IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 12 1986
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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 REPLY BRIEF

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STATEMENT OF THE FACTS

The Town states:

> Pursuant to the Implementing Resolution [Resolution 40, 1985], the Town's engineer prepared the assessment roll and plat, and hand carried both to the Town Clerk. A. 388-89. The Town Clerk placed on file the Implementing Resolution, the assessment plat, the plans and specifications and an estimate of the cost of the proposed improvements. A. 271. Then, the Town published the Implementing Resolution. A. 641.

Answer Brief at 2 (emphasis added). That statement is misleading and is not supported by the portions of records that it cites.

The statement suggests that everything was done in the chronological order contemplated by Chapter 170, Florida Statutes. Resolution 40 ("the Implementing Resolution") did not direct the Town's engineer to prepare an assessment roll; it instead purported to accept the assessment roll "presently on file." A 52. The only assessment roll officially on file was, by the engineer's own testimony, the "combined front foot and square foot" roll that the engineer had prepared and filed pursuant to Resolution 31. A 383-85. The engineer's testimony cited by the Town does not clearly reflect which roll the engineer was discussing.

The Town cites excerpts from the deposition of Robert Bischoff, which appear in the appendix filed by the Town. At

the bond-validation hearing, the Town rested without offering this deposition testimony in evidence. The Town subsequently tendered this testimony with its written final argument to the trial court. Rinker filed a motion to strike it on the grounds that it was being offered after the Town had rested, that there was no foundation for its admission (since Mr. Bischoff is merely "a real estate representative" for Rinker and not an officer, or director, or managing agent of the corporation), and that it was irrelevant and immaterial. The court issued its final judgment without ruling on the motion to strike. The testimony of Mr. Bischoff is not a part of the record below, should not have been included in the Town's appendix, and should not be considered by this court.

ARGUMENT

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

"Lawyer gobbledygook" -- thus the Town of Lake Park characterizes the goal of promoting the integrity of a municipality's legislative process. Answer Brief at 11-12. The Town acknowledges that protection of due-process rights is a worthy cause, but it scorns the legislative procedure designed to pro-

vide that protection. The Town kneels at the altar of Due Process for all to see but brushes aside the collection plate that maintains it. It is this disdain for legislatively mandated safeguards that brings Rinker to the courts for redress.

There need be no confusion about the standard of review. Rinker claims that the Town's authorization of the bonds and implementation of the underlying assessments do not comply with the requirements of law. The trial court was empowered to make that very determination, Wohl v. State, 480 So.2d 639, 640-41 (Fla. 1985), and, in doing so, was required to consider "any matter or thing affecting the regularity or legality" of the Town's issuance of the bonds. City of Fort Myers v. State, 97 Fla. 704, 117 So. 97, 101 (1928).

This court is to determine whether the evidence supports the trial court's determination. Although that determination arrives clad in that tattered but still popular suit of clothing, this court is not obligated to treat it like the king's new clothes. The question to be answered is whether the evidence supports the conclusion that the Town's bond issue and underlying special assessments have been implemented in compliance with the requirements of law.

Parties can argue at length about whether "strict" compliance or "substantial" compliance is the rule. Cases can be found that without analysis or reference to context appear to support one side or the other. We are dealing here with a

form of the taxing power, a power that municipalities do not enjoy absent express grant by the legislature. City of Coral Gables v. Coral Gables, Inc., 119 Fla. 30, 160 So. 476, 478 (1935). Regardless of whether a municipality's compliance with the legislatively mandated procedure for exercising that power must be "strict" or "substantial," the procedure itself must be strictly construed. See City of St. Petersburg v. Florida Coastal Theatres, Inc., 43 So.2d 525, 526 (Fla. 1949).

In the case of special assessments for municipal improvements, the legislature has granted each municipality the power to tax specific property owners and to impose enforceable first-priority liens on their property, all without giving them the chance to vote yes or no and without adopting an ordinance that has been read publicly on two separate days. Instead, the legislature has mandated a step-by-step procedure to be followed. A municipality should not be free to rewrite the procedure and thereby substitute its own judgment, in the name of "substantial compliance," for that of the legislature as to what constitutes adequate protection against its own abuse of the taxing power. "No harm, no foul" is a rather casual if not flippant approach to the protection of due-process rights. Better that we concern ourselves with maintaining the integrity of a municipality's legislative process and presume harm when that process is altered.

The Town cites cases that, despite its contention to the contrary, do not support the idea that "substantial" ("no harm, no foul") compliance is sufficient. The Town cites City of Coral Gables v. Coral Gables, Inc., 119 Fla. 30, 160 So. 476 (1935) for that proposition. Indeed, the court in Coral Gables noted that "the method prescribed by the Legislature must be substantially followed." 160 So. at 478. The city was alleged to have failed, among other things, to file plans and specifications, to record the implementing resolution in the proper record book, and to cause the assessment roll to reflect the owners' names and lot descriptions, all in violation of the city's charter. The court held:

> ... [W]hile we would not say that they are all well grounded, it is sufficient to say that there is ample showing of failure to comply with mandatory provisions of the charter in imposing the assessments for which they are infected with fundamental error and are invalid.

