DREES CO. v. HAMILTON TWP.

2010 Ohio 3473

The Drees Company, et al., Plaintiffs-Appellants,
v.
Hamilton Township, Ohio, et al., Defendants-Appellees.

No. CA2009-11-150.

Court of Appeals of Ohio, Twelfth District, Warren County.

July 26, 2010.

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OPINION

POWELL, P.J.

{¶¶1} Plaintiffs-appellants, The Drees Company, Fischer Single Family Homes II, LLC, John Henry Homes, Inc., Charleston Signature Homes, LLC, and the Home Builders Association of Greater Cincinnati (collectively, Builders), appeal from the decision of the Warren County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Hamilton Township, Ohio, Hamilton Township Board of Trustees, Becky Ehling, Trustee, Michael Munoz, Trustee, and O.T. Bishop, Trustee (collectively, the Township), in a case regarding the authority of the Township to impose "impact fees" upon anyone who applies for a zoning

certificate for new construction or redevelopment within its unincorporated areas. For the reasons outlined below, we affirm.

{¶¶2} The stipulated facts and exhibits submitted to the trial court provide for the following:

{¶¶3} In recent years, Warren County has been the second fastest growing county in the state of Ohio and has been ranked the 52nd fastest growing county in the nation. The Township, which occupies 34.4 square miles of south central Warren County, is a limited home rule township established pursuant to R.C. Chapter 504.

{¶¶4} On May 2, 2007, the Hamilton Township Board of Trustees passed Amended Resolution No. 200722120418, entitled "Amended Resolution Implementing Impact Fees Within Unincorporated Areas of Hamilton Township, Ohio for Roads, Fire and Police, and Parks," that established a fee schedule charged to anyone who applied for a zoning certificate for new construction or redevelopment within the Township's unincorporated areas. As the title indicates, the resolution includes four fee categories: a road impact fee, a fire protection impact fee, a police protection impact fee, and a park impact fee. The sum of these four fees, which varies based on the intended land use, make up the total impact fee charged to the applicant on a per unit basis and are charged as follows:

Land Use Type	Unit	Road	Fire	Police	Park	Total
Single-Family Detached	Dwelling	$3,964	$335	$206	$1,648	$6,153
Multi-Family	Dwelling	$2,782	$187	$115	$921	$4,005
Hotel/Motel	Room	$2,857	$160	$98	$0	$3,115
Retail/Commercial	1,000 sq. ft.	$7,265	$432	$265	$0	$7,962
Office/Institutional	1,000 sq. ft.	$4,562	$244	$150	$0	$4,956
Industrial	1,000 sq. ft.	$3,512	$153	$94	$0	$3,759
Warehouse	1,000 sq. ft.	$2,503	$97	$60	$0	$2,660
Church	1,000 sq. ft.	$2,797	$91	$56	$0	$2,944
School	1,000 sq. ft.	$3,237	$138	$85	$0	$3,460
Nursing Home	1,000 sq. ft.	$1,871	$244	$150	$0	$2,265
Hospital	1,000 sq. ft.	$7,212	$244	$150	$0	$7,606

{¶¶5} Each of the collected fees, which are assessed "to offset increased services and improvements needed because of the development," and which must be paid before a zoning certificate will be issued, are kept in separate accounts apart from the Township's general fund. Once collected, the fees are to be used "to benefit the property by providing the Township with adequate funds to provide the same level of service to that property that the Township currently affords previously developed properties." If the fees are not spent on projects initiated within three years of their collection date, the fees are to be refunded with interest. The resolution also defines a list of projects exempt from payment and creates an extensive system of credits.

{¶¶6} In the fall of 2007, The Drees Company, Fischer Single Family Homes II, John Henry

Homes, and Charleston Signature Homes, applied for a zoning certificate with the Township, were assessed the applicable "impact fee," and paid the charge under protest. After the zoning applications were approved, Builders filed a complaint against the Township seeking injunctive relief, declaratory judgment, and damages.[1] Builders and the Township then filed cross-motions for summary judgment. After holding a hearing on the matter, the trial court granted summary judgment in favor of the Township.

{¶¶7} Builders now appeal the trial court's decision granting summary judgment to the Township, raising one assignment of error.

{¶¶8} "THE TRIAL COURT ERRED BY NOT GRANTING SUMMARY JUDGMENT IN FAVOR OF [BUILDERS], AND INSTEAD GRANTING SUMMARY JUDGMENT IN FAVOR OF [THE TOWNSHIP]."

{¶¶9} In their sole assignment of error, Builders argue that the trial court erred by granting summary judgment to the Township. We disagree.

Summary Judgment Standard of Review

{¶¶10} Summary judgment is a procedural device used to terminate litigation when there are no issues in a case requiring a formal trial. *Forste v. Oakview Const., Inc.*, Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶¶7. A trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶¶11} An appellate court's review of a summary judgment decision is de novo. *Creech v. Brock & Assoc. Constr.*, 183 Ohio App.3d 711, 2009-Ohio-3930, ¶¶9, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. In applying the de novo standard, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran*, 155 Ohio App.3d 713, 2004-Ohio-181, ¶¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383.

Ohio's Limited Home Rule Townships & R.C. Chapter 504

{¶¶12} In Ohio, "townships are creatures of the law and have only such authority as is conferred on them by law." *State ex rel. Schramm v. Ayres* (1952), 158 Ohio St. 30, 33. In turn, Ohio townships have no inherent or constitutionally granted police power, but instead, are "limited to that which is expressly delegated to them by statute." *W. Chester Twp. Bd. of Trustees v. Speedway Superamerica, L.L.C.*, Butler App. No. CA2006-05-104, 2007-Ohio-2844, ¶¶66; *Yorkavitz v. Bd. of Trustees of Columbia Twp.* (1957), 166 Ohio St. 349, 351.

