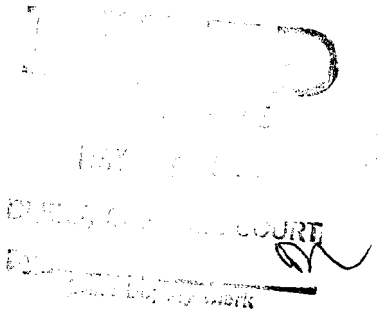
IN THE SUPREME COURT OF FLORIDA

RINKER MATERIALS CORPORATION, a Florida corporation, Appellant, vs. TOWN OF LAKE PARK, a Florida municipal corporation, et al., Appellees.	)	CASE NO. 68,582



ON DIRECT APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

Special Assessments Importantly

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PREFACE

Appellant, Rinker Materials Corporation, was an intervenor-defendant in the trial court and in this brief will be referred to as "Rinker." Appellee Town of Lake Park was the plaintiff in the trial court and in this brief will be referred to by its full name or as "the Town." Appellee State of Florida was a defendant in the trial court and in this brief will be referred to as "the State."

An indexed, three-volume appendix accompanies this brief. As used in this brief, "A" followed by a numeral refers to a page of that appendix.

STATEMENT OF THE CASE AND THE FACTS

A. The Case

The Town brought this action to obtain judicial validation of bonds that were to be issued to pay for certain planned roadway, drainage, water, and sewer improvements. A 93. Payment of the bonds was to be secured solely by the levy of special assessments to be paid by the owners of property within the designated improvement district. Rinker intervened as a party defendant to contest the validity of the proposed bond issue and the underlying assessments. A 134. No other affected property owner intervened.

The case was tried nonjury on February 14 and February 26, 1986. On March 10, 1986, the trial court entered final judgment validating the bonds. A 172. Rinker timely filed this direct appeal pursuant to Article V, Section 3(b)(2), Florida Constitution, Section 75.08, Florida Statutes (1985), and Florida Rule of Appellate Procedure 9.030(a)(1)(B)(i). A 175.

B. The Facts

1. The Team

The Town is a small municipality located just north of West Palm Beach in Palm Beach County. The Town employs the council-manager form of government with five elected councilmen called "commissioners." The council employs a town manager. A 573.

When the first resolution in question was adopted, three of the commissioners had been in office less than one month. A 432-33, 491-92, 511-12. The other two commissioners were beginning their second term on the council. A 456-57, 548-49. None of the five had prior experience in government as an elected official. A 432-33, 456-57, 511-12, 548-49, 991-92. The Town Manager had held that position for less than four years. A 572. The job was his first as a city manager. Id.

The town attorney maintains a private practice and serves the Town part-time. A 206-07. The Town has retained outside attorneys to serve as bond counsel. A 227. The Town further retained a private engineering firm to serve as consulting engineers on the project and an investment broker to serve as bond underwriter. A 97, 294.

2. The Game Plan

In 1985 the Town decided to undertake a project for the construction of roadway, drainage, water, and sewer improvements in a light-industrial area within the Town's corporate limits sometimes referred to as "the Watertower Road area." A 210. Rather than use general funds or issue general-obligation bonds, the Town decided to issue improvement bonds payable solely from the proceeds of special assessments to be levied on certain parcels of lands in the Watertower Road area. A 3, 20.

The Town retained a consulting civil engineer and an investment banker to prepare and recommend the details for the proposed project and financing of it. The Town directed the consulting engineer to prepare a plat describing a proposed improvement district containing the lands to be specially assessed. The contemplated improvements were to be constructed on certain rights-of-way, some of which existed and some of which the Town would be required to obtain, for mostly unpaved roads designated as Watertower Road, East Street, Center Street, West Street, and South Street. However, the Town did not restrict the consulting engineer from considering the propriety or desirability of including additional improvements in the project. A 355. Likewise, the Town did not impose on the engineer any guidelines for drawing the district boundaries. A 349.

The engineer was also directed to recommend the appropriate method of assessment. Three methods, with possible variations of each, were available: the "area" or "square footage" method, the "front footage" method, and the "combined front footage and area" method. The "area" method apportions the cost of the project among the affected parcels solely in proportion to the respective area or square footage of each parcel. A 305-06. The "front footage" method apportions the cost of the project among the affected parcels in direct proportion to the amount of frontage that each parcel has on

the planned roadways. A 306-07. The "combined" method apportions the cost of some of the improvements in proportion to respective area and the cost of the rest of the improvements in proportion to respective front footage. A 314.

