4-27-1979

Colorado Land Use Commission v. Board of County Com'rs of Larimer County

NO. 79SA47

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

COLORADO LAND USE COMMISSION, Appellant, vs. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER, and in their official capacity, WILLIAM LOPEZ, Chairman, DAVID WEITZEL, and NONA THAYER, the individual members of said Board, and THE CITY OF FT. COLLINS, THE CITY OF LOVELAND, THE CITY OF LONGMONT, THE TOWN OF ESTES PARK, and THE PLATTE RIVER POWER AUTHORITY, a political corporation and a political subdivision of the State of Colorado, Appellees.	APPEAL FROM THE DISTRICT COURT OF LARIMER COUNTY HONORABLE CONRAD L. BALL, DISTRICT JUDGE

AMICUS CURIAE BRIEF

OF THE BOARD OF COUNTY COMMISSIONERS

OF THE COUNTY OF EL PASO

STATE OF COLORADO

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SUMMARY

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II. BOARDS OF COUNTY COMMISSIONERS ARE NOT SPECIAL COMMISSIONS WITHIN THE MEANING OF ARTICLE V, SECTION 35 OF THE COLORADO CONSTITUTION, AND HAVE THE AUTHORITY TO REGULATE MUNICIPAL ACTIVITIES IN THE UNINCORPORATED AREAS OF THEIR RESPECTIVE COUNTIES. 6

ARGUMENT

I. COUNTIES HAVE DISCRETION IN DESIGNATING MATTERS OF STATE INTEREST. TRIAL DE NOVO IN THE DISTRICT COURT, FOLLOWING A COUNTY'S DECISION NOT TO DESIGNATE, VIOLATES ARTICLE III OF THE COLORADO CONSTITUTION.

In its Opening Brief the Land Use Commission concedes that it does not have the authority to compel counties to designate matters of state interest:

> While the commission, in the trial court, urged that counties had a duty to designate after formal request by the commission, the commission is now persuaded that such an interpretation of the Act is not appropriate. The commission agrees that the decision of whether or not to designate after formal request is discretionary so long as that decision is supported by the record developed in the county designation hearing. (Appellant's Opening Brief, p. 6.)

The legislative declaration of the purpose of article 65.1 of title 24, CRS 1973, as amended (hereinafter referred to as the "Act"), stated in section 24-65.1-101(2), CRS 1973, as amended, supports this conclusion:

> It is the purpose of this article that:
>
> (a) The general assembly shall describe areas which may be of state interest and activities which may be of state interest and establish criteria for the administration of such areas and activities;
>
> (b) Local governments shall be encouraged to designate areas and activities of state interest and, after such designation, shall administer such areas and activities of state interest and promulgate guidelines for the administration thereof; and
>
> (c) Appropriate state agencies shall assist local governments to identify, designate, and adopt guidelines for administration of matters of state interest. (Emphasis added)

The Amicus Board of County Commissioners of El Paso County had originally intended to speak to this issue in its brief but since the Land Use Commission has agreed that it cannot compel counties to designate, no further discussion of this point is necessary.

The Land Use Commission, however, does argue that if it is dissatisfied with a county's decision not to designate it may obtain a trial de novo in the district court pursuant to section 24-65.1-407(1)(c), CRS 1973, as amended. The trial court found this trial de novo provision unconstitutional and the Amicus Board of County Commissioners of El Paso County supports the trial court's decision.

The trial court ruled that the General Assembly's provision for a trial de novo on designation issues was in violation of article III of the Colorado Constitution. Article III provides for the separation of the legislative, judicial and executive functions among the respective branches of government. The trial court found that a designation hearing was a legislative function and accordingly, it could not be delegated by the General Assembly to the courts.

