2-7-1984

Beaver Meadows v. Board of County Comm'rs

SUPREME COURT, STATE OF COLORADO

Case No. 83SA313

1. BEAVER MEADOWS, a partnership;
2. DONALD B. WEIXELMAN;
3. DIANE WEIXELMAN;
4. O.J. HARVEY;
5. MARY CHRISTINE HARVEY;
6. CHARLES B. McKIBBEN;
7. LOUISE S. DiLUZIO;
8. RONALD H. FOX;
9. ROBERTA M. FOX;
10. ALLEN ZOHN;
11. RUTH ZOHN;
12. RONALD LEE SELL;
13. JOANN SELL;
14. CHRISTOPHER J. CANNON;
15. BECKY J. CANNON;
16. STEVEN W. HANSON;
17. MARILYN M. HANSON;
18. ROSEMARY SIMONE;
19. ROBERT SIMONE;
20. VERNON L. RIDER;
21. WILLIAM MELVIN DEWAR II;
22. PAT D. BOYD;
23. SHIRLEY J. BOYD;
24. GERALD WAYNE MOORE;
25. JAMES E. MOORE;
26. DONALD GIAQUE;
27. DOROTHY GIAQUE;
28. E.H. BARKER;
29. PATRICIA R. BARKER;
30. KENNETH W. RONKAINEN;
31. HELEN RONKAINEN;
32. KENNETH E. CLINE;
33. JEAN F. CLINE;
34. TERRY R. MINTON;
35. CLAUDIA MINTON;
36. GARY L. VANCE;
37. ERICK W. WEISS;
38. RICHARD BIVENS;
39. ADRIANNA BIVENS;
40. KENNETH L. BARKER;
41. W. SAM ROGERS;
42. KENNETH E. CLINE, JR.;
43. STEVEN E. CLINE;
44. PEGGY E. CLINE;
45. H. BUCKHORN ESTATES, INC.;

46. ORVILLE HAWKINS; and
47. SHIRLEY HAWKINS;

Plaintiffs-Appellants,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER, STATE OF COLORADO; COURTLYN W. HOTCHKISS; NONA THAYER; JAMES D. LLOYD; and the COUNTY OF LARIMER, STATE OF COLORADO,

Defendants-Appellees.

Appeal from the District Court of the County of Larimer, State of Colorado

Civil Action No. 81DV272

The Honorable William F. Dressel, Judge.

REPLY BRIEF

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COME NOW Plaintiffs-Appellants (Beaver Meadows) and present this Reply Brief.

I. THERE IS NO BASIS FOR DISMISSING THE APPEAL.

Defendants-Appellees (County) have repeatedly sought to have this appeal dismissed, apparently basing their argument on the allegation that no excusable neglect was shown for filing the notice of appeal beyond thirty days after entry of the order denying the motion for new trial. In argument to this Court, the County relies on the provisions of Rule 77(d) of the Federal Rules of Civil Procedure. While that rule may be instructive in certain cases, there is no comparable Colorado rule and Beaver Meadows would note an exception in that rule "as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure" which will excuse a party from failing to file the requisite notice of appeal.

Rule 4(a)(5) of the Federal Rules of Appellate Procedure contains a provision virtually identical to the provisions of the third paragraph of Rule 4(a) of the Colorado Appellate Rules (as they existed prior to January 1, 1984) allowing the trial court, "upon a showing of excusable neglect", to grant an extension of the time for filing a notice of appeal for a maximum of an additional thirty days. Cases interpreting the Federal Appellate provision have held that ruling on a motion for extension of time to file a notice of appeal is discretionary with the district court which the appellate court should not second guess, Davis v. Page, 618 F.2d 374 (5th Cir. 1980) and the granting of such a motion may be overturned on appeal only if the reviewing court finds that the lower court abused its discretion in granting the extension, Matter of Estate of Butler's Tire & Battery Co., Inc., 592 F.2d 1028 (C.A. Ore. 1979).

