O.A. 11-7-91

047

SUPREME COURT OF FLORIDA

Case No. 77,468

CITY OF BOCA RATON, FLORIDA,

Appellant,

v.

THE STATE OF FLORIDA, and the TAXPAYERS, PROPERTY OWNERS and CITIZENS OF THE CITY OF BOCA RATON FLORIDA, including NON-RESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, et al.,

Appellees.

CROSS-REPLY BRIEF OF APPELLEE/CROSS-APPELLANT ASTRAL INVESTMENT, INC.

On Appeal From The Circuit Court Of The Fifteenth Judicial Circuit In And For Palm Beach County, Florida

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ISSUE II

THE SPECIAL ASSESSMENTS ARE AN AD VALOREM TAX WHICH IS INVALID UNDER ART.VII, §12 OF THE FLORIDA CONSTITUTION.

At Argument I of its Reply Brief, BOCA RATON correctly sets out the requirements for a valid special assessment. BOCA RATON's failure to comply with the requirements, however, converts its "Special Assessments" into ad valorem taxes. Meyer v. City of Oakland Park, 219 So.2d 417 (Fla. 1969); City of Fort Myers v. State, 117 So. 97 (Fla. 1928).

Even assuming that there is an overall benefit to the DDRI from the Visions 90 Project, the assumption is insufficient to validate the Special Assessments. The benefit/burden analysis must be conducted on a property-by-property basis. Meyer, 219 So.2d at 102. BOCA RATON has conducted no such analysis.

BOCA RATON'S Special Assessments are based solely upon the present ad valorem value of the Assessed Parcels. The Special Assessments cannot be prepaid and will recur yearly for at least ten years. In contrast, Lake Howell Water and Reclamation District v. State, 68 So.2d 897 (Fla. 1972), cited by BOCA RATON, requires that each parcel bear a proportionate burden. The Lake Howell Court specifically noted that the assessment before it was based upon the acreage owned by respective property owners rather than the ad valorem value of the property. Id. at 898. Second, the Court distinguished special assessments from ad valorem taxes as not being "subject to

recurring general levies." Id. at 899.

Contrary to BOCA RATON's argument, pure ad valorem special assessment of dissimilar parcels receiving dissimilar benefits has never been condoned by Florida courts. Richardson v. Hardee, 85 Fla. 510, 96 So. 290 (1923), involved only the state's authority to impose a drainage district ad valorem "maintenance tax [which] shall be used for maintenance, repairs, upkeep, and any other general or necessary purpose of the [Everglades drainage] district." 96 So. at 290, 291, quoting the statute. This is an authorization by the Legislature to a municipal body to impose a general ad valorem tax. While the term "special assessment" is used, the tax in Richardson was not a special assessment as defined by City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954) or State v. Henderson, 137 Fla. 666, 188 So. 351 (1939).

In City of Naples v. Moon, 269 So.2d 355 (Fla. 1972), this Court recognized only that ad valorem valuation may form the basis for a special assessment. However, the special assessment in Moon was not based solely upon the ad valorem value of the assessed property. First, the Court presumed that all property before it was improved. Id. at 358. Second, the Court noted that the ad valorem assessment formed only a logical valuation basis against which a special assessment multiplier was to be applied. The multiplier was determined by analyzing the potential benefit to each property. The Court emphasized that an apartment house with parking would benefit

less than an apartment house without parking and should be assessed accordingly.

Comparison of the Moon analysis with the methodology urged by BOCA RATON emphasizes the lack of factual support for the Special Assessments. No provision has been made for specific benefit analysis even though, in many instances, a particular property recognizes no benefit from one of the many projects included in the Vision 90 Project. The ASTRAL property, as an example, recognizes no benefit from the drainage system improvements. App-S, V-I, T-4, pp.280-285. The undeveloped Assessed Parcels, on the other hand, are immensely improved since no development of these parcels is possible without the drainage project. App-S, V-I, T-2, p.48. Nevertheless, ASTRAL pays a much higher proportion of the drainage Special Assessment because of its higher ad valorem value as improved real estate. BOCA RATON'S failure to complete the Moon analysis removes its Special Assessments from the protection of any case decided by this Court.

