STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1092

In the Matter of: Appeal of Special Assessment
Adopted by the City of Sauk Rapids
against James W. Miller

Filed July 21, 2009
Affirmed
Toussaint, Chief Judge

Benton County District Court
File No. 05-CV-06-3528

Frank J. Rajkowski, Gregory J. Haupert, Rajkowski Hansmeier LTD, 11 Seventh Avenue North, P. O. Box 1433, St. Cloud, MN 56302-1433 (for appellant James W. Miller)

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Considered and decided by Minge, Presiding Judge; Toussaint, Chief Judge; and Collins, Judge.*

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

TOUSSAINT, Chief Judge

Appellant James W. Miller challenges the special assessment levied on his property by respondent City of Sauk Rapids, arguing that (1) the district court's findings

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

of fact are not supported by the record; (2) the previous property owners' settlement agreement is not binding on him; (3) even if the prior agreement were binding on him, its terms no would longer apply; (4) respondent did not have statutory authority to assess the property for road improvements; and (5) respondent did not properly calculate the amount of the assessment. Because the evidence supports the district court's factual findings, which in turn support its conclusions of law, we affirm.

D E C I S I O N

On April 3, 1995, Ambrose and Mary Jane Kukloks, the previous owners of appellant's property, entered into a settlement agreement with respondent because it had initiated condemnation proceedings to take, by eminent domain, a portion of their property, then located in Sauk Rapids township, to construct a new road to provide highway access from the property. Respondent also planned to extend city water, sanitary sewer, and storm sewer utility services to the area immediately abutting the property because of residential and commercial development activity. But respondent did not plan to extend these utilities to the property itself.

The Kukloks agreed to the amount of the assessment to be levied for street and utility improvements at the time of future annexation, including charges for storm sewer, street construction, curb and gutter, sanitary sewer, water-main construction, highway-access fees, land-acquisition fees, and wetland fees. The agreement provided:

> If the Kukloks annex their property within ten years from the date of this Agreement, interest will not be payable on the amount of the assessments . . . . [but] [i]f the Kukloks annex their property after ten years from the date of this Agreement, their property shall be assessed at the rate in effect at that time and all agreements herein as to the amount of assessments and/or

interest on those assessments shall have no further affect.

Appellant purchased the property from the Kukloks in 1998. It was annexed in 2006 under to an agreement between respondent and the township. Appellant challenges the 2006 special assessment of $349,596.67 levied against the property for a street-and-utility-improvement project completed in 1996.

A district court's review of a special assessment "must be based upon independent consideration of all the evidence." *McNally Dev. Corp. v. City of Winona*, 686 N.W.2d 553, 559 (Minn. App. 2004). "This court cannot upset this de novo review of the special assessment when the district court's determination is supported by the record as a whole." *Id.* "Our scope of review is a careful examination of the record to determine whether the evidence fairly supports the district court's findings and whether those findings support its conclusions of law." *Id.*

"The cost of any improvement, or any part thereof, may be assessed upon property benefited by the improvement, based upon the benefits received, whether or not the property abuts on the improvement . . . ." Minn. Stat. § 429.051 (2008). A municipality's power of assessment is limited to the following conditions: (1) the land must receive a special benefit from the improvement; (2) the assessment must be uniform upon the same class of property; and (3) the assessment amount may not exceed the special benefit. *Carlson-Lang Realty Co. v. City of Windom*, 307 Minn. 368, 369, 240 N.W.2d 517, 519 (1976) (citation omitted). The special benefit is measured by the increase in market value of the affected property as a result of the improvement. *Id.* Generally, any valuation method that approximates the increase in a subject property's

market value before and after the municipal improvement may be used. *DeSutter v. Township of Helena,* 489 N.W.2d 236, 238 (Minn. App. 1992), *review denied* (Minn. Sept. 30, 1992). But an assessment is "void on its face" if it fails "even to approximate a market-value analysis." *Continental Sales & Equip. v. Town of Stuntz,* 257 N.W.2d 546, 551 (Minn. 1977).

A city is presumed to have legally assessed its property until proven to the contrary, and the introduction of its assessment roll into evidence constitutes prima facie proof that the assessment does not exceed the special benefit to the property. *Bisbee v. City of Fairmont,* 593 N.W.2d 714, 718 (Minn. App. 1999). But the party appealing the assessment can overcome that presumption by introducing competent evidence that the assessment is actually greater than the benefit. *Carlson-Lang Realty Co.*, 307 Minn. at 370, 240 N.W.2d at 519. If the city then presents evidence that the amount of the assessment is equal to or less than the increase in the market value of the property, the district court must weigh the parties' evidence and make a factual determination. *Id.* at 370, 240 N.W.2d at 519-20.

Appellant makes five arguments on appeal. First, he claims that the district court's findings regarding the parties' intent to seek annexation of the property when the settlement agreement was drafted are not supported by the record. But that issue is irrelevant to a determination of the lawfulness of the assessment. Even if the district court's finding that respondent entered into the settlement agreement instead of immediately annexing the Kukloks' property in 1996 was clearly erroneous, any error in the finding was harmless. *See* Minn. R. Civ. P. 61 (courts must disregard any error that

does not affect parties' substantial rights).

