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DEC 28 1977

IN THE COURT OF APPEALS OF IOWA, CLERK SUPREME COURT

CHICAGO, MILWAUKEE, ST. PAUL)
& PACIFIC RAILROAD COMPANY,)

Appellee, Cross-Appellant)

Filed December 28, 1977

vs.)

CITY OF CLIVE, IOWA,)

Appellant, Cross-Appellee)

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2-59388

Appeal from Polk District Court - Anthony M. Critelli, Judge.

Defendant appeals (1) decision of district court that plaintiff could appeal the valuation of its property pursuant to § 391A.31(2), The Code 1973, even though it failed to appeal the adoption of a resolution of necessity under § 391A.31(1), The Code 1973, and (2) the court's reduction of the assessment on plaintiff's property. Plaintiff cross-appeals asserting that the assessment should be further reduced. AFFIRMED IN PART AND REVERSED IN PART.

H. Richard Smith, of Ahlers, Cooney, Dorweiler, Haynie & Smith, of Des Moines, counsel for appellant.

Jerry P. Alt, of Duncan, Jones, Riley & Finley, of Des Moines, counsel for appellee.

Heard by Donielson, Acting C. J., Snell, Oxberger and Carter, JJ; Allbee, C. J., takes no part.

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DONIELSON, Acting C. J.

Defendant, the City of Clive, appeals from an adverse judgment which reduced defendant's special assessment on plaintiff's property for a street improvement project from \$30,731.79 to \$16,250. Plaintiff, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, cross-appeals, asserting that the assessment should be further reduced.

Plaintiff owns and operates a railroad line in and through Clive. In 1973, pursuant to Chapter 391A, The Code 1973, and a street improvement project, Clive undertook to improve its streets, including those bordering on plaintiff's property. Clive adopted a resolution of necessity on June 7, 1973, and caused to be prepared a plat and schedule showing the location of the paving project, the property to be assessed and the amounts to be assessed against the property involved.

Although plaintiff had received notice of a public hearing and had objected to the resolution, it did not appeal the city council's decision to adopt the resolution. The proposed assessment against plaintiff was in the amount of \$30,731.79. Clive subsequently published notice of the final assessment, with final publication being made on December 3, 1974.

On December 5, 1974, plaintiff commenced the instant action pursuant to § 391A.31, The Code 1973, alleging, inter alia, that the assessment was excessive, inequitable, illegal, discriminatory, and beyond the power of the city to enact because it exceeded 25 percent of the actual value of the property, in contravention of § 391A.27, The Code 1973. Plaintiff also alleged that the assessment exceeded the special benefits conferred, contrary to § 391A.26, The Code 1973.

Defendant denied plaintiff's allegations and affirmatively alleged that plaintiff was precluded from raising the issue of valuation since it had failed to challenge the regularity of the city council proceedings within 20 days of the adoption of the resolution of necessity as prescribed by § 391A.31(1), The Code 1973. Consequently, according to defendant, the district court was limited to a review of the amount of the assessment pursuant to § 391A.31(2), The Code 1973.

The district court concluded that plaintiff was entitled to challenge both the question of valuation and benefit under § 391A.31(2) and rendered its decision on that basis. The court found that the actual value of plaintiff's property was \$65,000 and, after applying the 25 percent rule of § 391A.27, the assessment would be limited to

\$16,250. The court also concluded that the benefits conferred approximated this \$16,250 total and ordered a reduction of the assessment to that amount.

I. Interpretation of § 391A.31(1) and (2)

Defendant contends that the instant appeal was brought pursuant to § 391A.31(1) which allows an aggrieved party only 20 days within which to test the regularity of the proceedings leading to the adoption of the resolution of necessity after the resolution has been adopted. Since plaintiff brought no action until December 3, 1974, well beyond the 20 day period following the date on which the resolution of necessity was adopted—June 7, 1973—defendant argues that the district court's review was limited by § 391A.31(2) solely to questions dealing with the amount of the assessment.

The district court partially agreed with defendant's interpretation, but also concluded that when § 391A.31(1) and (2) are analyzed together, it is clear that the legislature intended in subsection 1 to limit the time within which an aggrieved party could challenge the regularity of municipal proceedings leading to the adoption of a resolution of necessity to 20 days from the date of adoption. The court further concluded:

"The only questions an appealing party cannot raise by an appeal contesting his assessment are the questions of 'regularity' precluded by Section 391A.31(1) if the appeal was first brought beyond the twenty day Section 391A.31(1) time limitation.

"In reading subsection (1) this way, subsection (2) becomes the broader and more liberal provision under which an appeal may be maintained. Consistent with the breadth suggested by an analytical look at the phrase of subsection (2) -- 'such appeal shall go only to the amount of that assessment' -- this section is best read as allowing consideration of all questions concerning the 'assessment' itself that are not foreclosed from examination by those items encompassed within the 'regularity of proceedings' term of Section 391A.31(1). In short, all questions not dealing in any sense with procedural or adjective matters may be raised by the appealing party so long as there is compliance with the filing limitations set out in Section 391A.31(2)."

We agree with the trial court's interpretation of § 391A.31(1) and (2).

However, defendant argues that an appeal should not lie as to value because the question of valuation inheres in the resolution of necessity. In support of this proposition, defendant relies upon *Moss v. Incorporated Town of Hull*, 249 Iowa 1178, 91

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N.W.2d 599 (1958). However, as plaintiff correctly observes, *Moss* was decided under Chapter 391, The Code 1973, a completely separate and distinct statute from Chapter 391A, with completely different rules regarding objections and appeals. Furthermore, *Moss* deals solely with the issue of objections filed before the city council and not with appeals to district court. On these grounds, we conclude, as did the trial court, that *Moss* is inapposite in the instant case and that the district court properly considered all matters bearing upon the formulation and imposition of the assessment.

