In the

Supreme Court of the United States

VILLAGE OF BELLE TERRE, et al.,

Appellants,

v.

BRUCE BORAAS, et al.,

Appellees.

No. 73-191

Washington, D. C.,

February 19, 1974
and
February 20, 1974

Pages 1 thru 52

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Washington, D. C.,

Tuesday, February 19, 1974.

The above-entitled matter came on for argument at 2:40 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BERNARD E. GEGAN, ESQ., 50 Beacon Hill Road, Port Washington, New York 11050; for the Appellants.

LAWRENCE G. SAGER, ESQ., New York Civil Liberties Union, 84 Fifth Avenue, New York, New York 10011; for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-191, Village of Belle Terre against Boraas.

Mr. Gegan.

ORAL ARGUMENT OF BERNARD E. GEGAN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GEGAN: Mr. Chief Justice, and may it please the Court:

I appear for the Village of Belle Terre, and the named individual defendants in this action, on an appeal from a judgment of the United States Court of Appeals for the Second Circuit.

That judgment held unconstitutional a portion of the zoning law of the Village. The portion that it held unconstitutional provided that, No. 1, the Village has a one-family zone. The court did not dispute that.

But "family" is defined in terms of two -- of a family related by blood, adoption or marriage; or an unrelated individual living in a household but not in excess of two.

The Village of Belle Terre --

QUESTION: So a household then would consist either of a group of people, not limited in number, related by blood, adoption or marriage; or of two people not related by blood, adoption or marriage?

MR. GEGAN: According to the ordinance, Your Honor.

QUESTION: So that three spinsters could not live together.

MR. GEGAN: According to this ordinance, that is just so, Your Honor.

QUESTION: But two homosexuals could.

MR. GEGAN: Yes. Yes, Your Honor.

The Village of Belle Terre is a small community of 700 people, approximately, on the north shore of Long Island in Suffolk County. The plaintiffs, the Dickmans, own a house within the Village, and rented it to six students at the State University at Stony Brook.

The Village threatened to enforce its ordinance with attendant criminal penalties against these individuals, and they commenced the action in the federal district court.

QUESTION: And the students were all unrelated to each other, by blood or marriage, were they not?

MR. GEGAN: Yes, they were. That was in their complaint, so alleged, Your Honor.

QUESTION: And some were males and some were females; correct?

MR. GEGAN: Apparently one was a female, Your Honor.

QUESTION: Unh-hunh.

MR. GEGAN: Yes.

Pending this appeal, I was informed that these students had left, and so stated in my brief.

QUESTION: They were all graduate students, were they?

MR. GEGAN: Not all of them, Your Honor.

QUESTION: I see.

MR. GEGAN: Some of them were.

QUESTION: And they left because they had completed their --

MR. GEGAN: We have no knowledge of why they left, Your Honor.

I am updated by counsel for the plaintiffs, as they state in their supplemental brief, that they have been replaced by six more unrelated adults.

QUESTION: Right.

MR. GEGAN: So we are now back in that position.

I would like, in the beginning, to proceed from the general --

QUESTION: Are these new tenants parties to the case or not?

MR. GEGAN: They are not parties to the case, Your Honor. If the problem --

QUESTION: Not a class action, then.

MR. GEGAN: It's not a class action, Your Honor; individual action.

QUESTION: Well, then, does it make any difference whether the house is occupied by these people or by no one at

all?

MR. GEGAN: I think in so far as the case could be thought to be moot, --

QUESTION: Are the same --

MR. GEGAN: -- that the Dickmans have continued to be plaintiffs throughout, and have never withdrawn or left.

QUESTION: I see. They are plaintiffs?

MR. GEGAN: They are the owners of the house, --

QUESTION: And they're the ones that want to rent it. Exactly. All right.

MR. GEGAN: And their interests have been continuous, and now of course they've been revived by the new group of unrelated persons.

QUESTION: Right.

MR. GEGAN: In discussing the constitutionality of the law, I would like to proceed, if I may, from the general to the particular.

I would begin by stating what I would like to think of as a starting point for analysis of the issues here. That laid down in Euclid v. Ambler, that a State may legitimately have a one-family zone, as set -- a community may legitimately have a one-family zone as distinguished from a two-family, detached, as distinguished from apartments, commercial, light industrial, and so on down the line.

If that is true, and if the one-family zone which

the town has a right to enact, if the one-family zone is to have any meaning, you have the problem of an unlimited number of persons assembling under the roof in the one-family house.

I suppose the Village has a couple of alternatives. It could just forget about its one-family zone and have no limit on the number of people, of any type, that could live in the building. I don't think it's required to throw out its one-family zoning.

Or, as plaintiffs suggest in their brief, they could have an across-the-board limit, a maximum number of people can live in the house according to the number of bedrooms, or some other formula, period; across-the-board.

The consequences of this suggestion would be to penalize larger families, families with children, for example, in excess of the number of bedrooms in the house.

Whether it would be constitutional for a village to do this, I don't even discuss. Certainly a village is at liberty not to make that policy judgment.

