

A06-0982

State of Minnesota

In Court of Appeals

Juris Curiskis,

Appellant,

vs.

City of Minneapolis,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

Was Appellant's appeal of the proposed special assessment to his property properly dismissed because he failed to comply with Chapter 10 section 6 of the Minneapolis City Charter?

The trial court found in the affirmative.

Appositive cases:

Wessen v. Village of Deephaven, 284 Minn. 296, 298, 170 N.W. 2d 126 (1969)

Apposite statutes:

Minnesota Statutes § 429.11

Minneapolis City Charter Chapter 10 sections 6 & 8

May Appellant rely upon a theory not argued before the trial court as the basis for his request for a reversal of the district court's dismissal of his appeal of a special assessment?

Appositive case:

Thiele v. Stich, 425 N.W.2d 580 (Minn.1988)

STATEMENT OF THE CASE

This an appeal of an assessment filed in Hennepin County District Court. A motion for summary judgment was brought by the City of Minneapolis. Judge Q. McShane granted the City's motion and dismissed Appellant's appeal of his special assessment.

STATEMENT OF FACTS

The special assessment challenged by this action arises from the Bryn Mawr Renovation project. The project involves street reconstruction and installation of selected new curb and gutter and other paving related improvements as needed with the cost divided between general city funds and special assessments to the benefited properties. (Respondent's Appendix, hereafter Res. Ax., p. 30, ¶ 10).

On April 19, 2005, all those to be assessed for the road construction work were sent notice of a public hearing to be held on May 3, 2005, before the Transportation and Public Works Committee of the Minneapolis City Council. Notice of the hearing was sent to Appellant, as well as information indicating that the City Council was proceeding under Chapter 10 of the City Charter. (Appellant's Appendix (hereafter Ap. Ax.) p. 15-17).

The Appellant filed no objections to the special assessment of his property with City Clerk prior to the public hearing. (Res. Ax. p. 33, response 3). A petition signed by Appellant and a number of other parties was received by the council committee coordinator, Peggy Menshek, at the Transportation and Public Works committee which conducted the public hearing on May 3, 2005. (Res. Ax. p. 37, ¶ 4). The committee

approved the special assessments and the full City Counsel approved the special assessment on May 13, 2005. (Res. Ax. p. 40).

On June 10, 2005 Appellant and a number of other parties filed an appeal of their assessments to District Court with the City Clerk (App. Ax. P 19). On June 20, 2005, the appeal was filed with the district court. (App. Ax. P. 20). After a motion to dismiss brought by the City of Minneapolis, all of the appellants except Juris Curiskis (hereafter Appellant) were dismissed from the appeal.

The special assessments for the Bryn Mawr project were spread among the benefited properties on the basis of the "street influence" method of assessment. This method has been used by the Minneapolis Public Works Department for a number of years on a variety of projects. The method is a more complex method of spreading assessments than the front footage method of assessment which is commonly used. The street influence method includes an analysis of the square foot area of the property to be assessed, whether the property is residential or non-residential, and the relationship of the property to be assessed to the construction. (Res. Ax. p. 30, ¶ 7). The assessments for the Bryn Mawr Street reconstruction project varied between four hundred eighty four dollars and seven thousand nine hundred fifty six dollars. (See Assessment Roll.) Special assessments may be paid at one time or over 20 years with a minimal interest charge (Res. Ax. p. 30, ¶ 8). All of the properties were assessed in the same manner using this method. (Res. Ax. p. 30, ¶ 9).

ARGUMENT

I. INTRODUCTION

The Appellant claims in this appeal that the trial court's dismissal of his special assessment appeal was not proper because Appellant complied with the requirements of Chapter 8 of the Minneapolis City Charter. This argument is specious because appeals of special assessments are governed by Chapter 10 section 6 of the Minneapolis City Charter. In addition this theory may not be considered on appeal because Appellant did not raise this argument in the district court.

II. APPELLANT'S APPEAL WAS PROPERLY DISMISSED BECAUSE HE FAILED TO COMPLY WITH THE REQUIREMENTS OF THE MINNEAPOLIS CITY CHARTER.

A. Appellant failed to follow the requirements necessary for the court to have jurisdiction to review the special assessment.