160 So. at 479.

The Town cites City of Hollywood v. Davis, 154 Fla. 785, 19 So.2d 11 (1944), for an example of a court's upholding special assessments notwithstanding a list of alleged deficiencies. A close reading of the decision reveals that almost all of the alleged deficiencies were disposed of by the court for other than "substantial compliance" reasons. 19 So.2d at 114-17. For example, one deficiency was a typographical error in a citation to an applicable provision of law.

Abrams v. City of Hollywood, 105 So.2d 602 (Fla. 2d DCA 1958), appears to stand for the proposition that it is sufficient to carry out all of the requirements of the statute even if not in the designated chronological sequence. However, in Abrams the sequential variance was simply that the work on the improvements commenced before the implementing resolution was adopted and a hearing held. The procedural sequence itself (resolution, hearing, etc.) was proper. Further, the court invoked estoppel because the taxpayers had registered no objections before filing the lawsuit.

The Town also relies on Moody v. City of Vero Beach, 203 So.2d 345 (Fla. 4th DCA 1967), for the substantial-compliance theory. The language that the Town quotes from the Moody case is inapposite to the issues before the Moody court and makes little sense in the context of those issues. In addition, the quoted language cites Abrams and Davis as its authority, neither of which, as has been demonstrated, provide strong support for the notion that a municipality can play fast and loose with the procedures mandated by the legislature in Chapter 170, Florida Statutes.

The Town argues that Rinker has not been deprived of any constitutional right because it had an opportunity to address the unfairness of the assessment at the equalization board meeting on January 8, 1986. Even if this argument were correct, the bond-validation hearing, sought not by Rinker but

by the Town for its own financial benefit, is a separate proceeding in which Rinker is entitled to challenge any and all matters affecting the power or authority of the municipality to issue the bonds, including defects in the special-assessment process. City of Fort Myers v. State, 97 Fla. 704, 117 So. 97, 101 (1928).

The Town argues that Resolution 40 was adopted at Rinker's "request." That simply is not true. Rinker complained about the switch in assessment methods, because Resolution 31 had adopted a "combined front foot and square foot method." The Town on its own motion adopted Resolution 40 and repealed Resolution 31 and Resolution 35. Rinker certainly did not request the Town to adopt a resolution that approved the area method of assessment.

The Town argues that when Resolution 40 was adopted, there was already on file an area-method assessment roll. Nonetheless, the undisputed evidence is that the only assessment roll then officially on file with the clerk was the combined-method roll that had been prepared and filed pursuant to Resolution 31 and approved by Resolution 35, both of which were repealed by Resolution 40.

The Town argues that even if an assessment roll was not on file, Rinker waived any challenge to that defect when it addressed the area method of assessment during the equalization board hearing on January 8, 1986. Rinker had no reasonable

choice but to do so. If Rinker had not appeared and addressed the assessment method contemplated by the Town in Resolution 40, the Town would argue that Rinker had waived its right to challenge the method. By appearing and addressing the method, Rinker should not now be held to have waived any challenge properly considered in a bond-validation hearing.

The provisions of Chapter 170, Florida Statutes, do not relate "to some immaterial matter, where compliance is a matter of convenience rather than substance." Neal v. Bryant, 149 So. 2d 529, 532 (Fla. 1963); cf. Reid v. Southern Dev. Co., 52 Fla. 595, 42 So. 206, 208-09 (1906). The Town has no authority to levy a special assessment unless it complies with the laws of this state as enacted by the elected representatives of the people.

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

The Town argues that only development orders are required by law to be consistent with a municipality's comprehensive land-use plan. Answer Brief at 18. That argument ignores the plain language of Section 163.3194 (1)(a), Florida Statutes, which provides as follows:

> After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to

> land covered by such plan or element shall be consistent with such plan or element as adopted.

§ 163.3194(1)(a), Fla. Stat. (1985) (emphasis added). Thus, two activities are covered: (1) development undertaken by the governmental agency and (2) actions taken in regard to development orders by the governmental agency.

"Development" includes the making of any material change in the use or appearance of land. §§ 163.3164(5), 380.04, Fla. Stat. (1985). Accordingly, the Town's planned project constitues a "development" that is required by law to be consistent with the Town's land-use plan.

The Town also argues that Rinker's sole remedy for challenging the consistency of the project with the land-use plan is a suit pursuant to Section 163.3215, Florida Statutes. That argument also ignores the plain wording of the applicable statute. Section 163.3215 provides that "[s]uit under this section shall be the sole action available to challenge the consistency of a development order with a comprehensive plan adopted under this part." (Emphasis added.) The statute applies only to development orders and not to all development.

