

CASE NO. A10-1740

State of Minnesota
In Court of Appeals

American Bank of St. Paul, successor in
interest to 2700 East Lake Street, LLC

Appellant,

vs.

City of Minneapolis

Respondent,

RESPONSE AND REPLY BRIEF OF AMERICAN BANK OF ST. PAUL

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INTRODUCTION

In response to the Appellate Brief of Appellant, American Bank of St. Paul, a Minnesota banking corporation (“American”), Respondent, the City of Minneapolis (“City”), continues its efforts to avoid the legal and factual shortcomings of its case. Simply, the City failed to present any evidence at trial that would support the actual value of the work done in conjunction with the assessment at issue or which would rebut American’s evidence contradicting the same. The City admittedly failed to disclose witnesses, including its expert witness, who subsequently failed to testify about the actual value of the work done in conjunction with the assessment. Moreover, the City relies on an erroneous legal standard created by the District Court, which is wholly different than the well established legal standard relied upon by the District Court in denying the City’s motion for Summary Judgment. Each of the foregoing provides sufficient basis for the reversal or remand of this matter.

The City has also appealed the District Court’s denial of the City’s motion for Summary Judgment. For ease of addressing this separate issue, American has bifurcated its arguments into a Response Argument to the single issue raised by the City in support of its appeal of the denial of the City’s motion for Summary Judgment and separately a Reply Argument in support of American’s Appellate Brief.

RESPONSE/REPLY TO THE CITY'S STATEMENT OF FACTS

The City, not American, failed to respond to discovery.

1. The City introduces evidence in support of its claim that American failed to respond to discovery, which is found nowhere in the District Court record. *Responsive Brief* at pp. 5-8.

2. The City references discovery requests and an apparent motion to compel that was, apparently, served on 2700 East Lake Street LLC, a Minnesota limited liability company ("2700 LLC"), the former owner of the Property. *Responsive Brief* at pp. 5-6.

3. What the City fails to admit is that the City never proceeded with a motion to compel and, more importantly, the City never served American with discovery requests, despite an amendment to the scheduling order to provide an opportunity to do so. *Responsive Brief* at p. 7.

4. The City never even forwarded the discovery requests it previously directed to 2700 LLC to American, nor asked that American respond to the same. *Id.*

5. Apparently, American was expected to obtain the discovery requests from its former borrower who American was forced to foreclose upon. *Addendum II* at pp. 12-26.

6. The City makes such argument in an effort to explain away its admitted failure to properly respond to American's discovery requests. *Addendum II* at 10-27.

7. There simply is no basis for the City's claims, nor the District Court's reference, to any failure of American to respond to discovery that was never provided, let alone served, on American.

The City's "expert" witness, Patrick Todd, provided no relevant testimony.

8. In its rationalization for being allowed to call its undisclosed "expert" Patrick Todd, the City admitted that Mr. Todd would not be providing an opinion as to the value of the Property. *Addendum II* at pp. 14-16.

9. Instead, Mr. Todd detailed a lengthy hypothetical detailing, by analogy, his theory on how the value of a property declines in a similar situation and then, again without any factual support, that the property thereafter increases in value equal to the prior decrease. *Addendum II* at pp. 134-135.

10. Mr. Todd's hypothetical misstates the law applicable to the valuation of an assessment. *Addendum II* at pp. 134-136.

11. The District Court, however, wholly relied upon the testimony provided by Mr. Todd, which should not have been allowed due to the City's failure to identify him as an expert and which, alternatively, was not relevant as Mr. Todd's testimony did not go to the value of the assessment at issue. *Addendum I* at pp. 5, 8; *Addendum II* at pp. 134-136.

Application of the correct and consistent legal standard.

12. On January 29, 2009, the District Court heard argument on a motion for Summary Judgment brought by the City, which motion was subsequently denied pursuant to that certain Order and Memorandum Denying Defendant's Motion for Summary Judgment dated March 22, 2010 ("Summary Judgment Order"). *App. Appendix* at p. 186.

13. The Summary Judgment Order, among other things, established the law of the case providing, in relevant part:

- a. A city's power of special assessment is limited by the following: (a) the land must receive a special benefit from the improvement being constructed, (b) the assessment must be uniform upon the same class of property, and (c) the assessment may not exceed the special benefit. *Carlson-Lang Realty Co. v. City of Windom*, 307 Minn. 368, 370, 240 N.W.2d 517, 519 (1976).
- b. In actions contesting special assessment, there is a presumption that the city's assessment is valid until proven otherwise. *Tri-State Land Co. v. City of Shoreview*, 290 N.W.2d 775, 777 (Minn.1980).
- c. However, this presumption can be overcome "by introducing competent evidence that the assessment is greater than the increase in market value of the property due to the improvement." *Carlson-Lang*, 307 Minn. at 370, 240 N.W.2d at 519.
- d. "When evidence is also received that the assessment is equal to or less than the increased market value, the district court must make a factual determination." *Id.* at 519-520.

