STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1536

SJC Properties LLC, et al.,
Respondents,

vs.

City of Rochester,
Appellant.

Filed July 7, 2009
Affirmed
Worke, Judge

Olmsted County District Court
File Nos. 55-C6-05-001988, 55-C1-05-001994, 55-C3-05-001995, 55-C5-05-001996, 55-C6-05-001991, 55-C7-05-001997, 55-C8-05-001992

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Considered and decided by Minge, Presiding Judge; Worke, Judge; and Muehlberg, Judge.*

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

WORKE, Judge

In this assessment dispute, appellant argues that the district court (1) erroneously excluded part of the project from its consideration and (2) made several findings that are not supported by the record. Respondent-property owners argue that the district court abused its discretion by failing to grant them leave to amend their pleadings to request attorney fees. We affirm.

FACTS

Respondents SJC Properties, LLC, Franklin P. Kottschade, Willow Creek Commons, LLC, and B & F Properties, LLC, own approximately 200 acres of undeveloped real estate known as Willow Creek Commons (WCC) located in appellant City of Rochester. WCC is located at the southwest corner of 40th Street Southwest and Highway 63; it is bordered by 40th Street to the north, West 80 development to the south, 11th Avenue Southwest to the west, and Highway 63 to the east.

Kottschade either owns or manages all of the WCC parcels. He took title to his WCC parcels in 1994 intending to develop the property for commercial use. But appellant denied Kottschade's application to rezone the property from low-density single-family use to commercial use. In 1995, Rochester Olmsted Council of Governments

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

(ROCOG) completed a study setting forth recommendations to improve transportation along Highway 63, which would require modifications to 40th and 48th Streets. Kottschade pointed out to appellant that the redesign of Highway 63 was inconsistent with WCC's low-density single-family-use zoning. As a result, Kottschade asked appellant to reconsider his rezoning application. In 1996, appellant approved Kottschade's application to rezone approximately 82 acres of the eastern part of the property closest to Highway 63 for commercial use. In 1998, appellant approved Kottschade's application to rezone approximately 55 additional acres for commercial use. In 2003, appellant approved Kottschade's proposal for commercial development of approximately 70 acres (GDP 214) on the eastern portion of the property adjacent to Highway 63. On March 21, 2005, appellant approved the commercial plat associated with GDP 214, which was conditioned on three access alternatives: (1) improvements to 40th Street, (2) the connection of the frontage road to 48th Street, or (3) Minnesota Department of Transportation (MnDOT) granting temporary access to Highway 63.

MnDOT ultimately undertook the transportation-improvement project recommended by the ROCOG. On July 8, 2004, appellant passed a resolution establishing the traffic improvement district program (TID), which establishes predetermined fees in an amount proportionate to the need for public facilities generated by development. Property owners were given the option to either voluntarily pay the TID fee or have a special assessment levied against them. The TID fee applicable to respondents' property was $1,716,586.34, which respondents chose not to pay.

On March 31, 2005, appellant provided notice of a special-assessment hearing. Appellant indicated that benefiting property owners of vacant developable land would be required to pay a portion of the reconstruction of 40th Street Southwest (40th Street project). On April 18, 2005, appellant approved a special assessment of costs associated with the 40th Street project and adopted an assessment roll of those costs against respondents' property. The special assessment levied against respondents' property was $1,716,586.34—the same amount of the TID fee. In May 2005, respondents appealed the special assessment to the district court, arguing that the fee was far in excess of the benefit to the property.

In January 2008, the district court held a hearing. Both parties offered expert-witness testimony concerning the special benefit conferred as a result of the 40th Street project. The district court relied on the testimony offered by appraiser Robert Strachota. Strachota prepared a "before" and "after" appraisal of WCC to determine whether a special benefit was conferred by the 40th Street project. Strachota determined that commercial and residential development was the best use before and after the April 18, 2005 assessment date. Regarding the highest and best use in the "before" condition, Strachota, using the comparative sales approach, valued WCC at $18,390,000, and in the "after" condition at $18,915,000. Strachota determined that the total benefit to the property was $525,000. Strachota additionally used two other methods to determine the benefit to the property, and each resulted in the conclusion that the assessment exceeded the special benefit.