In attempting to support its Special Assessments, BOCA RATON argues that the Resolution finds a special benefit to the Assessed Parcels. Reply Brief, p.6. However, since the Resolution is silent as to any facts, any presumption or weight afforded the conclusory language in the Resolution must be based upon facts articulated elsewhere. See, Atlantic Coastline R. Co. v. City of Lakeland, 94 Fla. 347, 115 So. 669 (1927). A review of the testimony below reveals that BOCA

RATON's purported factual basis is the same ipsi dixit condemned by this Court in Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956), dressed up with additional showmanship.

BOCA RATON suggests that the Benefit Evaluation Report and the testimony of Robert Harmon, BOCA RATON'S urban economic consultant, provide the factual support. Reply Brief, p.7. A review of the Benefit Evaluation Report reveals no such factual analysis of the special benefits to be received by each of the Assessed Parcels. App-S, V-II, T-2. The Benefit Evaluation Report merely targets six types of benefits for which all Assessed Parcels are assessed. These benefit categories include the following: (1) reduced development improvement costs and accelerated development approval; (2) reduced parking costs; (3) reduced infrastructure costs; (4) increased land values; (5) premium lease rates; and (6) increased retail sales. App-S, V-II, T-2, p. IV-6.

BOCA RATON admits that the first three benefits are not available to already-developed Assessed Parcels such as the ASTRAL property. App-S, V-I, T-3, pp.77, 178. Nevertheless, the developed Assessed Parcels and the undeveloped Assessed Parcels are assessed on the basis of identical receipt of all the benefits, while the developed Assessed Parcels incur a far greater burden because of their proportionately higher appraised value. Not until the undeveloped Assessed Parcels are fully developed will the burden be equalized. If, for

instance, a presently undeveloped parcel should be completed with construction identical to that on the ASTRAL property, that Assessed Parcel would have paid far less than ASTRAL over the entire assessment period for the six benefits. Moreover, the parcel with new development will have benefited from reduced infrastructure development costs, a benefit not available to the ASTRAL property. BOCA RATON's method of reducing the infrastructure and development costs to the undeveloped Assessed Parcels is to spread the cost to the developed Assessed Parcels. Rather than support the Special Assessments, the Benefit Evaluation Report supports ASTRAL'S position that the Special Assessments are thinly disguised ad valorem taxes.

Robert Harmon's testimony is equally unavailing. Mr. Harmon admitted that the entire analysis for the Benefit Evaluation Report was based upon six prototypical land parcels. App-S, V-I, T-3, p.129. No effort was made to determine the benefit to any Assessed Parcel except on the basis of the closest prototype. The closest prototype to the ASTRAL property is "Existing Office, Hotel or Multi-Tenant Retail Facility Owners." App.5, V-II, T-2, pp.II-11,12. This broad classification falls far short of the needed determination of special benefit to an individual property.

Although BOCA RATON fails to directly address ASTRAL'S argument regarding the absence of benefit to its property, BOCA RATON urges that no finding of special benefit to each Assessed

Parcel is necessary since the type of improvements involved allow a presumption of general benefit to the Assessed Parcels. As support, BOCA RATON cites Cape Development Company v. City of Cocoa Beach, 192 So.2d 766 (Fla. 1966), City of Treasure Island v. Strong, 215 So.2d 473 (Fla. 1968), and City of Hallandale v. Meekins, 237 So.2d 318 (Fla. 1970). Reply Brief, pp.19-21. In Cape Development, this Court noted that the grading and paving improvement was separate from and assessed differently than the storm sewer and drain improvement. In contrast, BOCA RATON has chosen to lump grading, paving, storm sewers, drainage, benches, landscaping and street lights, among others, and assess all the improvements under the single Visions 90 Project with no "benefit" distinction for any Assessed Parcel based upon type or location. Furthermore, Cape Development, based upon a statutory analysis of an earlier version of Chapter 170, Florida Statutes, was decided prior to the 1967 revision to Section 170.06 which now requires a finding of benefit to each property. Accordingly, the case offers no support for the Special Assessments.

