

IN THE SUPREME COURT OF FLORIDA

DAVID M. POMERANCE and
RICHARD C. POMERANCE,

Petitioners,

vs.

CASE NUMBER: SC00-912
Lower Tribunal No. 5D98-2504

HOMOSASSA SPECIAL WATER
DISTRICT, a political subdivision
of the State of Florida,

Respondent.

After an Opinion by the District Court of Appeal,
Fifth District (Case No. 98-02504)

On Appeal from the Circuit Court, Fifth Judicial Circuit
In and For Citrus County, Florida, Case No. 94-2070-CA

PETITIONERS' REPLY BRIEF

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PRELIMINARY STATEMENT

The Plaintiffs/Appellants, DAVID M. POMERANCE and RICHARD C. POMERANCE, will hereinafter be referred to as "PETITIONERS" or "POMERANCE". The Defendant/Appellee, HOMOSASSA SPECIAL WATER DISTRICT, will hereinafter be referred to as "RESPONDENT", "THE DISTRICT", and/or "WATER DISTRICT". Citations to the record herein will be referred to as "R - ____". Citations to the transcript of the trial before the lower Court will be referred to as "Transcript at page ____" or (T-____)". Citations to the opinion of the Fifth District Court of Appeal dated March 24, 2000 will be referred to as "Opinion at Page _____ or (O - ____)."

STATEMENT OF THE FACTS AND CASE

NOTE: The Petitioners will not reiterate the facts as contained within the Petitioners' Initial Brief herein. However, in several areas the Respondents' restated Statement of the Facts and Case is either inaccurate or fails to provide a full and complete statement of the facts addressed. Accordingly, the Petitioners will address the following facts as set forth in the Respondents' Answer Brief:

The Respondent quotes Section 2 of Ch. 63-1222, Laws of Florida to note that the Amendment to the Respondents' Charter authorized the front footage method of assessments. What the Respondent failed to include is the balance of the referenced paragraph which reads:

Such project may be initiated by the Board by a Resolution ordering the construction of the improvements and shall assess against the property to be specially benefited by such improvements that portion of the cost which the Board has designated such remaining cost to be paid from other funds designated by the Board... The amount of the assessment against each lot or parcel of land shall in no event exceed the special benefits accruing thereto.

Ch. 63-1222, L.O.F. at S.2, (P. Ex. 2; T. 541) (Emphasis added)

The Respondent further states that the Respondent's Resolution of March 13, 1995 which adopted the Second Revised Final Assessment Roll contained "an express determination that the assessed properties would derive special benefits from the project and that the assessments were proportionate to the benefits derived". (B.5-6).

A review of that document, including that portion quoted by Respondent, reflects that it, on its face, contains no further findings of special benefit other than conclusions as to benefit and proportionality and a list of property owners and the amounts to be assessed. Respondent further fails to inform the Court that the March 13, 1995 Resolution was adopted after Respondent assessed Petitioners' property and nearly one (1) year after Petitioners filed this action. An after the fact conclusionary finding of benefit cannot serve as the foundation for a special assessment made earlier.

Finally, the Respondent indicates that the experts testifying at trial testified that the property may be developable. (B.p. 8). However, even Respondent's own expert as well as Respondent's Statement of the Facts reflects that off site mitigation "might be required." (T. 471 B. p. 8). Respondent fails to provide the Court with the balance of that testimony which clearly established that the Petitioners own no off-site lands for use as possible mitigation. In addition, Respondent includes facts regarding the testimony of the Petitioners' appraiser who testified that the availability of a potable waterline would benefit the property if on-site uplands were developable. However, Respondent fails to include the appraiser's testimony that in the event the property were developable, the benefit received by the property as a result of the Respondent's potable waterline would be the cost of a potable well or \$2,000.00 to \$5,000.00. (See, testimony of James Morton at T-214 and R-545). Additionally, Mr. Morton testified

that even if it could be developed, the property would be worth only \$58,000.00 (T-213) and the Respondent's waterline improvement would be still of benefit only to the extent of the value of a well.

