10-4-1979

City of Lakewood v. Bethlehem Evangelical Lutheran Church

NO. 28521

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF LAKEWOOD, a Colorado corporation, ET AL.,	Appeal from the District
Defendants-Appellants,	Court of Jefferson County
v.	No. 49336
BETHLEHEM EVANGELICAL LUTHERAN CHURCH, a Colorado non-profit corporation, ET AL.,	Honorable GEORGE G. PRIEST Judge
Plaintiffs-Appellees.	

REPLY BRIEF

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No. 28521

IN THE SUPREME COURT

STATE OF COLORADO

BETHLEHEM EVANGELICAL LUTHERAN CHURCH, a Colorado non-profit corporation; and TAMMINGA CONSTRUCTION COMPANY, Inc., a Colorado corporation, Plaintiff-Appellees, vs. CITY OF LAKEWOOD, a Colorado CORPORATION: THE CITY COUNCIL OF THE CITY OF LAKEWOOD; CAROLYN BACHER, SHARON CARR, DON DeDECKER, CARL NEU, GAYLOR SMITH, PAUL THOMPSON, LESTER WILLSON, BILL WILSON and ROBERT WRIGHT as members thereof; CITY OF LAKEWOOD PLANNING COMMISSION: KENNETH CAMERON, SARAH MASTERSON, HOWARD REVIE, ANTHONY SABATINI and JOHN KELLY as members thereof; and CHARLES L. GILLETT, SUPERINTENDENT OF CODE ENFORCEMENT and CHIEF BUILDING OFFICIAL OF THE CITY OF LAKEWOOD, COUNTY OF JEFFERSON STATE OF COLORADO, Defendants-Appellants.	REPLY BRIEF OF THE CITY OF LAKEWOOD et al. DEFENDANTS-APPELLANTS

Counsel for the Bethlehem Lutheran Church in his Answer Brief has argued that the Lakewood Municipal Ordinance 14.13.010 violates the Constitutions of the United States and the State of Colorado and that the Public Improvements requirements exceed the statutory authority and police power of the City of Lakewood. However, he has failed to recognize that the ultimate purpose of a city and its governmental structure is to protect the public health, safety and general welfare of its inhabitants.

It is the contention of the City of Lakewood that it has a duty to protect the public health, safety and general welfare and that its power to enforce this duty coexists with the statutes governing eminent domain as well as the statutes concerning public improvements, Sections 31-35-303 and 304, C.R.S. 1973. Where a city plans extensive public improvements in an area, then it can exercise its power by the above cited statutes; but when there is a subdivision plat, a rezoning application or an application for a zoning permit which will burden the general welfare of the community at the time of construction, the city

must be able to act to protect that general welfare and be able to act quickly.

For example, a Massachusetts court, in the case of United Reis Homes, Inc., v. Planning Board of Natick, 270 N.E. 2d 402 (1971), held that subdivision plans must comply with reasonable recommendations of the Board of Health, and the Planning Board has the power to incorporate in the approval of a subdivision plan the reasonable recommendations recommended by the Board of Health relating to drainage. Where the records showed that lot drainage problems often could not be confined to the particular area upon which a building is to be erected the Board was not limited to consideration of buildings on designated areas and the bond could be required to cover work which the Board of Health required to be done in the whole subdivision rather than work relating to designated lots. Importantly, for the present case, there was evidence before the Planning Board of Natick that an open brook in an inhabited area becomes a natural catchall and a public health problem and that pockets of stagnant water become breeding places for vermin and mosquitoes. This evidence was held enough to justify the condition that the brook be piped and that certain lots be filled in.

In the case of, Middlesex & Boston Street Ry. Co. v. Board of Aldermen, Mass., 359 N.E. 2d 1279 (1977) the same court as that in the Reis Homes case upheld a condition attached to a special permit requiring the owner to dispose of solid waste from an apartment development at the owners expense.

In summary, where a developer will cause the need to protect the public health, safety and general welfare, or even where a development will occur in an area that has problems which adversely effect the public health, safety and general welfare, then reasonable conditions can be attached to the plan or building application in order to minimize the adverse effect and protect the general welfare.

The Church in its Brief also stated that the Planning Commission changed the requirements set by the Lakewood staff and that its actions constituted punishment which it could not impose because it was a quasi judicial body.

First, although the Planning Commission is an appellate body, it was probably not acting in a quasi-judicial capacity. See, Snyder v. City of Lakewood, Colo., 542 P2d 371 (1975) for the standards for determining if the matter is quasi-judicial in character.

Second, the record is clear that the changes made by the Planning Commission were made in an effort to reach a compromise between the Church and the staff, it was not intended as a punishment.

Third, and in any event, the City contends that the Planning Commission, may require a developer or applicant for a building permit to complete the improvements within a specific period of time. See, Costanza & Bertolino, Inc. v. The Planning Board of North Reading, (Sup. Jud. Court Mass, 1971 (277 N.E. 2d 511). Moreover, if improvements can be required and if a date for completion can be required, as in the Costanza case, then, clearly, the protection of a bond or surety is not unreasonable, either.

In conclusion, the City of Lakewood did not intend to coerce and blackmail the Church into building public improvements. Rather, the City perceived that the proposed public improvement of a gymnasium would adversely affect the public health, safety and general welfare of the community and that it would aggravate an already existing adverse situation. The City believes that not only does it have the power to impose reasonable conditions upon building permit applications, but that the conditions imposed in this case are reasonable. It is impossible to conceive of these conditions as making the land unfit for any use, as was stated in the Answer Brief, especially since the property has been used as a Church and would continue to be used as a Church even if the gymnasium had not been constructed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, hereby certify that on the 4th day of October, 1979, I mailed a true and correct of the foregoing Reply Brief to: Mr. Donald A. Mielke, 12211 West Alameda Parkway, #105, Lakewood, Colorado 80228, by depositing said properly addressed envelope in the United States mail postage fully prepaid.

Joanne S. Randall

TABLE OF CASES

STATUTES