5-26-1976

Board of County Com'rs of Jefferson County v. Mountain Air Ranch

No. 27199

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO, a body politic and corporate, Plaintiff-Appellee, vs. MOUNTAIN AIR RANCH, a Colorado nonprofit corporation, and HHH CORPORATION, a Colorado corporation, Defendants-Appellants.	Appeal from the District Court of the County of Jefferson State of Colorado HONORABLE GEORGE G. PRIEST Judge

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CASES CITED

STATUTES AND OTHER AUTHORITIES

I. SUMMARY OF ARGUMENT

1. THE PROCEEDING WAS CLEARLY CRIMINAL IN NATURE AND FAILURE OF THE COURT TO APPLY CONSTITUTIONAL SAFEGUARDS WAS PREJUDICIAL TO THE DEFENDANTS.

2. 1973 C.R.S. 30-28-113(1) GRANTS THE COUNTIES THE POWER TO REGULATE MOBILE HOMES BY ZONING. THE JEFFERSON COUNTY ZONING ORDINANCE SECTION 8 VIRTUALLY BANS MOBILE HOMES FROM THE COUNTY BY PROHIBITING THEM IN ALL ZONES IN THE COUNTY SAVE SPECIAL LEGAL TRAILER CAMPS. THE EFFECT IS TO PROHIBIT MOBILE HOMES, AN ACT WHICH IS BEYOND THE POWER GRANTED IN THE STATUTE.

3. APPELLANTS DO NOT DISPUTE THE PRESUMPTION OF FACIAL VALIDITY OF SECTION 8, BUT MAINTAIN THAT THE COUNTY HAS NOT SUSTAINED ITS BURDEN OF SHOWING THAT, IN THE ABSENCE OF NUISANCE, ITS EXERCISE OF POLICE POWER HAS A REAL AND SUBSTANTIAL RELATIONSHIP TO PROMOTING PUBLIC HEALTH, SAFETY AND WELFARE.

4. ON ITS FACE, SECTION NO. 8 IS UNIVERSAL AND COUNTY-WIDE IN BANNING MOBILE HOMES EXCEPT IN NARROWLY DEFINED ZONES FOR TRAILER CAMPS, STRICTLY LIMITED IN SECTION 36. SUCH BREADTH COMBINED WITH THE STRICTURES OF SECTION 36 ARE CONSTITUTIONALLY DEFECTIVE.

5. REMOVAL IN 1972 OF "AMUSEMENT RESORT" FROM AGRICULTURAL-TWO ZONING UNDER WHICH MOUNTAIN AIR HAD EXISTED SINCE 1955 WAS A VIOLATION OF DUE PROCESS.

II. ARGUMENT

1. The proceeding was clearly criminal in nature and failure of the Court to apply constitutional safeguards was prejudicial to the defendants.

(a) The proceeding instituted by the County in the Court below was a criminal proceeding in all basic aspects, and all constitutional protections should have been applied by the Court.

The demand by the County that the defendants be held guilty of violating a misdemeanor remained during the entire proceeding until the close of the case, and the County attorney did not move to withdraw that demand until rebuttal in closing arguments. As detailed in appellants' opening brief, the Court merely stated, "Your remarks are noted." but never clearly ruled as to whether or not the County would be permitted to withdraw its demand for a finding of guilt. Counsel for the appellants raised the question of the nature of the proceeding in his Motion to Dismiss at the close of the County's case by asking the Court to apply the rule that it must find that the defendants were guilty beyond a reasonable doubt. The Court did not clearly rule on this point. It can hardly be said that the defendants "waived" their rights to all of the constitutional protections in a criminal proceeding by not moving to strike the demand of the County for a finding of guilt.