App. Appendix at pp. 186-193.

14. On July 30, 2010, the District Court issued that certain Findings of Fact, Conclusions of Law and Order ("Order"), denying American's appeal of the Assessment and making the following "Conclusions of Law":

"12. The proper way to measure the benefit to the property of the removal of an illegal condition, such as an areaway removal, is to compare the value the property from the moment the order compelling the removal of the condition is issued, to the value of the property immediately after that illegal condition is remedied."

"13. Hence, once the City lawfully ordered that the Areaway be removed... the property owned by Plaintiff dropped in value in an amount equal to the cost of removing the Areaway. In order to place a valuation on a benefit that is conferred to the property from the removal of the Areaway, the Court must look to the cost that the City incurred in removing the illegal condition. Once the illegal Areaway was removed, the value of the property went back up to the pre-removal-order value."

App. Addendum at p. 11.

15. The District Court’s creation of the legal standard, set forth above, is wholly contradictory to the prior decision of the District Court in its Summary Judgment Order. *App. Appendix at pp. 186-193.*

16. The legal standard urged by the City and the *Amicus Curiae* League of Minnesota Cities would make it a legal impossibility for property owners to appeal assessments such as the Assessment at issue herein.

17. The City provides a “graphic depiction” of this alleged standard in its Responsive Brief, which “standard” appears in no case law, was not argued at Summary Judgment, and is not supported by anything more than mere conjecture of the City and its “expert” Patrick Todd. *See Responsive Brief at p. 36.*

RESPONSIVE ARGUMENT

I. THE LEGAL STANDARD APPLIED BY THE DISTRICT COURT IN DENYING THE CITY’S MOTION FOR SUMMARY JUDGMENT IS THE CORRECT LEGAL STANDARD.

Although it is buried in the City’s brief, the City has raised an issue on appeal, which issue is whether the District Court properly employed the “Special Benefit Test” in denying the City’s motion for Summary Judgment. The City cites no law in support of its contention that the Special Benefit Test does not apply “to the removal of illegal and nuisance conditions” and no such law exists. Instead, the City asks this Court to create a new legal standard, in contradiction of the readily adopted Special Benefit Test.

A. It is not the role of the Court of Appeals to create new law where a well established legal standard has previously been recognized.

It is not the function of the Court of Appeals court to create new law. *Engler v. Wehmas*, 633 N.W.2d 868, 873 (Minn.Ct.App. 2001) (citing *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 80-83 (Minn.Ct.App. 1989) (refusing to create a cause of action that had not been recognized by the courts or established by the legislature because “[t]he function of this court is primarily decisional and error correcting, rather than legislative or doctrinal”). Only when there are no statutory or judicial precedents to follow will the Court of Appeals make new law. *St. Aubin v. Burke*, 434 N.W.2d 282, 284 (Minn.Ct.App. 1989) (quotation omitted), rev. den’d (Minn. Mar. 29, 1989).

The City urges this Court to adopt the legal standard created by the District Court in its Order, which standard has absolutely no legal support, and which wholly contradicts the Special Benefit Test. It is not the role of the Court of Appeals to overturn well established case law to create a contrary legal standard. On this basis, the City’s appeal should be denied.

B. Contrary to the City’s argument, the “Special Benefit Test” is the appropriate legal standard to measure the assessment for the abatement of a nuisance.

In support of its proposition that the “special benefit test” does not apply to the case at hand, the City cites only to *Singer v. City of Minneapolis*, 1996 WL 208486 (Minn.Ct.App. 1996), where the Court was asked to determine an appeal associated with the improved value to real estate for widening France Avenue. The widening of a street has absolutely no application with respect to the areaway abatement that is at issue in this

particular case. Moreover, the *Singer* decision merely stood for the proposition that “abating nuisances on private property is an improvement.” American stipulated to the fact that the abatement of the Areaway was an improvement to the Property, but has disputed the value of that improvement. *Singer* does not address the issue of whether or not the special benefits test is still applicable for an improvement. In fact, just the opposite is true.

The special benefits test does apply to the case at hand and the District Court properly agreed with such a proposition when issuing its Summary Judgment Order.

