Rider v. Lenoir County
RIDER et al. v. LENOIR COUNTY et al.

73 S.E.2d 913 (1953)
No. 384.
Supreme Court of North Carolina.
January 6, 1953.

R. S. Langley, Matt H. Allen and John G. Dawson, Kinston, for plaintiffs, appellants.

Chas. B. Aycock, R. A. Whitaker and Thos. J. White, Kinston (Reed, Hoyt & Washburn, New York City, of counsel), for defendants, appellees.

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¶1 73 S.E.2d 918 JOHNSON, Justice.

¶2 This appeal comes here on a printed record of 499 pages. The complaint covers 93 pages and the judgment 57. More than 30 assignments of error have been brought forward and argued in the briefs. All these have been duly considered and the entire record has been carefully examined. But necessarily we include in this opinion and the preliminary statement of facts only such references to the record as seem pertinent to decision. State v. Smith, 221 N.C. 400, 20 S.E.2d 360; State v. Lea, 203 N.C. 13, 164 S.E. 737.

¶3 The questions raised by the appeal fall into two classes: (1) those which relate to the validity of the bond order and bond election, and (2) those which challenge the legality of the proposed expenditures on the ground that they are materially in excess of the amount approved and limited by vote of the people.

¶4 1. Questions relating to the validity of the bond order and the bond election.—The plaintiffs point to numerous alleged irregularities in both the bond order adopted by the Board of Commissioners and in the conduct of the election as held on 8 July, 1950. However, chief stress seems to be placed on the contention that the bond election, having been held within one month after the regular Democratic run-off primary election of 24 June, 1950, was held in violation of the provisions of this statute:

¶5 "G.S. § 153-93. When election held. —Whenever the taking effect of an order authorizing the issuance of bonds is dependent upon the approval of the order by the voters of a county, the governing body may submit the order to the voters at an election to be held not more than one year after the passage of the order. The governing body may call a special election for that purpose, or may submit the order to the voters at the regular election for county officers next succeeding the passage of the order, but no such special election shall be held within one month before or after a regular election for county officers. Several

orders or other matters may be voted upon at the same election. (1927, c. 81, s. 23.)" (Italics added.)

¶6 The court below found, on uncontroverted evidence: "That one of the days on which the registration books were opened for the registration of voters in said special election to be held July 8, 1952, was Saturday, June 24, 1950. That on Saturday, June 24, 1950, there was held in Lenoir County and throughout the State of North Carolina, a primary election which was a `second primary' or `run-off' primary for the nomination of the Democratic candidate for the U. S. Senate, and in Lenoir County on said date, there was a second primary or run-off primary election for the nomination of the Democratic candidate for Sheriff of Lenoir County; that in Trent Township in Lenoir County on said date, there was a second primary or run-off primary for the nomination of the Democratic candidate for Constable in said township. That the last regular election for the election of County officers held in Lenoir County prior to said special election held on July 8, 1950 was held November 2, 1948. That the next regular election for County officers held in Lenoir County subsequent to said special election held July 8, 1950, was held November 7, 1950."

¶7 The defendants insist (1) that the Democratic run-off primary held 24 June, 1950 was not a "regular election for county officers" in contemplation of G.S. § 153-93, and that this statute does not apply here; but (2) if it be held otherwise, then, in any event, the defendants insist that since the plaintiffs did not institute this suit within the 30-day limitation period prescribed by G.S. § 153-100, the plaintiffs are precluded from attacking the bond election by the express terms of this latter statute.

¶8 As to this, the plaintiffs contend in effect that the 24 June, 1950 Democratic runoff primary was a "regular election for county officers", within the meaning of G.S. § 153-93, and that the 8 July, 1950 bond election, held less then 30 days after the primary election, was held in violation of this statute, and that by reason thereof the bond election was utterly void and subject to attack at any time, irrespective
73 S.E.2d 919 of the 30-day limitation provisions of G.S. § 153-100, upon the theory that in legal contemplation no bond election was held, and that the limitations imposed by G.S. § 153-100 apply only to irregular or voidable elections, as distinguished from those which are utterly void. See City of Monroe v. Niven, 221 N.C. 362, 20 S.E.2d 311.

¶9 An examination of G.S. § 153-93 in the light of these contentions pro and con discloses that when a bond election is required to be held, as in the instant case, the statute by express terms provides that "The governing body may call a special election * * *, or may submit the order to the voters at the regular election for county officers next succeeding the passage of the order, * * *." It thus appears that this statute does not declare as a matter of fixed legislative policy that a bond election must be held more than a month before or after any other election, on a day specially set apart for such election. Indeed, the statute leaves it for the Board of Commissioners to say whether in their discretion the bond proposition shall be submitted at a special election called for that purpose, or passed on by the voters at the "regular election for county officers next succeeding the passage of the (bond) order, * * *." It is only when the Board of Commissioners decide to call a special election that

the statute inhibits holding the special election within one month "before or after a regular election for county officers."

