IN THE COURT OF APPEALS OF IOWA

No. 1-514 / 91-196

FILED
FEB 25 1992
CLERK SUPREME COURT

JOSEPH N. HOHMANN and BECKY M. HOHMANN, CARL J. SARAZIN and BERTHA L. SARAZIN, ELMER V. MICHELS and KAREN A. MICHELS, MICHAEL H. McCANN and MYRNA J. McCANN, HERMAN D. HUBBARD and MARY LOU HUBBARD, ALEXANDER C. TISCHUK and MARY ANN TISCHUK, THOMAS J. FOSTER and COLETTA A. FOSTER, BERNARD F. PITZ and BENEDETTA A. PITZ, ROGER C. KAUFFMAN, MATTHEW C. HEFEL and STELLA F. HEFEL, STEVE J. SMITH and MARTHA SMITH, LAWRENCE J. ZIMMER and NANCY LEE ZIMMER, RONALD D. WAGNER and SHIRLEY K. WAGNER, PATRICK L. CONWAY and ELIZABETH A. CONWAY, I. DALE LAUNSPAUCH and MARY KAY LAUNSPAUCH, RICHARD H. LUDWIG, and MARY LAVON WAGNER,

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Appellees,

vs.

CITY OF ASBURY, IOWA,

Appellant.

Appeal from the Iowa District Court for Dubuque County, Peter Van Metre, Judge.

City appeals the district court's reduction of special assessments made against adjoining property owners to a city street improvement project. **AFFIRMED.**

Stephen J. Juergens and Mark J. Willging of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for defendant-appellant.

Joseph P. Zwack, Dubuque, for plaintiffs-appellees.

William F. Sueppel and William J. Sueppel of Meardon, Sueppel, Downer & Hayes, Iowa City, for amicus curiae League of Municipalities.

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

OXBERGER, C.J.

The plaintiffs, (hereafter referred to as Homeowners), brought this action in equity seeking a ruling under Iowa Code section 384.66 that certain special assessments levied against their residential and commercial properties in the City of Asbury were illegal, null, and void. The defendant City of Asbury, (hereafter referred to as the City), lies immediately west of Dubuque, Iowa. The residential property owners reside along Hales Mill Road, (HMR). HMR begins at the intersection of Asbury Road and runs northwesterly until it exits the City for a total distance of approximately 2,600 feet.

HMR connects the City to Highway 52 which runs north of the town. The road provides the Sun Valley addition to the City consisting of more than 200 units, with its primary access. The road is also used by a local gravel quarry which runs about 200 round trips per day with trucks weighing between 50,000 and 70,000 pounds.

The road was constructed using rural-type construction and varies in width between 18 feet to 22 feet. It has narrow gravel shoulders on either side. The road and adjoining properties are drained by a surface drainage system consisting of side road ditches and culverts. It has been in a deteriorating state and since 1983 the City has discussed reconstructing or otherwise improving it.

In early 1988 the City retained an engineering firm which recommended that the old road surface and subgrade be removed, and a new asphalt or concrete surface be installed. The new design called for a 37-foot wide urban-type street with a parking lane on each side, curb and gutters, and longitudinal subdrains.

The total cost of the project was budgeted at $500,000. The assessment was calculated on a rate of $48.629 per front foot against the 17 abutting property owners. The 200 plus owners in the Sun Valley addition were assessed $100 per unit.

The trial court found that the road was an urban arterial road and the basic reasons for the reconstruction of it were for the benefit of the whole community and the quarry. The court acknowledged that although the plaintiffs will receive some special benefits by having new paving, storm sewers, sidewalks, an extra traffic lane, etc., these special benefits are a far less dollar value to the abutting owners than the amount of assessments. Accordingly, the court reduced the special assessments for 15 property owners by 65%. It reduced one triangular property by 75%, and reduced a commercial property by 50%. The City has appealed.

Scope of Review: On appeal, we examine the evidence de novo. Uhlenhake v. City of Ossian, 418 N.W.2d 642, 647 (Iowa 1988).

Two issues are raised for review by the City and the Homeowners. First, whether the trial court erred in concluding that the special assessments were in excess of the special benefits conferred on the properties. Second, whether the trial court was correct in determining that the assessments against the Homeowners' properties were unjust and inequitable. A third issues is raised by the League of Iowa Municipalities in its brief of amicus curiae regarding whether the presumption of validity involving a special assessment by a city is overcome when the city only considers a straight charge per foot to determine special benefits conferred upon the property.