The engineer and the underwriter proposed an project with a total cost of $1,500,000. A 274-75. Less than $900,000 of that amount constitutes construction costs. A 330-31. The total actual project cost (construction, engineering, and related costs) comes to $1,030,692. A 274-75. To that figure the underwriter added capitalized interest, a relief debt-service reserve account, the underwriter's discount (profit), legal expenses, and a "case contingency figure." A 274-76. That brought the total to $1,465,000, and for purposes of validation the underwriter rounded the amount to $1,500,000. Id.

3. The Playing Field

The engineer prepared a plat showing a proposed improvement district. A 1. Included in the proposed district are 35 parcels, each of which abuts at least one of the rights-of-way designated for improvement. One of the parcels, "Parcel K," is owned by Rinker. A 1, 298. It is by area the largest parcel in the proposed district. A 1. Its configuration is that of a reversed L, and it is approximately fifteen acres in size. A 1, 298. It has 220 feet of frontage

on Watertower Road and 60 feet of "frontage" on what would be the stubbed-off end of East Street. A 1, 315-16. Several parcels in the proposed district have more frontage. A 1. Approximately 12 of the 35 parcels, or perhaps 20% of the total area, is developed. A 298. The Rinker parcel consists of vacant land. A 298.

In accordance with state law the Town has in place a comprehensive land-use plan, which it has titled "Future Land Use Plan." A 2; 241-42. That plan reflects corridors designated for future roadways that run north-south along the east side of the Rinker parcel and east-west along part of the south side of the Rinker parcel. A 2; 248. It further reflects a southerly extension of East Street through the Rinker parcel to connect with the contemplated east-west roadway. A 2.

If the north-south road were built, it would bring with it drainage, water, and sewer improvements. A 360. The Rinker parcel would have access to that road as well as to the drainage, water, and sewer improvements built with it. A 361. Indeed, if the north-south roadway were built along the east side of the Rinker parcel as shown in the Town's Future Land Use Plan, that road would provide the access and utilities for the Rinker parcel. A 391.

Watertower Road currently is paved for a distance of 350 feet west of Old Dixie Highway. A 1, 2, 297. That paving

extends to within 100 feet of the east edge of the Rinker parcel. A 374. The Rinker parcel will not benefit from the planned improvements to South Street. A 376. The Rinker parcel will not benefit from the planned improvements to Center Street. A 375. The Rinker parcel will not benefit from the planned improvements to West Street unless Rinker acquires easements across private property from the westerly portion of its parcel so that it can hook into the planned sewer line on West Street. Id. Further, although East Street will be paved down to the line of the Rinker parcel, Rinker will have no access to its parcel from that location, because barriers will be erected at the end of the paving. A 370-72. The Rinker parcel could be developed to its highest use even without the planned project improvements if the north-south roadway were built along its east boundary pursuant to the Town's land-use plan. A 393.

4. The Kickoff

In determining whether to include any or all of the Rinker parcel within the boundaries of the district, the consulting engineer gave no consideration to the future benefits will flow to that parcel from the contemplated north-south road shown on the Town's land-use plan along the east side of the parcel. A 359-60. Likewise, he did not consider the future benefit to the Rinker parcel of the

contemplated southerly extension of East Street. A 359. Indeed, in deciding what the boundaries of the district should be, he gave the Town's land-use plan gave no consideration whatsoever. A 356-57.

In addition, although the Town did not restrict him from doing so, the consulting engineer gave no consideration to whether the southerly extension of East Street through the Rinker parcel as shown on the land-use plan or the contemplated roadways bounding the Rinker parcel as shown on the land-use plan should be included in the improvements project. A 351-53. Further, when he determined to include all of the Rinker parcel in the district, he did not consider what internal development of the parcel would be necessary to use the planned improvements. A 346. The engineer acknowledged that there is no law that required him to include all of the parcel in the district solely because it was owned by one owner. A 348.

The consulting engineer recommended to the Town that it use the "area" method of assessment. Under the "front footage" method the assessment that would be levied on the Rinker fifteen-acre parcel is $42,954.80. A 79, at 81. Under the "combined front footage and area" method, the assessment would be $92,602.12. A 6, at 8; A 79, at 81. Under the "area" method the assessment soars to $402,736.25. A 57, at 62; A 79, at 81. The next highest assessment under the "area" method is

$167,586.94, and 31 of the 35 parcels are assessed under the "area" method at less than $100,000.00. A 79, at 81.