The doctrine articulated in the trilogy of cases cited by BOCA RATON is inapplicable to BOCA RATON'S Visions 90 Project. Strong, 215 So.2d at 479, clarifies that only certain types of improvements are entitled to presumptions of special benefits. "Where there is no obvious relationship in terms of special benefits between the property sought to be assessed and the nature of the improvement project, a specific determination of

such benefits is necessary to sustain the assessment, and the absence of such a determination constitutes a jurisdictional defect in the assessment proceeding." Meekins, 237 So.2d at 321, specifically notes that a sanitary sewer system provides no benefit to property beyond the "protective proximity of the improvement." In direct contravention to Meekins, the ASTRAL property, beyond the protective proximity of the drainage improvement, is nevertheless assessed for the improvement based upon BOCA RATON'S conclusory analysis.

Furthermore, the Visions 90 Project involves far more than a sewer system. Neither the Benefit Evaluations Report nor BOCA RATON's urban economic consultant explained how the Assessed Parcels which neither abut nor are within the protective proximity of an improvement such as street lighting or paving are benefited by the improvement except as a general enhancement of the DDRI.

Contrary to BOCA RATON'S assertion, ASTRAL does not suggest each Assessed Parcel must be assigned a dollar value of special benefit. Reply Brief, p.19. However, it is unreasonable and a violation of the relevant standards to assess the developed and undeveloped Assessed Parcels on the irrational assumption that each receives the same benefit from six identical benefit factors. It further defies reason that ASTRAL, as developed property, pays a higher assessment yet receives no benefit from the first three benefit categories identified in the Benefit Evaluation Report.

The complete absence of any factual analysis of special benefits to a particular Assessed Parcel in the Benefit Evaluation Report, coupled with the acknowledgement that the developed Assessed Parcels will not receive the six classes of special benefits upon which they are assessed, is "strong, direct, clear and positive proof" that the Special Assessments are disguised ad valorem taxes. See, Meyer v. City of Oakland Park, 219 So.2d at 420.

ISSUE III

THE SPECIAL ASSESSMENTS ARE NOT DIRECTLY PROPORTIONAL TO AND LESS THAN THE SPECIAL BENEFITS TO BE PROVIDED EACH PARCEL.

BOCA RATON argues that the Special Assessments are valid since the total of the Special Assessments does not exceed the total cost of the Visions 90 Project. Reply Brief, p.8. That fact does not meet the standard articulated by the controlling case law. Once again, BOCA RATON misses the mark by attempting to generalize to the project in gross, when the law requires consideration of specifics. First, the assessment must be less than the benefit to each parcel and, second, the assessment on each parcel must be proportionate based upon the benefit to that property. City of Treasure Island v. Strong, 215 So.2d 473 (Fla. 1968). The rationale behind this requirement is that the portion of the community specially and peculiarly benefited by the improvement contribute its fair share of the cost of the benefit. BOCA RATON's analysis ignores the "fair share" requirement of the Special Assessment guidelines.

The "Incidence of Burden" analysis notes that the owners of "existing office, hotel or multi-tenant retail facilities could realize three distinct potential categories of benefits that do not involve sale or redevelopment of their properties." Supp. App., p.11. (Emphasis added). However, the "three distinct" benefits are illusory. The potential benefit of increased rents to already developed Appraised Parcels is negated by the increased amount of retail space which will be available in the DDRI and at Mizner Park after completion of the Visions 90 Project. The "potential to refurbish" is completely reliant upon the ability to command increased rents. Additionally, the "potential for increased rents" is equally available to undeveloped Appraised Parcels after development. Nevertheless, the Special Assessments are based upon current appraised values which impermissibly places a much higher present assessment burden upon the already developed Parcels.

