judgment. However, it was improper to find as a matter of law

that the defenses and counterclaims should be dismissed when they were not at issue in the Motions for Summary Judgment nor were there Findings of Fact to support the Conclusion of Law resulting in summary dismissal.

Much of the evidence presented to support Olsen/Mason's contention that not all the issues surrounding the alleged noncompliance of the permit were appropriate for summary judgment because of disputed facts also support Olsen/Mason's defenses and counterclaims. However, the issues of Olsen/Mason's defenses and counterclaims were not requested, addressed, or briefed by summary judgment motions nor were heard by the District Court. Olsen/Mason and therefore the District Court did not have stipulated facts to rely upon for a motion for summary judgment on the defenses and counterclaims. In this aspect of the decision, the issue of the District Court's dismissal of Olsen/Mason's remaining issues, including defenses and counterclaims based upon the action and conduct of City and its employees and agents and Third Parties was overlooked by this Court in its Order dated January 6, 2009. Therefore, its decision is appropriate for rehearing, and either may reconsider its decision as it stands, or allow additional briefing on the issues.

ARGUMENT

1. Neither City nor Olsen/Mason filed a Motion for Summary Judgment on the Issues of Olsen/Mason's Defenses and Counterclaims.

City's Motion for Summary Judgment was limited specifically to the issue of whether the permit issued to Olsen/Mason by the City had been violated by Olsen/Mason. Similarly, Olsen's Motion for Summary Judgment was limited to whether the Olsen house met the setbacks as required by the permit. Neither City's Motion for Summary Judgment nor Olsen's Motion for Summary Judgment went to the issues raised by the defenses or the counterclaims pled. Contrary to City's claim, at no time did Olsen/Mason

agree that all the facts were undisputed and all the legal issues ripe for summary judgment. Olsen never conceded and specifically disputed in its Brief in Opposition to City's Motion for Summary Judgment that the issues City raised regarding the permit had significant factual disagreement, including the "claim" that the permit could be read and understood absent the ordinances surrounding the permit. Olsen specifically stated in their reply brief to the city that both parties moving for summary judgment does not establish, in and of itself, that no genuine issues of material fact exist. Faith Lutheran Retirement Home v. Veis, 156 Mont. 38, 47, 473 P.2d 503, 507 (1970).

Olsen/Mason only moved on the issue "**regarding whether the house meets the setback requirements as set forth by the Virginia City Ordinance**". Olsen/Mason's brief did not claim that any other issues regarding compliance with the permit or ordinances was ripe for summary judgment, and especially did not claim that its defenses and counterclaims were ripe for summary judgment. City's Motion in Limine, opposed by Mason/Olsen, preventing discovery into core issues of the defenses and counterclaims was still pending.

In addition, this Court specifically pointed out that the evidence filed by OLSEN and MASON, especially the Affidavit of Carl DONAHUE, were not addressed by the previous orders of the District Court. *VC v. Olsen*, 310 Mont. 527, 52 P.3d 383 (2001). This evidence still was not addressed by the District Court at all. The District Court did not address this evidence in terms of the Motion for Summary Judgment on the noncompliance of the permit as directed by this Court. The District Court also did not address it in terms of Olsen/Mason's defenses and counterclaims, which is appropriate unless you are going to summarily dismiss the defenses and counterclaims also. The Court should require the District

Court specifically address the Affidavit of Carl Donavan on rehearing of this matter – as it did in its Order dated August 8, 2002.

2. Contrary to this Courts Order dated August 8, 2002, The District Court did not have Findings of Fact Which Addressed Olsen/Masons Defenses, Let Alone with Particularity as Required by this Court.

In the Court's Order dated August 8, 2002, this Court concluded that the language of the District Court's Order dismissing the defenses failed to specify with particularity the rationale underlying the Court's ruling, particularly dismissing the defenses. Yet in its most recent decision, the District Court issues absolutely no Findings of Fact that state, let alone with particularity, its rationale for dismissing the defenses. And the dismissal of the counterclaim in only justified with the statement that since the City won its claim that Olsen/Mason violated the building permit, there is no damages to be determined. This Conclusion of Law was not supported by Findings of Fact, and it did not take into consideration nor address Olsen/Mason's defenses and counterclaims and the damages that flow from such. Therefore, the District Court's order not only violates established law but also violates the previous conclusion and direction of this Court in its Order dated August 8, 2002 regarding the sufficiency of consideration given by the District Court.

