

**APPENDIX 2:**

**McIntyre Court of Appeals Argument**

J. E. MC INTYRE ET AL

VS

THE BOARD OF COUNTY COMMISSIONERS

ANSWER BRIEF TO ARGUMENT OF COUNSEL OF APPELLANTS.

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Counsel for appellees understood that the privilege granted us was to file additional citations which we accordingly did, but thereafter received from appellants counsel something in the nature of a more extended argument, and we take the liberty to offer some suggestions in opposition to the views thus expressed by counsel.

Counsel for appellants urged that this is an expressed thrust, there and that there were three parties, to-wit:- the dedicator, the trustee and the beneficiary; that the beneficiary is the people or the public and that nothing may be done without their consent. Viewed in one light that position is perfectly harmonious with the position of counsel for appellees, and, as we think, properly stated in this wise:-

The public, ~~the~~ the beneficiary, can only act by and through its lawfully constituted representative, the legislature, and not otherwise so far as the control over public property is concerned; that that beneficiary, the public, has, in <sup>the</sup> only way in which it is possible for it so to do, expressed its willingness and given its consent to the change of use of these public grounds by the act of the legislature, its only representative, in the act of 1877, M. A. S. 4403 SUBDIVISION 7. There can be no question about the proposition that the legislature in the last analysis, is the controlling power over these public grounds, and particularly is this true where the language of the dedication is ambiguous, indefinite or so stated that the grounds would appear to be dedicated to more than one use. By the act above referred to the legislature has invested the city council with power:- 1st. to vacate. 2nd. To regulate the use. The ordinance passed by the city council of Colorado Springs did not attempt to vacate Alamo Square, but that the ordinance did, in so

that as it is within the council to do, regulated the use of Alamo Square in the manner most harmonious to the wording of the dedication in the plat and upon which the appellants relied absolutely. This regulation of the use of Alamo Square being in perfect harmony with the terms of the dedication, being pursuant to the act of the legislature, which is the expressed will of the public, should be and is sufficient of itself to authorize the construction and erection of a court-house in Alamo Square.

Thus, if we were to admit that the beneficiary cannot be divested of its rights without its consent, or that the property may not be used, except for the expressed purposes mentioned by the dedicator, yet we are clearly of the belief that in as much as the dedicator has said that this ground should be used for public buildings and parks, and the public by its expressed will through the legislature directed to the city council, and the city's expressed consent that the grounds shall be used jointly for the purposes expressed by the dedicator, we are not in discord but in perfect harmony with both the will of the dedicator and the public, and that no rights are generally jeopardized, no undue or unfair advantage is being taken and the things sought to be done by the Board of County Commissioners are in every sense proper, equitable and justified. If our position is correct in all things, except as to the court-house being a public building, then the only contention left for determination <sup>is</sup> the meaning of the words "public buildings" as used on the plat, and upon this point we have to say that we have been unable to find any authority which placed the limit upon these words contended for by appellants, but, upon the contrary we have cited to your honorable court City of Alton vs Ills. Trans. Co. 12 Ills. page 59; 9 A. & E. Enc Law p. 79, and other cases heretofore cited.

We are unable to agree with the counsel for appellants that the intention of the legislature was:-"that upon vacating, the land should be applied to some other municipal use \* \* \* " or that:- That the legislature never dreamed of giving authority to the city council to vacate a park, or make a present of the land to some other corporation for its corporate use"

~~but we contend that the intention of the legislature was exactly what~~  
the plain terms of that enactment say:- That the city council had a right to VACATE or REGULATE the use of that ground as public necessities, changed conditions and peculiar exigencies might require, leaving the matter, as to manner, use, time, purpose and conditions wholly and absolutely to the judgment and discretion of the city council, whose pulse beats are at least supposed to be quickened or retarded by the local wants and desires of that community.

Counsel contends that if the county- court-house may now be built in ALAMO Square under and by authority of the terms of the dedication, the Colorado Springs Company may now intrude upon these grounds and build a company building. This contention is not only incorrect, but as the learned counsel said in his oral argument "absurd" for the reason that the dedicator dedicated his property to a public use or uses, viz:- PUBLIC BUILDINGS AND PARKS, and when the city of Colorado Springs entered upon that ground and devoted it to the use of a park, which was one of the uses to which it had been dedicated, and the Colorado Springs Company winked at that use for twenty-nine (29) years, its rights were absolutely out off; but with the public, it is very different; the public had and has the right to put those grounds to the use indicated - not only one but all - expressed in the act of dedication and no length of time will cut off the rights of the public thus acquired, and therein is the difference between the Colorado Springs Company and the public.

Counsel for appellants contends that appellants, suing as they do, for themselves and all other residents and taxpayers of the city of Colorado Springs, may have their suit; but on the contrary that an act passed by the legislature requiring delegating the control of these grounds to the city council is of no effect. This contention as it presents itself to my mind, is without any foundation, and I do not believe that counsel upon reflection will insist that the whole community, the entire public, may not do as much as one or two individuals moved by selfish motives as to themselves, and assuming without authority the right to speak for every body else, may do. In other words, as I conceive of it, a few citizens, self delegated, may not do more <sup>than</sup> or undo what has been done by the entire public through the legislature.

Respectfully,  
Robert Hubbard  
for appellee