The "area" method disregards the amount of the parcel's front footage. A 334. It disregards the configuration of the parcel and the proximity of various points within the parcel to the planned improvements for which the assessments are to be levied. Id. When the consulting engineer decided to recommend the "area" method, he did not consider the amount of internal development of the parcel that would be necessary to use the planned improvements. A 346. He merely assumed that every square foot of the Rinker parcel would be benefitted by the improvements. A 341-42. Likewise, in deciding what assessment method to recommend, he did not take into consideration the Town's land-use plan or any future benefits to the Rinker parcel from the construction of the additional roadways contemplated by that plan. A 357, 359, 360.

5. The Opening Drive

On October 6, 1985, the Town adopted Resolution No. 31, 1985, which purported to initiate the project and the special-assessment program. A 3. Resolution 31 designated the consulting engineer, created Special Assessment Improvement District No. 1, and adopted the engineer's assessment plat as the plat for the district. Id. It directed the engineer to prepare and file with the town clerk an assessment roll on a

"combined front foot and square foot basis." Id., at 4, § VII (emphasis added). Pursuant to Resolution 31 the consulting engineer prepared and filed with the town clerk an assessment roll using the "combined front footage and area method." A 6. The assessment to be levied on Rinker's parcel was $92,601.12. A 6, at 8.

On October 16, 1985, the Town adopted Resolution No. 35, 1985, which recited the acceptance of the assessment roll on file. A 15. Resolution 35 gave notice of the town council's authorization of the project, creation of the district, adoption of the combined method of assessments, and intent to meet as an equalization board on November 5, 1985, to consider the propriety of the project, its costs, its manner of payment, and the amount to be assessed against each affected parcel. Id.

On October 30, 1985, the Town adopted Resolution No. 36, 1985 ("the financing resolution"). A 20. Resolution 36 described the financing plan for the improvements authorized by Resolutions 31 and 35 and authorized the issuance of special assessment improvement bonds to pay for the $1,500,000 cost of the project. The bonds were to be secured only by the annual collection of the special assessments levied against the affected parcels.

6. The Lateral

Unbeknownst to Rinker (and presumably to the other affected owners as well), the Town Council's purported adoption of the "combined" method of assessment was, in fact, no such decision at all. Rather, the "combined" method had been incorporated in Resolution 31 not as the result of any affirmative decision by the town council but instead merely to leave the council with "sufficient flexibility to make changes and adjustments," "so the Commission would have different methods, different bases, upon which they could make their decision." A 253-54. As stated by the town attorney:

> The concept was, when the Commission voted and eventually equalized these things they would have before them the various methods of equalization we believe they could use under the statutes. However, one had to be selected in order to get the procedure to move.

A 254. Indeed, in the view of some of the councilmen, it was not a decision but rather action taken merely to "get the project moving," to get the thing rolling." See, e.g., A 552-53.

Rinker, believing that the town council, as required by statute, had made an affirmative decision to use the "combined" method, a method that would result in an assessment on Rinker's parcel of $92,602.12, did not attend the equalization board meeting held on November 5, 1985. A 215. At that meeting the Town dropped the "combined" method of

assessment and settled on the "area" method. A 214-16. The resulting assessment on the Rinker parcel jumped to $402,736.25. A 57, at 62. When Rinker learned of this switch, it complained to the Town about the procedure involved. A 41.

7. The End Run

Presumably as a result of Rinker's complaint, the Town's advisors decided to attempt to correct any possible deficiency. On December 4, 1985, the Town adopted Resolution No. 40, 1985 ("the implementing resolution"). A 48, 52, 219. This resolution repealed Resolutions 31 and 35 and purported to reinitiate the whole project. A 52. It purported to accept the assessment roll "presently on file," designated the affected lands, and adopted the "area" method of assessment. Id. When Resolution 40 was adopted, the only assessment roll officially on file was the "combined front foot and square foot" assessment roll that had been prepared and filed pursuant to Resolution 31. A 238, 383-85. Resolution 40 contained notice of another equalization board meeting to be held January 8, 1986. Id.

A Rinker representative and consulting civil engineer appeared at the January 8 meeting and asserted the excessiveness of the $402,736.25 assessment. A 57. They also argued that the Town had failed to comply with its own comprehensive land-use plan. The Town's consulting engineer

recommended to the town council that if the roadways shown on the land-use plan were expected to become realities and cause a reduction in the land area of Rinker's parcel, a corresponding adjustment should be made in Rinker's assessment as though that area were excluded. A 321-24. The town council voted to reduce the assessable area of the Rinker parcel by the square footage that the Town would take to build those roadways. A 57, 324. No other adjustment was made for the Rinker parcel, and no change was made in the method of assessment. Rinker's assessment was thereby reduced to $353,119.07. A 57, at 62.

