1982

Wayne M. Patterson v. Alpine City : Brief of Appellant

Utah Supreme Court

Ray M. Harding; Attorney for Respondent;
John C. Backlund; Young, Backlund, Harris & Carter; Attorneys for Appellant;

SUPREME COURT
STATE OF UTAH

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WAYNE M. PATTERSON,

Plaintiff/Respondent,

vs. : Case No. 18,114

ALPINE CITY, a municipal corporation,

Defendant/Appellant.

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APPELLANT'S BRIEF

--ooo0ooo--

Appeal from the Judgment of the
District Court of Utah County
State of Utah
Honorable J. Robert Bullock, Judge

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

RULES CITED

OTHER AUTHORITIES

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STATEMENT OF THE NATURE OF THE CASE

Respondent, Wayne M. Patterson, initiated this action seeking a declaratory judgment that assessment by Appellant, Alpine City, of its applicable sewer connection fee was void, unenforceable and unconstitutional. Respondent contended that the sewer connection fee had not been legally established by adoption of an appropriate ordinance or resolution by Appellant. Respondent also contended that the Appellant acted beyond its statutory authority in establishing the amount of the sewer connection fee. Respondent prayed for a permanent injunction enjoining Appellant from assessing the sewer connection fee and also sought restitution of the fee paid by Respondent to Appellant.

Respondent filed a Motion for Summary Judgment which the Trial Court granted in part and denied in part. The written

ruling by the Trial Court, dated April 16, 1981, states in part:

> 1. As applied to this plaintiff the sewer connection fee of $1,500.00 was illegally assessed for the reason that sewer connection fees to be charged were not established by written resolution or ordinance as required by law. It is also the Court's opinion that regardless of the practicality and effectiveness of defendant's sewer finance plan it is not within the City's statutory authority.

The Trial Court further ruled that Respondent was not entitled as a matter of law to a refund of the full $1,500.00 connection fee. The Trial Court did not rule that the sewer system finance plan of Appellant violated the equal protection clauses of the Constitution of the State of Utah of the United States Constitution.

A Partial Summary Judgment reflecting the ruling was entered by the Trial Court on May 29, 1981.

The Trial Court in September, 1981, pursuant to a stipulation of the parties dismissed Respondent's claim for restitution and entered judgment permitting Respondent to retain the sewer connection right and permitting Appellant to retain the sewer connection fee paid by Respondent to Appellant.

DISPOSITION IN LOWER COURT

The District Court entered Summary Judgment in favor of Respondent on the 29th day of May, 1981, holding, among other things, that the Appellant acted outside of its statutory authority with respect to the manner in which sewer connections were sold and sewer connection fees established.

RELIEF SOUGHT ON APPEAL

The Supreme Court should reverse the Summary Judgment entered below on the issue of whether or not Appellant exceeded

its authority in establishing sewer connection fees or selling sewer connection permits, or in the alternative order the District Court to proceed to conduct a trial on that issue. The Court should further find and rule that Respondent was not entitled to Summary Judgment as a matter of law.

STATEMENT OF FACTS

In 1976, the Alpine City Council and Mayor authorized preliminary studies for the design, construction and financing of a wastewater collection system to serve the inhabitants of Alpine City. Alpine City, together with the cities of American Fork, Lehi, and Pleasant Grove, assisted in establishing the Timpanogos Special Service District to provide for construction of a regional wastewater treatment facility serving the four cities.

Prior to construction of the Alpine City wastewater collection system, the Appellant investigated thoroughly the cost of such system and available funding. Eventually, the Appellant was able to obtain a portion of the funding from Farmer's Home Administration and the Environmental Protection Agency. Money borrowed was to be repaid from the proceeds from the sale of bonds. The remaining portion of the cost of the system was approximately $875,000.00. Based upon an engineering study, the projected number of sewer connections was 540. No wastewater collection facility serviced any part of Alpine City prior to construction of this project. The amount to be charged per connection to pay Appellant's share of the initial cost of design and construction was approximately $1,620.50 per connection.

Later, in early 1977, the Appellant obtained a grant fro Farmer's Home Administration in the sum of $499,400.00, which then left the remaining amount to be paid by Appellant, aside from grants and loans, of $375,000.00. Appellant then revised the amount of the initial connection fee to $700.00. The sum of $375,000.00 was required to be collected, in full, and on deposit prior to final approval by federal agencies of the grant and loans to fund the project.