1. Legal Requirements for an Appeal

The Minnesota Courts have consistently held that an appeal of the levy of a special assessment is a special proceeding in law. There being no right to appeal the levy of a special assessment at common law, the right is wholly found in the statute or charter provisions providing for the appeal. Further, the courts have held that the procedural requirements of the enabling law must be strictly followed. If those requirements are not followed, the court hearing the appeal is deprived of jurisdiction to consider the appeal. Since these requirements are not ambiguous, the courts have stated that the requirements to appeal will not be expanded by construction. When timely, specific prior written objections have not been received the appeal must be dismissed. Habel v. Chisago City,

346 N.W.2d. 668, 670 (Minn. App. 1984); Peterson v. Inver Grove Heights, 345 N.W.2d. 274,277 (Minn. App. 1984); Wessen v. Village of Deephaven, 284 Minn. 296, 298, 170 N.W. 2d 126, 128 (1969); Village of Edina v. Joseph, 264 Minn. 89, 93, 119 N.W. 2d 809, 816 (1962); Ewert v. City of Winthrop, 278 N.W. 2d 545, 550 (Minn. 1979).

Minnesota Statutes § 429.11 allows the city of Minneapolis to use the provisions of its home rule charter for assessing property owners for road improvements. The city in this matter has elected to proceed under the charter for the assessment at issue. The Minneapolis City Charter therefore is the statutory authority which sets forth the requirements that a must be complied with by a property owner in order to appeal a special assessment to district court. The Minneapolis Charter, Chapter 10, Section 6 relates to the appeal of special assessments. That provision requires that any person "may at anytime before such award or assessment shall be confirmed by the City Council, file with the City Clerk, in writing, an objection to such confirmation, setting forth therein specifically the particular irregularities complained of, . . .". (emphasis added). The Charter further states that "such person so objecting shall have the right to appeal" to the District Court within thirty days. (App. Ax. P. 12). Only upon complying with the Charter's requirements does the district court obtain jurisdiction over the appeal.

2. Appellant failed to state particular and specific objections to the levy of the assessment by the City Council.

Appellant presented a document to the City Council at the public hearing for the proposed special assessments for the Bryn Marw street reconstruction project on May 3, 2005. (Res. Ax. P37, ¶ 4). This document, which is entitled "PETITION", did not

contain objections to the proposed special assessments, nor does Appellant claim that the document was meant to state objections to his assessment. In response # 3 in Appellant's response to the City's demand for production of documents, Appellant states: "There were no objections filed with the Minneapolis City Clerk's office prior to the adoption of the assessments by the Minneapolis City Council. The exhibit "A" that you make reference was a PETITION handed in at the public hearing..." (Res. Ax. P.33, response 3).

The petition does not address assessments per se, but it states that the signatories object to the five year capital improvement program in Bryn Mawr because the program violates the Bryn Mawr residents' Minnesota State Constitutional rights. The petition asks for all proceedings on the five year capital improvements to stop until "a due process is followed and all proper information is given to the residents of Bryn Mawr." (Res. Ax. pp. 41-42). Nowhere in this language is there a reference to the special assessments proposed to be levied upon his property. (Res. Ax. P. 33). This makes this appeal similar to the attempted appeal in Wessen, supra. There the court found the failure to file "Notices of Objection" provided a basis for dismissal.

B. Appellant's claim that Chapter 10 section 8 governs the appeal of special assessment for road construction is incorrect.

The Appellant states the trial court erroneously found the court lacked jurisdiction because the Appellant failed to comply with the procedures set forth in the Minneapolis City Charter. Appellant does not claim that he complied with either of the requirements found in Chapter 10 section 6 of the Minneapolis Charter cited by the trial court. Instead

he argues that he did not need to file objections to the proposed assessment prior to the adoption of the special assessment by the city council. (Appellant's brief (hereafter App. br.), p. 6). He also claims that he filed the appeal with the district court within the deadlines set forth in the Minneapolis City Charter. These claims are clearly erroneous.