Further, failure to receive notice of the order of the trial court is the sort of contingency contemplated by the excusable neglect provisions of the rules permitting extensions of time, National Life Ins. Co. v. Hartford Acc. & Indem. Co., 475 F. Supp. 282 (D.C.E.D. Va. 1979); Resnick v. Lehigh Valley R. Co., 11 F.R.D. 76 (D.C. N.Y. 1951); United States v. Commonwealth of Virginia, 508 F. Supp. 187 (D.C. E.D. Pa. 1981).

Further, the County is simply wrong in its statement, at page 6 of its brief, that Beaver Meadows' motion did not state that the trial court's ruling on the motion for new trial was never received. Beaver Meadows' motion for extension of time to file notice of appeal clearly states that:

> "No notice of the entry of the court's ruling on their motion for new trial or to alter or amend judgment was received by the plaintiff's [sic] counsel either through the failure of the United States mail or internal office distribution." (Vol. III, p. 1280).

The County's citation of the court's notation that three copies of the ruling on the motion were sent to attorney Burch reflects the fact that in the telephone conversation of June 24, 1983, referenced in the motion for extension of time, counsel requested a copy of the trial court's ruling. When no copy was received by the afternoon of June 27, 1983, counsel again telephoned the District Court Clerk to request a copy. Apparently a copy was sent on June 27, 1983 but was not received until July 1, 1983. As noted from Exhibit A appended hereto, the outside envelope did not indicate the name of counsel nor was there any such indication on the order enclosed. In a firm with a large number of attorneys, this can cause substantial delay in distributing mail internally; only because this was the object of some frantic searching was this finally received by counsel on July 1.

The cases relied on by the County either relate to a wholly different factual circumstance (Long v. Emery, 383 F.2d 392 (10th Cir. 1967); Concelman v. Ray, 36 Colo. App. 181, 538 P.2d 1343 (1975), involve a period of no less than six months between the entry of an order and the filing of a notice of appeal (Lathrop v. Oklahoma City Housing Authority, 438 F.2d 914 (10th Cir. 1971); Federal Lumber Co. v. Hanley, 33 Colo. App. 18, 515 P.2d 480 (1973) or hold that miscounting the number of days to file a notice of appeal does not constitute excusable neglect, Bosworth Data Services, Inc. v. Gloss, 41 Colo. App. 530, 587 P.2d 1201 (1978).

Nothing in the County's arguments constitutes a showing that the trial court abused its discretion in granting the motion for extension of time. Thus the County's arguments must fail. Additionally, it appears that the County has also been the victim of fallible mail service since its Answer Brief took six days for delivery from Ft. Collins to this court.

II. THE COUNTY SIMPLY DOES NOT HAVE THE POWER TO IMPOSE THE CONDITIONS IT DID.

There are two basic fallacies to the County's arguments concerning its powers. First is the County's assumption that it has the same inherent police powers as do municipalities. This is not the case as pointed out by Beaver Meadows in its Opening Brief. Thus the County's reliance on cases involving municipal planning and subdivision issues is misplaced. As the California Supreme Court noted in Ayers v. City Council of City of Los Angeles, 34 Cal.2d 31, 207 P.2d 1 (1949):

> "The status of an autonomous city [citations] is recognized by express references to city ordinances in the Subdivision Map Act. Whereas here no specific restriction or limitation on

> the City's power is contained in the Charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions.", 207 P.2d at 5.

The second fallacy in the County's arguments is the contention that the County has been granted the power to impose conditions such as those at issue here by specific statutory enactments. This is patently not true. The "Planned Unit Development Act of 1972", article 67 of title 24, C.R.S. specifically authorizes counties and municipalities to permit planned unit developments by the enactment of a resolution or ordinance which meets certain statutory requirements.

Included in these requirements is the mandate that:

> "every resolution or ordinance adopted pursuant to the provisions of this article shall set forth the standards and conditions by which a proposed planned unit development shall be evaluated, which shall be consistent with the provisions of this section. . . .", §24-67-105 (1), C.R.S.

Nowhere in the cited section nor in the act itself is there any authorization for a local government to impose, as condition for approval of a planned unit development, the requirement that improvements be made to any off-site facility, including roads. The statutory section relied on by the County is merely a declaration of purpose rather than a specific grant of power.

