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IN THE SUPREME COURT  
OF THE STATE OF COLORADO  
NO. 79SA171

FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO  
MAY 29 1979

*David W. Begina*

ADAMS COUNTY GOLF, INC.,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the District
	)	Court of Adams County
v.	)	
	)	Civil Action No. 32448
COLORADO DEPARTMENT OF	)	
REVENUE and STEVEN V.	)	The Honorable Abraham
BERSON, Deputy Direct-	)	Bowling, Judge
or, thereof,	)	
	)	
Defendants-Appellants.	)	

OPENING BRIEF OF APPELLANTS

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NO. 79SA171

ADAMS COUNTY GOLF, INC.,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the
	)	District Court of
	)	the County of Adams
	)	
COLORADO DEPARTMENT OF	)	The Honorable Abraham
REVENUE and STEVEN V.	)	Bowling, Judge
BERSON, Deputy Director,	)	
thereof,	)	
	)	
Defendants-Appellants.	)	

OPENING BRIEF OF APPELLANTS

PREFATORY STATEMENT

The plaintiff-appellee (Adams County Golf, Inc.) will be referred to herein as "Adams".

The defendants-appellants (Colorado Department of Revenue and Steven V. Berson) will be referred to herein as the "Department" and "Deputy Director".

Colorado Revised Statutes 1973, 12-46-101 through 12-46-118, effective July 1, 1976, will be referred to herein as the "Colorado Beer Code".

The Colorado Beer Code Regulations, adopted by the Colorado Department of Revenue, effective January 15, 1977, will be referred to herein as the "Regulations".

The Board of County Commissioners of Adams County will be referred to herein as the "Board".

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the trial court erred in ruling that the plaintiff corporation was entitled to a 3.2% fermented malt beverage license.

B. Whether the trial court erred in ruling that a local licensing authority was entitled to a 3.2% fermented malt beverage license.

C. Whether a county has the authority to operate a 3.2% fermented malt beverage outlet.

STATEMENT OF THE CASE

In April, 1978, Adams County Golf, Inc. applied to the Board of County Commissioners of Adams County for transfer of the 3.2% fermented malt beverage license then held by Golf Professionals, Inc., dba Adams County Golf Club. The Board approved the transfer to Adams on April 10, 1978.

On April 12, 1978, Adams filed an application with the Department for a 3.2% fermented malt beverage license.

Hearing was held by the Department on the application on July 21, 1978, before Steven V. Berson, deputy director.

In a decision issued July 24, 1978, the deputy director denied the application of Adams upon the grounds that Adams was a creation of, and is wholly controlled by, Adams County which is the local licensing authority.

Adams instituted action in the Adams County District Court on July 28, 1978. The court issued an injunction on August 1, 1978, restraining the Department from any action on the license during the pendency of this suit.

The trial court after reviewing the decision of the administrative hearing officer and hearing arguments of counsel reversed the decision of the department and remanded the matter to the department to transfer the license to Adams, on November 30, 1978.

The department filed a motion for a new trial on December 9, 1978. The motion was denied in an order issued December 12, 1978. Notice of Appeal to the Colorado Court of Appeals was filed December 21, 1978. Appellants' Preliminary Statement was filed on January 11, 1979.

Appellees filed a Motion to Dismiss Appeal with the Court of Appeals on January 22, 1979 and appellants filed a Motion in Opposition to the Motion to Dismiss Appeal on January 31, 1979. The Motion to Dismiss was denied by the Court of Appeals on February 5, 1979.

Appellants filed a Petition to Certify to Supreme Court on April 2, 1979 and appellee countered with a Motion in Opposition To Petition to Certify to Supreme Court on April 4, 1979. The Colorado Supreme Court granted the petition for transfer on April 10, 1979.

The department contends that Adams is the alter ego of the Board and should not be issued a 3.2% fermented malt beverage license since the Board is the local licensing



authority under the Colorado Beer Code.

