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STATE OF NORTH DAKOTA

SUPREME COURT NO: 20100196

Grand Forks County No: 09-C-1521

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the matter of Appeal of Grand Forks Housing Authority,

Appellant,

vs.

Grand Forks Board of County Commissioners,

Appellee.

REPLY BRIEF OF APPELLANT
GRAND FORKS HOUSING AUTHORITY

Appeal From The Order Denying Motion for Extension of Time or Alternatively to Stay Proceedings – Order Denying Motion to Remand – Order Affirming Denial of Tax Abatement dated April 28, 2010 and Judgment entered on May 25, 2010, arising out of an Administrative Agency Appeal to the District Court and a denial by the Administrative Agency of tax abatements for 2006 and 2007, in District Court, Northeast Judicial District, Grand Forks County, North Dakota; The Honorable Debbie Kleven, Presiding.

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LAW AND ARGUMENT

I. The district court employed an incorrect standard of review, thus, the case should be reversed or remanded in order to view the facts and law under the proper standard.

[1] The district court misapplied the standard of review by employing a more narrow scope than necessary. The district court mistakenly viewed the standard out of proper context and only applied isolated quotes of law from assorted precedent, without taking into account the surrounding circumstances of these cited cases. The Board of County Commissioners (hereinafter "Board") is arguing for this same incorrect standard, since it would make it more difficult to overturn the lower court's decision. (Appellee's Br. 4-8.) However, applying this standard was a complete misapplication of the law.

[2] A tax board's interpretation of a statute is fully reviewable by the court. Trollwood Vill. Ltd. P'ship v. Cass County Bd. of County Comm'rs, 557 N.W.2d 732, 734 (N.D. 1996). When the court reviews a local tax board's decision, the standard of review allows them to determine whether the decision is arbitrary, capricious, or unreasonable. Id.; e.g., Tibert v. City of Minto, 2006 ND 189, ¶ 8, 720 N.W.2d 921, 924 (N.D. 2006). "A decision is arbitrary, capricious, or unreasonable if it is not the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation." People to Save the Sheyenne River, Inc. v. North Dakota Dep't of Health, 2005 ND 104, ¶ 24, 697 N.W.2d 319, 329.

Furthermore, a local tax board's failure to correctly interpret and apply controlling law is seen as arbitrary, capricious, and unreasonable. Trollwood, 557 N.W.2d at 734.

[3] Altogether this means that a local governing board's decision can only be upheld if: (1) it is not arbitrary, (2) it is not capricious, (3) it is not unreasonable, (4) it is supported by substantial evidence, and (5) it is based upon a correct interpretation and application of controlling law. Johnson, 173 N.W.2d at 482.

[4] Typically in tax cases, the scope of review is the same as the district court's standard, and the court must independently determine the propriety of the local governing body's decision without according special deference to the district court's review. Ennis v. Williams County Bd. of Comm'rs, 493 N.W.2d 675, 679 (N.D. 1992). Although this Court does not pay special deference to the district court's review, the Grand Forks Housing Authority (hereinafter "Housing Authority") asserts that the district court failed to use the correct standard of review, thus, special attention should be paid to applying the appropriate scope of review.

[5] The majority of tax assessment cases point to a more limited standard of review, but they concern the overturning of a board's assessment value or categorization of a particular piece of property; in other words, these cases are interpreting factual matters. Caldis v. Bd. of County Comm'rs, Grand Forks County, 279 N.W.2d 665, 668 (N.D. 1979); e.g., Appeal of Johnson, 173 N.W.2d

475, 476 (N.D. 1970); e.g., Ulvedal v. Bd. of County Comm'rs of Grand Forks County, 434 N.W.2d 707, 708 (N.D. 1989).

[6] Most of these tax cases, where a limited standard of review is cited, involve a court that is reluctant to reduce the tax assessment value of a piece of property since this is seen as outside the scope of the court's reach; distinguish these cases with the case at bar, where there is a clash of statutory interpretations between the parties, as opposed to an argument based on the tax assessed value of land. Johnson, 173 N.W.2d at 476; e.g., Ulvedal, 434 N.W.2d at 708. In other words, it is disfavored for a court to alter the tax assessed property value, which is why a restricted standard of review is used in these types of cases; however, here we have a matter of statutory interpretation which is fully reviewable on appeal. Trollwood, 557 N.W.2d at 734.