¶10 Moreover, since the express language of the statute provides that in the discretion of the Commissioners the bond order may be submitted to the voters at "a regular election for county officers", it is manifest that the "regular election" contemplated is the regular election at which county officers are actually elected, as distinguished from a primary election held merely for the purpose of nominating candidates later to be voted on. See Constitution of North Carolina, Article VII, Section 1; Article II, Section 27; and Article IV, Sections 24 and 25; G.S. § 163-4.

¶11 And if this be the legislative meaning of "regular election for county officers" when used first in the statute in conferring on the Board of Commissioners discretionary power either to call a special election or to submit the proposed proposition at a "regular election for county officers", then it would seem reasonable to infer that the Legislature placed the same meaning on the expression "regular election" when used the second time in the same statute in directing that when a special election is called it shall not be held within one month before or after a "regular election for county officers." Expressum facit cessare tactitum; 50 Am.Jur., Statutes, Sections 243 and 247.

¶12 A contextual study of this statute leaves the impression that the Legislature did not intend to include within the inhibitions of the statute a party primary.

¶13 All the more would this seem to be so since there is a well-defined distinction between a primary election and a regular election. A primary election is a means provided by law whereby members of a political party select by ballot candidates or nominees for office; whereas a regular election is a means whereby officers are elected and public offices are filled according to established rules of law. In short, a primary election is merely a mode of choosing candidates of political parties, whereas a regular election is the final choice of the entire electorate. G.S. §§ 163-117 to 147; 29 C.J.S., Elections, § 1 (d) and (e); 36 Words and Phrases, p. 667 et seq.

¶14 It is also significant that at the time of the enactment of G.S. § 153-93 in 1927 our Primary Law had been on the statute books about 12 years. Chap. 101, Public Laws of 1915, now codified as G.S. § 163-117 et seq. Thus, the absence from the language of the statute at hand of any reference to primary elections negatives the idea that such an election was intended by the Legislature to be included in the term "regular election for county officers."

¶15 It is also relevant to note in this connection that Chapter 1084, Section (f), now codified as § 18-124(f), which provides that no special election under the Wine and Beer Control Act shall be held within 60 days of certain designated elections, 73 S.E.2d 920 expressly names and places within the inhibited class these elections: "any general election, special election, or primary election in said county or any municipality thereof." See also G.S. § 18-61.

¶16 We conclude that the term "regular election for county officers", as used in G. S. § 153-93 does not include a party primary.

¶17 In this view of the case, we do not reach for decision the question whether a special bond election held within one month before or after a "regular election for county officers" amounts to such violation of G.S. §

153-93 as to render the election wholly void and subject to attack at any time on the theory that no election was held, or merely voidable and subject to attack only within the 30-day period provided by the limitations imposed by G.S. § 153-100.

¶18 The plaintiffs further contend (1) that the bond order as adopted by the Board of Commissioners is violative of G. S. § 153-78 and invalid for duplicity in stating the purpose for which the bonds are or may be issued; (2) that the form of the ballot by which the question of the bond issue was submitted is likewise bad for duplicity; and (3) that the form of the ballot was vague and did not present to the voters the question of acceptance of the offer of the hospital corporation to donate the hospital to the County. These and other alleged irregularities of the same type, challenging the validity of the bond order and bond election, we deem it unnecessary to discuss in detail. Suffice it to say, we think the ballot was sufficient in form to present the question of acceptance of the offer to donate the hospital. Proposition No. 1 set out on the ballot states that the purpose of the proposed bond issue "is to finance the erection of additions to and the alteration and reconstruction of the existing buildings comprising the Memorial General Hospital and the erection of an additional building or buildings for such hospital * * *" as authorized by the bond order of 5 June, 1950. We think it clearly implicit in this language that the County was to accept and take title to the hospital in the event of a favorable vote on the proposed bond issue.

¶19 As to the rest of the alleged irregularities, it is manifest that the plaintiffs, not having commenced this suit within 30 days after publication of the statement of results of the bond election, are now precluded from asserting any right of action based thereon by virtue of the provisions of one or the other of these statutes:

¶20 "G.S. § 153-90. Limitation of action to set aside order.—Any action or proceeding in any court to set aside a bond order, or to obtain any other relief, upon the ground that the order is invalid, must be commenced within thirty days after the first publication of the notice aforesaid and the order or supposed order referred to in the notice. After the expiration of such period of limitations, no right of action or defence upon the validity of the order shall be asserted, nor shall the validity of the order be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period. (1927, c. 81, s. 20.)"