8. The Final Gun

The Town purported to give final approval to the special assessments by adoption of Resolution No. 4, 1986 on January 22, 1986. A 75, 79, 223-27. In the meantime, the Town had sought validation of the bonds described in Resolution 36 by filing a complaint for validation on December 13, 1985. A 93.

The financing resolution, (Resolution 36), which preceded by more than a month this new resolution re-enacting the assessment program, remained unchanged. No new financing resolution has been adopted.

At no time did the commissioners give any thought to whether the district boundaries as drawn by the town engineer were appropriate or whether any lands included in the district

as proposed by the engineer should be excluded. A 442-43, 484, 498, 518. Further, in considering what method of proration to adopt, the commissioners did not consider the relative cost to individual parcel owners, including Rinker, even to make use of the planned project improvements. A 443-45, 474-75, 499, 562.

Mayor Guard did not even engage in any independent thought-process concerning which of the methods of proration was appropriate. A 496-97. Commissioner Cottrell was not even aware that the town council had changed from one method to another method upon the repeal of Resolutions 31 and 35 and the adoption of Resolution 40. A 468-69, 472-73. Indeed, Commissioner Cottrell described the area method as "a combined method of several things." A 471. Commissioner Neyland believed that the area method is what the commission initially adopted. A 552.

Furthermore, the commissioners did not even consider what impact the land-use plan would have on the relative benefit that the planned project improvements provided the Rinker parcel. Mayor Guard: "I don't think I even gave it any thought." A 499. See also A 445-46, 475.

SUMMARY OF ARGUMENT

The Town has failed to comply with the required procedural steps both for authorizing the issuance of the bonds and for levying the underlying special assessments. Contrary to the requirements of Section 170.11, Florida Statutes, the Town adopted the financing resolution before it equalized, approved, and confirmed the levying of the special assessments. In addition, the financing resolution (Resolution 36) was founded on a project and on assessments that were implemented by resolutions that were later repealed.

Furthermore, the Town combined into a single implementing resolution (Resolution 40) what Chapter 170 requires be done by two separate resolutions. That resolution was further defective because it purported to approve an assessment roll then on file with the town clerk that was based on an assessment method different than the method described in the resolution itself. Indeed, that assessment roll had been prepared and filed pursuant to an earlier resolution that was repealed.

In addition, the assessment on Rinker's parcel is invalid because it is inconsistent with the Town's comprehensive land-use plan. The improvements for which the assessments are being levied constitute a development under the Local Government Comprehensive Planning Act of 1975. Any

development must be consistent with the cognizant governing authority's comprehensive land-use plan. The Town has premised its assessment of Rinker's parcel on assumptions that directly contradict what the Town's own land-use plan contemplates.

Finally, the assessments are the product of arbitrary governmental decision or nondecision. The Town's elected governing officials and unelected administrators and advisors failed even to consider a host of relevant factors, including but not limited to the development and benefits contemplated by the Town's comprehensive land-use plan. Indeed, the elected officials themselves brought to bear no substantial independent reasoning or judgmental processes on the policy decisions in question, instead abdicating them altogether to others in an impermissible exercise of nongovernment.

ARGUMENT

I. THE TOWN FAILED TO COMPLY WITH THE PROCEDURES REQUIRED BY LAW FOR LEVYING SPECIAL ASSESSMENTS AND FOR ISSUING BONDS

A. The Scope of Review

In an action to validate bonds founded on special assessments, the trial court must consider "any matter or thing affecting the power or authority of a municipality to issue bonds or the regularity or legality of their issue." City of Ft. Myers v. State, 97 Fla. 704, 117 So. 97, 101 (1928). This broad scope of inquiry is required because:

> If the judgment validates such bonds, certificates or other obligations, which may include the validation of ... any taxes, assessments or revenues affected, and no appeal is taken within the time prescribed, or if taken and the judgment affirmed, such judgment is forever conclusive as to all matters adjudicated against ... all parties affected thereby ... , and the validity of said bonds, certificates or other obligations or of any taxes, assessments or revenues pledged for the payment thereof, or of the proceedings authorizing the issuance thereof, including any remedies provided for their collection, shall never be called in question in any court by any person or party.

§ 75.09, Fla. Stat. (1985) (emphasis added). This court's charge on review of a bond-validation proceeding is "to determine if a public body has the authority to issue such bonds under the Florida constitution and statutes, to decide

whether the purpose of the obligation is legal, and to ensure that the authorization of the obligations complies with the requirements of law." Wohl v. State, 480 So.2d 639, 640-41 (Fla. 1985) (emphasis added).