STATEMENT OF THE FACTS

Plaintiff-appellee, Adams County Golf, Inc., was incorporated as a non-profit corporation on April 5, 1978. (Hearing transcript, Applicant's exhibit A-1) The address of the corporation is 450 South 4th Avenue, Brighton, Colorado, 80601. (D-3), the Administration Building of Adams County. The initial directors were Michael F. Swanson, Adams County Administrator, David Wykes, Adams County golf professional, and Donna L. Barber, Adams County Deputy Clerk, all of whose addresses were listed as the Adams County Administration Building. (D-5)

After the Board of County Commissioners of Adams County approved the local license, Adams County Golf, Inc. filed an application with the Department for a 3.2% fermented malt beverage license to sell beer at the Adams County golf course. (D-1) The application was not approved, at the request of the applicant, a hearing was held before the Deputy Director, Department of Revenue.

The hearing officer denied the application for a 3.2% license. (ff5-11) The transcript of the hearing was incomplete due to technical difficulties in the recording device; but the plaintiff and defendants agreed to accept the transcript and avoid the necessity for a re-hearing. (ff 22, ff 39)

SUMMARY OF ARGUMENT

The plaintiff corporation, Adams, was set up by the Board of County Commissioners of Adams County to apply for a 3.2% beer license at the county golf course. The corporate officers were county officials under the control of the Board. The corporation acting for the Board cannot be granted a beer license because the Board is the local

licensing authority. The Board cannot issue a license to itself.

The Board erred in approving and granting the license to Adams. The trial court erred in approving the issuance of a license to Adams.

The Board has no authority to operate a beer outlet.

#### ARGUMENT

A. THE APPELLEE CORPORATION APPLYING FOR THE LICENSE IS THE ALTER EGO OF THE BOARD OF COUNTY COMMISSIONERS OF ADAMS COUNTY.

At the administrative hearing in this matter it was established that the plaintiff corporation is the alter ego for the Board of County Commissioners of Adams County.

Plaintiff's exhibits A-1, A-3, and defendants' exhibits D-1, D-2, D-3, D-4, D-5 D-6 and D-7 from the hearing transcript prove the relationship between plaintiff corporation and the Board of County Commissioners of Adams County.

In reply to a question as to whether the plaintiff corporation was acting for and on behalf of the Adams County Board of County Commissioners, the County Attorney replied, "Didn't know there was any doubt about it."

(Hearing transcript p. 5)

The next question addressed to the County Attorney was: "Would you admit - stipulate for the record that the application for the liquor license is by and for the benefit of the Adams County Board of County Commissioners?"

The County Attorney's answer: "Well, if by the Board of County Commissioners you mean the political entity known as Adams County, yes." (Hearing transcript, p.5)

The evidence adduced at the hearing showed that the identity of the three incorporators of plaintiff corporation and the identity of the county is so interlocked as to be indistinguishable. The County Attorney reaffirmed

the Department's contention at the hearing. (Transcript, p. 8):

"Now, I don't know if you have objection or if you're just making a observation, but the attorney for the county was the attorney for the applicant. Again, we've never tried to make the situation any different from what it is on the face of all these documents . . . "

On page 17 of the hearings transcript, the County Attorney states: "The only issue (inaudible) is the relationship between this corporation and the county, and I think that relationship is obvious. The county's problem is it should never have tried to hide that."

The County Attorney readily admitted that the three plaintiff incorporators included Mr. Swanson, Adams County Administrator, Donna Barber, Adams County Deputy Clerk, and David Wykes, Adams County golf professional.

The appellants contend that if the unity of the County and the license applicant were not the same, then we are sure that the County Attorney would not be representing both parties since it would be highly improper and possibly unethical for an attorney to represent the Board of County Commissioners and at the same time to represent a license applicant before the Board.

**B. THE COUNTY AS A LOCAL LICENSING AUTHORITY CANNOT HOLD A FERMENTED MALT BEVERAGE LICENSE.**

The simple question before this Court is whether, under the dual control system of beer regulation adopted by the Colorado legislature, the two functions of granting beer licenses and policing beer operations can be effectively carried out if the regulating agency holds a beer license.

The local licensing authority is defined in C.R.S.

1973, 12-46-103 as:

"(4) "Local licensing authority" means the govern-

ing body of a municipality or city and county, the board of county commissioners of a county, or any authority designated by municipal or county charter, municipal ordinance, or county resolution."

In the case of the plaintiff's application, the local licensing authority is the Board of County Commissioners of Adams County.

The gravamen of this case is 'who can get a beer license'?