The actual value of a sewer connection fee was greater than $700.00. The federal grants, in effect, subsidized the project and allowed the initial connection fee to be set at $700.0(This served to benefit all present and future residents of Alpine because without the $375,000.00 generated from the sale of connection fees, the system could not have been funded or built when it was.

The City Council then determined to raise the amount of the connection fees in two increments. First, it was proposed to raise the fee to $1,000.00 and then $1,500.00. This plan was approved by the Alpine City Council, the Mountainlands Association of Governments, the Utah County Council of Governments, the Utah County Planning Commission, the State of Utah Clearing House, the State of Utah Planning Coordinator, the State of Utah Division of Health, the Environmental Protection Agency, and the Farmer's Home Administration.

The City Council then advertised the proposal and conducted public hearings. Subsequently, the plan was adopted in a regular, open City Council meeting. To induce purchase of the

required number of sewer connections, the initial fee was set at $700.00 and any person could purchase connections.

The public was advised that the fees would be increased to $1,000.00 and later to $1,500.00.

The plaintiff attended the public hearings and knew of the proposed increases.

Increases were required to enable the City to repay its bonded indebtedness on the project and its share of the bonded indebtedness of the Timpanogos Special Service District, the regional agency providing sewage treatment facilities.

ISSUES

WHETHER OR NOT APPELLANT, ALPINE CITY, ACTED WITHIN ITS AUTHORITY BY: (1) PRE-SELLING SEWER CONNECTIONS TO OBTAIN REQUIRED FUNDS TO CONSTRUCT A MUNICIPAL SEWER SYSTEM; AND, (2) RAISING SEWER CONNECTION FEES FROM $700.00 TO $1,500.00 IN A PERIOD OF SEVERAL MONTHS.

ARGUMENT

POINT I

SUMMARY JUDGMENT IS NOT APPROPRIATE IN THE INSTANT CIRCUMSTANCES.

Rule 56(c) of the Utah Rules of Civil Procedure provides as follows:

> . . . the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Summary Judgment should not be affirmed because significant issues of material fact exist and Respondent is not

entitled to judgment as a matter of law. Respondent, in making a Motion for Summary Judgment, has ignored these essential principles of summary judgment analysis under Utah law.

First, upon motion for summary judgment, the trial court is required to consider all relevant facts and their reasonable inferences in a light most favorable to the party against whom the motion is made. The Utah Supreme Court noted in Controlled Receivables, Inc. v. Harmon, 17 Utah 2d 420, 413 P.2d 807 (1966) as follows:

> A motion for summary judgment is a harsh measure, and for this reason plaintiff's contentions must be considered in a light most to his advantage and all doubts resolved in favor of permitting him to go to trial; and only if when the whole matter is so viewed he could, nevertheless, establish no right to recovery, should the motion be granted.

Id., 413 P.2d at 809. For other numerous references made by the Court to this proposition, see Hughes v. Housley, 599 P.2d 1250 (Utah 1979); Livingston Industries, Inc. v. Walker Bank & Trust Co., 565 P.2d 117 (Utah 1977); Foster v. Steed, 19 Utah 2d 435, 432 P.2d 60 (1967).

Second, if the facts and their reasonable inferences when viewed in a light most favorable to the non-moving party are in dispute, summary judgment is simply improper. In Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975), the Utah Supreme Court stated:

> It is not the purpose of the summary judgment procedure to judge the credibility of the averments of the parties or witnesses or the weight of the evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail.

Id., at 193. See also Peterson v. Fowler, 29 Utah 2d 386, 510 P.2d 523 (1973); University Club v. Invesco Holding Corp., 29 Utah 2d 1, 504 P.2d 29 (1972); Transamerica Title Insurance Co. v. United Resources, Inc., 24 Utah 2d 346, 471 P.2d 165 (1970); and Robinson v. Employers Liability Assurance Corp., 22 Utah 2d 163, 450 P.2d 91 (1969).