[7] Even with a seemingly narrow standard of review for tax assessment cases, there are several instances where the Court reins in a tax board's authority. For example, the Stark County Board of County Commissioners allowed a spot variance that was in conflict with the relevant standards of the zoning ordinance, arguing that they had "virtually unlimited authority" under the county's zoning ordinance. Gullickson v. Stark County Comm'rs, 474 N.W.2d 890, 895 (N.D. 1991). Although the standard of review was limited, a full review of the interpretation of the ordinance was allowed. Id. at 892. Ultimately, the Court pulled back their authority, finding that the board's decision to allow the variance

was arbitrary, capricious, or unreasonable. Id. at 895. This case illustrates that a tax board is not above the reach of the court.

[8] Similarly, in Hentz v. Elma Township Board of Supervisors, the Court's standard of review for the zoning commissioner's decision to prohibit the planting of trees 120 feet from the centerline of a road was limited, where the decision had to be affirmed unless the local body acted arbitrarily, capriciously, or unreasonably, or there was not substantial evidence supporting the decision. 2007 ND 19, ¶¶ 2, 4, 727 N.W.2d 276, 278. In this case, it was determined that the township had acted arbitrarily, capriciously, or unreasonably in their decision that plaintiff tree farmers were in violation of the zoning ordinance because they had a tree farm which was specifically exempted by the zoning ordinances and the township did not correctly construe its ordinances. Id. at ¶ 10-11, 727 N.W.2d at 279-80. Again, the interpretation of a statute is fully reviewable by the court; thus, the standard of review in tax cases is not as stringent as it may initially appear. Medcenter One, Inc. v. North Dakota State Bd. of Pharmacy, 1997 ND 54, ¶ 13, 561 N.W.2d 634, 638.

[9] Every instance where a board was found to have made a decision unreasonably, without substantial evidence, or while misinterpreting the law, the Court has reversed its decision. Hentz, 2007 ND at ¶ 10-11, 727 N.W.2d at 279-80; Gullickson, 474 N.W.2d at 895; National Sun Indus. v. Ransom County, 474 N.W.2d 502, 508 (N.D. 1991). The Housing Authority's situation is similar, where

the Board failed to correctly interpret the applicable statutes and, therefore, acted arbitrarily, capriciously, or unreasonably.

[10] At the district court level, it appears that the court focused too intently on the quoted passages of precedent taken out of context without carefully considering that these passages of narrow standards were taken from cases where the tax assessment value - a factual issue - was the crux of the dispute. This authority was cited, giving the impression that the court's hands were essentially tied, even though this particular case does not pertain to tax assessment valuations. Instead, this case relates to the interpretation of statutes, which is fully reviewable on appeal. Trollwood, 557 N.W.2d at 734. The deference paid to the local board's decision is likely to be less when the construction and application of a statute is involved rather than when a purely local issue, such as a tax assessment value, is presented for review. Riverview Place, Inc. v. Cass County By and Through Cass County Bd. of Comm'rs, 448 N.W.2d 635, 639 n.4 (N.D. 1989).

[11] In sum, a very narrow standard of review was misapplied at the district court level, since the district court used quoted passages of precedent that were misconstrued as directly applying to the case at bar, while the scope of review is not actually this limited. Therefore, this higher Court should scrupulously review how the Board interpreted the applicable statutes in light of the Housing Authority's situation.

II. Determination by the County Commission to adopt the City's

Findings and Conclusions that annual tax payments made timely in the ordinary course of business without protest for 2006 and 2007 are "payments in lieu of taxes" is arbitrary and unreasonable.

[12] In order for a payment to be a "payment in lieu of taxes," there would need to be an agreement; no agreement exists or existed and no evidence of an agreement was ever presented. N.D.C.C. § 23-11-29. Instead, the Board, in making its determination to deny the Authority's tax abatement, merely relied on the fact that the Housing Authority made voluntary payments. (App. 28, 34, 47). Similarly, the Board stresses that the Housing Authority made voluntary payments, thus, they are barred from abatement. (Appellee's Br. 10-14). However, whether taxes were paid voluntarily or under protest is a moot point.

[13] The North Dakota legislature has previously determined that protest is irrelevant to a claim of abatement: "an application for refund of taxes paid with respect to any part of an assessment abated under this section must be granted, regardless of whether or not such taxes were paid under protest, oral or written." N.D.C.C. § 57-23-04(2). Furthermore, the Board relies on the "voluntary payment doctrine," which encompasses a situation where a party makes a tax payment, it is considered voluntary and cannot be recovered back. (Appellee's Br. 11.) However, the Board fails to mention the exception to the rule, stated in the same source that the Board cites, that this is true unless such recovery is authorized by statute. Debra E. Wax, Annotation, Recovery of Tax Paid on Exempt Property, 25

A.L.R.4th 186, § 3 (1983); 72 Am. Jur. 2d State and Local Taxation § 979 (2010); see Elzea v. Perry, 12 S.W.3d 213, 215 (Ark. 2000) (showing that another Eighth Circuit state found this statutory exception to the voluntary payment doctrine); see also Aberdeen Council, No. 820, K. of C., v. Brown County, 223 N.W. 950, 950 (S.D. 1929) (finding that, in a neighboring Eighth Circuit state, where a non-profit organization had voluntarily paid real estate taxes for five years, then applied for a refund of the previously paid taxes, the non-profit would be awarded its tax refund for the past five years).