¶21 "G.S. § 153-100. Limitation as to actions upon elections.—No right of action or defense founded upon the invalidity of the election shall be asserted, nor shall the validity of the election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the publication of such statement of result as provided in § 153-99.(1927, c. 81, s. 30.)"

¶22 We conclude that as to both the bond order and the bond election no irregularity now open to challenge has been made to appear. It

follows, then, that the court below correctly held that the bond election is in all respects valid.

¶23 2. The question of limitation on the amount to be expended on the hospital project. Here the plaintiffs, treating the bond election as valid, challenge the legality of the supplemental appropriation of $138,713.80 from surplus nontax funds on the ground that this additional appropriation 73 S.E.2d 921 materially varies the terms of the bond order and the proposition submitted to and approved by the voters.

¶24 It may be conceded that the enlargement of a county hospital is a public purpose for which a county ordinarily may expend unallocated nontax moneys on hand without vote of the people. G.S. § 131-126.23; Adams v. City of Durham, 189 N.C. 232, 126 S.E. 611; Nash v. City of Monroe, 198 N.C. 306, 151 S.E. 634; Mewborn v. City of Kinston, 199 N.C. 72, 154 S.E. 76; Burleson v. Board of Aldermen of Town of Spruce Pine, 200 N.C. 30, 156 S.E. 241.

¶25 And it may be conceded also that where such public funds are to supplement bond moneys, it is not required that the bond order specify, or the voters be advised, that the proceeds of the proposed bond issue are to be used with, or in addition to, a sum of money on hand or otherwise available for the proposed improvement. G.S. § 153-78. See also Atkins v. McAden, 229 N.C. 752, 51 S.E.2d 484.

¶26 However, under the statutory procedure prescribed for submitting a bond proposal to the voters, as in the instant case, the bond order, required to be adopted by the Board of Commissioners and published prior to the election, is the crucial foundation document which supports and explains the proposal to be submitted. G. S. §§ 153-78, 86, 87, 89, and material representations set out in the bond order ordinarily become essential elements of the proposition submitted to the voters.

¶27 Accordingly, where the bond order contains a stipulation definitely fixing the maximum amount of county funds to be expended on a proposed project, such stipulation, treated as a compact, becomes a limitation upon subsequent official acts based on a favorable vote and may not be materially varied. 64 C.J.S., Municipal Corporations, § 1865, p. 408; Moore v. City of Central City, 118 Neb. 326, 224 N.W. 690; Raff v. City of Philadelphia, 256 Pa. 312, 100 A. 815. See also Waldrop v. Hodges, 230 N.C. 370, 53 S.E.2d 263; Teer v. Jordan, 232 N.C. 48, 59 S.E.2d 359; Annotation 117 A.L.R. 892, 895.

¶28 In the case at hand it is noted that the bond order stipulated in effect that the proposed hospital project will require "not to exceed $465,000" of county funds. It now turns out that the amount so limited is not enough to complete the project according to present plans, and in order that the contracts for construction may be let, it appears necessary for the County to appropriate an additional sum of $138,713.80.

¶29 A study of this record impels the conclusion that the proposed supplemental appropriation of $138,713.80 of county funds works a material variance of the proposition submitted to and approved by vote of the people in the 8 July, 1950 election, and is therefore invalid. It necessarily follows that since the total county funds now proposed to be spent on the hospital project is materially in excess of the maximum amount authorized by vote of the people, the defendants are without authority of law to disburse the funds here involved or proceed further

with the hospital project pending further proceedings below. See G.S. § 159-49.1.

¶30 As to this phase of the case, the lower court's conclusion that the plaintiffs are not entitled to relief because of laches is without adequate factual support. The facts found below disclose that the Board of Commissioners did not attempt to make the proposed supplemental appropriation until 2 April, 1952, nor attempt to let the contract for construction until 25 April, 1952. This suit was instituted 15 May, 1952. These findings do not support the conclusion that the plaintiffs are barred by laches.

¶31 For the errors indicated, the judgment below is reversed and the cause remanded for entry of judgment and further proceedings below in conformity with this opinion, and the defendants, if so advised, may (1) consider the feasibility of conforming the proposed project to the limits authorized by the voters, or (2) submit another or other proposals to the voters. Meanwhile, the temporary restraining order will be deemed and treated as in force and effect to the extent of staying disbursement of funds in furtherance of the proposed 73 S.E.2d 922 hospital enlargement project and preventing further action on the part of the defendants in furtherance of the construction project, except in conformity with this opinion.

¶32 Error and remanded.

¶33 PARKER, J., took no part in the consideration or decision of this case.