The County attorney in maintaining that this action had to be commenced by the filing of an Information failed to quote all of 1973 C.R.S. 16-5-101. Sub-section (d) provides:

> "Prosecution of a misdemeanor or petty offense may be commenced in the County Court by: (I) the issuance of a summons and complaint;"

Accordingly, this action was statutorily correct as a criminal proceeding for a misdemeanor under the provisions of 1973 C.R.S. 16-5-101, and process in such proceedings may be served as in civil actions, 1973 C.R.S. 16-5-102.

The County attorney here claims that he has no power to initiate and prosecute criminal actions, and that the District Attorney is the one person so empowered. 1973 C.R.S. 20-1-102

specifically empowers County Commissioners to employ one or more attorneys to appear and prosecute criminal actions on behalf of the County. Sub-section 2 specifically provides:

> "(2) Nothing in this section shall be so construed as to prevent the County Commissioners of any county from employing one or more attorneys to appear and prosecute or defend in behalf of the people of the state or of such county, in such indictment, action, or proceeding."

(b) The County misconstrues its own prayer in paragraph 5 as being one in the nature of a contempt proceeding.

The prayer reads:

> "5. In the event Defendants fail to tear down, remove or correct the property within said time certain, if so Ordered by the County, the Defendant, in accordance with Colorado Revised Statutes 1973, 36-15-9 and 106-2-23, be found guilty of a misdemeanor and fined One Hundred Dollars ($100.00) for each day of delinquency after the expiration of said time certain." (emphasis added)

Counsel in their brief on page 9 state:

> "The prayer requests a fine be levied against defendant, if and only if defendant does not obey the order of the court to remove, tear down, or correct the property;" (emphasis added)

It is clear that the County was asking for punishment for disobedience to an Order of the County, and not for disobedience of an Order of Court. In no way can this demand be interpreted as a proceeding or citation for contempt of Court. It was clearly a demand for punishment for commission of a misdemeanor under state law.

(b) The proper burden here was upon the prosecution to withdraw its prayer for a finding of guilt for a misdemeanor if it did not wish to undergo the burden of carrying on a criminal proceeding and proving its case beyond a reasonable doubt.

It is indeed a far stretch of logic for the County to maintain that the proper remedy was for counsel for the defendants to ask that the criminal demand be stricken as "redundant, immaterial, impertinent, or scandalous," under Rule 12(f) of the Rules of Civil Procedure. It is equally beyond logic to say that defendants

must necessarily have waived their rights to object under Civil Rule 12(h). The defendants raised the issue of the nature of the proceeding with their Motion to Dismiss at the close of the plaintiff's case, asking that the Court apply the rule requiring proof beyond a reasonable doubt and again at the close of defendants' case.

We agree with counsel for the County that the rulings of the Court were "unclear at best" as to whether or not the prayer for criminal sanctions was stricken, and whether the Court applied the criminal safeguard of proof beyond a reasonable doubt.

The defendants were entitled to a clear ruling on both points, namely, the nature of the proceeding and, second, the extent of the burden of proof. Where there is doubt, certainly City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614, does apply, and the Court should have at least granted the Motion for a New Trial when these questions could have been clarified.

2. 1973 C.R.S. 30-28-113(1) grants the counties the power to regulate mobile homes by zoning. The Jefferson County zoning ordinance Section 8 virtually bans mobile homes from the county by prohibiting them in all zones in the county save special legal trailer camps. The effect is to prohibit mobile homes, an act which is beyond the power granted in the statute.

Appellees cite the case of Board of County Commissioners v. Thompson, 177 Colo. 277, 493 P.2d 1358 (1972), in which the banning of "junk yards" in agricultural districts was upheld. In Thompson, this Court noted that "junk yards" were not simply limited to areas zoned as "junk yards" but could also be maintained in other classifications. This Court said at page 285:

> "The last argument we consider is that the zoning unlawfully prohibits the participation in a lawful activity anywhere in the entire county. It is quite clear, as appellants admitted in their testimony, that the activity prohibited in the A-Agricultural zone is a permissible principal use in the GI-General Industrial District. The record contains further evidence that such use might be permissible in the C-Commercial District and also in the ED-Economic Development District

(areas for special uses which have economic value for the county and which can be developed to be compatible with surrounding areas.)"