Furthermore, even if the exclusive-remedy provision of Section 163.3125 did apply, it does not prohibit raising a defense that challenges consistency. It merely provides that suit under that statute is the sole "action" available. That is, the aggrieved party can bring no action to challenge the

consistency of a development order with a comprehensive plan other than the action authorized by that same statute.

The circuit courts have jurisdiction to determine the validation of bonds "and all matters connected therewith." § 75.01, Fla. Stat. (1985). A final judgment validating bonds is "forever conclusive" as to all matters adjudicated against all parties affected by it. § 75.09, Fla. Stat. (1985). If Rinker were not permitted to challenge the consistency of the assessment with the land-use plan in the bond-validation proceeding, it could not do so later, by independent action or otherwise.

The Town further argues that Rinker waived the inconsistency issue by failing to plead it. Answer Brief at 19. The Town alleged in its complaint that it had legal authority to issue bonds to finance the cost of the planned improvements. A 93, para. 2. Rinker denied that allegation. A 134, para. 2. Furthermore, the plaintiff in a bond-validation action brings into issue the "legality of all proceedings in connection" with its authority to issue bonded debt. § 75.02, Fla. Stat. (1985). The inconsistency issue was before the trial court.

The Town argues that its assessment plat and its land-use plan are not inconsistent because there is no inconsistency between the location of existing roads and the location of planned roads. Answer Brief at 20-21. That argument

misses or ignores the point. The Town proposes to assess Rinker although its land-use plan clearly demonstrates that the Rinker's parcel will benefit far more from the future roadways shown on the land-use plan. Including the entire Rinker parcel in the improvement district flouts the land-use plan, and assessing the Rinker parcel on an area-method basis flouts the land-use plan. This inconsistency demonstrates that the special assessment on the Rinker parcel is far disproportionate to any benefits received by it from the planned project.

III. THE RINKER PARCEL WAS ASSESSED ARBITRARILY

Although the actions of the trial court and the Town enjoy presumptions of correctness, those presumptions are not absolute. Much as the Town may wish to have the unfettered authority to do as it pleases in levying assessments and issuing bonds, a system of checks and balances remains in place through judicial review.

The Town argues that the mere recitation in the implementing resolution that the properties be assessed in proportion to benefits derived establishes that they have, in fact, been assessed in proportion to benefits received. Answer Brief at 21-22. Saying it's so doesn't make it so. Carrying the Town's argument to its logical extreme would preclude judicial review altogether, thereby permitting the legislature to act as the judiciary as well.

Rinker is not questioning the motives of the legislative body. In fact, Rinker doubts that the councilmen got so far as to formulate a motive. Rinker is questioning the arbitrary exercise of the Town's authority as demonstrated by the testimony of its commissioners. The Town attempts to explain away the confusion of its elected officials over just what method was adopted and what implications that method had for the affected property owners, but the testimony of the commissioners stands uncontradicted. Commissioners Bache, Cottrell, Inlow, and Guard (the mayor) each testified that they did not even consider whether the boundaries for the special assessment district were appropriate or whether any lands included should be excluded. Instead, they abdicated their responsibility in that matter to a consulting engineer and blindly accepted his recommendations.

The statement attributed to Commissioner Cottrell, who described the area method as "a combined method of several things" is not an unfair one despite the Town's protest to the contrary. Commission Cottrell's testimony as quoted in the Answer Brief demonstrates even more vividly that he did not understand the area method sufficiently to be able to explain it and its impact on property owners. Answer Brief at 26. The testimony of the other commissioners raises similar doubts about whether they understood the significance of choosing an assessment method.

Finally, the Town contends that Rinker made no comment at the equalization board meeting that any of its land should be excluded from the district or that it had a complaint about the boundaries. Answer Brief at 27. That simply is incorrect. The Town's own minutes of the January 8, 1986, equalization board meeting show that Rinker's representative asked that the Rinker parcel not be assessed under the area method for anything greater than a 210-foot depth, because beyond that depth service from the proposed improvements was impractical. A 60. Rinker noted the substantial costs it and others would be required to incur to use the improvements if such an adjustment were not made. A 60.

The self-serving conclusion of the Town that it considered everything Rinker wanted it to consider does not excuse the commissioners' failure to apply their independent discretion and judgment as elected officials in making these special assessments. The fact that the commissioners' minds may have been open does not mean that they were full. The testimony reflects that, on the issues in question, their minds were, if anything, empty of thought.

CONCLUSION

The Town failed to comply with the requirements of Chapter 75 and Chapter 170, Florida Statutes. In addition, the assessments are inconsistent with the Town's comprehensive land-use

plan. Furthermore, the Town assessed the Rinker parcel arbitrarily, and Town officials failed to exercise any judgment or discretion in adopting the assessments. Taken separately or together, these procedural and substantive flaws mandate reversal of the final judgment.

The proposed bond issue, secured solely by the underlying special assessments levied by the Town, is not entitled to the "forever conclusive" judicial validation contemplated by Chapter 75, Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has 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 Mail this 30th day of June, 1986.

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