STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0110

Terry C. Colton, et al. d/b/a Scenic Point Resort,
Appellants,

vs.

Clitherall Township,
Respondent.

Filed January 20, 2009
Affirmed
Connolly, Judge

Otter Tail County District Court
File No. 56-C4-05-001836

Penn C. Brandborg, Brandborg Law Office, 315 South Mill Street, P.O. Box 475, Fergus Falls, MN 56537 (for appellants)

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Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellants, owners of Scenic Point Resort, assert that they were improperly assessed for the paving of two roads in Clitherall Township. Specifically, appellants

argue that respondent failed to provide an assessment methodology as required by Minn. Stat. § 429.031, subd. 1 (2004), that the assessment exceeded the benefit to their property, and that the advertisement and letting of bids did not comply with Minn. Stat. § 429.041, subd. 1 (2004). Because respondent complied with Minn. Stat. § 429.031, the benefit to appellants' property did exceed the assessment, and any argument regarding the bidding process is waived, we affirm.

FACTS

On May 13, 2004, residents living along Quartz Road petitioned respondent Clitherall Township, seeking blacktopping of Quartz Road and 189th Street. Brenda Burton, part owner of Scenic Point Resort (SPR), signed the petition. SPR is a seasonal resort with nine cabins, one residence, and 23 campsites. The north end of Quartz Road, which runs north and south, abuts the resort; while 189th Street, running east and west, intersects, and is roughly perpendicular, to Quartz Road. The main entrance to SPR is 195th Street, which runs east and west to the north of, and parallel to, 189th Street.

At the May 13 meeting, the township board passed a motion to begin an investigation into the cost of the improvements requested in the petition. On July 15, 2004, at a monthly township meeting, the township engineer presented a feasibility report which found the project to be necessary, cost-effective, and feasible with an estimated cost of $200,000. The board approved the report and adopted a resolution to hold a hearing about the project on August 14, 2004.

On August 14, 2004, the board held a hearing on the proposed road improvement project pursuant to Minn. Stat. § 429.031. The township engineer summarized his report

and provided the estimated cost of the project. It does not appear that a description of the methodology to be used in preparing assessments was provided at the hearing as required by Minn. Stat. § 429.031, subd. 1(b).[1] A partial owner of SPR, Terry Colton, questioned how SPR would be assessed and expressed his disapproval of the project. The hearing was recessed to investigate SPR's status and determine how to assess it for the road improvement project.

After the August 14 hearing, the township engineer learned that the road base of 189th Street would need to be rebuilt prior to blacktopping. He prepared a revised feasibility report again finding the project to be necessary, cost-effective, and feasible, but raised the estimated cost to $240,000.

The board met again on September 9, 2004, and received bids for the blacktopping projects from Central Specialties and Mark Sand and Gravel. The board also adopted a special assessment policy dated August 18, at the meeting. A motion was passed to recess the meeting and wait to award the contracts until after the September 11 project hearing.

The board held a new project hearing on September 11, 2004, pursuant to Minn. Stat. § 429.031. A township supervisor discussed the in-progress assessment policy and gave a general description of the methodology to be used in preparing assessments. SPR partial owner Colton again spoke at the hearing. At the conclusion of the hearing, the recessed September 9 township meeting was reconvened. At the reconvened meeting, the board passed a motion to proceed with plans to complete the road improvements to

[1] The minutes do reflect, however, that the methodology was discussed.

Quartz Road and 189th Street. The board further awarded the contract for aggregate base and paving to Mark Sand and Gravel and the contract for restructuring the road bed on 189th Street to Christenson Construction. The contractors began work on the project within days of the adoption of the resolution.

Between September 11, 2004, and the final assessment hearing on September 10, 2005, the methodology and procedure related to the assessments for the road improvement project were discussed at public meetings on multiple occasions. In February 2005, an appraiser performed two analyses for the township as part of the assessment process: (1) a comparative market analysis to determine the value added due to blacktopping and (2) an appraisal of SPR and the increase in its value due to blacktopping. This appraiser eventually concluded that the increase in value to SPR due to the blacktopping was $98,686.

On August 10, 2005, Colton objected to the special assessment. The township board held its final public assessment hearing on the project one month later. The board adopted a special assessment resolution for the road improvements. The total amount assessed for the road improvement was $163,134.92, with SPR paying $19,882.