B. The Statutory Procedures Must Be Strictly Followed

1. General Principles

Florida's municipalities derive their very existence, as well as their powers and functions, from the will of the people expressed by the state legislature. Cleary v. Dade County, 160 Fla. 892, 37 So. 2d 248, 250 (1948). A municipality's mere existence does not endow it with the power to exercise all the governmental powers of the state; it possesses only such powers as the citizenry through the state confers upon it or those necessarily or fairly implied in or incidental to them. Haines City v. Certain Lands, 130 Fla. 379, 178 So. 143, 145 (1938). Powers delegated to a municipality, particularly grants of power that touch a citizen's right to liberty or property or common-law rights, must be strictly construed. City of St. Petersburg v. Florida Coastal Theatres, Inc., 43 So.2d 525, 526 (Fla. 1949).

2. Special Assessments

Municipal corporations lack the inherent authority to levy special assessments, and no such power exists at common law. City of Coral Gables v. Coral Gables, Inc., 119 Fla. 30, 160 So. 476, 478 (1935). The grant of this power to municipalities is an act of grace by the Legislature.

> In order that such assessments be valid and enforceable they must be made pursuant to legislative authority[,] and the method prescribed by the Legislature must be substantially followed.

Id.; see also, Anderson v. City of North Miami, 99 So.2d 861, 863-64 (Fla. 1958) (assessments must be made "in accordance with the method prescribed by the legislature"); Snell Isle Homes, Inc. v. City of St. Petersburg, 199 So.2d 525, 527 (Fla. 2d DCA), cert. denied, 204 So.2d 210 (Fla. 1967).

Municipalities historically have used special assessments to finance development by causing those who will specially benefit from the improvements also to bear the cost. Designating these assessments as "special" accurately implies that they involve a power quite distinct from the general taxing powers of the state, county, or municipality.

> Special assessments for local improvements, although resting on the taxing power, are distinguishable in many respects from a general tax imposed for state, county, or municipal purposes. The fair and just foundation on which special assessments for local improvements rest is special benefits accruing to the property benefited; that is to say, benefits received by it in addition to those received by the community at large.

City of Ft. Myers v. State, 97 Fla. 704, 117 So. 97, 104 (1928).

Chapter 170, Florida Statutes, offers the municipality, as its title suggests, "a supplemental and alternative method of making municipal improvements." Special assessments are not placed before the citizenry for their acceptance or rejection in a referendum, as in the case of general-obligation bonds. They need not even be levied by the adoption of an ordinance, which is enforceable as a local law, § 166.041(1)(a), Fla. Stat. (1985), and must which be read by title or in full on two separate days. § 166.041(3)(a), Fla. Stat. (1985). They may be levied merely by resolution, ch. 170, Fla. Stat. (1985), which is a less formal enactment concerning matters of administration or providing for the disposition of a particular item of business. § 166.041(1)(b), Fla. Stat. (1985). The municipality may issue improvement bonds secured by the special assessments. These bonds are secured only by the assessments themselves and not by the municipality's full faith and credit. § 170.11, Fla. Stat. (1985).

Because the affected landowners do not have a voice at the polls on the issue and are not protected by the formalities required for adoption of an ordinance, the state, upon granting the authority to make special assessments, insured fairness through strict mandatory procedure. The step-by-step process, detailed in Chapter 170, Florida Statutes, protects the

constitutional rights of property owners against the taking of property without due process or just compensation. See Art. I, § 9, Fla. Const.; art. X, § 6(a), Fla. Const.

The word "shall" is used throughout Chapter 170. "Shall" is mandatory, not permissive, language, and it signifies the municipality's duty of strict compliance. Neal v. Bryant, 149 So.2d 529, 532 (Fla. 1963). These statutory provisions do not relate "to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions ... are given with a view to the proper, orderly and prompt conduct of business merely," so as to permit the provisions to be treated as directory rather than mandatory. Cf. Reid v. Southern Dev. Co., 52 Fla. 595, 42 So. 206, 208-09 (1906) (emphasis added). The provisions of Chapter 170 permit the deprivation of a property right; the procedural requirements for doing so cannot be regarded as an "immaterial matter" or a "matter of convenience rather than substance." Neal v. Bryant, 149 So.2d at 532.

C. The Required Procedures

1. For the Improvements and Assessments

The legislature has mandated a specific sequence of events for the adoption of resolutions that implement and levy special assessments:

First, the municipality must adopt a resolution declaring the municipality's intent to make the improvements and to defray the expense by special assessment. That resolution must designate the lands affected, choose the assessment method, and state the total estimated cost of the project. § 170.03, Fla. Stat. (1985). At the time of the adoption of this resolution, the town clerk must have on file and open to the public an assessment plat showing the area to be assessed. § 170.04, Fla. Stat (1985).