Third, because an improperly granted summary judgment represents an extremely high cost in terms of time and resources to both the litigants and the courts of this state, summary judgment should not be granted in any but the most clear-cut cases. To this effect is the court's holding in Durham v. Margetts, 571 P.2d 1332 (1977):

> The summary judgment procedure has the desirable and salutary purpose of eliminating the time, trouble, and expense of a trial when there are no issues of fact in dispute and the controversy can be resolved as a matter of law. Nevertheless, that should not be done on conjecture, but only when the matter is clear; and in case of doubt, the doubt should be resolved and allowing the challenged party the opportunity of at least attempting to prove his right of recovery.

Id., at 1334.

Appellant maintains that there are substantial and material issues of fact in dispute, and that the controversy therefore cannot be resolved against Appellant by Summary Judgment as a matter of law.

The Trial Court should have conducted a trial on the issues presented on appeal. Evidence should have been received regarding the reasonableness of Appellant's plan for financing construction of the City's sewer system and

for defraying the costs of constructing, operating and maintaining the system, in part, through the sale of sewer connection permits.

POINT II

THE ESTABLISHMENT OF REASONABLE CONNECTION FEES AND PRE-SELLING A DETERMINED NUMBER OF CONNECTIONS WAS A VALID EXERCISE OF THE GENERAL POLICE POWERS BY APPELLANT.

Prior to the decision of the Utah Supreme Court in the case of State v. Hutchinson, No. 16,087, Utah had followed the so-called Dillon rule first enunciated in Merriam v. Moody's Executors, 25 Iowa 163 (1868). Essentially, the Dillon rule provided that local units of government had no powers or authority to act unless such action was taken pursuant to a specific grant of authority by the State Legislature.

In Hutchinson, supra, the defendant challenged the constitutionality of a county ordinance which required the filing of campaign statements and the disclosure of campaign contributions. The defendant challenged the ordinance on the basis that absent a specific grant of authority from the legislature, the county was powerless to enact this type of ordinance. The issue in the case was whether or not the general welfare grant found in Utah Code Annotated, Section 17-5-77, 1953 as amended, by itself provided a county with legal authority to enact this type of ordinance or whether there must be a specific grant of authority for counties to enact such measures. The Utah Supreme Court held that the rule requiring strict construction of powers delegated by the

legislature to counties and municipalities is a rule which is archaeic, unrealistic and unresponsive to the current needs of both state and local governments and effectively nulifies the legislature's grant of general police power to the counties.

The campaign ordinances were held to be permissable under the general welfare provision above cited, as an independent source of power to act for the general welfare of county citizens. The opinion significantly broadened the authority of local governments to enact ordinances unique to local government. As the Supreme Court stated:

> When the state has granted general welfare to local governments, these governments are independent authority apart from and in addition to specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power . . . and the courts will not interfere with the legislative choice of the means selected unless it is arbitrary, or is directly prohibited by or is inconsistent with the policy of, the state or federal laws or the constitution of this state or of the United States.

The provisions of Utah Code Annotated, Section 17-5-77, 1953 as amended, relating to a general grant of powers to county commissioners, are virtually identical to the provisions of Utah Code Annotated, Section 10-8-84, 1953 as amended, which is a general grant of authority to municipalities in the State of Utah.

Section 10-8-84, Utah Code Annotated, 1953 as amended, was cited by the Utah State Supreme Court in the case of John Call and Clark Jenkins v. City of West Jordan, No. 15,908, filed

December 26, 1979, a case involving a suit by several subdividers against the City of West Jordan challenging imposition of a so-called impact fee. The court, in determining that the city, in fact, had authority to impose that type of fee, even though there exists no state statute specifically granting cities that authority, cited with approval, Section 10-8-84, UCA.

McQuillin, Municipal Corporations, 3rd Edition Revised, Volume 11, Section 31-10, states as follows:

> The establishment and maintenance of a sewer system by a municipality is usually regarded as an exercise of its police power and so is an ordinance requiring property owners to make connections therewith. All persons hold their property subject to the law providing for the public health and general welfare and when sewers are necessary for the preservation of the public health, property must bear its just proportion of the cost of construction and maintenance of them.

McQuillin, in Section 31-30 also states:

> Power to regulate and control sewers and drains carries with it as a necessary incident authority to compel, regulate and control all dispensible, desirable or convenient connections subject, of course, to the observance of private property rights, accordingly, express power to 'construct, establish and maintain drains and sewers' includes power to make reasonable regulations for tapping and connecting with the sewers. Municipalities are generally authorized to compel property owners to make connection with the sewer within a reasonable distance when the public health requires it, and to pay the cost and expenses involved, all of which may be provided for by statute or ordinance, in the exercise of the police power.