The Jefferson County Ordinance Section 8 is far more limiting that the restriction imposed in Thompson and is virtual prohibition, which is a step beyond the power of the County.

The County argues that General Outdoor Advertising Co. v. Goodman, 128 Colo. 344, was a situation in which the County Regulations were an absolute prohibition against sign boards and thus not pertinent to the fact situation here. Actually, in Goodman, sign boards were permitted in commercially zoned areas but only on the specific approval of the Commissioners, who denied the advertising company's application. This Court ruled that the denial was beyond the powers of the Commissioners of the County. The predicament of Mountain Air is similar here. Section 8 bans trailers everywhere in the county except areas specifically zoned as trailer camps.

The County maintains that Mountain Air failed to exhaust its administrative remedies in not applying for zoning as a trailer camp allowing a purpose to which its ground is reasonably adapted. During the long period of litigation complained of by opposing counsel, several possibilties were actually explored with County authorities. Mountain Air is a private club operating a non-profit recreational and amusement resort for its members. Mr. Carter, former county Zoning Administrator, admitted that the premises were well adapted for use as a resort and recreation area. (ff 382). The operation of Mountain Air is not compatible with the limitations in the zoning for a private, profit-making, residential trailer court. In the many conferences with county authorities, Mountain Air was advised that even if it applied to rezone to a Section 8 classification, such application would be denied. Efforts were also made to have the area classified as a Section 36 Conservation Zone, and also a Section 39 Planned Development District, but these possibilities were rejected by the County simply because under these classifications the Commissioners as a matter of policy would not allow a

variation from the sweep being prohibitions of Section 8. The situation here is, therefore, very similar to Goodman, where by an absolute power to restrict, the Commissioners are prohibiting rather than regulating house trailers.

Such county-wide enforcement of Section 8 is unreasonable and arbitrary in that it has clearly precluded the use of Mountain Air's property for any use to which it is reasonably adapted. Huneke v. Glaspy, 55 Colo. 593, Famularo v. Board of County Commissioners, 180 Colo. 333.

Contrary to the contentions of cousel for the County, Combined Communications Corp. v. City & County of Denver, No. 26784 decided November 3, 1975, is also pertinent. There the effect of the Denver ordinance was to eliminate some commercial signs in Denver. The trial Court found that this ordinance would eventually eliminate about 2% of the signs in Denver. This could hardly be considered, as opposing counsel contends, as an absolute prohibition of signs throughout the city. Nevertheless, this Court held that off-premises signs were a distinct and separate business and at page 3 that Denver ordinance "No. 94 in effect prohibited the erection of any new outdoor advertising signs." (emphasis added) Accordingly, this Court said that Denver had exceeded its powers to "regulate" under the state statute.

The use of trailers for housing is critical to the continued operation of Mountain Air on its present modest scale. The situation of Mountain Air is thus similar to that of Combined Communications in that it is a distinctive kind of operation, a non-profit, private, recreational facility, the operation of which is being "in effect" prohibited by application of an over-broad prohibition in a zoning ordinance. The exercise of such broad power in county government was not contemplated by the legislature and should be nullified.

3. Appellants do not dispute the presumption of facial validity of Section 8, but maintain that the County has not sustained its burden of showing that, in the absence of nuisance,

its exercise of police power has a real and substantial relationship to promoting public health, safety and welfare.