Second, upon the adoption of the first resolution, the Town must cause to be prepared an assessment roll in accordance with the method chosen in the initial resolution. § 170.06, Fla. Stat. (1985).

Third, this roll when completed must be filed with the town clerk. Id.

Fourth, after the completion and filing of the assessment roll, the municipality must adopt a second resolution setting the time and place for its governing authority to meet as an equalization board to consider public comment "as to the propriety and advisability of making such improvements, as to the cost thereof, as to the manner of payment therefor and as to the amount thereof to be assessed against each property so improved." § 170.07, Fla. Stat. (1985).

Fifth, the municipality's governing authority must then sit as an equalization board to "hear and consider any and

all complaints as to the special assessments and ... [to] adjust and equalize the assessments on a basis of justice and right." § 170.08, Fla. Stat. (1985).

Sixth, the governing authority must by resolution approve the equalized assessments. Id. Upon the adoption of that third resolution, the assessments become binding first liens against the affected property co-equal with other state and local liens, and superior to all other liens and taxes. § 170.09, Fla. Stat. (1985).

2. For the Bonds

The authority and procedure for the issuance of improvement bonds appear in Section 170.11, Florida Statutes. A municipality is permitted to authorize the issuance of the bonds by adoption of a resolution "[a]fter the equalization, approval and confirmation of the levying of the special assessments for improvements as provided by [Section] 170.08 ... ." § 170.11, Fla. Stat. (1985) (emphasis added). This provision explicitly requires the financing resolution to be adopted after all six of the steps required for implementing the project and the assessments have been completed.

D. The Town Has Not Followed the Required Procedures

1. The Implementing Resolution

The Town relies on Resolution 40, 1985 as the resolution that implements the improvements project and the assessments to pay the cost of the project. Resolution 40 in at least two ways is so procedurally flawed as independently to preclude validation:

First, Resolution 40 attempted to do in one resolution what is required to be done in two. The statutes call for a two-step process. This promotes the integrity of the municipality's legislative process and protects the citizenry's due-process rights, much as do multiple readings of ordinances. To compress the process is a clear abuse of authority.

Second, Resolution 40 purported to adopt an assessment roll "presently on file" but also purported to approve the "area" method of assessment. The only roll officially on file with the town clerk when Resolution 40 was adopted was the assessment roll prepared on a "combined front foot and square foot method" pursuant to Resolution 31. Alternatively, the repeal of Resolutions 31 and 35 had nullified its filing, leaving no assessment roll on file. Resolution 40, therefore, either attempted to adopt a roll no longer officially on file or a roll directly contradictory to itself.

2. The Financing Resolution

The financing resolution required by Section 75.03, Florida Statutes, as a condition precedent for judicial validation must be adopted "in accordance with law." The applicable law is Section 170.11, Florida Statutes.

The Town's financing resolution (Resolution 36) is invalid for two reasons:

First, it was adopted before the equalization, approval, and confirmation of the levying of the special assessments by Resolution 4, 1986. It predates the equalization board meeting of January 8, 1986, by more than two months, and it predates the January 22, 1986, confirmation of the special assessments by almost three months.

Second, Resolution 36 predates what ultimately became the project's implementing resolution, Resolution 40. Resolution 36 was adopted with Resolutions 31 and 35 as its reference points. Upon their repeal, Resolution 36 lost its conceptual framework and became ineffective.

E. Conclusion

The requirements of Chapter 170 are not overly technical or difficult to meet. Yet from the inception of the program, the Town has demonstrated a failure to follow the mandated procedures found in just four pages of Florida Statutes. When exercising the power to levy special

assessments--a power possessed only by a special grant of authority from the legislature, a municipality must strictly comply with the procedures mandated for the exercise of that authority. By failing to do so, the Town has abused its authority, and the trial court's validation of the bonds secured by the special assessments is erroneous.

II. THE ASSESSMENTS ARE INCONSISTENT WITH THE TOWN'S COMPREHENSIVE LAND-USE PLAN

A. The Town's Land-Use Plan Applies to the Project

When the Florida Legislature adopted the Local Government Comprehensive Planning Act of 1975, it expressed its intent that "adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act." § 163.3161(5), Fla. Stat. (1985). All of a municipality's development orders and regulations are required by law to be consistent with the comprehensive land-use plan. § 163.3194(1)(a)(b), Fla. Stat. (1985).