{¶¶13} There are two types of townships in Ohio; namely, a standard township and a limited home rule township. Pursuant to R.C. 504.04(A)(1), a limited home rule township "may * * * [e]xercise all powers of local self government within the unincorporated area of the township, other than powers that are in conflict with general law * * *." See *Board of Twp. Trustees of*

Deerfield Twp. v. City of Mason, Warren App. No. CA2001-07-069, 2002-Ohio-374. However, while the General Assembly has granted limited home rule townships broad governing authority, they "shall enact no taxes other than those authorized by general law * * *." R.C. 504.04(A)(1).

A Tax, or Not A Tax? That is the Question

{¶¶14} Initially, Builders argue that the trial court erred by granting summary judgment to the Township because the "impact fees are really taxes" that are "not authorized by any Revised Code provision governing taxes or special assessments a township can impose."[2] We disagree.

{¶¶15} As noted above, a limited home rule township "shall enact no taxes other than those authorized by general law." R.C. 504.04(A)(1). A tax, while not explicitly defined in the Ohio Revised Code, "refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people." *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 153-154. "A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to * * * construct a house * * *." *National Cable Television Assn. v. United States* (1974), 415 U.S. 336, 340-341. "A fee is a charge imposed by a government in return for a service it provides; a fee is not a tax." *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St.3d 111, 113.

{¶¶16} While these definitions are certainly informative, determining whether a charge is a tax or a fee is a difficult task, for "it is not possible to come up with a single test that will correctly distinguish a tax for a fee in all situations where the words `tax' and `fee' arise." *Withrow* at 117; see, generally, Rosenberg, The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees, (2006), 59 SMU L.Rev. 177, 249-252 (discussing various tests courts have employed to aid in the difficult task of classifying a charge as a fee or a tax). Therefore, because "a tax for one inquiry is not necessarily a tax under other circumstances," courts must evaluate whether a charge is a fee or a tax on a case-by-case basis. *Withrow* at 115, 117.

{¶¶17} In support of their claim, Builders argue that the charges are taxes because they "are intended to be spent on public infrastructure unassociated with the development, as a means to benefit the public broadly," that "the benefit is not targeted to the fee payer," and that "it is easy to envision that a property for which an impact fee is paid may never see an improvement that directly benefits it, even if every impact fee dollar is spent." However, while it may be true that money generated through taxes is "expended for the equal benefit of all the people," Builders' claim flies in the face of the parties stipulated facts, which state, in pertinent part:

{¶¶18} "The purpose of the impact fee is to benefit *the property* by providing the Township with adequate funds to provide the same level of service to *that property* that the Township currently affords previously developed properties." (Emphasis added.)

{¶¶19} To quote Builders, "[i]n order to be classified as a fee, a charge must specially benefit the property that pays the fee." Based on the parties stipulated facts, that is exactly what occurs here; namely, a payment to the Township to obtain a zoning certificate in order to build on property within its unincorporated areas so that "*that property*" can receive the same level of service provided to previously developed properties. By stipulating to these facts, Builders are now bound by their agreement. See, e.g., *Westfield Ins. v. Hunter*, Butler App. Nos. CA2009-05-134,

2009-06-157, 2009-Ohio-5642, ¶¶28.

{¶¶20} Furthermore, the collected charges are never placed in the Township's general fund, but instead, separated into individual funds to be used only for narrow and specific purposes occasioned by the Township's ever-expanding population growth. In addition, the collected charges are refunded if not spent on projects initiated within three years of their collection date. These factors, when taken together, indicate that the charges imposed by the Township are fees paid in return for the services it provides. See *Withrow* at 116-117. Therefore, after a thorough review of the record, and based on the narrow and confined facts of this case, we find the charges imposed upon all applicants seeking a zoning certificate for new construction or redevelopment within the Township's unincorporated areas function not as a tax, but as a fee. Accordingly, because the collected charges are fees, Builders' first argument is overruled.

Contrary Directives & Conflict by Implication

{¶¶21} Builders also argue that the Township's resolution conflicts with various provisions found in R.C. Chapters 505, 511, 5571, and 5573 because, according to them, the resolution "attempts to raise revenues by means other than those expressly authorized by statute as the sole means by which funds may be generated for zoning, roads, police, fire, and parks systems."[3] However, after an extensive review of the alleged conflicting statutory language, none of these provisions expressly prohibit townships from charging impact fees to fund these services, nor do they provide for the exclusive means by which these services must be funded. *City of Fairfield v. Stephens*, Butler App. No. CA2001-06-149, 2002-Ohio-4120, ¶¶19; *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, ¶¶32; *Village of Struthers v. Sokol* (1923), 108 Ohio St. 263, paragraph two of the syllabus. Therefore, just as the trial court found, and for reasons with which we agree, the Township's resolution does not conflict with the various named provisions found in R.C. Chapters 505, 511, 5571 and 5573. Accordingly, Builders' second argument is overruled.

Alter the Structure of the Township Government

{¶¶22} In their final argument, Builders claim that the Township has "impermissibly changed and altered its form and structure of government" by creating an "impact fee district." However, by simply charging impact fees to anyone who applies for a zoning certificate for new construction or redevelopment within its unincorporated areas to account for the increased need for services and improvements, the Township has not changed or altered its statutorily permissible limited home rule form of government as provided for by R.C. Chapter 504. Therefore, Builders' final argument is overruled.

{¶¶23} In light of the foregoing, we find no error in the trial court's decision granting summary judgment to the Township. Builders' sole assignment of error is overruled.

{¶¶24} Judgment affirmed.

Ringland and Hendrickson, JJ., concur.