The presumption of the constitutionality of a legislative enactment, whether it be at the level of the state legislature or a zoning ordinance passed by County Commissioners, is well established law in Colorado and at no place in the brief of the appellants was there any contention that the County had the burden of proving the constitutionality of its Zoning Resolutions. We do contend that when the County exercises police power, it must show that such action has a real and substantial relationship to the public health, safety or welfare. Denver v. Denver Buick, Inc., 141 Colo. 121. Contrary to the contention of counsel for the County, Denver Buick has not been entirely overruled. The basic principle enunciated in that case relating to limits on the exercise of police power was reaffirmed in Stroud v. City of Aspen, 532 P.2d 720 (1975). In Stroud, this Court cited two United States Supreme Court decisions on zoning, the latter being Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed. 2d 797 (1974). At page 722, this Court said:

> "Both cases recognize that zoning is constitutionally permissible so long as it is not arbitrary and is reasonably related to the public health, safety, morals and welfare."

The record in this case does not show any "real and substantial" relation between the drastic prohibition against the use of trailers everywhere in the County of Jefferson and the promotion of public health, safety and welfare. The trial Court found no nuisance or public health hazard existing on the defendants' premises. Witnesses for the County specifically testified that there was no health problem to their knowledge. There is no showing in this record that the County has sustained its burden of showing that there is valid justification for exercise of police powers to prohibit the use of trailers on the defendants' premises. For lack of legislative authority to prohibit and the failure of the County to show a valid basis for exercising a police power of prohibition, the legislative and constitutional underpinnings of

the County's case must fall and the Order of the trial Court should be reversed.

4. On its face, Section .. No. 8 is universal and county-wide in banning mobile homes except in narrowly defined zones for trailer camps, strictly limited in Section 36. Such breadth combined with the strictures of Section 36 are constitutionally defective.

The answer brief of the County sets out Section 36 which provides a detailed definition of what a trailer camp must be. The rigid pattern describes a commercial trailer camp permitting a single-family house for a manager, residential trailers, and common laundry and toilet facilities. Section 36, as an exception, makes the over breadth of Section 8 eminently more clear. The net result is that if one wished to live in a mobile home in Jefferson County, one would have to locate in an established trailer camp or abandon the idea of living in a mobile home entirely. The owner of real estate cannot live in his own moible home on his own ground unless he applied for Section 8 zoning and qualified it in every detailed respect to the satisfaction of the County Commissioners. Such a project is extremely difficult to attain, particularly in Jefferson County.

The County cites Board of County Commissioners v. Thompson, supra, in support of its position that Section 8 is reasonable and not overbroad. We have already shown that in Thompson, this Court pointed out that the activity (junk yard) prohibited in agricultural zoning was permissible in three other zoning classification, i.e., commercial, industrial or economic development districts. The restriction on junk yards under Thompson was in no way as severe as in this case before the Court. Jefferson County restricts trailers to one very limited type of district and, thus, enhances the broad and sweeping prohibition in Section 8. The narrower the exception, the broader the general prohibition which, in this case, is contrary to the basic constitutional precepts.

5. Removal in 1972 of "amusement resort" from Agricultural-Two Zoning under which Mountain Air had existed since 1955 was a violation of due process.

In its answer brief, the County fails to meet the basic point that Mountain Air in operating a private recreation and amusement resort over a period of 17 years acquired a vested interest that cannot arbitrarily be removed by amendment to the zoning under which the resort was operated. In 1955 when Mountain Air was placed under Agricultural-Two Zoning, that classification permitted race tracks, fair grounds, amusement resorts, airports, radio towers and radio stations. The classification was obviously extremely broad. Over the intervening 17 years until 1972, Mountain Air as a resort had developed a pattern of using mobile homes for housing for those members using the grounds for recreational and amusement purposes. Testimony of plaintiff's witnesses established the existence of 15 trailers on the property by late 1971. (ff. 294 and 306) In 1972, after commencement of this action, the County changed Agricultural-Two Zoning by eliminating "amusement resorts" from the classification and providing no new and suitable class into which such an operation could be placed. Obviously, the much more limited definitions in the amended Agricultural-Two Zoning was not and is not adapted to the pattern of housing and other facilities required for an amusement resort. This new and severe limitation on Agricultural-Two Zoning when combined with Section 12 passed in 1966, banning mobile housing from all land in county except that specifically zoned as trailer camps, is unreasonable, oppressive and discriminatory. It was particularly discriminatory in that it provided no classification under which a recreation and amusement resort of the kind operated by Mountain Air could logically be placed and reasonably operated. We have already discussed earlier in this brief the attempts of Mountain Air to find some classification suitable to its operation and the ultimate response of the County that there was no suitable classification. Mountain Air over the 17 years of its operation under the original Agricultural-Two Zoning acquired a vested right to operate its amusement resort as zoned. The arbitrary removal of those rights which occurred here by amendment of the basic zoning ordinances is therefore a