Finally, the Respondent notes that the report and testimony of District Engineer, Mr. George McDonald submitted on behalf of the Respondent, claims that benefit is equal to cost. Nowhere within the Respondent's Charter as Amended, its Resolution or elsewhere is there any authority for the proposition that the special benefit to each parcel of property is equal to the cost it takes to bring the benefit and, in fact, such is contrary to the above cited language contained within the Amendment to the Respondent's Charter wherein the Amendment provides that properties must be assessed in accordance with the benefit to each property with the balance of the funds or costs to construct paid from other District funds.

SUMMARY OF ARGUMENT

In accordance with F.R.App.P. 9.210 and the limited nature of a Reply Brief, the Petitioners will respond only to the new arguments raised by the Respondent within its Answer Brief and will not reiterate or repeat the primary arguments as contained within the Petitioners' Initial Brief. With respect to new arguments provided by the Respondent, while in some cases benefit may be presumed, such is a presumption only and in this case such presumption was rebutted by the testimony at trial. While benefit

may be a question of fact to be found by the legislative body, there must exist such a finding of fact based upon evidence and not mere conclusions. Additionally, the Pomerances are not precluded from relief as a result of their lack of previously filing for development permits where it is clearly established that such application would be fruitless and where it is established that such is not a condition precedent to this action. Accordingly, the Resolution authorizing the assessment against the Pomerance property is improper and directly contrary to the Respondent's governing Charter. The Opinion of the Fifth District Court of Appeal and the Judgment of the Circuit Court upholding Respondent's assessment should be reversed.

ARGUMENT

I. THE DISTRICT FAILED TO DETERMINE BENEFIT IN ACCORDANCE WITH ITS CHARTER, AS AMENDED.

The Respondent Water District failed to make a determination of benefits to which the Lower Court could defer. In reviewing the validity of special assessments, the Florida Supreme Court has adopted a two-prong test. See, Lake County, Florida v. Water Oak Management Corporation, 22 FLW S231, 232 (Fla. 1997). See also Sarasota County v. Sarasota Church of Christ, 667 So.2d 180, 183 (Fla. 1995); City of Boca Raton v. State, 595 So.2d 25, 29 (Fla. 1992). First, it must be determined "whether the services at issue provide a special benefit to the assessed property" and

second, it must be determined "whether the assessment for the services is properly apportioned". Lake County, 22 FLW at 232.

In Harris v. Wilson, 22 FLW S137, 138 (Fla. 1997), a county's partial year special assessment applicable to residential properties in unincorporated areas for the purpose of financing solid waste disposal was found not to be arbitrary. In discussing the county's determination of benefits, the court noted that the county had stated in both the ordinances and the resolution adopting the assessment that the properties to be assessed would be specially benefited by such an assessment. See Id. Specifically, the county's Resolution directly stated that:

"Benefits provided to affected lands include by way of example and not limitation, the availability of facilities to properly and safely dispose of solid waste generated on improved residential lands, closure and the long term monitoring of the facilities, a potential increase and value to improve residential lands, better service to owners and tenants, and the enhancement of environmentally responsible use and enjoyment of residential land." Harris, 22 FLW at 138.

In contrast to Harris, however, the Resolution as adopted by the Homosassa Water District failed to provide any specific findings of special benefit to property to be assessed. (See Resolution, dated January 13, 1992 at R-542 and Resolution dated March 13, 1995). Rather, the Resolutions merely stated in general terms that the water system improvements were being provided based on a petition by a majority of the residents of a portion of the area to be assessed, that the District desired to provide the

water service provided that the special assessment was paid by the lands to be benefited, and that the properties would be benefited. See Id. and no mention was made of what that benefit might be. See Id.