Issue I: We consider first whether the trial court was correct in concluding that the special assessments were in excess of the special benefits conferred on the Homeowners' properties. The City asserts the special assessments fixed by the Council were correct and did not exceed the special benefits conferred on the properties. We disagree and affirm the trial court on this issue.

A special assessment may only be levied in proportion to the precise amount of special benefits conferred upon the benefited property, and not in excess thereof. Iowa Code section 384.61 provides in pertinent part:

> The total cost of a public improvement, except for paving that portion of the street lying between railroad tracks and one foot outside of the tracks, or which is to be otherwise paid, must be assessed against all lots within the assessment district in accordance with the special benefits conferred upon the property, and not in excess of such benefits.

In challenging the amount of a 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 his property." City of Clive v. Iowa Concrete Block & Material, 298 N.W.2d 585, 592 (Iowa 1980). In the absence of such evidence, the assessment must stand. Id. Assessment cases cannot be determined with mathematical certainty. Goodell v. City of Clinton, 193 N.W.2d 91, 95 (Iowa 1971). The evidence is necessarily based on opinion, some of it made more conjectural because it attempts to project present conditions into the future. Id. These opinions must be taken with those reservations arising from the nature of the case, the self-interest of the witnesses, and the uncertain basis upon which they rest. Id.

There is no dispute that the Homeowners will receive some special benefits. The City argues the Homeowners will benefit from the increased safety provided by the elimination of pot holes, cracked surfaces, rutted edges, a parking lane, curves in the road, less wear and tear on their vehicles and ponding on the road. In addition, the City asserts that there will be a reduction in noise and

vibration, less maintenance with respect to the drainage ditch and better drainage. Although sidewalks are given as an additional benefit, the cost of such was not assessed to the Homeowners. The Homeowners argue that almost all of the alleged special benefits the City says would accrue to them would also accrue to the general public and are therefore not special benefits.

The critical factor in this case is the usage of this road. The trial court found and we agree that HMR is an urban arterial road and not a typical roadway serving local and delivery traffic. Substantial evidence established extensive use of this road by heavy truck traffic for Tschiggfrie's stone quarry. The quarry alone conducts approximately 400 trips per day along the HMR. HMR is the only road north out of the City. It is the connecting vein between the City and Highway 52. Approximately 3,200 to 3,300 cars travel the road every day. This usage far exceeds a normal residential street.

The City acknowledges that the heavy truck traffic caused the city council to consider the possibility of a weight or truck embargo on the road. The City sought initially to receive funds from the State of Iowa's RISE Program (Revitalize Iowa Sound Economy). This is an indication the City was aware the project related to the economy of the area. There is nothing in the record to indicate HMR would not have remained adequate for the

Homeowners, absent the extensive use by others in the community. We find the trial court properly concluded that the special assessments were in excess of the special benefits conferred on the Homeowners' properties and affirm on this issue.

Issue II: We next consider whether the trial court was correct in determining that the assessments against the Homeowners' properties were unjust and inequitable. Judicial power is broad enough to make whatever adjustments are necessary to attain "just and equitable" results. Knudsen v. City of Des Moines, 254 N.W.2d 1, 4 (Iowa 1977). An assessment may fail the "just and equitable" test even though it is not excessive when measured against the benefits conferred. Id.

In the present case, a figure of $100.00 per home was assessed to the 200 plus homes within the area referred to as Sun Valley. The record clearly establishes that persons from the Sun Valley area use HMR extensively and on a daily basis. Even though the through traffic on HMR results in no assessment to the heavy traffic users, such as the Quarry and its trucks, the Homeowners were assessed more than $5,000 per lot average. In light of the circumstances effecting the use of HMR, we affirm the trial court and find the assessments upon the Homeowners fails the just and equitable test.

Amicus Curiae: The League of Iowa Municipalities has joined with the City to raise the issue whether the presumption of validity involving a special assessment by a city is overcome when the city only considers a straight charge per foot to determine special benefits conferred upon the property. Based upon our prior reasoning and conclusions of Issue I and II above, we do not address this issue.

Each party will pay his or her own attorney's fees. Costs are taxed to the appellant.

AFFIRMED.