3. Olsen's Counterclaim for Liability of City Employees, Agents and Third Parties is not Moot.

Montana law allows civil actions to arise when there is an obligation and damages. Rule 27-1-104, M.C.A. A pleading which sets forth of a claim for relief, including a counterclaim, shall contain a short and plain statement showing that the pleader is entitled to relief and a demand for judgment. Rule 8 (a) M.R.Civ.P. Complaints are to be construed in a light most favorable to the plaintiff. Mysse v. Martens (1996), 279 Mont. 253, 266, 926 P.2d 765, 773. Olsen filed a counterclaim alleging that the conduct of the employees and

agents of City caused or contributed to the damages Olsen would sustain and were sustain because of the City's revocation of the building permit. City pled the affirmative defense of contributory negligence.

The counterclaim specifically states that the Historic Preservation Officer (HPO), Chandler Simpkins, provided advice, supervision, and regular monitoring of the building project including preparation of the permit and explanation of its requirements to the builder. The Mayor of Virginia City acknowledged the duty of HPO Simpkins when he stated in his affidavit that the "Historic Preservation Officer is responsible for administering and monitoring activities under the Town's zoning and site development ordinances". See Affidavit of Dorlan Sturgill in Support of Virginia City's Motion in Limini filed December 1, 1999. See also Ordinance 503, Section 10, Application Procedure (2). Mayor Sturgill further states that it was complaints by Town Residents (not City, nor the HPO itself) that prompted the City to take action after the house had already been built to the third floor. And most interestingly, throughout the case, City employees and agents, including the HPO Carl Donavan, claim the house is compliance. See Affidavit of Carl Donavan.

In a similar case, this Court held that the active participation in the zoning process by a "Zoning Coordinator" is sufficient to support an argument that "Fergus County" is liable to appellants. As the Court stated in that case, this Court should also give Olsen an opportunity to show that City, through its agents, is liable for the conduct of its employees and agents.

In every instance of Olsen/Mason's misunderstanding or "noncompliance" of the building permits, City's employees and agents were directly involved and their conduct caused or contributed to Olsen/Mason's conduct. For instance, this Court upheld that the Olsen Home violated the footprint and profile of the permit according to the requirements

found in the drawing attached to the permit. Yet it was Ellingson, a city employee and the Chairman of HPAC who drew the sketch that the building allegedly violates. According to his own testimony, not only is a "detailed plan" not required for the permit (Ellingson TR. 9/9/99 54:11) but admitted that his drawing, which is key to several of the violations, was not intended to be scaled from:

> **I didn't draw this as a to-scale drawing or using mechanical techniques. It's simply a pictorial sketch of the house. And I wouldn't be comfortable scaling anything off of it. I think it's more of a matter of what you see with your mind there. Id. 55:16-20.**

Ellingson later added:

> **I think Philly [Mason] is fully capable. He's a good builder. I've seen a lot of Philly's projects. And he's done some very fine building projects in Virginia City, including the very difficult building of the Bale of Hay Saloon. And I think he's fully capable of building a house of this type without plans just out of his head.**
> **Id. 83:24-84:5.**

HPAC Chair Ellingson admits that he, the drawer of the sketch, would not scale anything off of the sketch. He also admits that it was the City's understanding and intention at the time of the permit that Mason build this type of house "just out of his head". This admission not only goes to the disputed facts prohibiting summary judgment as presented in the Brief in this matter, but also indicates conduct on behalf of the City that caused or contributed to Olsen/Masons "failure to comply with the permit".

Notwithstanding later City claims that the building did not meet setback requirements, the City's Historic Preservation Committee members went to the building cite and agreed upon the location of the building and the permit itself was approved by the City as the foundation was being constructed. In addition to actively supervising and advising Olsen/Mason during the building process and even writing and securing the permit from the

City Council (5 weeks after construction began), HPO Simpkins monitored the cite and the building process on a weekly, if not daily basis. Pursuant to the duty mentioned above, Simpkins has an obligation to Olsen/Mason to act reasonably as do all the City employees and agents. It is for a jury to decide whether waiting until the building is at the third floor to raise concerns about setbacks is reasonable, especially when the permit was issued by the city with knowledge of where the building was to be located in reality and not just on paper. And it is no small fact that the HPO for the City has signed a sworn affidavit that, not only is the house in compliance, but that he and the City have treated Olsen/Mason differently than they have treated others similarly situated and have held Olsen/Mason to requirements that no-one had been held to before or was being held to in simultaneous building permits. City may consider this information "irrelevant" as they stated in their Motion in Limine to Prohibit Evidence of Variances or Site Development Elsewhere in Virginia City, however equal treatment of citizens by their government is required by law.