The County's reliance on its policy plan which is an element of its comprehensive plan must be based on the whole of that policy plan and not merely on certain concepts. Included in the policy section of that plan is a statement that "new development, to the extent it is measurable and

equitable, should pay its own way" (Larimer County Policy Plan, p. 18). Further, the action policies and programs section of the plan provides that:

> "The county should develop mechanisms for assessing the short and long-term impact of a proposed development on public expenditures and revenues. When applicable, the county should require payments from the applicant, to the extent it is fair and equitable, to upgrade a given county service or facility." (Larimer County Policy Plan, p. 22).

The provisions of article 28 of title 30, C.R.S. relied on by the County are again mere general statements of purpose rather than specific authorization for the County to impose specific conditions on approval of developments, particularly when such conditions involve payment of money by the private developer to provide a public benefit. Even §30-28-123, C.R.S. makes specific reference to regulations of the county conflicting with standards imposed by statute. The County's assertion that local regulations may conflict with the enabling statute are patently absurd since an enabling statute cannot authorize the exercise of powers that conflict with the powers granted.

The requirement of a specific grant of power is found even in cases dealing with municipal exercise of powers. In Bethlehem Evangelical Lutheran Church v. City of Lakewood, ____ Colo. ____, 626 P.2d 668 (1981), a case relied on by the County, this court said:

> "In view of the statutory scheme that permits the assessment of these property improvement costs to the abutting property, we have no difficulty in holding that when a property owner seeks to put his property to an enlarged use which reasonably necessitates, in the interest of public safety and welfare, the installation of sidewalks, curbs, gutters and street surfacing, a building permit may be conditioned on the construction of such public improvements at the cost of the property owner.", 626 P.2d at 672, emphasis added.

The legislative scheme requirement is found in Wood Bros. Homes, Inc. v. City of Colorado Springs, 193 Colo. 543, 568 P.2d 487 (1977) as well.

However, in the instant case, there is clearly no statutory authorization for the conditions imposed by the County, either with regard to the road improvements or the provision of emergency medical services, and the County has failed to point to any specific resolution or regulation which even purports to establish standards to be used in imposing such conditions in an attempt to "implement" the statutory policies.

This court has recently rejected an argument made by the City and County of Denver that Article XX of the State Constitution granted an implied police power sufficient to sustain an ordinance imposing and apportioning costs for viaducts, Denver and Rio Grande Western Railroad Company v. City and County of Denver, (No. 83SA242, November 29, 1983). Although that opinion was based primarily on the distinction between matters of local versus matters of state wide concern, the rejection of the argument that implied police power sustains the imposition of costs for public improvements on private parties militates strongly against the County's arguments.

Finally, this court held, in Cherry Hills Farms, Inc. v. City of Cherry Hills Village, (No. 82SA165, October 11, 1983), that a fee imposed by ordinance on developments to provide for expansion of municipal services is a tax and that as between a property or excise tax, it is the latter. The purpose of that fee, which was determined pursuant to standards set forth in the ordinance, is identical to the purpose of the condition imposed with regard to the road improvements. Although municipalities are given the power to tax business, nowhere in the statutes is there authority granted a county to impose any kind of excise tax other than a sales tax.

The conclusion is inescapable that the County simply does not have the power to raise revenues for public improvements by means other than those expressly stated in the statutes. Since there is no such authorization for the kind of conditions imposed on Beaver Meadows, the conditions must fall.

III. THERE IS NO REASONABLE RELATIONSHIP BETWEEN THE CONDITION IMPOSED AND THE IMPACT OF THE DEVELOPMENT.

The County then attempts to argue that having the inherent power to impose the kinds of conditions it did, those conditions were reasonable. With respect to the emergency medical services, the County has totally failed to cite any statutory authority nor has it refuted Beaver Meadows' arguments concerning the total lack of any such authority. Again here the County has failed to point out any resolution or regulation which provides a standard even if the County had statutory authority.

More telling is the County's attempt to justify the conditions with respect to paving of the road. In Bethlehem Evangelical Lutheran Church, supra, this court found that the standard of "necessity" was a sufficient standard for the requirement of certain public improvements immediately adjacent to the church. This same theme is carried through the other cases cited by the County in its brief.