In its statement of Legal Issues, the City alleges that a second case, namely *Village of Edina v. Joseph*, 264 Minn. 84119 N.W.2d 809 (1962), also provides apposite authority for the application of the Special Benefit Test, yet the City fails to even refer to *Joseph* in its argument. The City’s failure to rely on *Joseph* likely stems from the fact that *Joseph* provides no support for the City’s argument. Rather, that decision stands for the general proposition that special assessments that are rendered against adjoining property for road improvements are limited to special benefits that are found to exist and that the mere fact that there may be some general benefit from the improvement does not render the assessment invalid.

Moreover, the court in the *Joseph* decision set forth: “the assessment in the instant case is limited to the special benefits found to exist. The fact that there may have been such general benefit from the improvement does not render the final assessment invalid because such general benefit may have been largely ignored.” In the case at bar, at Summary Judgment and again at Trial, the City provided no evidence whatsoever to

support any benefit, whether in the form of a special benefit or a general benefit. The City relied solely upon hypotheticals and unsupported oral testimony.

Moreover, the *Joseph* decision cites *In re Assessment for Improving Superior Street*, 172 Minn. 554, 216 N.W. 318 for the proposition that “when an assessment for a local improvement has been made by the proper municipal board or officers under due legislative authority and in the regular course of procedure such assessment is *prima facie* valid, and the burden rests upon the objector to prove its invalidity.” *Joseph*, 264 Minn. at 95, 119 N.W.2d at 816-817.

This is the precise “special benefits test” that has been argued throughout this litigation, but for the Order issued by the District Court. In summary, the *Joseph* case does not stand for the proposition that a special assessment associated with an areaway abatement is, *de facto*, determinative of the value of the improvement to the subject property.

The City asks that this Court create a legal standard that would wholly deprive property owners of their due process rights to challenge assessments relating to illegal conditions or nuisances. The City’s position, which was erroneously adopted by the District Court at trial, would provide the City with a “blank check” to abate these conditions, with no recourse to the property owner. The need for due process is the reason the Special Benefit Test has been adopted, to provide due process and ensure reasonable value is associated with the abatement.

REPLY ARGUMENT

I. THE LEGAL STANDARD ADOPTED BY THE DISTRICT COURT AFTER ACKNOWLEDGING APPLICATION OF THE “SPECIAL BENEFIT TEST” IN ITS SUMMARY JUDGMENT ORDER, ERRONEOUSLY CREATED AN UNSUPPORTED LEGAL STANDARD IN ITS ORDER SUBSEQUENT TO TRIAL.

The City focuses its argument on its attempt to substantiate the legal standard argued by the City, and adopted by the District Court, for an assessment appeal. The District Court, in its Order, established the following “Conclusions of Law”:

“12. The proper way to measure the benefit to the property of the removal of an illegal condition, such as an areaway removal, is to compare the value the property from the moment the order compelling the removal of the condition is issued, to the value of the property immediately after that illegal condition is remedied.”

“13. Hence, once the City lawfully ordered that the Areaway be removed... the property owned by Plaintiff dropped in value in an amount equal to the cost of removing the Areaway. In order to place a valuation on a benefit that is conferred to the property from the removal of the Areaway, the Court must look to the cost that the City incurred in removing the illegal condition. Once the illegal Areaway was removed, the value of the property went back up to the pre-removal-order value.”

App. Addendum at p. 11.

However, there is no legal basis for the foregoing “standard”. And if this were truly the legal standard, the City would unquestionably prevail on any assessment appeals, because under this “standard” the “value” of the assessment would always equal to the change in property value. However, this is not the established legal standard.

The City provides graphic evidence of the absurdity of this “standard” in its Responsive Brief, which plainly shows that absolutely no consideration is given to the actual value to the Property, as a result of the removal of the Areaway. *See Responsive*

Brief at p. 36. In the City's "graphic depiction" it is clear that under this purported standard, no property owner could ever mount a successful challenge to an assessment, because the increase in property "value" will always equal the prior decrease in "value" caused by the condition at issue. *Id.*

To determine the value of a special benefit, the taxing authority must consider "what increase, if any, there has been in the market value of the benefited land." *City of St. Louis Park v. Engell*, 283 Minn. 309, 316, 168 N.W.2d 3, 8 (1969); *Nyquist v. Town of Center*, Minn., 251 N.W.2d 695 (1977) (overruled on other grounds by *Downtown Development Project, Marshall City Council Resolution No. 57 v. City of Marshall*, 281 N.W.2d 161 (1979)). **The test is whether the improvement for which the assessment was levied has increased the market value of the property, against which the assessment operates, in at least the amount of the assessment.** *In re Appeals by Am. Oil Co. v. City of St. Cloud*, 295 Minn. 428, 206 N.W.2d 31 (1973) (emphasis added). The benefits from an improvement are calculated on the market value of the land before and after the improvement. *Buzick v. City of Blaine*, 505 N.W.2d 51, 53 (Minn.1993) (citing *Anderson v. City of Bemidji*, 295 N.W.2d 555, 560 (Minn.1980)).