If, as BOCA RATON appears to argue, the question of "best possible use" should govern, then the Special Assessment is void because all parcels should be assessed on the basis of post-development value. Reply Brief, p.9. This shift by BOCA RATON to a "best possible use" argument highlights the injustice of the inversely proportional assessments and the uncertain prospect of a "market adjustment." Only the parcels in least need of the Improvements are assessed based upon their "best possible use," while those parcels in greatest need are under-assessed as vacant parcels. Any prospect of a just

apportionment is a hazy hope in Robert Harmon's crystal ball.

In Fisher, 84 So.2d at 572, this Court required that a special assessment have a "relation to" a special benefit to a particular property assessed. BOCA RATON has conducted no analysis of special benefit to any particular property assessed. Fisher, 84 So.2d at 574, noted that a special assessment based "entirely on the basis of the ad valorem valuation of [the] real property without particular regard to the 'special benefits' accruing to such property from the particular improvements" was invalid. A special benefit may never be inferred on the theory that all similar situated parcels were benefited in the ratio that such parcels relate to the total value of all improved parcels. St. Lucie County v. Higgs, 141 So.2d 744 (Fla. 1962). The methodology condemned by Fisher, when compared with the acceptable methodology discussed in Moon, 269 So.2d at 358, accents the impropriety of BOCA RATON'S Special Assessments. Ad valorem assessments, with no recognition of special benefit adjustments, are invalid. BOCA RATON'S ad valorem assessment is no exception.

ISSUE IV

THE NON-ADJOINING, NON-ABUTTING IMPROVEMENTS ARE NOT A SINGLE PROJECT.

BOCA RATON's only response to ASTRAL's argument is to suggest that City of Fort Meyers v. State, 117 So. at 103-104 is inapplicable in the context of this case. The only analysis of the statement is that the Benefit Evaluation Report "clearly

indicates" that the "type of benefits conferred by the Visions 90 Project" will "usually accrue to each of the properties." Reply Brief, pp.20-21. Nothing in the Benefit Evaluation Report substantiates the argument.

In City of Treasure Island v. Strong, 215 So.2d at 479, this Court held:

> Where there is no obvious relationship between the property sought to be assessed and the nature of the improvement sought, a specific determination of such benefit is necessary to sustain the assessment ....

In this case, the "obvious relationship" is totally lacking and is not supplied by the bald and factually unsupported assertions in the Benefit Evaluation Report and the Resolution. The improvements cannot be treated as a single project.

ISSUE V

THE EXCLUDED PARCELS WOULD RECEIVE MORE THAN INSIGNIFICANT SPECIAL BENEFITS.

At Argument II of its Reply Brief, BOCA RATON urges that residential property and governmental facilities are properly excluded from the Special Assessment since those properties receive "only general benefits not differing materially from the benefits received by the community in general." Reply Brief, p.16. That is exactly the point of ASTRAL's Cross-Appeal. Both ASTRAL's property and the Excluded Parcels are in the DDRI. Every parcel in the DDRI is similarly situated with respect to the benefits to be obtained from the Visions 90

Project. Transportation improvements, intersection improvement, drainage, water, sewer and beautification as far away as Broward County are encompassed within the Visions 90 Project. App-S. V-I, T-2, pp.46-47, 49. The Visions 90 Project includes improvements. Nevertheless, the residential properties and governmental facilities, even those abutting the road improvements, are excluded from the Special Assessments on the basis of "no special benefit." The conclusory evaluation of "no special benefit" contained in the Benefit Evaluation Report is contradicted by the testimony of BOCA RATON'S own engineer: "Any time you make road improvements or transportation improvements in a vicinity, it's going to benefit whoever lives in that vicinity." App-S, V-I, T-2, p.64; App-S, V-II, T-2, p.II-6; Reply Brief, p.16.