The method of designating matters of state interest established by the General Assembly created a legislative, rather than judicial, function. Part 4 of article 65.1 of title 24, CRS 1973, as amended, establishes the criteria for designation. Local governments are authorized to designate matters of state interest after holding a public hearing on the issue and taking into account "the intensity of current and foreseeable development pressures" together with guidelines issued by the Land Use Commission and the recommendations of applicable state agencies, section 24-65.1-401(1), CRS 1973, as amended. Requirements of notice by publication and written notice to interested persons and the Land Use Commission are established for designation hearings, section 24-65.1-404(2), CRS 1973, as amended. Technical assistance from state agencies is provided to local governments in order to assist in the designation process, section 24-65.1-403, CRS 1973, as amended. If the local government decides to designate, it must not only "(s)pecify the boundaries of the proposed area" but must also:

> (s)tate the reasons why the particular area or activity is of state interest, the dangers that would result from uncontrolled development of any such area or uncontrolled conduct of such activity, and the advantages of development of such area or conduct of such activity in a coordinated manner, section 24-65.1-401(2), CRS 1973, as amended.

By providing for trial de novo in the district court the General Assembly apparently contemplated the courts' involvement in all of these matters. In its Opening Brief the Land Use Commission attempts to have this Court impose standards and limitations on such trials de novo, Appellant's Opening Brief, p. 8. While the legislature may provide a variety of limitations on a court's review of such matters, the General Assembly has not done so in enacting section 24-65.1-407(1)(c), CRS 1973, as amended.* The Land Use Commission cannot escape the inherent, broad meaning of the term "trial de novo:"

> "Trial de novo" is generally held to mean a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken, Spano vs. Western Fruit Growers, 83 F.2d 150, 152 (10th Cir. 1936). See Black's Law Dictionary, Fourth edition, "trial de novo," at 1677.

As the trial court pointed out the terms "judicial review" and "trial de novo" have inherently different meanings and contemplate different functions for the court. See South vs. Railroad Retirement Board, 43 F.Supp. 911, 913 (D.C. Ga. 1942).

Section 24-65.1-407(1)(c), CRS 1973, as amended, to the extent it provides for trial de novo of the designation hearing, is unconstitutional as a violation of article III. In People vs. Herrera, 183 Colo. 156, 516 P.2d 626 (1976), this Court stated:

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* Of course it would be inappropriate for this Court to supply the General Assembly's omissions and provide limitations on such trials de novo so as to make the statute constitutional. Under article III it is not the function of the Supreme Court to enact legislation but only to pass upon the constitutionality of legislation enacted by the General Assembly.

It is clear that the doctrine of separation of powers applies with equal force to all three branches of the government, as stated in Hudson vs. Annear, 101 Colo. 551, 75 P.2d 587:

> ". . . Article III of the Constitution applies no less to the judicial departments than the other departments. It is well, of course, that all departments give pause, that they may not offend. All must answer to the people, in and from whom, as specifically set forth in the Constitution, all political power is invested and derived, article II, section 1 . . ."

The judiciary can no more exercise a power constitutionally conferred upon the legislature than can the executive, 183 Colo. at 161.

This Court has held that de novo review by the courts of a nonjudicial function violates the separation of powers doctrine of article III, Public Utilities Commission vs. Northwest Water Corp., 168 Colo. 154, 168, 451 P.2d 266 (1969). Designation of matters of state interest, like the fixing of utility rates, is a legislative rather than judicial function. Performance of such legislative functions requires an expertise and the aid of a staff which the judiciary does not possess. The Act clearly contemplates the assistance of staff and use of the expertise of various state agencies in the designation process.

In Wenderoth vs. City of Fort Smith, 251 Ark. 342, 472 SW2d 74 (1971), the Arkansas Supreme Court struck down a statute similar to section 24-65.1-407(1)(c), CRS 1973, as amended, finding it violated Arkansas' separation of powers clause. The Arkansas legislature had provided a trial de novo remedy in the courts for zoning determinations by local government. The Court stated:

> In the case at bar we are . . . of the view that this statute cannot empower the judiciary to take away the discretionary powers vested by our legislature in the city's legislative body to enact zoning and rezoning ordinances. The provisions of this statute provide for a trial de novo . . . On appeal the issue would be tried entirely anew, the same as if the city's governing board had not acted . . . By this method of appellate review there is attempted to impose upon the circuit court a function of a nonjudicial character in a matter that is exclusively within the discretion and legitimate power of the city's legislative body. The result would be to substitute the judgment of the circuit court for that of a municipal law-making body. This is contrary to . . . our constitution which prohibits intrusion by the judiciary upon the legislative domain, 472 SW2d at 75.