Billings Assoc. Plumbing, Heating, and Cooling Contractors v. Board of Plumbers, 184 M 249, 602 P2d 597 (1979) quoting *Mont. Land Title Ass'n v. First Am. Title*, 167 M 471 (1975) and *U.S. v. Reiser,* 394 F. Supp 1060 (D.C. Mont 1975). The principal purpose of the equal protection clause is to ensure that people are not subjected to arbitrary and discriminatory state action. *McKamey v. St.*, 268 M 137, 885 P.2d 515, 51 St. Rep. 1218 (1994).

A matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy. It becomes moot when the court cannot grant effective relief or the parties cannot be restored to their original position. *Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 19, 293 Mont. 188, ¶ 19, 974 P.2d 1150, ¶ 19. The

liability of the City for the conduct of its agents and employees and Third parties must be addressed by the Court and not summarily dismissed without consideration.

4. This Courts Opinion Conflicts with a Previous Court Opinion.

As mentioned above, the City official who drew the sketch testified that the sketch should not be scaled from and that his intention and belief was that Mason was capable of building without specifics.

In *Yurczyk v. Yellowstone County*, 319 Mont. 169, 83 P.3d 266, (2004), town officials could not agree on the meaning of "on-site construction". In that case, the Supreme Court stated that, it is difficult to imagine how the general public could be any more informed as to what on-site construction means when the very officials who adopted the regulation and who are to enforce it could not agree on its meaning. Accordingly, the Court upheld the District Court's conclusion that regulation was void for vagueness.

It is clear that this case contains conflicting City testimony on every requirement of the Building Permit Process and Ordinances, however, most important is there is conflicting evidence of the very City Official who drew the sketch that it was not intended to be scaled nor was such detail required of Mason. The Court's Order upholding the District Courts order, which required finding for one City official's understanding of the permit over another City's official's understanding of the permit appears to conflict with your opinion in Yrczyk and therefore meets the requirement for rehearing under Rule 20. See also the Affidavit of Carl Donavan.

In addition, Olsen/Mason should also be able to use the issues of city officials conflicting understandings and representations to present their defenses and counterclaims. If the City has not waived its right to enforce or in to estopped from enforcing the permit under these

conditions, then Olsen/Mason City should at least be able to present to a jury that it is unreasonable to be held accountable for conflicting city ordinances, processes, and official's understanding and belief.

Conclusion

Summary judgment motions are not favored. *Jarvenpaa v. Glacier Electric Cooperative, Inc.*, 271 Mont. 477, 478, 898 P. 2d 690 (1994). If there is any doubt whatsoever regarding the propriety of the summary judgment it should be denied. *Whitehawk v. Clark*, 238 Mont. 14, 18, 776 P.2d 484, 486-487 (1989). City's Motion in Limini requesting protection for City's conduct was pending in the District Court as well as a jury trial. The evidence supporting Olsen/Masons defenses and counterclaims deserve to be fully addressed and heard, and not summarily dismissed without Findings of Fact to support or even indicate that Olsen/Mason's defenses and counterclaims were addressed by the parties, let alone the District Court.

Justice, in equity and in law, requires that the merits of Olsen/Mason's defenses and counterclaims be heard by a jury on all factual issues still in dispute after full pre-trial discovery.

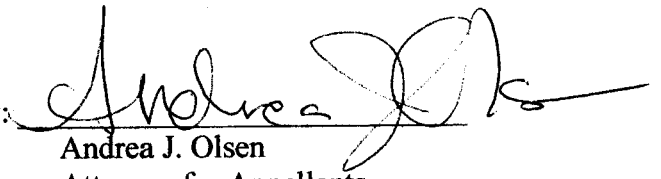
DATED this 21st day of January 2009.

By: _____
Andrea J. Olsen
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January 2009, I served a true and accurate copy of the foregoing APPELLANTS' REQUEST FOR REHEARING by depositing said copies into the U.S. Postal Service, postage prepaid, addressed to the following:

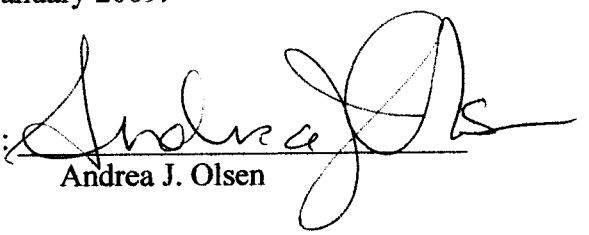
William A. Hritsco
DAVIS, WARREN & HRITSCO
P. O. Box 28
Dillon, MT 59725

By: 
Andrea J. Olsen
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a New Times Roman text typeface of 12 points; is double spaced; Microsoft Word 8 for MAC, is not more than 10 pages, excluding certificate of mailing and certificate of compliance.

DATED this 21st day of January 2009.

By: 
Andrea J. Olsen