

IN THE SUPREME COURT, STATE OF FLORIDA

TOWN OF PALM BEACH SHORES,

Appellant,

vs.

CITY OF RIVIERA BEACH,

Appellee.

Case No. SC06-206

4DCA Case No.: 4D04-4869

On Discretionary Review From a Decision of the Fourth District Court of Appeal

BRIEF ON JURISDICTION OF
RESPONDENT, TOWN OF PALM BEACH SHORES

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INTRODUCTION

In this case, the City of Riviera Beach (“Riviera Beach”) has sought to extricate itself from a longstanding contract which it no longer desires. Riviera Beach has argued that a statute enacted almost twenty years after the contract has, at Riviera Beach’s option, invalidated the contract. However, as the Fourth District Court of Appeal correctly observed, the contract (“the 1951 Agreement”) does not impose any obligation upon Riviera Beach that is inconsistent with the statute (“the 1970 Statute”). The statute is neutral with respect to the agreement, and municipalities remain free to enter into a similar agreement today. That fact entirely resolves the issues raised in this case below, and further precludes the existence of any express and direct conflict, as the Fourth District recognized in denying Riviera Beach’s motion for certification of conflict.

STATEMENT OF THE CASE AND THE FACTS

Under the 1951 Agreement, Riviera Beach received the entire water plant and distribution system that had previously served the Town of Palm Beach Shores, in exchange for its agreement to furnish water service to all residents of Palm Beach Shores at the identical rates or charges it makes to its residents within Riviera Beach. (A-1) In 1970, a statute was passed which authorized municipalities to charge users outside of the city limits up to 25% more for water service than it charges those within city limits. (Id.) However, the statute did not

require a city to charge a higher rate to customers outside city limits, leaving that within the discretion of the city. (Id.)

Riviera Beach brought an action in 2001 seeking a declaration that, because of the 1970 Statute, it was no longer bound to the 1951 Agreement. (A-2) The trial court agreed, holding that the statute authorized the city to charge users outside the city limits up to 25% more than those inside the city limits regardless of any existing contract to the contrary and thereby rendering the rate limitation in the 1951 Agreement invalid. (A-1) On appeal, the Fourth District reversed, ruling that because the statute does not *require* that a municipality charge more to customers outside city limits than it does to those within city limits, there is no inconsistency between the contractual rate and the statute and that, therefore, Riviera Beach is still bound by the 1951 Agreement. (A-3)

Riviera Beach moved for rehearing, rehearing en banc, and for certification of conflict. Riviera Beach argued, as it does here, that the Fourth DCA opinion conflicts with Mohme v. City of Cocoa, 328 So. 2d 422 (Fla. 1976) and, relatedly, that the decision conflicts with well-established principles which subject municipal contracts to modification by the exercise of legislative power. (Petitioner's Brief at 1, 2) The Fourth District denied rehearing and declined to certify conflict.

SUMMARY OF ARGUMENT

In this case, Riviera Beach asserts two similar bases for conflict jurisdiction. Both are invalid. First, in Mohme v. City of Cocoa, 328 So. 2d 422 (Fla. 1976) this Court determined only that the 1970 Statute is not unconstitutional. Mohme does not address or impact municipal contracts that do not violate the statute. The 1951 Agreement does not violate the 1970 Statute and is an agreement that could be entered into today. Second, the cases dealing with the longstanding precedent that municipal contracts are subject to modification by the exercise of the State's reserved police power authority are not relevant here. That is so for the same reason expressed above that the statute does not create any restrictions that contradict the terms of the 1951 Agreement. In other words, the State has not chosen to set specific water rates, and its 1970 Statute contains no terms preventing an agreement such as the 1951 Agreement. Therefore, there is no express and direct conflict, and this Court should decline jurisdiction.

ARGUMENT

The specific language of the obligation in the 1951 Agreement to provide water to Palm Beach Shores customers includes, in relevant part, the requirement that Riviera Beach charge the Town "identical rates or charges...so that there shall be no discrimination in service or rates...by reason of transmission distance from the well field, source of water supply or otherwise." (A-3) The 1970 Statute,

entitled “Limitation on rates charged consumer outside city limits,” provides, in relevant part:

(1) Any municipality within the state operating a water or sewer utility outside of the boundaries of such municipality shall charge consumers outside the boundaries rates, fees and charges determined in one of the following manners:

(a) It *may* charge the *same* rates, fees, and charges as consumers inside the municipal boundaries. However, in addition thereto, the municipality *may* add a surcharge of not more than 25 percent of such rates, fees, and charges to consumers outside the boundaries. Fixing of such rates, fees, and charges in this manner shall not require a public hearing except as may be provided for service to consumers inside the municipality . . .