Although it can generally be said that the benefits from water service may potentially improve residential lands, no such specific benefit was expressed by the Water District nor did the District receive any evidence of benefit other than conclusions. See Id. Additionally, no determination of any benefit to commercial properties or those environmentally impacted such as the Pomerance property was made by the District. See Id. The Respondent, at trial, stipulated that the official minutes of the meetings of the Commissioners of the District accurately reflect all evidence considered by the District in confirming the Special Assessment roll and the specific assessment which is the subject of this action. (See, Joint Stipulation of the parties at T-277). In fact, a review of the Official Minutes of the District reflects that no evidence as to benefit was considered by the Board except the improvement plans and the assessment roll describing property and amounts for each assessment. (See, R-548). No evidence in support of special benefit to any property including the Pomerances' property was considered by the Board. In fact, the only evidence considered by the Board was provided by the Pomerances and established a lack of benefit to the Pomerance property. (See, R-554 and minutes of the meeting attached

to Respondent's Brief).

While the law may require a court to defer to a legislative finding of special benefit, see e.g. Sarasota County, 667 So.2d at 180, no such deferral can be made absent such a finding. The rule clearly states that it must be determined "whether the services at issue provide a special benefit to the assessed property." Lake County, 22 FLW at 232. Thus, this determination is required to be made prior to the levying of a special assessment, not after such assessment has been levied. The Water District failed to establish any benefit, as evidenced in its Resolution, dated January 13, 1992. The Water District's effort to establish a benefit through a later Resolution and the testimony of experts after the institution of this litigation has no bearing on the finding the Water District was required to make prior to levying the assessment. Further, because it is a legislative function and not a judicial function to determine benefit, See Sarasota County, 667 So.2d at 180, the Lower Court could not infer or provide a special benefit where the Water District failed to establish its existence.

More importantly, the evidence at trial clearly established that the Respondent is a Special District subject to the provisions and requirements of its legislatively created Charter, as Amended. (See, R-541). Nowhere within its specific governing language does the Respondent's Charter provide that special benefit may be assumed or that a bare conclusion or assertion of special benefit may be made. The law

governing the Respondent's special assessments as set forth with its Charter, as amended, clearly provides that such must be in proportion to the benefits derived from the improvement. (emphasis added).

At trial, the Respondent presented no testimony as to the alleged benefit to Plaintiffs' property except the testimony of the engineer who drafted the plans for the improvement. (T-495). Mr. George McDonald testified that "the cost of bringing water to that person is equal of the cost that it takes to run pipe across the front of the lot" (T-495). Such is directly contrary to the language and requirements of Respondent's Charter, as Amended. As set forth above, Respondent's Charter requires that an assessment be based upon proportionate benefit, not proportionate cost. (R-541). While Respondent's Charter authorizes the front footage assessment method, it clearly states that the District must:

assess against the property to be specially benefited by such improvements that portion of the cost which the Board has designated, such remaining cost to be paid from other funds by the Board. (R-541) (emphasis added).

The Charter allows for front footage assessment based upon benefit, not cost, and requires that the additional funds be paid from other sources. (R-541). The Respondent, in imposing the assessment without any foundation or determination of benefit of any kind, (other than their conclusion) created an arbitrary assessment.

Herein, the Pomerances' property is not specially benefited by the Respondent's

waterline improvement in any way. The testimony at trial established that the Pomerances' property cannot be developed or used for any commercial purpose. (T-77). The testimony at trial further established that the Respondent's waterline improvement provides no benefit to the property if, in fact, the property cannot be developed (T-85,127,257). Petitioners expert witnesses established that the Petitioners' property cannot be used or developed as a result of the predominant wetlands. (T-77,120,126).

Given the predominant wetlands located on the site and the inability to develop the site, the Respondent's waterline improvement provides no benefit to the Pomerances' property. (T-85,126). Even if the property could be developed, the uncontroverted evidence at trial established that the maximum value of the special benefit to the property is the sum of \$2,000.00 - \$5,000.00, the cost of a well. (T-214). Respondent's assessment of \$19,044.39 is clearly far in excess of the special benefit, if any, derived by Plaintiffs' property and should be declared by this Court to be arbitrary and void.