However, from these cases it is clear that the necessity must derive from the proposed development, and the County's arguments completely ignore the conclusions found in the engineering study which it commissioned that "there is not sufficient justification to hard surface the roadway prior to 1990" (Vol. III, p. 1156). Further, it is difficult to correlate the 400% increase in maintenance costs estimated by the County (Vol. III, p. 1173) with the data regarding impact found in the engineering study showing a

16% impact (Vol. III, p. 1157), despite the assertion that the estimate was based on the Beaver Meadows development alone.

The other arguments made by the County such as assistance of stranded motorists or the question of dust pollution either have no relationship to the condition imposed (motorists will be stranded whether or not the road is paved) or relate to existing problems which the County seeks to have solved by the private developer rather than using county or public monies. The latter issue is fully discussed in Beaver Meadows' Opening Brief.

Finally, in a somewhat desperate attempt to demonstrate the reasonability of the condition imposed relating to the road, the County attempts to analyze the condition. The requirements of the revised findings and resolutions speak for themselves (Vol. III, pp. 1268-1270) and a careful review shows that they offer no real alternative or reasonable choice at all. The County alleges that the developer "has the option to present to the county the material required to hold a hearing for the formation of a local improvement district" (Answer Brief, page 22). A quick review of the county local improvement district statutes, part 6, of article 20 of title 30, C.R.S., shows that there is no such material required.

Those local improvement districts may be formed unilaterally by the board of county commissioners or may be formed upon presentation of a petition for improvements "subscribed by the owners of a majority of the frontage directly abutting on that portion of the street to be improved", §30-20-603(3)(a), C.R.S. Since the Beaver Meadows development does not abut on any of the road proposed to be improved, this appears to be an impossible requirement.

Further, the resolution conditions formation of the district on the support of a majority of the property owners and inhabitants, a condition not found in the statute. The county may or may not form the district and even if it does, if bonds financing the improvement are not sold within eighteen months, the entire process is invalidated. Meanwhile no development may occur, despite the engineering finding that the road improvement is not required until at least 1990. Then, in the event a district is not formed, the developer has one of two "alternatives" to fully fund the improvements being required.

Thus, despite the fact that the maximum impact this development will have on the road, according to the engineering study commissioned by the County, is 16%, it is being required to bear 100% of the cost of an improvement which may be desirable to alleviate an existing dust problem but is hardly necessary to accommodate this development. All of the findings relied on by the County are merely conclusions which, when compared with the underlying facts, cannot be sustained, and the proferred "alternatives" would create a hazardous road. There is therefore no basis for holding that the requirements imposed are reasonably related to the development.

IV. THE COUNTY'S DEALINGS WITH BEAVER MEADOWS HAVE TAINTED THE ENTIRE PROCESS.

The County entirely ignores the inescapable conclusion from the factual recitation in the Opening Brief that its dealings with Beaver Meadows have been less than fair. The fact that the initial resolution imposed conditions which were legally impossible and which were publicly brought out only at the last minute, the continued delay in addressing the question of Creedmoor Lakes Road even after two alterna-

tive proposals were presented at the February 1982 hearing, the failure of the board of county commissioners to follow its own timetable in preparing its final revised resolution, and the clearly documented attempt to justify, after the fact, the decision reached in June of 1982 without the requested input from the developer and without personal knowledge of the commissioners of the documentation which would support their decision are only the more blatant examples of the County's actions.

This attitude is further evidenced by the County's attempt to explain the unilateral additions to the agreement made between Beaver Meadows and the County. Beaver Meadows clearly documented, in its Opening Brief, the fact that collateralization would not be required at the Master Plan stage, yet the County included it in the revised resolution, despite its own statement at the public hearing that only disputed issues, which this was not until the revised resolution appeared, would be addressed.

The second unilateral addition is not, as the County attempts to describe it, an attempt to indicate <u>how</u> improvements were to be required but rather a specification of <u>what</u> improvements in a related but distinct area not part of the plan submitted to the County, would be required for consideration with this master plan. The revised resolution clearly states that it is those improvements "that are, in the opinion of county staff, essential to this master plan" (Vol. III, page 1269) that were to be included in consideration of the present application. This clearly vests unbridled discretion in the county staff and cannot be sustained.