Second, appellant argues that the district court erred in holding that the settlement agreement was binding upon him as a subsequent purchaser. The agreement mentions neither any application to subsequent purchasers nor running with the land.

A covenant cannot run with the land unless the covenanting parties intend their successors to be bound by the terms of the covenant. *In re Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 369 (Minn. 1979). Generally speaking, a covenant touches or concerns the land if it concerns the occupation or enjoyment of the land and the liability to perform it, and the right to take advantage of it must pass to the assignee. *Id.* Here, the agreement "touches" the land because it concerns the possession and enjoyment of the property and the right of the owner to take advantage of the improvements paid for by respondent. The benefit gained by the Kukloks following the improvements was not a personal benefit to them; it stayed with the land to be enjoyed by appellant.

Additionally, a special assessment is an obligation that attaches to the property. Minn. Stat. § 429.061, subd. 2 (2008) ("The assessment, with accruing interest, shall be a lien upon all private and public property included therein . . . ."). An assessment for improvements is made upon the subject land in an in rem proceeding and is not a personal obligation upon the owner. *Ind. Sch. Dist. of White Bear Lake v. City of White Bear Lake*, 208 Minn. 29, 35-36, 292 N.W. 777, 781 (1940) ("The liability for the benefits is imposed on the land, not the owner. All the proceedings for levying, collecting and enforcing payment of the assessment are in rem against the land and are not in personam against the owner.").

As the district court noted, appellant was aware of the pending assessment and settlement agreement when he purchased the land and used the existence of the settlement agreement to negotiate a lower price. The district court did not err in concluding that the settlement agreement ran with the property and made appellant, as the current owner, liable for the special assessment attached to the property in an in rem proceeding.

Third, appellant contends that, even if the agreement is binding upon him, its terms no longer apply because the property was annexed after the ten-year window and the Kukloks did not request annexation. He argues that the agreement "contemplates an affirmative act on behalf of the Kukloks seeking annexation of their property as a prerequisite to the provision becoming effective."

"[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). A reviewing court must "construe a contract as a whole so as to harmonize all provisions, if possible, and to avoid a construction that would render one or more provisions meaningless." *Stiglich Constr., Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn. App. 2001) (citation omitted), *review denied* (Minn. Jan. 30, 2001).

As a whole, the settlement agreement's purpose was to resolve the condemnation damages and to provide certainty to the parties as to the amount of the assessment and when it would be payable. The Kukloks benefitted by being able to cap the assessments for ten years and continue farming on township property. Respondent benefitted by

being able to recoup its carrying costs if the annexation did not occur within ten years. By appellant's interpretation, the agreement would not apply if respondent and the township agreed to annex the property, pursuant to their annexation agreement, without the Kukloks' consent. If such an annexation occurred within ten years of the agreement, the Kukloks would be deprived of the benefit of the agreement. The district court did not err in finding that the agreement bound appellant regardless of which party sought annexation of the property.

Fourth, appellant argues that respondent did not have authority to assess the property for road improvements because Minn. Stat. § 429.051 (2008) allows a municipality to "subsequently" reimburse itself only for "water, storm sewer, or sanitary sewer improvement," when the property at issue abuts the improvement but was "not previously assessed." But the property here was originally assessed, with a notation that the assessment was deferred per agreement, in 1996. The statutory phrase "not previously assessed" suggests a situation where a city later assesses a property not included in the original assessment. Thus, section 492.051 did not preclude assessment for utilities and road improvements.[1]

Fifth, appellant claims that respondent did not properly calculate the amount of the assessment because it used unrelated construction costs for another project completed in 2003-2004. For this claim, appellant relies on *Bisbee*, 593 N.W.2d. at 719 (holding that

[1] Additionally, appellant's reliance on section 492.052 (which allows a city to construct street improvements outside its jurisdiction with the consent of the affected township and then subsequently assess the benefitting properties) is misplaced because the newly constructed street was constructed within respondent's boundaries, not within the township.

city's method of calculating special assessment is invalid if "completely unrelated to the costs of construction of a particular improvement in a particular year.") But the record indicates that respondent calculated the assessment using the *actual* costs of construction from the 1995-1996 project and applying the "current" assessment rates, pursuant to the agreement, by using the rates of an earlier, yet similar, project and adjusting for inflation. Appellant argues that this method did not approximate actual project costs and was arbitrary. But respondent attempted to determine how much the 1995-1996 project would have cost in 2006 and attempted to estimate the benefit received by the property in 2006 by using numbers from the actual project and applying rates to adjust for the lapse in time.

As the district court noted, respondent could have calculated the assessment by applying interest for a period of ten years to the original assessment amount, and the assessment levied in 2006 would have been even higher. The district court did not err in affirming respondent's method of calculating the special assessment on appellant's property.

Because the record establishes that the land received a special benefit from the improvements, that the assessment did not exceed the special benefit, and that respondent calculated the assessment according to the parties' agreement while also considering market value, the district court did not err in affirming the assessment.

Affirmed.