Section 10-8-38, Utah Code Annotated, 1953 as amended, does provide that any city or town may, for the purpose of defraying the construction, reconstruction, maintenance, or operation of any sewer system or sewer treatment plant, provide for mandatory hookup where the sewer is available and within

300 feet of any property line with any building used for human occupancy and make a reasonable charge for the use thereof. Applying the Hutchinson decision, it would certainly be within the Respondent's power to sell sewer connections to finance construction of a badly needed sewer system and to charge a reasonable amount for such connections. Section 10-8-38, UCA, 1953 as amended, is a grant of authority but is not a specific limitation upon the exercise of authority by municipalites.

In the case of Rupp v. Grantsville (Utah 1980) 610 P.2d 338, this Court upheld the mandatory sewer connection ordinance of the municipality of Grantsville. The opinion contains the following language:

> In Utah, municipalities are granted broad powers for the protection of the health and welfare of their residents. Among these powers is the statutory authority to establish and maintain public utilities for the benefit of those residents. Inherent in the power to preserve and protect the health and welfare of municipal residents is the authority to adopt ordinances directed at the effectuation of that protection. This general grant of police power is codified in 70-8-84 which provides:
>
> > 'They [municipalites] may pass all ordinances and rules and make all regulations not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health and promote the prosperity . . . comfort and convenience of the city and inhabitants thereof, and for the protection of property herein; . . .'
>
> The scope of police power conferred on municipal governments by the requirements incident to effective protection of the health and welfare of their citizenry are reflected in statutes such as 70-8-84. The relationship between a mandatory connection ordinance and this police power was recognized in Bigler v. Greenwood. In Bigler, this Court in upholding the mandatory connection ordinance

> 'Such an ordinance is undeniably proposed to protect the health and welfare and is therefor a valid exercise of authority expressly conferred under the police power.'
>
> There is nothing in the present situation which requires a retreat from that position. The Grantsville ordinance in question is a valid exercise of the municipalites recognized police power and therefore is enforceable against the plaintiffs.

It is clear that under the rationale of Hutchinson, Call, and Rupp, supra, that Appellant has the authority to enact and enforce a reasonable plan to finance construction of a sewer system. The Trial Court erred in granting Respondent's Motion for Summary Judgment, and in failing to receive evidence with respect to the reasonableness of the ordinance.

Appellant contends that no state statute purports to limit a municipality from taking reasonable and proper steps to finance construction of a sewer system. Municipalites must of necessity be allowed to exercise municipal powers in a flexible and effective manner to appropriately deal with varying circumstances. Appellant must have the inherent power to establish and carry out reasonable plans for financing construction of its sewer system.

CONCLUSION

A tremendous amount of effort and hard work expended by the Alpine City Mayor, Alpine City Council, City Engineer, Alpine Planning Commission and Federal and State Agencies resulted in a reasonable and legal plan for the designing, construction of and funding for Alpine City wastewater collection system. Federal funding through grants and loans was contingent upon Appellant depositing the sum of $375,000.00

prior to final approval of Federal funding. Appellant and many Regional, State and Federal Agencies all approved the plan to pre-sell sewer connection permits to raise Appellant's share.

Because the initial sewer connection fee was being subsidized by a Federal grant the connection fees were raised in two steps to an amount required to provide the sewer fund of Appellant with sufficient income to meet with the costs associated with Appellant's obligation to the Timpanogos Special Service District for treatment of sewage waste from Alpine.

Appellant's actions were undeniably taken to protect the health and welfare of Alpine City and residents. It is apparent that under Hutchinson, supra, and the other cases cited herein, Appellant does have the inherent power to enact and enforce a reasonable plan for the sale of sewer connection permits and to establish connection fees reasonably related to the expenses incurred in financing, building, operating and maintaining a municipal sewer system.

RESPECTFULLY SUBMITTED this 15TH day of January, 1982.

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(continued)

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing to Ray M. Harding, Attorney for Respondent, 306 West Main Street, American Fork, Utah 84003, postage prepaid, this 15th day of January, 1982.

John C Backlund