The residential properties and governmental facilities receive the benefit of improved drainage, improved water and sewer facilities, improved roadways, and sidewalk installations. If, as BOCA RATON argues, the ASTRAL property is specially benefited by those improvements, there is no distinction between the benefit to the ASTRAL property and the benefit to the residential parcels and governmental facilities. There is no legitimate basis for distinguishing between the already developed Assessed Parcels, the residential property and the governmental facilities with respect to the alleged special benefits.

Furthermore, the only portion of the Mizner Park development which appears on the property tax rolls appears as an undeveloped parcel and will be specially assessed accordingly on the basis of its ad valorem appraisal. However, in Meyer v. City of Oakland Park, 219 So.2d 417 (Fla. 1969), this Court dictated that the term "benefit" embraces potential, actual, or added use and enjoyment of the property. To the extent Mizner Park, currently vacant, will be assessed at a much lower ad valorem value than its potential enjoyment, and the ASTRAL property is assessed on its already developed value, the Special Assessments are invalid. In effect, the ASTRAL property is made to bear the burden of development of Mizner Park and the remaining DDRI until such time as those parcels are fully developed and bear their fair share of the Special Assessment. On that basis, the Special Assessment is an arbitrary and manifest abuse of BOCA RATON'S taxing power.

BOCA RATON'S argument that the Special Assessments are valid since only approximately one-third of the total cost of the Visions 90 Project is being assessed against the Assessed Parcels is unpersuasive. Whether the Special Assessment applicable to the Assessed Parcels is one-third or one-tenth of the total cost of the improvements is irrelevant to BOCA RATON'S burden of showing that each Assessed Parcel is proportionately assessed based upon its special benefit. Nothing in the record suggests that the improvements to the Excluded Parcels are to be made with funds from earmarked sources other

than the assessments against the Assessed Parcels.

In this case, the benefit to the Excluded Parcels is the same or substantially similar to that which is conferred upon the already developed Assessed Parcels. If the benefit to the Excluded Parcels is general, then the benefit to the already-developed Assessed Parcels is also general. BOCA RATON's argument that the same road improvement does not benefit a residential parcel on the north side of the road while a commercial parcel on the south side of the road receives a special benefit cannot overcome the presumption of special benefit to all property abutting an improved street. City of Treasure Island v. Strong, 215 So.2d 473 (Fla. 1968). The area-wide improvements planned by BOCA RATON either generally benefit all area property owners and the Special Assessments are invalid or, in the alternative, the special benefits accruing from the Visions 90 Project also accrue to the residential and governmental parcels.

As this Court ruled in South Trail Fire Control District v. State, 273 So.2d 380, 383 (Fla. 1973) quoting 48 Am.Jur., Special or Local Assessments, §29, pp.588-589:

> There is a point beyond which [a government entity] cannot go, even when it is exerting the power of taxation. It cannot by its fiat make a local improvement of that which in its essence is not such an improvement, and it cannot by its fiat make a special benefit to sustain a special assessment where there is no special benefit.

BOCA RATON's fiat cannot alter the invalidity of the Special Assessments.

CONCLUSION

For the foregoing reasons, the trial court's findings of fact regarding the Special Assessments should be invalidated.

Respectfully submitted,

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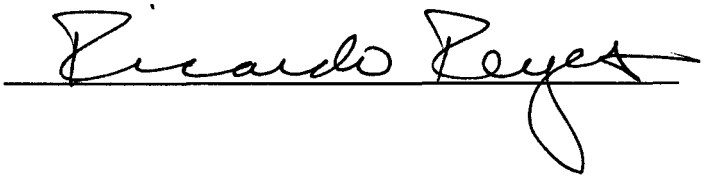
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 5th day of July, 1991 to counsel of record noted below.



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