The Colorado legislature has, in enacting the Colorado Beer Code (12-46-101 et seq.), provided a comprehensive scheme for the granting of licenses and the regulation of the sale of fermented malt beverages within Colorado. The legislature can control the sale of fermented malt beverages as such sales are affected with a public interest and the Colorado Beer Code is a valid exercise of the police power of the legislature for the protection of the health, peace and morals of the people of this state. Big Top, Inc. v. Schooley, 149 Colo. 116, 368 P.2d 201 (1962)

The duties of the county to enforce the provisions of the Colorado Beer Code are set out in C.R.S. 1973, 12-46-105(5):

"Licenses granted and issued pursuant to this article shall at all times be conspicuously placed in the licensed premises where the said license is exercised and used, and all sheriffs, police, peace officers, and city and county officials shall enforce every provision of this article within their jurisdiction."

The licensing system contemplates private ownership of liquor establishments with governmental regulation to eliminate and suppress the evils incident to the business. 45 Am. Jur. 2d §114.

Contrary to plaintiff's assertion that it should be granted a license because no specific statutory language forbids it, a statute which expressly prevents certain classes of persons from engaging in the business of

selling liquors does not thereby license those not within the enumeration. 45 Am. Jur. 2d §124.

The plaintiff in this action is requesting this Court to nullify the dual control system set up by the Colorado legislature for the control of sellers of fermented malt beverages.

If Adams County can grant itself a license, the County can also deny all other applications within its unincorporated area and thereby assume a monopoly of the beer business.

The Colorado Attorney General, H. Lawrence Hinkley, issued an opinion on April 11, 1947, on an analogous situation. The Town of Hayden wanted to revoke all the licenses in that town and take over the liquor trade. The attorney general replied that there were no statutes under which the town could engage in this private business. He also cited the statutes which outlined who might engage in the liquor business and held that a town did not qualify as a "person" under the law.

In 1610, in *Bonham's Case*, 8 CO. 1140, the court said, "No man shall be a judge in his own cause." The process of prosecuting judges becoming trial judges of the charges they preferred was disapproved by the United States Supreme Court in Marcello v. Bonds, 349 U.S. 302, 75 S. Ct. 757, 99 L. Ed. 1107 (1955).

A lengthy discussion of 'separation of functions', set out in Davis, Administrative Law Treatise (1958), at 13.01-13.11, recognizes the dangers of 'the regulator regulating the regulator'.

C.R.S. 1973, 12-46-113 (7) states:

"The purpose and intent of the provisions of this section is to prohibit and prevent the control of the retail outlets for the sale of fermented malt beverages by any persons or parties other than the retail licensee

licensed pursuant to the provisions of this article."

The statute (12-46-102) says:

"that fermented malt beverages shall be . . .  
. sold only by persons licensed as provided in this article."

"Person" is subsequently defined in 12-46-103 as:

"a natural person, partnership, association, company, corporation, or organization or a manager, agent, servant, officer or employee of any of them."

The plaintiff, Adams, contends that a county is a corporation, and therefore should be entitled to obtain a beer license. The department contends that a county is not a corporation within the meaning of this statute where a series of business organizations is named. A county is not a corporation proper, but a quasi-corporation, the Court of Appeals said in Stermer v. Board of County Com'rs of LaPlata County, 5 Colo. App. 379, 38 P. 839 (1894).

Assuming arguendo that a county is a corporation and as a corporation it is entitled to a beer license. Is there any other reason that county shouldn't have a beer license? The department contends that since the Board of County Commissioners of Adams County is the local licensing authority under 12-46-103(4), the Board cannot give itself a license and cannot put itself in the chameleonic position of enforcing the provisions of the beer code against itself. To assume that the legislature intended to obtain this result is inconceivable.

The intentions in enacting a statute are that a just and reasonable result is intended; and public interest is favored over any private interest. C.R.S. 1973, 2-4-201. The consequences of a particular construction maybe considered. C.R.S. 1973, 2-4-203(1)(e).

Where an unjust or absurd consequence would result from a literal interpretation of terms and words used that would be contrary to a statute's obvious and manifest purpose, intention of legislature will prevail over such a literal interpretation. People v. Silvola, 190 Colo. 363, 547 P.2d.

1283 cert. den. 429 U.S. 886.

C.R.S. 1973, 12-46-108 makes no provision for the granting of a beer license to a county.