At this point I think we come to the crux issues in the case. Are there any circumstances in which the village can treat the family, because of what it is, because of the value it has for our society, can it treat the family different from the unrelated group?

And the third alternative is the one the village adopted here. To have a numerical limitation on the number of

unrelated people, but no numerical limitation on families, counting on the normal expectancy that families tend to remain within a certain range. Whereas there is no such expectancy or predictable size of group in the case of unrelated individuals.

QUESTION: Was the whole village zoned as one-family?

MR. GEGAN: Yes, it was, Your Honor.

QUESTION: I thought so.

MR. GEGAN: And on that point the plaintiffs make something of that, in that the argument is that if Belle Terre can do it, so can everybody else; and unrelated groups might find themselves eventually deprived of convenient and fitting places to live.

Addressing myself just to that question, Your Honor, I first wish to re-emphasize there are two issues: one, is the Village appropriately zoned for what it is; second, what body has the right to make the zoning decision?

This is the point that the plaintiffs challenge in this branch of the case.

QUESTION: Does this Village have the legal right to grant variations or exceptions from their zoning for tempo --

MR. GEGAN: No, --

QUESTION: They have not?

MR. GEGAN: --Mr. Chief Justice, there is no administrative machinery; it is a fixed zone. No variances.

QUESTION: Unh-hunh.

QUESTION: Is the -- the Village of Belle Terre depends for its zoning authority on the grant from the town of Brookfield [sic], doesn't it?

MR. GEGAN: Well, it derives it directly from State law, under the New York State village law.

QUESTION: The town of Brookfield, then, has no control over what zoning the --

MR. GEGAN: Well, the way it works, Your Honor, is that the town has zoning power, but if the village incorporates within the geographic area of the town, it then acquires zoning power over its area.

QUESTION: Without reference to the town?

MR. GEGAN: Without reference to the town. But to the extent that the Village is not an incorporated village, the town's zoning is applicable.

QUESTION: You say it's single-family, are there no commercial, retail store areas, that sort of thing?

MR. GEGAN: No, not within this Village. It's just single-family houses, as residential.

QUESTION: What's the population of Belle Terre?

MR. GEGAN: Seven hundred people, Your Honor, in approximately 220 homes.

The consequences of the plaintiff's argument on this branch of the case apparently would be, and I can't see

any way around it, that they would say it's unconstitutional to have a governmental entity endowed with zoning power, unless that governmental body itself could accommodate the full range of zoning uses.

This -- just the argument is that since Belle Terre consists solely of one-family residences, it shouldn't be able to zone, unless it can accommodate other uses. This is an astonishing proposition that would render innumerable zoning ordinances, all across the country, unconstitutional. It would negate the value of local autonomy, which this Court so recently emphasized in San Antonio School District case.

Why this astonishing conclusion is pressed on this Court apparently is that the plaintiffs believe that if Belle Terre is allowed to have its one-family zone, then other communities will zone them out.

Mind you, the argument is not that this is the present situation. On the contrary, Judge Dooling made his finding of fact down below that Belle Terre is a tiny unit within a large area of permissibly zoned area. He made the finding that the town of Brookhaven, within which the university is, and within which the Village is, that the town of Brookhaven, even its highest zoning district would accommodate the residential use engaged in by the plaintiff students.

So the argument is not that under the present

existing circumstances the students have been deprived of a meaningful and appropriate place to reside. The argument is that it might become so in the future.

The Second Circuit Court of Appeals accepted this argument. I think this turns upside-down the presumption of constitutionality. We have a tradition that if any state of facts might be conceived, that would make the operation of a law reasonable, then the law is valid.

The Court of Appeals reversed this, upside-down, that if any state of facts might be conceived in futuro, by which the operation of this law would become unreasonable, then the law must be held valid, void presently.

Now, of course, the Village of Belle Terre excludes two-family houses; but no one is in a panic thinking that, Heavens, if Belle Terre excludes two-family houses, there will be no place for two-family houses.

The plaintiff group, consisting of unrelated people, is not the kind of suspect minority which this Court contemplated in the Caroline Products case, footnote 4; they are numerous, they are articulate, they are educated, they are mobile, in the sense that members of this group become members of families, and back and forth. So they are the very opposite of the kind of helpless minority in whose behalf strict or special judicial scrutiny is involved.

The plaintiffs, at a couple of points in their brief,

try to impute to the Village some sort of judgment that individuals living in groups are, per se, socially undesirable.

I suppose they are trying to come close to the Marino case, recently decided by this Court, which said that the State has no legitimate interest in punishing politically unpopular groups.

Well, of course, that would be the antithesis of a bill of attainder, and no one would assert that is a constitutionally permissible purpose.

But this kind of division that they try to impute to the Village, that we in the Village, the families are the good guys, and groups are somehow the bad guys, the social undesirables that are excluded, that are out. This distorts totally the kind of fine-tuned judgments that are made in zoning.