Even a minuscule amount of development on the property would not be possible, as the Pomerances would be required to provide on-site or off-site mitigation for any permitted filling of jurisdictional wetlands. (T-139). Petitioners own no off-site lands for mitigation. (T-35) Because the wetland jurisdictional line as established by the United States Army Corps of Engineers reflects that no upland access to the nearest

road exists, clearly the filling of jurisdictional wetlands would be required in order to utilize any portion of the upland property. (See, R-555). The property contains insufficient upland property such that mitigation for the disturbance of wetland areas could not be made and no development could occur. Consequently, the Pomerances property cannot substantially benefit, nor is any possible benefit certain or likely to occur within a reasonable time period. Respondent's Special Assessment is arbitrary and should be set aside.

II. PURSUANT TO THE RESPONDENT'S CHARTER, AS AMENDED, THE POMERANCES WERE NOT REQUIRED TO SEEK DEVELOPMENT PERMITS OR A DENIAL OF DEVELOPMENT RIGHTS PRIOR TO CHALLENGING THE ALLEGED BENEFIT OF RESPONDENT'S WATERLINE TO THEIR PROPERTY.

The Respondent argues that evaluation of benefit to the Pomerance property based upon its ability to receive such a benefit through development is improper because the Pomerances' have not received a formal denial of development rights. It is clear that the Petitioners' are not and were not claiming exclusively that their land is undevelopable. Rather, Petitioner's primary claim is that Respondent's services can provide no benefit. Petitioners have not claimed a regulatory taking contrary to Respondents assertion within its Brief. Rather, Petitioners claim that the Districts assessment is improper and violates both the law and its Charter requirements.

Although, Respondent cites Key Haven v. Board of Trustees of the Internal

Improvement Trust Fund, 427 So.2d 153 (Fl. 1982), Key Haven is inapplicable in that it deals with the denial of the dredge and fill permit and the issue of a taking of property without due process of law. Even assuming it were applicable, Key Haven is questionable law. It has been distinguished, Dade County v. National Bulk Carriers, Inc., 450 So.2d 213, 216 (Fla. 1984), criticized, State of Florida Commission on Ethics v. Sullivan, 430 So.2d 928, 938 (Fla. 1st DCA 1983) and questioned, Bowen v. Department of Environmental Regulations, 448 So.2d 566, 568 (Fla. 2nd DCA 1984).

Accordingly, whether or not the Pomerances have attempted to obtain a development permit, is immaterial as to the issue of whether the Respondent has assessed the Pomerances' property in accordance with the benefit that the property receives from the waterline insomuch as Respondent's Charter does not require a landowner to make such a development application. Nowhere within the Respondent's Charter as Amended, is a requirement that the property owner have applied for a development permit or exhausted any administrative remedies in order to contest whether or not a special benefit to that owner's property is conferred. (See, R-541). In fact, while an application for a development permit is generally required in cases seeking to establish that a governmental regulation constitutes a taking of property without due process of law, herein, the issue is solely whether the waterline improvement specially benefits the Pomerance property in proportion to the \$19,044.39

assessment. The testimony at trial was replete with evidence that it does not. See, e.g. T-126).

Finally, the testimony at trial clearly established that an application for development relative to the Pomerance property would be futile or fruitless. (T-69). For example, Clifford Manuel, an expert professional engineer, testified that the property is not developable (T-77), that any effort to apply for a development permit would be "without merit" and would result in a "denial of any kind of reasonable property development" (T-81). Mr. Manuel further testified that in his professional opinion the availability of public water does not enhance its developability or provide a benefit (T-85) and that his opinions do not depend upon whether a permit has been applied for and denied (T-85). Finally, the testimony of Mr. Gary Maidhof, Director of Citrus County Department of Developmental Services established that the property cannot be developed without off-site property (for use as mitigation) and that there is "not much benefit" to the property for public water. (T-257).

Respondent argues that the lack of development potential is irrelevant because no permit has been sought or because no development applications have been applied for and denied. All of the cases cited by Respondent are equal protection, due process or eminent domain cases wherein a landowner was claiming that the application of a development regulation deprived the owner of due process or equal protection. All of

these cases hold that in order to be ripe, an owner must obtain a final decision regarding the application of the ordinance in question to a Plaintiffs' property. Herein, the issue is not whether Federal and State Regulations regarding development constitute a taking and deprive the Pomerances of due process or equal protection.