In order to avoid the problem that Wessen, supra., creates for Appellant's appeal of his special assessment, Appellant now claims that he was not required to follow the requirements set forth in Minneapolis City Charter Chapter 10 section 6, entitled "Appeal of Assessments". (App. br., p. 2). In order to support of this argument Appellant recites language taken out of context from both section 8 and section 6 of Chapter 10 of the Minneapolis City Charter. He argues that section 8 sets forth the requirements in the following language:

"if after the City Council adopts the assessments, the owner of the property is dissatisfied with the assessments against the property the owner may appeal to district court by serving a notice upon the Mayor or the City Clerk within thirty days after the City Council has adopted the assessments and by filing the notice with the clerk of district court within ten days after its service."

App. br., p. 4.

Appellant, however, ignores the language preceding this quote. This language clarifies that the language cited by Appellant merely relates to information which must be included in the notice from the City to the owner of the assessed property. The full text of the applicable language is:

A notice of such hearing, including a statement of the amount of the proposed assessment, shall be required to be mailed to the owners of the property to be assessed. Included with the notice shall be a statement that if after the City Council adopts the assessments, the owner of the property is

dissatisfied with the assessment against the property the owner may appeal to district court by serving a notice upon the Mayor or the City Clerk within thirty days after the City Council has adopted the assessments and by filing the notice with the clerk of district court within ten days after its service and the City Council shall cause to be made, and shall adopt an assessment roll thereof which shall be in any form which the City Council may deem proper. (emphasis added).

Charter Ch. 10 sec. 8 of the Minneapolis City Charter (App. Ax. p. 9-10).

Charter Ch. 10 section 6 however is the section that sets forth the requirements and the procedure for an appeal. Despite the fact that this section is clearly labeled, Appellant again by selectively citing some of the language in the section, argues that this section does not apply to special assessments for road improvements. In support of this argument he cites the following language in section 6: “Any person whose property is proposed to be taken,---”. (App. br., p. 5). Based on this out of context language, the Appellant argues that section 8 of the chapter 10 of the Charter controls the appeal process rather than section 6, because section 8 applies to special assessments for street maintenance. (App. br., p. 5). The Appellant ignores the following language which clearly states an appeal of any assessment levied pursuant to Chapter 10 must meet the requirements set forth in section 6. The charter states:

Section 6. [Appeal of Assessments.] Any person whose property is proposed to be taken, interfered with or assessed for benefits under any of the provisions of this Chapter, and who deems that there is any irregularity in the proceedings of the Council or action of the Commissioners, by reason of which the award of the Commissioners ought not to be confirmed, or who is dissatisfied with the amount of damages awarded for the taking of or interference with said individual's property or with the amount of the assessment for benefits to any property affected by such proceedings, may at any time before such award or assessment shall be confirmed by the City Council, file with the City Clerk, in writing, an objection to such confirmation, setting forth therein specifically the

particular irregularities complained of, and containing a description of the property affected by such proceedings, and if, notwithstanding such objections, the City Council shall confirm the award or assessment, such person so objecting shall have the right to appeal from such order of confirmation of the City Council, to the District Court of the County of Hennepin, at any time within thirty days after such order. Such appeal shall be made by serving a written notice of such appeal upon the Mayor or City Clerk of said city, which shall specify the property of the appellant affected by such award, and refer to the objection filed as aforesaid, and by filing the notice of appeal upon the clerk of district court within ten days after its service. (emphasis added).

Thus, it is clear that any special assessment authorized by Chapter 10 may be appealed only by complying with the provisions of section 6 of Chapter 10. This would include those for street improvements authorized in section 8. Therefore Appellant's admission that he did not make the necessary objections as required in section 6 (App. br., p. 6), dooms his attempts to appeal the judgment of the district court.

Appellant also contends that he filed his special assessment appeal within the deadlines set forth in the Minneapolis City Charter. He does not dispute that the filing in district court was outside the thirty days allowed by Chapter 10 section 6 of the Minneapolis City Charter. Instead he again relies upon the language in Charter Chapter 10 section 8 as the basis for his argument that he was not required to meet this deadline. For the reasons stated above this reasoning is fallacious.