Florida Statutes § 180.191 (1970) (emphasis added).

On the face of the 1970 Statute, a municipality is not *required* to charge any additional amount to customers outside of its boundaries and leaves the municipality free to agree to refrain from doing so or to limit the amount of that extra charge. So even after the enactment of the 1970 Statute, the parties would be free today to enter into the same economic agreement as that contained in the 1951 Agreement. Therefore, as the Fourth District ruled, because the statute did not *require* Riviera Beach to charge a higher rate than that agreed upon, there is no conflict between the statute and the agreement, and Riviera Beach continues to be bound by the 1951 Agreement. (A-3)

Riviera Beach's argument essentially ignores the impact of the 1951 Agreement upon the relationship of the parties. Riviera Beach does not factor into its analysis that Riviera Beach freely chose to enter into and be bound by that agreement in order to receive valuable consideration. That agreement and consideration is what distinguishes this case from all of the cases relied upon by Riviera Beach in its Petition. For example, just as it did below, Riviera Beach relies heavily upon Mohme v. City of Cocoa, 328 So.2d 422 (Fla. 1976). However, the Mohme case has no bearing upon the validity of this water service agreement. Mohme holds only that the 1970 Statute is not unconstitutional. Id. at 425. Palm Beach Shores does not dispute that the 1970 Statute, on its face, continued to permit a municipality to charge more to out-of-city customers than it does in-city customers for water service. However, that is not the point. The statute simply does not affect the 1951 Agreement. Riviera Beach was free to insist upon charging more to Palm Beach Shores residents as part of the 1951 Agreement, *without* such a statute, if that had been the parties' agreement. Moreover, if the statute had already existed in 1951, it still would not have *required* Riviera Beach to charge more to Palm Beach Shores residents.

With one limitation, both before and after the 1970 Statute, a municipality was and is permitted to make its own evaluation and then enter into the agreement believed to be in its best interest. The only limitation is that the statute *limits* the

amount that a municipality may insist upon receiving above the amounts charged to its in-city users. In actuality, as the legislative history shows, the statute was intended to protect the out-of-city users from exorbitant additional charges by municipalities. See Chapter 70-997, Laws of Florida (referring to out-of-city consumers “who should be protected from excess charges for such utilities by said municipality in view of the exclusive privilege that the municipality enjoys . . .”)¹

Riviera Beach’s argument that the Mohme decision refers to the legislative *presumption* that it typically costs more money to supply water to out-of-city users than to in-city users, has no relevance in this case where Riviera Beach entered into a binding agreement. (Petitioner’s Brief at 5) Under the 1951 Agreement, Riviera Beach has already received the consideration it bargained for to compensate it for the rate it promised to charge Palm Beach Shores residents.

Likewise, Riviera Beach’s reference to the price for water set forth in the 1951 Agreement as a “fixed rate” is wholly invalid. (Petitioner’s Brief at 6) A fixed rate contract is one that specifies a price per unit of water (e.g. 5 cents per thousand gallons). Such a contract has been found to be invalid when, over time, the cost of water exceeds that fixed price, forcing the municipality to incur an

¹ Riviera Beach’s contrary suggestion that the statute was intended to bring some new benefit or protection *to the charging municipality* simply misconstrues the statute and its legislative history. (See Petitioner’s Brief at 2, 5-6) Regardless, Riviera Beach’s point is irrelevant because the 1951 Agreement includes no terms that are proscribed by the 1970 Statute.

overall loss on its water service. See, e.g., City of Clearwater v. Bonsey, 180 So. 2d 200 (Fla. 2d DCA 1965). In fact, the case that truly disposes of the issue raised by Riviera Beach in this case is this Court's decision in City of Daytona Beach v. Stansfield, 258 So.2d 809 (Fla. 1972). As this Court ruled, so long as a contract does not *require* the municipality to supply water at less than its cost, the contract is valid. See Stansfield, 258 So.2d at 810. Riviera Beach continues to be in control of the exact amount that it charges for water, so long as it charges the same rate to Riviera Beach and Palm Beach Shores users. Therefore, Riviera Beach continues to be in control of whether it charges a sufficient rate to cover all of its costs. Nothing else is required for a valid price agreement for water service under Florida law. Riviera Beach, in its Brief, has erroneously cited Stansfield for the proposition that a contract such as the present one is discriminatory and prohibited. (See Petitioner's Brief at 7-8) In fact, Stansfield specifically found that where an agreement provides that the price to be charged out-of-city residents is established based upon the rate to be charged in-city users and where that rate may be set in the discretion of the municipality, it is valid. 258 So. 2d at 810.