Appellants, owners of SPR, appealed the special assessment to the district court under Minn. Stat § 429.081 (2004). The district court held hearings on July 24 and 25, 2007 and affirmed the special assessment on November 26. This appeal follows.

D E C I S I O N

I. The district court's conclusion that respondent met the requirements of Minn. Stat. § 429.031, subd. 1 as applied to appellants is supported by the record.

Appellants contend that respondent did not meet the requirements of Minn. Stat. § 429.031, subd. 1 because it failed to supply the methodology for applying assessments at the project hearing and changed the methodology after the project was bid and completed. The district court disagreed, stating that "[t]he special assessment policy dated August 18, 2004, available at the hearing, substantially met the requirement of a description of the methodology used to calculate individual assessments." "The scope of our review is a careful examination of the record to ascertain whether the evidence as a whole fairly supports the findings of the district court and whether these in turn support its conclusions of law and judgment." *Dosedel v. City of Ham Lake*, 414 N.W.2d 751, 756 (Minn. App. 1987) (quotation omitted).

Minn. Stat. § 429.031, subd. 1(b) states:

> Before the adoption of a resolution ordering the improvement, the council shall secure from the city engineer or some other competent person of its selection a report advising it in a preliminary way as to whether the proposed improvement is necessary, cost-effective, and feasible and as to whether it should best be made as proposed or in connection with some other improvement. The report must also include the estimated cost of the improvement as recommended. A reasonable estimate of the total amount to be assessed, and a description of the methodology used to calculate individual assessments for affected parcels, must be available at the hearing. No error or omission in the report invalidates the proceeding unless it materially prejudices the interests of an owner.

The record indicates that a methodology was provided at the September 11, 2004 project hearing. The cost of the improvement and a reasonable estimate of the total amount to be assessed were also provided at the hearing. Appellants are simply seeking additional procedural requirements not written into the statute. They take issue with the nonavailability at the hearing of the following items: amount to be paid by respondent, total amount to be assessed against all properties (after respondent's share has been deducted), definition of commercial property, definition of residential property, number of residential properties, number of combined residential lots, definition of agricultural property, number of agricultural properties, or number of large acreages, what the interest will be used for, and when will an assessment be deferred. The statute simply does not require anything more than a description of the methodology to be used, which was provided at the September 11 hearing in the special assessment policy.

Furthermore, any error or omission in the report only invalidates the proceeding if it materially prejudices the interests of an owner. This court does not presume error on appeal. *White v. Minnesota Dep't of Natural Resources*, 567 N.W.2d 724, 734 (Minn. App. 1997) (quoting *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975)), *review denied* (Minn. Oct. 31, 1997). Furthermore, appellants bear the burden of demonstrating that any error is prejudicial. *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993), *review denied* (Minn. June 28, 1993). Appellants are unable to demonstrate prejudice, other than to argue that they could not determine their approximate maximum financial responsibility from the information provided at the project hearing. They fail to cite to caselaw or statutory language to

clarify that being able to make such a maximum approximation is required. An owner of SPR was present at the September 11 hearing and formally objected to the process on August 10, 2005. Appellants were aware of the ongoing assessment process and voiced their discontent on several occasions. But because they did not demonstrate prejudice, any minor flaws or vagueness in the methodology were not sufficient to invalidate the project. *See Rhodenbaugh v. City of Bayport*, 450 N.W.2d 608, 612 (Minn. App. 1990) (concluding that minor irregularities that are not prejudicial to the owner do not invalidate special assessment proceedings), *review denied* (Minn. Mar. 16, 1990).[2] The district court's conclusion that a sufficient methodology was available at the project hearings is supported by the record.