Appellant also argues that the notice from the city establishes creates the deadline for filing the appeal in district court. This is basically the same argument that section 8 controls the requirements and procedures for the appeal of a special assessment, since the language he refers to is required to be placed in the notice to property owners by section 8 of chapter 10. Appellant fails to mention that the notice states that the city is acting

pursuant to Chapter 10 section 6 of the Minneapolis City Charter. (Ap. Ax. p. 16). Appellant ignores this as he has the clear language of section 6, “Appeal of Assessments”, which sets forth the deadlines for his appeal.

III. APPELLANT’S NEW ARGUMENT CANNOT BE RAISED IN THIS APPEAL.

In the court below, the Appellant failed to establish the record needed to establish the jurisdiction of the court to hear his appeal of his special assessment. In this appeal Appellant has again failed to take an action which would enable him to raise the argument that Minneapolis City Charter Chapter 10 section 8 and not section 6 establishes the criteria to be followed if one wishes to successfully contest a special assessment in district court.

This theory was not argued by Appellant before the district court. Appellant did not cite the language in his response to the City’s summary judgment motion. The Appellant did not argue below that an appeal of a special assessment is governed by Charter 10 section 8 rather than Chapter 10 section 6 of the Minneapolis City Charter. This argument has only appeared after the district court had ruled against the Appellant.

In its summary judgment motion the City argued that the Appellant had not taken several actions required by the city charter in Chapter 10 section 6. (Res. Ax. P.6). The City in its memorandum in support of its motion for summary judgment set forth how the Appellant had failed to comply with the requirements for the appeal of his special assessment to district court as set forth in Minneapolis Charter Chapter 10 section 6. (Res. Ax. pp. 6-7). Appellant made no response to this argument in his response to the

motion for summary judgment. Appellant stated in the conclusion of his memorandum that all the filing was done in accordance to with the provisions of the Minneapolis Charter (Res. Ax. p. 22). However, no where did he argue that Charter chapter 10 section 8 set forth the requirements for appeal rather than section 6 of Chapter 10.

In addition, the language from section 8 cited on page 4 of Appellant's brief is not contained in his response to the city's memorandum in support of its motion for summary judgment. His only reference to the provisions of section 8 in his response was the language that states that the "City Council by ordinance shall adopt a procedure providing for a public hearing to be held prior to adoption of the assessment for any improvement." (Res. Ax. p. 16). Appellant relied upon this language to raise what he perceived to be a due process claim, i.e. the only recourse for citizens was to have their grievances heard in district court. This clearly is not an argument that the requirements of section 6 did not apply to his appeal. (Res. Ax. p. 16).

This attempt to change his argument is very similar to the unsuccessful attempt to argue a new theory before the Court of Appeals and Minnesota Supreme Court in Thiele v. Stich, 425 N.W.2d 580 (Minn.1988). Like Appellant, Thiele did not act in a manner which would allow the trial court to hear the case, i.e. she filed the matter beyond the time allowed by the statute of limitations. After the trial court found that the matter was barred by the statute of limitations, Thiele appealed raising the same issue, i.e. the statute had not run, but advancing a different theory to support the appeal. The Court of Appeals reversed the trial court based on the new theory; however the supreme court reversed the Court of Appeals finding that the new theory could not be reviewed on appeal.

The supreme court found that Thiele had lost the case on the theory under which she had argued the case, and had plainly raised an alternative theory for the first time on appeal. The supreme court found this could not be allowed, stating, “[n]or may a party obtain review by raising the same general issue litigated below but under a different theory.” Id. at 582.

In this matter the Appellant is making an attempt to redefine the theory underlying his argument just as Thiele attempted to do in her case. No mention of the new theory presented in this appeal appears in Appellant’s response to the City’s motion for summary judgment. This theory like that in Thiele only appears after Appellant had lost at the district court level. Therefore the issue raised by Appellant cannot be considered by this court, and the district court’s dismissal must be affirmed.

CONCLUSION

The Appellant has improperly attempted to raise anew theory to support his argument to this court. In addition the Appellant admittedly did not file the required objections to his assessment, nor did he otherwise comply with the requirements necessary to perfect his appeal to district court as set forth in Chapter 10 section 6 of the Minneapolis City Charter. The dismissal of the appeal of the special assessment by the district court must therefore be affirmed.

Dated: 7-18-06

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).