The Arkansas Court cited a number of other cases from various jurisdictions which struck down statutes providing for trials de novo in nonjudicial areas. See Ball vs. Jones, 272 Ala. 305, 132 So.2d 120 (1961). The zoning authority of local governments is analogous to the designation system established by the Act. The legislative declaration clearly provides that designation is the function of counties and other local governments, section 24-65.1-101(2)(b), CRS 1973, as amended.

Thus the Amicus Board of County Commissioners of El Paso County submits that Public Utilities Commission vs. Northwest Water Corp., supra, and the zoning cases from other jurisdictions cited above provide ample persuasive authority for this Court to hold unconstitutional the trial de novo provision of section 24-65.1-407(1)(c), CRS 1973, as amended.

It should be noted that judicial review of county designation hearings will still be available under Rule 106(a)(4), C.R.C.P. Courts can review the record of such hearings to determine if counties exceeded their jurisdiction or abused their discretion by acting in an arbitrary and capricious manner.

II. BOARDS OF COUNTY COMMISSIONERS ARE NOT SPECIAL COMMISSIONS WITHIN THE MEANING OF ARTICLE V, SECTION 35 OF THE COLORADO CONSTITUTION, AND HAVE THE AUTHORITY TO REGULATE MUNICIPAL ACTIVITIES IN THE UNINCORPORATED AREAS OF THEIR RESPECTIVE COUNTIES.

Throughout this action the Land Use Commission has contended that boards of county commissioners are "special commissions" under article V, section 35 of the Colorado Constitution (see Appellant's Opening Brief, p. 12). Section 35 provides:

> Delegation of Power. The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatsoever.

The trial court specifically found that boards of county commissioners, unlike the Land Use Commission, are not "special commissions." Boards of county commissioners, unlike the Land Use Commission, are constitutional creatures, article XIV, section 6. In its brief the Land Use Commission points out that the Public Utilities Commission, while also a constitutional creature, has been held to be a "special commission," City of Lamar vs. Town of Wiley, 80 Colo. 18, 21, 248 P. 1009 (1926); Town of Holyoke vs. Smith, 75 Colo. 286, 294, 226 P. 158 (1924).

In construing article V, section 35, and specifically the term "special commission," the Colorado Supreme Court has not used the criteria of whether the entity seeking to regulate municipal activities is a constitutional creature. Rather, the Court has looked to whether the entity seeking to regulate municipal activities is a governing body of a permanent nature.

In Milheim vs. Moffat Tunnel District, 72 Colo. 268, 211 P. 649 (1922), the Court determined that the Moffat Tunnel Commission was not a "special commission" under article V, section 35. The term "special commission" was held to refer "to some body or association of individuals separate and distinct from the city government; that is, created for different purposes, or else created for some individual or limited object not connected with the general administration of municipal affairs," 72 Colo. at 282. The Court went on to state:

> The tunnel commission is the governing body of the district and under the view of the court. . . cannot be regarded in any sense as a special commission (emphasis added), 72 Colo. at 282.

Similarly the board of directors of a water conservancy district is not a "special commission" under article V, section 35, People, ex rel. Setters vs. Lee, 72 Colo. 598, 606, 213 P. 583 (1923); People, ex rel. Rogers vs. Letford, 102 Colo. 284, 312, 79 P.2d 274 (1938). Such boards are the permanent governing bodies for such districts. The governing body of a sanitation district was held not to be a "special commission" in City of Aurora vs. Aurora Sanitation District, 112 Colo. 406, 418-419, 149 P.2d 662 (1944).