Lastly, appellants argue that because the methodology for the financing changed over time, it was improper. Appellants rely on *Independent School District No. 254 v. City of Kenyon* for this proposition. 411 N.W.2d 545 (Minn. App. 1987). This reliance is misplaced. In *Kenyon*, the city completely changed its financing from paying for a sewer improvement out of the city's general fund to specially assessing homeowners the cost. *Id.* at 548. The court noted that the citizens of Kenyon were denied their opportunity to voice their objections to the project because by the time it was determined that they would be assessed the costs, the project was complete. *Id.* That situation is not comparable to the one here. In this case, appellants were aware from the beginning that

[2] Appellants argue that because *Rhodenbaugh* was a Minn. Stat. § 429.031, subd. 3 case, not a Minn. Stat. § 429.031, subd. 1 case, its analysis regarding the nonprejudicial effect of minor irregularities does not apply. This is incorrect, considering that the language stating that minor errors or omissions are not fatal to the process unless prejudicial to the owner is actually found in Minn. Stat. § 429.031, subd. 1.

they would be assessed the costs for the road improvement project. They had multiple opportunities to voice their dissent and did so. The question of the particulars of the assessment may have been altered slightly between the project hearing and the final assessment hearing, but the underlying financing methodology did not change.[3]

II. The district court's conclusion that appellants received a special benefit from the improvement that exceeded the amount of the assessment is supported by the record.

Appellants argue that no assessment could properly be made against them for the road improvement project because the market value of SPR did not increase after the roads were blacktopped. In order for a special assessment to be constitutional, the assessment may not exceed the special benefit, which is measured by the increase in the market value of the land owing to the improvement. *Tri-State Land Co. v. City of Shoreview*, 290 N.W.2d 775, 777 (Minn. 1980). "In an action contesting an assessment, the city is presumed to have set the assessment legally until it is proven to the contrary." *Id.* "On appeal, a trial court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

At the district court's hearing, the township's appraiser concluded that the value of the improvements exceeded the amount of the assessment. The district court found the township's appraiser credible and concluded that the market value of SPR had improved.

[3] Moreover, any alteration over time actually benefited appellants. Instead of assessing SPR for 19 shares, one for each of its yardscapes, the township eventually assessed the property as one commercial share.

The district court is to be given due regard when judging the credibility of witnesses. Minn. R. Civ. P. 52.01.

Appellants argue that the district court erred by relying on the township's appraiser because he provided an invalid "lump-sum" assessment. In support of this argument, appellants rely on *Cont'l Sales and Equip. v. Town of Stuntz*. 257 N.W.2d 546 (Minn. 1977). In that case, the township passed a special assessment for a sewer project of $950 per residential dwelling, $2,000 per commercial building, and $5,000 per industrial building. *Id.* at 547. The court concluded that this "lump-sum approach based on present use bears little if any relation to the market value of the improvement." *Id.* at 550. But the court further noted that "any method resulting in a fair approximation of the increase in market value for each benefited parcel may be used. A method which on its face appears to be a fair approximation will be presumed valid, with the burden resting upon the objector to show its invalidity." *Id.* In this case the township's appraiser used a complicated method of comparison between SPR and other similarly situated properties, even allowing for a discount due to the fact that a portion of gravel would remain along the route to SPR. This was not a lump-sum assessment as in *Stuntz*, and appellants have not demonstrated that this method was invalid.

Appellants further argue that SPR did not have a dust problem, and therefore, the district court's finding that the reduction of dust contributed to the increased market value of the property was erroneous. The district court considered the diminished amounts of dust on that part of the property abutting Quartz Road as one of several reasons that the road improvements increased the market value of SPR. This finding is not clearly

erroneous. The township supervisor testified that there were "a lot of complaints about the gravel being dusty." Moreover, it is generally known that gravel roads often create dust. Furthermore, the presence of dust was merely one factor considered by the district court when assessing the increased market value of SPR.

III. Appellants waived their argument regarding whether or not respondent advertised and let bids in compliance with Minn. Stat. § 429.041, subd. 1.

Appellants argue that respondent did not properly advertise the project in compliance with the bidding procedure found in Minn. Stat. § 429.041, subd. 1. This argument was not raised in the district court.[4] All objections to an assessment are waived if not presented to the district court on appeal. Minn. Stat. § 429.081. Therefore, appellants cannot now challenge the bidding procedure and any detrimental effect the failure to follow such procedure had on their special assessment.

Affirmed.

[4] Appellants assert that the argument was raised in the district court by the mere introduction of Exhibit 11 at trial. Exhibit 11 is the actual advertisement for bids and was introduced as an exhibit by respondent without any further discussion at trial. Appellants also assert that they raised the issue by their submission of proposed findings of fact and conclusions of law and their brief supporting the proposed findings of fact and conclusions of law. However, appellants presented no facts or arguments on this issue at the actual trial before the district court. Therefore, this argument fails.