"Development" includes the making of any material change in the use or appearance of land. §§ 163.3164(5), 380.04, Fla. Stat. (1985). "Developer" includes any governmental agency undertaking any development. § 163.3164(4), Fla. Stat. (1985).

The Town is a "developer." Its planned project to pave streets, install drainage and water and sewer systems, and install curbs and gutters in the improvement district constitutes a "development." This development must by law be consistent with the Town's land-use plan.

B. The Rinker Assessment Clashes With the Land-Use Plan

The proposed improvements, district boundaries, and assessments, taken as a whole and as applied to the Rinker parcel, directly clash with the Town's comprehensive land-use plan. The Town acknowledged the applicability and effect of the land-use plan when it adjusted Rinker's assessement. Rinker's fifteen-acre parcel has been included in the improvement district merely because it fronts on Watertower Road. This is inconsistent with the land-use plan, because the north-south roadway along the east line of the Rinker parcel will provide extensive frontage. That roadway and the others shown on the land-use plan -- not the project improvements -- will serve Rinker's parcel. The Town's consulting engineer conceded as much, and the Town's assessing Rinker for the project improvements is anathema to the land-use plan. Instead, the town should have (1) included the future roadways in the current project, (2) substantially reduced the amount of the Rinker parcel included in the "area" method of computation, or (3) assessed the Rinker parcel according to the Watertower Road frontage only.

C. Conclusion

Any matter affecting the validity of the assessments and the bonds must be considered before validation of the bonds is granted. City of Ft. Myers v. State, 97 Fla. 704, 117 So.

97, 101 (1928). Otherwise that matter is put in repose by a decree of validation. § 75.09, Fla. Stat. (1985). The violation of land-use planning laws precludes validation of the Town's bond issue. Otherwise, Rinker will ultimately be subjected to a double taking of property without just compensation.

III. THE RINKER PARCEL WAS ASSESSED ARBITRARILY

A. The Governing Authority Must Exercise Judgment

Section 170.02, Florida Statutes, requires that special assessments be levied in proportion to the benefits derived. The exercise of judgment and discretion by the local governing authority as to what will and will not prove beneficial is an integral part of the special-assessment process. § 170.02, Fla. Stat. (1985); City of Fort Myers v. State, 97 Fla. 704, 117 So. 97, 104 (1928).

The determination and proration of benefits to be derived from local improvements requires consideration of many factors peculiar to the improvements and particular parcels. Id. Blind faith and unquestioning reliance on the judgments of nonelected officials do not satisfy the statutory mandate. Snell Isle Homes, Inc. v. City of St. Petersburg, 199 So.2d 525 (Fla. 2d DCA), cert. denied, 204 So.2d 210 (Fla. 1967). An actual, affirmative determination is necessary; mere legislative declaration is insufficient. City of Ft. Myers, 117 So. at 104.

The assessment levied on a particular parcel must be a fair proportional part of the total cost of improvements. South Trail Fire Control Dist. v. State, 273 So.2d 380, 384 (Fla. 1973). Assessment methods may vary, but the statutory

requirement of special benefit is constant. The amount of the assessment must not exceed the proportional benefits when compared to the assessments on other parcels in the improvement district. Id.

> The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is to the extent of such excess, a taking under the guise of taxation of private property for public use without just compensation.

Summerland, Inc. v. City of Punta Gorda, 101 Fla. 550, 134 So. 611, 613 (1938); Stockman v. City of Trenton, 132 Fla. 406, 181 So. 383, 384 (1938). Not even the state, in the exercise of its power to tax, power to condemn, or police power, may override a property right secured to the individual by organic law. Stockman, 181 So. at 384.

A special assessment that does not meet the statutory mandate of proportionality not only amounts to a prohibited taking of private property but also "may so transcend the limits of equality and reason that its exaction would cease to be a tax ... and become extortion and confiscation." Atlantic Coast Line R. Co. v. City of Winter Haven, 113 Fla. 807, 151 So. 321, 324 (1933). When such an abuse of power occurs, "it then becomes the duty of the courts to protect the person or corporation assessed from robbery under color of a better name." Id.

B. The Assessment Was Imposed Arbitrarily

The assessment imposed on Rinker's parcel is arbitrary, because the elected town officials did not exercise judgment or discretion on the merits of pertinent issues. Town Commissioners Bache, Cottrell, Inlow, and Guard (the mayor) each testified that no thought was given to whether the district boundaries as drawn by the Town's consulting engineer were appropriate or whether any lands included in the district as proposed by the engineer should be excluded. Further, in considering what method of assessment to adopt, the commissioners did not consider what the relative cost to individual parcel owners would be even to use the planned project improvements. Mayor Guard testified that she did not even engage in any independent thought-process concerning which of the methods of proration was appropriate.