[14] In sum, the voluntariness of a payment does not automatically fall into the category of "payments in lieu of taxes"; instead, an agreement must have been executed. N.D.C.C. § 23-11-29. Here, no agreement existed, nor has any indicia of one been shown to sustain the Board's argument; thus, the argument that the Housing Authority had an agreement to make payments in lieu of taxes must fail due to a lack of substantiation.

III. The Appellees mistakenly isolate the permissive language of N.D.C.C. § 57-23-04 in concluding that the decision for abatement is entirely discretionary, thus, giving excessive authority to the Board.

[15] While § 57-23-04(1) includes the permissive language "the board of county commissioners may abate or refund", § 57-23-05 is more direct in saying that someone who claims that tax levied against them is illegal is entitled make an application for abatement or refund and have such application granted if the facts

upon which the application is based bring it within the provisions of this chapter. The interpretation of the two aforementioned statutes must be read together to give full effect to the provisions; although a change in valuation may be given retroactive effect in § 57-23-04(1), someone who has paid an illegal tax is entitled to have their application of abatement or refund granted, according to § 57-23-05. Imposing taxes on property owned by a housing authority used for low income housing is illegal, because it is declared to be public property. N.D.C.C. § 23-11-29. Since levying this tax against the Housing Authority is illegal, the Housing Authority is entitled by § 57-23-05 to apply for abatement or refund and have this granted, as the facts in this case bring the Housing Authority's situation within the provisions of the relevant chapter.

IV. The full record was erroneously left out of the district court proceedings; therefore, the case should be reversed or remanded for a full airing of the facts, including missing transcripts.

[16] The city failed to forward the transcripts to the district court, even though the transcripts were supposed to be made part of the record, according to the city council minutes. (App. 52.) In the May 18, 2009 city council meeting minutes, it is clear that the council passed a motion to incorporate into the record the meeting transcripts, minutes, documentation, reports and exhibits that were used while deciding on the 2006 and 2007 applications. Id. The Board argues that, because of the procedural history, the appeal is based upon the record at the county commission level, not at the city council level. (Appellee's Br. 18.) The Board

goes on to cite N.D.C.C. § 28-34-01(3), which states that a court may order that additional evidence is heard by the local governing body, where an appeal from their determination is pending, if there are reasonable grounds for the failure to adduce such evidence in the hearing before the local governing body. This rule fits the Housing Authority's situation, since the failure to adduce was based upon the Housing Authority's reliance on the city council's passed motion to incorporate the additional evidence into the record.

[17] The Board points out that the county commissioners meeting was almost two months after the city council meeting, thus, the Housing Authority had ample time to gather up additional evidence it wanted the commissioners to hear; however, the Housing Authority reasonably relied on the city council's passed motion and, as a result, they believed the transcripts were incorporated. (Appellee's Br. 19.) Moreover, the Board argues that the Housing Authority cannot claim a lack of notice that the contents of the city's findings and recommendations were missing the full transcripts, since the Housing Authority received a copy of this document before the meeting; but, the Housing Authority did not receive the record with a copy of material forwarded to the county by the city. (Appellee's Br. 20.)

[18] Furthermore, when Judge Kleven made a determination, by reviewing the incomplete record, statements made by Mr. Warcup, the Board's attorney, was mistakenly attributed to Mr. Melland, the Housing Authority's attorney. (App. 77,

lines 7-8). It is critical that the finder of fact have access to the actual transcripts, so as to alleviate this misunderstanding.

CONCLUSION

[19] The district court erred in applying a narrower standard of review than what was actually applicable here. The Court is given full authority to engage in statutory interpretations and to review the application of the law. The fact that the Authority may have made voluntary payments is irrelevant, as the North Dakota Legislature has usurped the "voluntary payment doctrine." The uniform application of the law is worth protecting. The Appellants respectfully request that this Court reverse the lower court's decision, or, alternatively, remand for a full hearing of the entire record, applying the proper standard of review.

Dated this 27th day of September, 2010.

Respectfully submitted,

/s/ Russ J. Melland
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