violation of the due process rights of the defendants. Kissinger v. City of Los Angeles, 327 P.2d 10.

It must be conceded that zoning regulations are not contracts. Nevertheless, they may not be amended arbitrarily where such amendment has no relation to the public welfare and will cause unnecessary injury to one who has acquired or improved property in reliance upon the original regulations. Evanns v. Gunn, 29 N.Y.S. (2d) 368, affirmed 29 N.Y.S.(2d)150; Coldwater v. Williams Oil Co., 288 Mich. 140, 284 N.W. 675; Brady v. Keene, 90 N.H. 99, 4 A.2d 658.

III. CONCLUSION

The action in the trial Court was clearly criminal in nature: (1) it was initiated by a County Attorney which is permissible under state law; (2) it was in the form of a Summons and Complaint and demanded a conviction for a misdemeanor, all of which are in accordance with state law; and there was no withdrawal of the prayer for criminal sanctions until after the close of the case. The plaintiff County could not transform the case to one civil in nature by attempting to withdraw its prayer for criminal penalties after the close of the case, nor would a clear ruling by the Court allowing such withdrawal have transformed the nature of the proceeding. The Court did not clearly require proof beyond a reasonable doubt and thus denied the defendants of a basic constitutional right. Because of the threat of self incrimination, the nature and content of the evidence which the defendants could present was substantially impaired. Defendants' consitutional rights were thus severely infringed, and the case should be reversed on these grounds.

The statute granting counties zoning powers extend the power to regulate mobile homes. The Jefferson County Zoning Ordinance Section 8 virtually bans mobile homes from the county by prohibiting them in all zones in the county save special legal trailer camps. The definition of legal trailer camps is so narrow as a exception that it results in Section 8 in effect a county-wide prohibition, which is beyond the power granted in the statute.

Section 8 as applied to the defendants is beyond the power of the County and should be declared inoperative in this case.

When the County seeks to exercise its police powers, it has the burden of showing that, in the absence of nuisance, such exercise has a substantial relationship to promoting public health, safety and welfare. The County has failed to sustain this burden.

Section No. 8, when combined with the narrow provisions of Section 36, is overbroad and constitutionally defective.

Mountain Air operated a private recreation and amusement resort over a period of 17 years from the enactment of the Agricultural-Two Zoning Ordinance in 1955 until 1972 when the County arbitrarily eliminated "amusement resorts" from that zoning classification and did not create a new classification covering amusement and recreational resorts. That action coupled with the enactment of Section 8 in 1966 amounted to an unreasonable, oppressive and discriminatory action against the vested right of Mountain Air. Zoning ordinances may not be amended unless it be shown that they bear a real and substantial relationship to promoting public health, safety and welfare. There is nothing in the record to establish such a relationship.

For the foregoing reasons and those specified in the opening brief, the decision of the trial Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the within Reply Brief of Appellants to Gail E. Shields, Assistant County Attorney, Jefferson County Courthouse, Golden, Colo. 80419, and to James Kurtz-Phelan, Assistant Attorney General, 104 State Capitol Bldg., Denver Colo. 80203, by placing copies of same in the United States mail, postage prepaid, on this 25th day of May, 1976.

William F. Reynard