Respondent's Charter, as amended, expressly provides that properties may be specially assessed and provides:

Such Special Assessments shall be levied upon property specially benefited by such improvements in proportion to benefits to be derived therefrom.....

The amount of the assessment against each lot or parcel of land shall in no event exceed the special benefits accruing thereto....

The Board shall not confirm any assessment in excess of special benefit to the property and the assessment so confirmed shall be in proportion to such special benefit.

See, Appendix 1 of Petitioner's Initial Brief filed herein; 63-1222(17), Laws of Florida.

Nowhere does the Charter provide for "reasonable proportion" or in "non-arbitrary proportion". Respondent's Charter further provides for an owner's opportunity to object to an assessment and if still unsatisfied requires the owner to file suit within 10 days. The Pomerances appeared and objected to the assessment. Unsatisfied, the Pomerances filed suit within 10 days.

In fact, the Respondent's Charter specifically provides for the filing of a suit to

contest the assessment within ten (10) days of the owner's objection to the same. Nowhere within the Charter or any amendment thereto is there a requirement that a development permit be sought prior to filing suit. (R-541). The permitting process, as argued by the Respondent, is irrelevant to this case. Under the case law and Respondent's Charter, the Pomerances have done all things required of them. The Pomerances, as owners, objected to the assessment and obtained a final decision from the Respondent regarding the application of the assessment and resolution to their property prior to following suit. Respondent's assessment adversely effected the Pomerances' property from the moment it was imposed and was improper under the Respondent's Charter and Amendment from the moment it was imposed. No development application was or is required for the issue of special benefit to the Pomerances' property to be ripe and evidence of developability and lack of benefit is clearly material, relevant and reflects the lack of benefit the improvement provides to the Pomerance property as well as the failure of the District to assess in proportion to benefit as required by its Charter and the law.

Finally, Respondent argues that the special benefits test that should be applied herein, applies to assessed properties as a “community” (B-41). Respondent fails to note that the cases cited in support of that concept are all cases addressing special assessments imposed under various Florida Statutes. Herein, the Respondent’s ability

to impose a special assessment is derived solely from the Special Acts of the Legislature creating and amending its Charter.

Under the Special Acts governing the Respondent, the Florida legislature did not provide that Respondent's assessment be made such that the portion of the community that bears the cost receive a special benefit. Rather, the Florida legislature expressly provided as follows:

The amount of the assessment against each lot or parcel of land shall in no event exceed the special benefits accruing thereto. See Appendix 1 of Petitioner's Initial Brief, 63-1222, Laws of Florida.

The case law and language contained therein addressing community benefit as cited by Respondent simply does not address the requirements of Respondent's Charter, as amended and therefore, does not apply.

Respondent is and was obligated to assess only in specific proportion to benefit received by the Pomerances' property and did not do so. Respondent made no analysis of benefit to the Pomerance property and received no evidence of that. Instead, the Respondent arbitrarily and capriciously assessed Plaintiffs' property in the amount of \$19,044.39.

CONCLUSION

For the foregoing reasons and those set forth within Petitioners' Initial Brief, the Fifth District Court of Appeals/Opinion and the lower court's Final Judgment should

be reversed.

DATED on this _____ day of December, 2000.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the size and style of type used in this Petitioners' Reply Brief is 14 point Times New Roman, a font that is proportionally spaced in accordance with this Court's Administrative Order dated July 13, 1998. I further certify that this Brief is further transmitted upon a three and one-half inch computer diskette formatted for DOS, saved in WordPerfect 5.1 format and scanned for viruses prior to submission.

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the above and foregoing Petitioners' Reply Brief has been furnished by regular United States Mail to: JACK A. MORING, ESQUIRE, Moring & Moring, P. A., 7655 West Gulf to Lake Highway, Crystal River, Florida 34429; FRANK A. SHEPHERD, Pacific Legal Foundation, P.O. Box 522188, Miami, Florida, 33152-2188; and SIDNEY ANSBACHER, ESQUIRE, Upchurch, Bailey & Upchurch, P. A., Post Office Drawer 3007, St. Augustine, Florida 32085, on this _____ day of December, 2000.

Karen O. Gaffney