There is no inherent right to carry on the business of selling alcoholic beverages. Gem Beverage Co. v. Geer, 138 Colo. 42, 334 P. 2d 744 (1959).

To give the Adams County Board of Commissioners a beer license is equivalent to awarding the F.C.C. a license to run it's own T.V. or radio station, or issuing a license to the P.U.C. to run it's own bus or truck line, or giving a real estate salesman's license to the Real Estate Commission.

C. THE COUNTY HAS NO AUTHORITY TO OPERATE A BEER HALL OR OTHER LIQUOR ESTABLISHMENT.

In C.R.S. 1973, 30-11-107, the legislature delegated the counties certain powers. Among these powers is the power to 'issue liquor licenses'. Nowhere among these powers do we find the authority for counties to operate retail malt beverage outlets.

County commissioners are constitutional officers. Their duties and powers as a board are statutory. The Board possesses only such powers as are by the Constitution and statutes expressly conferred upon it, and, in addition, such implied powers as are reasonably necessary to the proper execution of its express powers. Robbins v. Hoover, 50 Colo. 610, 115 P. 526 (1911)

Counties are assigned the traditional role as an arm of the state, existing only for convenient administration of state government and to carry out the will of the state.

Board of County Com'rs of Otero County v. State Board of Social Services, \_\_\_ Colo. \_\_\_, 528 P.2d 244 (1974).

A county in Colorado is nothing more than an agency of the state in the general administration of the state policy, and its powers are solely governmental. Stermer v. Board of County Com'rs of LaPlata County, 5 Colo. App. 379, 38 P. 839 (1894).

Article X, Section 13, of the Constitution of Colorado, states that the making of profit, directly or indirectly, out of county money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

#### CONCLUSION

In the case of Manitou v. Walk, 149 Colo. 43, 367 P.2d 744 (1961), the Colorado Supreme Court commented on the discretion of the licensing authority to refuse to issue or renew a license for any good cause:

"At the outset let us make it clear that no licensee under the fermented malt beverage act has a vested right to renewal of a license \* \* \* \* This is not to say that a licensing authority may arbitrarily or summarily deny a renewal, but where, as here, a full hearing is granted, the question of renewal becomes one for the exercise of the discretion of the licensing authority and it may refuse to renew such license upon good causes shown. What is good cause depends upon the circumstances of the case \* \* \* it is clear that the licensing authority under the fermented malt beverage act is not limited in its consideration to the applicant's character, the needs of the neighborhood and the desires of the inhabitants. In the exercise of the police power it may refuse to issue or renew a license for any good cause and the courts may reverse



the decision of the licensing authority only if the refusal was arbitrary or without good cause under the circumstances of the case. MacArthur v. Sierota, 122 Colo. 115, 221 P.2d 346; MacArthur v. Sanzalone, 123 Colo. 166, 225 P.2d 1044.

Likewise, in the case of Commissioners v. Buckley, 121 Colo. 108, 213 P.2d 608 (1950), the Colorado Supreme Court stated that the right to determine what constitutes good cause has been vested by the legislature in the licensing authorities and such authorities have wide discretion in determining whether applicants meet the qualifications. In the absence of arbitrary or capricious action, the judiciary will not disturb the findings. Van de Vegt v. Commissioners, 98 Colo. 161, 55 P. 2d 703 (1936).

Under the facts of this case, the action of the Department as licensing authority was in accordance with the regulatory scheme as enacted by the legislature, supported by substantial evidence and consistent with the statutes and constitution. Further, the action was not arbitrary but taken only after fulfillment of due process requirements.

As stated in Potter v. McLearn, 171 Colo. 334, 467 P. 2d 54 (1970), it was the intention of the legislature to vest a wide discretion in licensing authorities and all reasonable doubts as to the correctness of the decision of the licensing authority are to be resolved in its favor. Neither the Supreme Court nor trial court may substitute its judgment for that of the licensing authority determining whether a liquor license should be granted.

For all of the above reasons, it is clear that the district court's Order and Judgment is in error and the defendants-appellants respectfully request that the judgment of the district court be reversed and the

injunction be dissolved.

Respectfully submitted,

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Dated: May 29, 1979

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the within  
BRIEF OF APPELLANTS upon all parties herein by depositing  
copies of same in the United States mail, postage prepaid,  
at Denver, Colorado, this 29 day of May, 1979, address-  
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