Indeed, the testimony of the commissioners raises considerable doubt about whether they even understood the significance of chosing an assessment method. Commissioner Cottrell was not even aware that the town council had changed from one method to another method upon the repeal of Resolutions 31 and 35 and the adoption of Resolution 40. Indeed, Commissioner Cottrell described the area method as "a combined method of several things." Commissioner Neyland testified that the area method is what the commission initially adopted.

Furthermore, despite the requirements of law that development within a municipality be consistent with that municipality's land-use plan, the commissioners did not even consider what impact the Town's land-use plan would have on the relative benefit that the planned project improvements provided the Rinker parcel. Mayor Guard, for example, testified, "I don't think I even gave it any thought".

Even the town manager and the town engineer totally failed to address any such considerations. Town Manager Whitt testified that neither he nor the others gave any consideration to whether any of the lands included in the district boundaries as drawn by the town engineer should be excluded. Further, Town Manager Whitt made no recommendation to the commissioners on whether additional improvements, such as certain roadways contemplated in the Town's land-use plan, should be added to the planned project improvements.

The consulting engineer testified that he himself, in considering what the district boundaries should be and in considering what method should be used to prorate the assessments, did not take into the consideration the divergent cost to individual parcel owners, including Rinker, of making reasonable use of the planned project improvements. He did not consider any individual parcel's configuration or topography. He did not consider the obvious impact of roadways and related improvements contemplated by the Town's land-use plan and the

fact that the Rinker parcel, as compared to other parcels within the district, would benefit far more from those improvements than it would from the planned project improvements.

In addition, the consulting engineer gave no consideration as to whether Rinker's entire parcel should be included in the boundaries of the district. In determining the district boundaries and in determining what method of proration to use, he merely made the judgment that any contiguously owned land fronting to any extent whatsoever on the planned project improvements should be included in its entirety and should be assessed on an area method. This decision caused the inclusion of Rinker's fifteen-acre parcel solely because it had 220 feet of frontage on Watertower Road and 60 feet of so-called "frontage" on what would be the stubbed-off and barricaded end of East Street.

C. Conclusion

This case is a regrettable example of absence of governance by those elected and obligated to govern. Rinker is at least entitled to have the elected governing officials apply their judgment and discretion on the relevant considerations. The issue is not whether the Rinker parcel receives "some" benefit from these improvements. The statute requires that the assessment imposed on the Rinker parcel be proportionate to the benefits received by it.

What little, if any, benefit the Rinker parcel will receive from the planned project improvements is disproportionate to the assessment imposed upon that parcel as compared to the benefits flowing to and assessments imposed on the remaining parcels in the district. The required exercise of governmental judgment and discretion simply has not been brought to bear in this instance. To say that judicial inquiry is precluded merely because a resolution contains a boilerplate recitation purporting to find special benefit is to say that a municipality can govern in any manner that it chooses, unfettered by moral or legal restraint.

That is not the law of this state or of this country. Government exists by license of the governed, not by the will of the governors. The courts exist to check otherwise unrestrained exercise of government and the potential for abuse flowing from it. This is a case for application of the judicial veto.

CONCLUSION

Local governing authorities govern pursuant to a license that grants limited powers and that mandates strict compliance with procedures for the exercise of those powers. They must do at least two things: (1) actually govern -- actually bring their reasoning and judgmental processes to bear on the decisions that they were elected to make concerning issues that the ideal of local self-government creates, and (2) conform to the conditions imposed by the people on the manner in which they arrive at and implement those decisions. The Town of Lake Park has done neither.

The Town failed to comply with the requirements of Chapter 75 and Chapter 170, Florida Statutes. In addition, the the assessments are inconsistent with the Town's own comprehensive land-use plan. Furthermore, the lack of exercise of any judgment or discretion by town officials compels the conclusion that the assessments have been levied arbitrarily.

For each and all of those reasons, the proposed bond issue and the underlying assessments are not entitled to "forever conclusive" judicial validation "never [to] be called in question" again. Accordingly, the final judgment validating the proposed bond issue and underlying assessments should be reversed, and this cause should be remanded to the trial court for entry of a judgment denying validation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief and the three-volume appendix to it have been furnished to David P. Ackerman, Esquire, 777 South Flagler Drive, West Palm Beach, Florida 33401 and to Frank Stockton, Esquire, 224 Datura Street, West Palm Beach, Florida 33401, by hand this 6th day of May, 1986.

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