The district court found that the highest and best use of the property in its "before" condition was commercial-residential mixed use. The district court relied on facts that existed prior to the April 18, 2005 assessment, including: (1) significant portions of WCC were rezoned to commercial use in 1996 and 1998; (2) commercial development GDP 214 was approved in September 2003; (3) appellant approved the preliminary plat for GDP 214 in March 2005; and (4) respondents established two points of access to WCC at 40th and 48th Streets prior to the special-assessment levy. The district court found that the only improvements appropriately considered in determining the amount of the special benefit were those provided by the 40th Street project funded by appellant. The district court did not consider the 40th Street interchange or the 48th Street interchange as improvements benefitting respondents because neither was funded by appellant, and the 48th Street interchange was completed two years earlier. The district court determined that the interchanges were almost entirely state and federally funded and were considered, even by appellant's witnesses, to be components of the regional-transportation system. Based on Strachota's appraisal, the district court determined that the base amount of the special benefit conferred on WCC was $525,000. The district court, concluding that the special assessment levied against the property exceeded the special benefit conferred, set aside the special assessment. This appeal follows.

D E C I S I O N

Special Assessment

Appellant argues that the district court erred in setting aside the special assessment and challenges several of the district court's findings. We will not upset the district

court's de novo review of the special assessment when the district court's determination is supported by the record as a whole. *Dosedel v. City of Ham Lake*, 414 N.W.2d 751, 756 (Minn. App. 1987). 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.*

40th Street SW Interchange

The district court concluded that the 40th Street project does not include the 40th Street-Highway 63 interchange because appellant paid for only a very small amount of the interchange. The district court found that (1) the interchange was part of a regional traffic plan for the entire area; (2) appellant did not create a TID at either 40th Street or 48th Street, perhaps because almost exclusively federal and state dollars were used to construct those interchanges; (3) the cost of the project, between $5.97 million and $6.3 million, did not include the interchange cost; (4) the special assessment levied against the property was exactly the same as the TID fee that respondents chose not to pay and the TID fee had no interchange fee within it; and (5) there was no showing that the municipality had been reimbursed for the 40th Street interchange costs.

> 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 and whether or not any part of the cost of the improvement is paid from the county state-aid highway fund, the municipal state-aid street fund, or the trunk highway fund. The area assessed may be less than but may not exceed the area proposed to be assessed as stated in the notice of hearing on the improvement, except as provided below. The municipality may pay such portion of the cost of the improvement as the council may determine from general

> ad valorem tax levies or from other revenues or funds of the municipality available for the purpose. The municipality may subsequently reimburse itself for all or any of the portion of the cost of a water, storm sewer, or sanitary sewer improvement so paid by levying additional assessments upon any properties abutting on but not previously assessed for the improvement, on notice and hearing as provided for the assessments initially made. To the extent that such an improvement benefits nonabutting properties which may be served by the improvement when one or more later extensions or improvements are made but which are not initially assessed therefore, the municipality may also reimburse itself by adding all or any of the portion of the cost so paid to the assessments levied for any of such later extensions or improvements, provided that notice that such additional amount will be assessed is included in the notice of hearing on the making of such extensions or improvements. The additional assessments herein authorized may be made whether or not the properties assessed were included in the area described in the notice of hearing on the making of the original improvement.

Minn. Stat. § 429.051 (2008). Introduction of the municipality's assessment roll generally "constitutes prima facie proof that the assessment does not exceed special benefit." *Carlson-Lang Realty Co. v. City of Windom*, 307 Minn. 368, 370, 240 N.W.2d 517, 519 (1976). But an assessment is "void on its face" if it fails to even "approximate a market value analysis." *Cont'l Sales & Equip. v. Town of Stuntz*, 257 N.W.2d 546, 551 (Minn. 1977). The assessment roll was admitted into evidence; thus, respondents were required to rebut the assumed validity of the assessment fee. *See Carlson-Lang*, 307 Minn. at 370, 240 N.W.2d at 519 (stating that a party may overcome that presumption by "introducing competent evidence that the assessment is greater than the increase in market value of the property due to the improvement").

The issue here is whether appellant could levy a special assessment for the cost of improvements even though appellant failed to establish that it paid for the improvements. Appellant does not argue that it paid for the improvements; rather, appellant relies on *In re Assessment for State Aid Rd. Improvement being Mackubin St. v. Vill. of Shoreview* (*In re Mackubin St.)*, in which the supreme court held that when the commissioner of highways reimbursed the village out of state funds for improvements, the village could still assess the benefitted property. 279 Minn. 193, 195, 155 N.W.2d 905, 906 (1968).

The district court determined that because appellant did not pay for the interchange improvements, it could not assess respondents for the amount associated with that project. That project was funded by federal dollars (80%) and state dollars (20%); the extent of appellant's participation is unclear. Appellant argues that it can be reimbursed for the cost of the project even though it did not pay for it, relying on Minn. Stat. § 429.051 and *In re Mackubin St.* But Minn. Stat. § 429.051 states that the cost can be assessed whether or not any part of the cost of the improvement is paid from the county state-aid highway fund, the municipal state-aid street fund, or the trunk-highway fund, and *In re Mackubin St.* involved the reimbursement to a village from state funds; neither contemplate the involvement of federal funding. Therefore, the district court did not err in determining that the assessment must be set aside because appellant did not fund the project and the project benefitted an entire region, not just abutting properties.

