

FILED

JAN 26 1989

CLERK SUPREME COURT

287

IN THE COURT OF APPEALS OF IOWA

ANTHONY C. WESTERHOF and)
MARGARET G. WESTERHOF,)

Petitioners-Appellants,)

vs.)

CITY OF CARLISLE, IOWA, and)
CARLISLE CITY COUNCIL,)

8-512

88-288

Respondents-Appellees.)

Appeal from the Iowa District Court for Warren County
(No. 21147), Richard Morr, Judge.

Petitioners appeals the district court decision
affirming the special assessment made against their
property. **AFFIRMED.**

Jeffrey G. Flagg, Des Moines, for petitioners-
appellants.

Robert L. Stuyvesant of Schooler, Stuyvesant & Benton,
Carlisle, for respondents-appellees.

Heard by Oxberger, C.J., and Donielson and Schlegel,
JJ.

DONIELSON, J.

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Petitioners brought this action to challenge a special assessment made against them by the City of Carlisle for improvements to New First Street located within the City. They appeal from the decision of the district court which confirmed the assessment levied against their property. Petitioners claim the district court erred in affirming the assessment formulated and used by respondents and that the amount of the assessment is excessive.

Petitioners Anthony C. Westerhof and Margaret G. Westerhof own real property in the City of Carlisle. When petitioners bought this property in 1955, there was a road on the east side of their property called First Street. This was not a paved road and was never officially dedicated as a street. In 1957, New First Street was built farther to the east and eventually Old First Street became overgrown with weeds and shrubs. In 1987, the Carlisle City Council passed a resolution of necessity for a paving project on New First Street. A special assessment was made against the Westerhofs for \$18,326.75. The Westerhofs filed a petition in district court challenging the special assessment made against them on the grounds that Old First Street had not been vacated and the property between the two First Streets was owned by the City. The district court confirmed the assessment and dismissed the petition.

Petitioners contend that Old First Street is a dedicated roadway under the doctrine of common law dedication and that it was never vacated by the City. They point out that Old First Street was used by the public before New First Street was built. The Westerhofs testified that they did not consider the land between the two streets to be theirs. The Westerhofs claim that their land does not abut New First Street and there is no direct access from petitioners' property to New First Street. In the alternative, petitioners ask that the amount of the assessment against them be reduced.

Our review is de novo, although we give weight to the findings of the trial court. Goodell v. City of Clinton, 193 N.W.2d 91, 95 (Iowa 1971). The City's determinations of value and amount are presumed correct. Uhlenhake v. City of Ossian, 418 N.W.2d 642, 647 (Iowa 1988). In challenging the amount of the special assessment, the burden is on the property owner to show that the assessment is excessive by evidence which includes proof of the actual benefit to this property, without which the assessment must stand. City of Clive v. Iowa Concrete Block & Material Co., 298 N.W.2d 585, 592 (Iowa 1980).

The general rule is that a "local improvement, although it may incidentally benefit all the property in the municipality and the public at large, is made primarily for the accommodation and convenience of inhabitants of a

particular area in the community whose property receives a special benefit from the improvement either in the form of service or enhancement of value." 70 Am. Jur. 2d Special or Local Assessments § 20 (1973) quoted with approval in Morrison v. City of Washington, 332 N.W.2d 125, 128 (Iowa App. 1983).

Iowa courts cannot redetermine which lots receive a special benefit as this is a legislative function. City of Clive, 298 N.W.2d at 590. The courts can only review the amount of the special assessment. Id.

Whether the Westerhofs' land actually abuts "New First Street" or not is irrelevant to our review. The City has determined that their lot receives a special benefit from the paving project. Although petitioners' driveway does not directly open onto "New First Street," its opening is only twenty to thirty feet from the intersection of "New First" and Circle Drive. This property fits within the general rule that it will receive a special benefit. Therefore, we will not interfere with the legislative function and redetermine whether this lot receives a special benefit.

As to the amount of the assessment, petitioners have failed to satisfy their burden to show that they were charged for property they did not own. There was no statutory dedication shown for "Old First Street." Even if there was common law dedication, the land was clearly

abandoned by the City. Kelroy v. City of Clear Lake, 232 Iowa 161, 168, 5 N.W.2d 12, 17 (1942). "New First" was built in 1957 and the old dirt road has become overgrown with trees and bushes. Petitioners have removed firewood from the area in question and have paid taxes on the area for approximately thirty years. Westerhofs did not conduct a formal survey and could only testify about the legal description of their lot in a general way. Westerhofs have not rebutted the presumption that the City's assessment is correct. Therefore, the decision of the district court is affirmed.

AFFIRMED.