To the extent that Riviera Beach now suggests that the water rate that Palm Beach Shores residents receives is preferential or somehow discriminatory as against *other* out-of-city users, this Court answered that question in Stansfield, also: "The fact that different rates may be charged to other outside users not

covered by the original agreement does not defeat that agreement's purpose and validity for those who are beneficiaries of it." 258 So.2d at 810. The exchange of consideration by the agreement removes any discrimination issue.

Similarly, to the extent that Riviera Beach argues that by charging the same rate to both groups of consumers, it may be charging a higher amount relative to its costs to its in-city users, the rule of the Stansfield case nullifies that argument. (See Petitioner's Brief at 7) Just like the agreement did for Daytona Beach in the Stansfield case, the 1951 Agreement and the consideration provided to Riviera Beach compensated Riviera Beach for that potential circumstance. In exchange, Palm Beach Shores received consideration in the form of assurance that it would not have to pay higher water rates than Riviera Beach residents. That was an important assurance in light of the fact that Palm Beach Shores was giving up its water distribution facility by which it had previously provided its own water and was thereby relinquishing all control -- were there no agreement otherwise -- over the amounts it could be charged.

Riviera Beach alleges that the Fourth District's decision directly conflicts with the longstanding precedent that municipal contracts are subject to modification by the exercise of the State's reserved police power authority. (Petitioner's Brief at 8) As the Fourth District noted, that argument also is resolved by the fact that the statute does not *require* an increase in the rate charged

non-residents of the City, such that there is no inconsistency between the contract rate and the statute. (A-2, 3) In other words, by enacting the 1970 Statute, the State did not modify the 1951 Agreement because the terms of that agreement are within that which is permissible under the 1970 Statute. The statute continues to leave within the discretion of the municipality whether it will charge an additional amount or whether it will contract not to charge such an amount, in exchange for consideration perceived to be valuable to the municipality. In effect, Riviera Beach's current position amounts to an argument that no municipality can legally enter into an agreement to obtain a water treatment plant or other valuable consideration because it can never assure its contracting party that it will be held to its obligations under such an agreement. That state of events, which would do municipalities much more harm than good, is not the law.

None of the cases cited by Riviera Beach below and to this Court support Riviera Beach's argument. For example, the case most directly relied upon by Riviera Beach, City of Plantation v. Utilities Operating Company, 156 So. 2d 842 (Fla. 1963), is a case in which this Court held only that the delegation of rate-setting power to a public utilities commission did not impair the obligation of a pre-existing contract between a city and a utility company under which the city reserved the power to regulate utility rates. (Id at 843-44) The authorizing statute at issue placed the Florida Railroad and Public Utilities Commission in charge of

regulating rates charged by water and sewer companies *in those counties which are placed under the law by resolution of the Board of County Commissioners.* (Id. at 843) (emphasis added) That precedent merely supports the constitutionality of a statute that permits a state utilities commission to set rates regardless of a pre-existing contract where a county government chooses to be subject to that regulation. Thus, it has no bearing upon the facts of the present case. Here, it is *the City*, not the State legislature, which seeks to abrogate its own contractual obligations and to charge a rate not permitted by its contract. The legislature has not sought to establish particular water rates to be charged by Riviera Beach nor has some other public agency been placed in charge of such rates. In fact, the action of the legislature at issue here has left the amounts to be charged within the discretion of the municipality -- such that the rates may be contracted for in the way that the municipality sees fit -- while placing only a ceiling upon the amount that may be charged out-of-city users relative to in-city users. Fla. Stat. § 180.191. Therefore, the Fourth District's opinion does not conflict with either the Mohme decision or the cases that discuss the ability of the State to modify municipal contracts by applicable legislation.

CONCLUSION

Based upon the foregoing, the Town of Palm Beach Shores respectfully submits that this Court should decline jurisdiction in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Elliot H. Scherker, Esq., Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131 and Susan Fleischner Kornspan, Esq., Greenberg Traurig, P.A., 777 South Flagler Drive, Third Floor East, West Palm Beach, FL 33401 this _____ day of March, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type size and style requirements and has been prepared in Times New Roman, 14 Point Font.

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