Boards of county commissioners are the governing bodies of their respective counties, section 30-11-103, CRS 1973. As such they are not special commissions under article V, section 35. The Land Use Commission is not a governing body but rather a part of the office of the governor, section 24-65-103(1), CRS 1973, with statutory duties and authority involving land use planning, section 24-65-104, CRS 1973, as amended.

In its Ruling and Judgment the trial court found article V, section 35, reflected the Colorado framers' fear of appointed, unelected boards and commissions which would be unresponsive to the people of the state and the most likely to be arbitrary and unreasonable. This interpretation appears to be valid in light of the selection processes for those bodies the Supreme Court has found not to be "special commissions." The Commissioners of the Moffat Tunnel District are elected by property owners in the District, section 32-8-103, CRS 1973. Similarly, the directors of sanitation districts are elected rather than appointed, section 32-4-112, CRS 1973. The boards of directors of water conservancy districts are appointed by the local district judge approving the organization of the conservancy district, section 37-45-114, CRS 1973. County commissioners, of course, are elected by the voters of their respective counties, article XIV, section 6 of the Colorado Constitution.

On the other hand, members of the Land Use Commission are, of course, appointed by the governor, section 24-65-103(1)(b), (c), CRS 1973. Members of the Public Utilities Commission are appointed by the governor with the consent of the senate, section 40-2-101, CRS 1973.

A number of other states have constitutional provisions similar to article V, section 35. The Supreme Court of Pennsylvania has held that a county highway control agency was not a "special commission" within the meaning of the Pennsylvania constitutional provision prohibiting delegation of power to make, supervise or interfere with municipal improvements, Tranter vs. Allegheny County Authority, 316 Pa. 65, 173 A. 289, 294-295 (1934). See also Wilson vs. Board of Supervisors of Placer County, 154 CA2d 101, 315 P.2d 748 (1957).

On the other hand, the Utah Supreme Court has held the State Water Pollution Control Board to be a "special commission" under the Utah constitutional provision prohibiting the legislature from delegating to any special commission any power to supervise or interfere with municipal improvements, State Water Pollution Control Board vs. Salt Lake City, 6 Utah 2d 247, 311 P.2d 370 (1957). The Court held that the Utah state legislature was therefore prohibited from delegating to the Board any statutory authority or jurisdiction over city sewer systems.

Boards of county commissioners possess those powers expressly conferred upon them by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry out such express powers, Board of County Commissioners vs. Love, 172 Colo. 121, 470 P.2d 861 (1970); Asphalt Paving Co. vs. Board of County Commissioners, 162 Colo. 254, 425 P.2d 289 (1967). Such powers include the authority to regulate certain activities involving land use in the unincorporated areas of the county, part 1

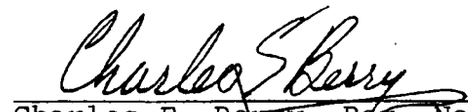
of article 28 of title 30, article 20 of title 29, and part 4 of article 65.1 of title 24, CRS 1973. The Colorado Supreme Court has recognized the authority of boards of county commissioners to regulate municipal utility activities in the unincorporated areas of counties, Robinson vs. City of Boulder, 190 Colo. 357, 362, 547 P.2d 228 (1976). The Act itself provides:

> With regard to public utilities, nothing in this article shall be construed as enhancing or diminishing the power and authority of municipalities, counties, or the public utilities commission . . . , section 24-65.1-105(1), CRS 1973, as amended.

Thus a finding by this Court that the Land Use Commission is a "special commission" within the meaning of article V, section 35, and therefore precluded from regulating municipal utility activities does not mean that counties are precluded from regulating such activities, either under the Act or any of the other regulatory authority over land use given counties by the General Assembly.

Respectfully submitted,

OFFICE OF THE COUNTY ATTORNEY
OF EL PASO COUNTY



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