Although we believe that defendant's interpretation is logically sound, we are convinced that the meaning of the statute is clear, and we are not disposed to read an ambiguity into a statute where one does not exist. Consequently, any change in the construction of this statute must be made by the legislature, not the judiciary.

II. Highest and Best Use of the Property

With regard to the valuation of property for assessment purposes, the law is settled that property must be valued at the highest and best use to which it may be put by a willing buyer. *Beh v. City of West Des Moines*, 257 Iowa 211, 221, 131 N.W.2d 488 (1965). Furthermore, § 391A.9, The Code 1973, provides that valuation shall be based upon the fair market value of the property at the time the local project is completed. Section 441.21, The Code, defines "market value" as the value established between a willing buyer and a willing seller, neither being under compulsion to buy or sell and each being familiar with all the facts relating to the particular property.

Defendant asserts that the trial court erred in finding that the highest and best use of this property was as railroad right-of-way, its present use. The court concluded that since railroad trackage ran through the middle of plaintiff's property and there were no plans to quit the area, there was little else the property could be used for, now or in the foreseeable future. See *Chicago and Northwestern Railway Co. v. Webster City*, 256 Iowa 201, 127 N.W.2d 115 (1964).

Our review in this matter is *de novo*. Rule 4, Rules of Appellate Procedure. Although we give weight to the trial court's findings of fact, we are not bound by them. Rule 14(f)(7), R. App. P. Assessments made by the city are presumed to be correct and the burden is on the property owner to prove otherwise. *Wharton v. City of Oskaloosa*, 159 N.W.2d 834, 835 (Iowa 1968). This rule includes the presumption that the assessment

levied did not exceed the benefits conferred. *Goodell v. City of Clinton*, 193 N.W.2d 91, 93 (Iowa 1971). Benefits are not necessarily limited by the present use of the property. Future potential uses, reasonably to be anticipated, should be considered as well. *Spring Valley Apts. v. City of Cedar Falls*, 225 N.W.2d 129, 131-132 (Iowa 1975); *Mulford v. City of Iowa Falls*, 221 N.W.2d 261, 266 (Iowa 1974).

Although the trial court correctly concluded that the assessment may not exceed 25 percent of the actual value of the assessed property, § 391A.27, and that the special assessment may not, in any event, exceed the value of the special benefits conferred, § 391A.26, we find that the court erred in its conclusion that the highest and best use of the property was as railroad right-of-way. The court stated that it placed "great value" on the testimony of Murray Work, a Des Moines property appraiser called by the plaintiff as an expert witness. Work stated that the property, including the benefits conferred, was worth \$56,817. This appraisal, according to the court, "was based on the tangible reality that the railroad was an operating concern and would continue to be so, not on the fiction that it was a fleeing apparition whose disappearance left its subject reinvigorated in value." However, the court apparently completely discounted the testimony presented by defendant's expert witnesses as to the parcel's potential highest and best use taking into account the future potential uses without the trackage. This constituted error.

The court's determination that plaintiff has no plans to quit the area does not compel a conclusion that the present use of the property constitutes its highest and best use. *Beh v. City of West Des Moines*, supra, 257 Iowa at 220-221. Furthermore, the court's conclusion that the property could be used for little else, now or in the future, is unsupported by the record. Defendant's experts testified regarding the value of plaintiff's parcel for commercial development. They stated that substantial sums were being paid for property of similar size in the area which was being commercially developed and that extensive commercial growth was taking place in the vicinity of plaintiff's property. In fact, plaintiff has leased some of its property to a lumber company.

Although the district court relied upon *Chicago and Northwestern Railway v. Webster City*, supra, as authority for its decision, that case is distinguishable from the instant situation. There, the city introduced no evidence to rebut the railroad's

testimony that the parcel in question could not be used for purposes other than as railroad right-of-way. The converse is true in the instant case.

In view of the commercial development taking place near plaintiff's property, defendant's experts valued it at \$220,000 at the least. With that figure in mind, we are confident that the assessment of \$30,731.79 did not exceed 25 percent of the value of the property. Consequently, there is no violation of § 391A.27. Furthermore, we find that the assessment did not exceed the special benefits conferred. See § 391A.26. In *Chicago and Northwestern Railway Co. v. Webster City*, *supra*, at 205, the court stated:

"There is also a conclusive presumption that some benefit accrues to the property assessed for a public improvement made pursuant to a council resolution of necessity and the burden rests upon the property owner to show that the benefit is less than that assessed. *Moss v. Incorporated Town of Hull*, 249 Iowa 1178, 1182, 91 N.W.2d 599, and citations."

Accord, *Persinger v. City of Sioux City*, 257 Iowa 727, 729, 133 N.W.2d 110 (1965); see *Brenton v. City of Des Moines*, 219 Iowa 267, 269-270, 257 N.W. 794 (1934); *Mulford v. City of Iowa Falls*, *supra*, at 268. Although plaintiff contends that these benefits were nominal, we conclude that it failed to sustain its burden and rebut the presumption in this regard.

In light of the various presumptions governing our analysis and the fact that the burden is upon the plaintiff to rebut those presumptions, we conclude that the district court erred in reducing the assessment levied by the city and accordingly reinstate that assessment. Our disposition of this issue makes consideration of the cross-appeal unnecessary.

AFFIRMED IN PART AND REVERSED IN PART.