Findings

Appellant challenges several of the district court's findings. First, appellant argues that it was not required to prepare a feasibility report. Appellant contends that the

district court found that the absence of a summary feasibility report was not grounds to invalidate the assessments; yet, the court mentioned the lack of a feasibility report as a basis to evaluate appellant's case. The district court found that "[t]here is a statutory requirement to prepare and make available to the public at the hearing a 'feasibility report.' Although [appellant] was aware of this statutory requirement, no such report was made available at the special assessment hearing."

Under Minn. Stat. § 429.031 (2008), before the adoption of a resolution ordering an 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 district court did note that appellant was statutorily required to prepare and make available a feasibility report. The district court concluded that appellant failed to secure and make available the feasibility report and that appellant admitted that it technically failed to prepare or produce a written "feasibility" report. The district court also stated that appellant suggested that it was enough that the city council was itself well-versed as to the feasibility of the project by virtue of having previously received and reviewed such documents as the Trunk Highway 63 Corridor Study, Trunk Highway 63

and 40th Street EAW, and Willow Creek TID plan. The court stated that respondents conceded, however, that appellant's failure was "not critical." The court stated that it mentioned appellant's failure because "it is typical of the approach of [appellant] with respect to th[e] entire roadway project. They didn't get a feasibility study, they didn't have an appraisal prior to the assessment, . . . and their assessment was in the amount of a sum they tried to have [respondents] 'voluntarily' pay pursuant to their [TID] formula." The district court raised appellant's failure to produce the report and failure to obtain a formal appraisal prior to the adoption of the assessment to reiterate that appellant failed to do several things in calculating an accurate assessment. But the record does not support appellant's argument that the district court relied on appellant's failures in setting aside the special assessment.

Second, appellant argues that although the district court did not make a determination regarding the uniformity of the benefit, it concluded that developed properties should have been assessed the same amount. While the assessment must be uniform upon the same class of property, the district court did not set aside the assessment for lack of uniformity. *See Carlson-Lang*, 307 Minn. at 369, 240 N.W.2d at 519 (stating that a municipality's assessment power is limited to a special benefit, the uniform assessment upon the same class of property, and the assessment must not exceed the special benefit). Rather, the district court set the assessment aside because it far exceeded the benefit conferred upon respondents' property.

Finally, appellant argues that the district court clearly erred in finding that respondents' access to 48th Street was available. To support this finding, the district

court relied on Kottschade's testimony, which the district court was permitted to do. *See* Minn. R. Civ. P. 52.01 (stating that findings of fact of a district court sitting without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses"). And the record supports this finding because the approval of the preliminary plat was conditioned on (1) improvements to 40th Street, (2) the connection of the frontage road to 48th Street, or (3) MnDOT granting a temporary access to Trunk Highway 63. This was the language in appellant's findings of fact, conclusions of law and order approving the preliminary plat. Kottschade testified that he secured an agreement for the connection of the frontage road to 48th Street. The district court found that there was no evidence to contradict Kottschade's testimony. And the record includes a development agreement dated March 15, 2005, prior to the assessment, identifying the frontage road extending from 48th Street to the southern boundary of WCC. Thus, the record supports the finding that respondents demonstrated access to 48th Street.

Attorney fees

Respondents argue that the district court abused its discretion by denying their motion to amend their pleadings to request attorney fees. The decision whether to permit a party to amend the pleadings is within the district court's discretion, and we will not disturb that decision absent a clear abuse of that discretion. *Warrick v. Giron*, 290 N.W.2d 166, 169 (Minn. 1980).

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is

> permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

Minn. R. Civ. P. 15.01.

The district court determined that justice did not require the court to allow respondents to amend their pleadings because they moved to amend at such a late date. The district court found that respondents had several years to amend their pleadings and that appellant would be prejudiced if respondents were allowed to amend their pleadings. The issue of prejudice in this matter relates to the fact that respondents would have been permitted attorney fees under the federal civil-rights statutes.

The district court was within its discretion in denying the motion to amend because the motion was untimely—the case was filed in 2005 and respondents did not move to amend until after the trial in 2008. Further, appellant would have been prejudiced because attorney fees would have been permitted under a federal statute, which could have moved the case to federal court and changed the scope of appellant's affirmative defenses and/or discovery.

Affirmed.