If you have a zone for a one-family residential community, that does not express a judgment that people living in two-family houses are undesirables. It excludes a monastery of fifty monks living in it. There's no judgment that the fifty monks are undesirables. It's a rather fine-tuned judgment that certain uses are more appropriately put off into one zone.

The plaintiffs use the epithet, "separate but equal". Well, that epithet has an odium connected with it, because of its legal history. But logically the concept, "separate but

equal" I must admist is the concept of zoning.

I think in this case that, of all of the opinions written below, the most acute statement was that of Judge Dooling in the District Court, in the Jurisdictional Statement, page 80a, in which he said:

"The essence of zoning is that its selection is not regarded as invidiously discriminatory against uses not selected. Zoning presupposes that convenient and fitting locations can be found for every legitimate land use, so that no pursuit of any use is denied, or disparaged."

Now, you can call that "separate but equal" if you will, but that's what it is. The exclusion of one land use from Zone X is not the kind of invidious judgment that excluding unrelated groups from food stamp programs is.

To exclude unrelated groups from food stamp programs does not put any greater nourishment in the stomachs of families.

QUESTION: Well, here you don't have an exclusion of unrelated groups, at least as I understand the ordinance. You have a limitation on their number as to two, where you don't have the same limitation on the number in the family. So the town hasn't excluded unrelated groups.

MR. GEGAN: That's true, Your Honor.

I would say in candor, however, that my basic principle rests, to a certain degree on the concept of

density. I think density certainly explains the general concept of why a village would want to put a numerical limit on the number of unrelated people, while leaving traditional families without a numerical limit.

QUESTION: Well, just to suggest one, six completely independent autonomous adults are more likely to have more automobiles and use up more parking space than one-family unit with two children, are they not?

MR. GLGAN: Among other, definitely one, Your Honor. One of the rational perceived grounds upon this distinction would be made.

QUESTION: Isn't this one of the bases on which the zoning ordinances will require X number of square feet parking space for every X number of living space in an apartment building, so that the persons living nearby an apartment are not going to have their space on the street taken up by the overflow from the apartment building.

MR. GEGAN: I think that is exactly so, Mr. Chief Justice.

QUESTION: Now, that would be true in a lesser degree right here, wouldn't it?

MR. GEGAN: Yes. I do feel --

QUESTION: But the record here doesn't show that as the reason, does it?

MR. GEGAN: One of the problems --

QUESTION: As I understand it, when it went back for findings, nothing was added to the record.

MR. GEGAN: We feel, Your Honor, this way. The United States Court of Appeals said that the Village has not proved the existence of problems, whether it be problems of transiency and community stability, whether it be problems of density, or whether it be problems in the ability of families to compete for the rental of a house against six wage-earners; these were the various reasons the Village endorsed.

QUESTION: Doesn't McGowan, or up to now hasn't McGowan v. Maryland said that an appellate court may conjure up any reason that supports the result?

MR. GEGAN: Yes, Your Honor. And I don't even go that far. But I do stand here, strongly objecting to the notion of the Second Circuit Court of Appeals that the Village somehow had to prove, as if it were an adjudicated fact to be proved by a preponderance of the evidence, the facts underlying -- the legislative facts underlying its ordinance.

To the contrary, we insisted there and we insisted -- we went back to the District Court and refused to put in any further facts, and we insist here that so long as the state of facts which the Village apprehends is rationally arguable that reasonable men could perceive that if we don't have this ordinance certain problems will develop, that that

is sufficient to justify the constitutionality of the ordinance.

We don't even ask the Court to exercise sua sponte imagination, to impute purposes to the Village. The Village comes before you tendering legitimate reasonable public purposes which underlie this statute.

The fact that the number of unrelated persons can't exceed two might be thought harsh, if density were the only rationale underlying this ordinance. That is why the Village has other rational bases underlying this ordinance.

QUESTION: You mean you might have difficulty if the requirement in addition to what you now have is that, and every house must be on a minimum of five acres?

MR. GEGAN: Yes, Your Honor. I --

QUESTION: You might be in trouble with that?

MR. GEGAN: I would certainly feel uncomfortable with it, and I don't want to carry that burden.

So, to justify --

QUESTION: Do you have an acre limitation?

MR. GEGAN: One acre, yes, it is, Your Honor.

QUESTION: One acre.

MR. GEGAN: To justify the number of two, as applied to groups of unrelated individuals, it seems obvious to us that we have an economic problem staring us in the face.

We are fifteen minutes away, as the affidavits show,

from Stony Brook University. A large unit of the State University. And the particular number, and I ask Your Honors to notice it, is some 12,000-odd students. They have more faculty than we have residents.

So there's a potentially tremendous supply of unrelated individuals who would be ready to form groups, were this ordinance not existing.

And we argue that the legitimate interests in rental parity and equity between a family which has one wage-earner, or at most two wage-earners, would be priced out of the rental market if --

MR. CHIEF JUSTICE BURGER: We'll resume at that point at ten o'clock in the morning, counsel.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Wednesday, February 20, 1974.]