The alleged "concessions" made by the County as well as its plea that this court not invalidate a portion of the conditions but rather again remand the matter to the county

should the conditions complained of be found invalid clearly demonstrate a continuing pattern of delay and impedance with respect to this development. The simplistic notion that either the developer comply with all conditions, however ill-founded they may be, or not be allowed to develop a project which is clearly within the contemplation of the County's planning documents cannot be allowed to require a continuing cycle of hearings without any final resolution. As the Court of Appeals noted in Interladco v. Billings, 538 P.2d 496 (Colo. App. 1965), there must be an end at some point. There is clearly authority for this court to strike some but not all of the conditions in Bethlehem, supra, where this Court did strike a portion of the city's conditions, holding that they were constitutionally invalid.

V. CONCLUSION.

For these reasons, Beaver Meadows requests that this court reverse the trial court and order the board of county commissioners to approve the master plan since the County has been unable to show that the plan, on its face, does not comply with existing county resolutions and regulations.

Respectfully submitted this 7th day of February, 1984.

CALKINS, KRAMER, GRIMSHAW & HARRING

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CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing REPLY BRIEF has been served upon the following counsel by depositing same, properly addressed and postage prepaid in the United States mail this 7th day of February, 1984:

George A. Hass, Esq.
Harden, Schmidt & Hass, P.C.
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Fort Collins, Colorado 80522

Mary D. Lowrar

RECEIVED JUL

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF LARIMER AND STATE OF COLORADO

WILLIAM F. DRESSEL JUDGE

JASON T. MEADORS REPORTER ORDER OF COURT

MARILYN W. SCHEINOST CLERK

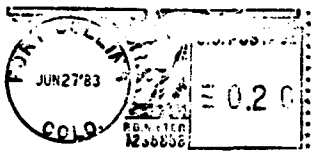
1 81 000272 05-17-83
05-17-83
WFD

BEAVER MEADOWS VS COUNTY COMMISSIONERS
UPON REQUEST OF PLF DUE TO THE WEATHER, COURT GRANTS AN EXTENSION OF 2 DAYS TO FILE THE MOTION FOR NEW TRIAL.

1 81 000272 05-23-83
05-20-83
WFD

BEAVER MEADOWS VS COUNTY COMMISSIONERS
PLFS' MOTION FOR NEW TRIAL OR TO ALTER OR AMEND JUDGMENT IS DENIED. THE COURT FOUND THAT THE COUNTY AS A POLITICAL SUBDIVISION OF THE STATE PURSUANT TO ITS GENERAL "HEALTH & WELFARE" POWERS DOES HAVE THE AUTHORITY TO INQUIRE INTO & REQUIRE APPROPRIATE PLAN OR PROPOSAL FOR "EMERGENCY MEDICAL SERVICES" (WHICH COULD BE HAVING A PUBLIC TELEPHONE AVAILABLE BUT IS A MATTER WITHIN REASONABLE DISCRETION OF THE DEF).
THE COURT DID NOT UPHOLD AN "ORDER OR CONDITION" REQUIRING THE PLFS TO IMPROVE THE ROAD. THE COURT UPHELD THE COUNTY'S FINDING THAT ACCESS IS INADEQUATE. THE EVIDENCE WAS IN CONFLICT ON THIS SUBJECT BUT EVIDENCE WAS PRESENTED WHICH SUPPORTED THE COUNTY'S FINDINGS.
THE COURT HAS CONSIDERED THE PLFS OTHER CONDITIONS & FINDS SAME TO BE WITHOUT MERIT. THE ISSUES WERE IDENTIFIED, PLFS WERE GIVEN THE OPPORT UNITY TO RESPOND, & THE COUNTY ISSUED ITS WRITTEN FINDINGS & ORDER ALL OF WHICH ACCORDED PLFS DUE PROCESS. CATYS

Clerk of the District Court
P.O. Box 2066
Fort Collins, Colorado 80522



C

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EXHIBIT A