On appeal, the court is not bound by lower court conclusions with respect to issues of law, and instead conducts an independent review of the record. *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 483 (Minn.1985). The legal standard adopted by the District Court is contrary to the standard well established for assessment appeals. The District Court created a "shifting" valuation methodology, which fails to consider the sole issue that is determinative, the change in market value of the Property. By adopting such

a methodology, the appeal process allowed by law is rendered rather meaningless.

The District Court considered only the “cost of removing the Areaway” and concluded that after its removal, the value of the Property “went back up to the pre-removal-order value”.

This standard has not been adopted by any court in the State of Minnesota and creates an insurmountable burden for a property owner to challenge an assessment. In general, such a standard would render an appeal to an assessment moot from the inception, as there is no consideration given to the market value improvement, or lack thereof, derived from the assessment.

The Court of Appeals is not bound, in any way, by this erroneous legal determination. This error requires that this matter be reversed and remanded to the District Court for application of the proper legal standard.

II. AMERICAN OVERCAME THE PRESUMPTION THAT THE ASSESSMENT WAS VALID, BY PROVIDING SPECIFIC EVIDENCE THAT THE VALUE OF THE PROPERTY HAD NOT INCREASED IN AN AMOUNT EQUAL TO THE AMOUNT OF THE ASSESSMENT.

The City correctly sets forth that in actions involving special assessments, there is generally a presumption that the assessment is valid until the property owner proves otherwise. *Tri-State Land Co. v. Shoreview*, 290 N.W.2d 775, 777 (Minn. 1980).

A. At trial, American introduced uncontradicted objective evidence that there was no corresponding increase in market value of the property due to the abatement of the Areaway.

As evidenced by the record and set forth more fully in American’s primary brief, American did provide evidence covering a three (3) year period of time associated with

the value of the affected Property before and after the areaway abatement took place. On the other hand, the City provided absolutely no evidence to contradict American's evidence or to show any increase of value associated with the Property before, during, or after the Areaway abatement process.

The only objective evidence presented to the Court during the course of the entire trial was the appraisal performed by American's expert, Anthony Ruzek, the Sheriff's certificate evidencing the sale price of the Property at the foreclosure sale, and Hennepin County's own property tax statements. The City, on the other hand, and as admitted in their responsive brief, provided nothing other than a hypothetical in the form of testimony provided by Patrick Todd, a member of the City's Assessor's Office.

The City produced absolutely nary a scintilla of evidence regarding any increases or decreases in value to the Property at any time during the course of the trial and the transcript is bereft of any objective criteria by which the City supported any of its unsupported conclusions, hypotheticals, alleged increases and decreases associated with the value of the building before and after the areaway assessment was made.

B. The City failed to provide any evidence whatsoever that the Property benefited from the improvement in an amount at least equal to the cost of the Assessment.

As evidenced by the transcript, the City provided absolutely no proof whatsoever that the value of the Assessment improved the Property by an amount at least equal to the cost of the same. Other than hypotheticals and unsubstantiated testimony, the City produced absolutely no evidence to prove what the improved value to the Property may have been other than to continually argue that the costs associated with the areaway

abatement constitutes the value of the improvement. This is not the test in the State of Minnesota and it never has been.

As set forth in the City's own brief, testimony was provided, on a generalized and hypothetical basis, wherein it sets forth:

“The City’s valuation method relies on the premise that any lawful order to remove or abate an illegal or nuisance condition on private property will have an automatic negative effect on the value of the property. The negative effect on the property’s value is equal to the cost of remediating the illegal or nuisance condition. Once the illegal or nuisance condition has been remediated, the property’s value is automatically restored in an equivalent amount.”

See Responsive Brief at p. 36.

However, there was absolutely no testimony or proof provided that this is in fact what happened to the Property. Once again, the City has relied upon generalizations and hypotheticals to stand for the proposition that the City, in this instance, *i.e.*, lowering the value and then thereafter increasing the value, is dispositive of the issue at value.

The City further supports American’s contention that all of Todd’s testimony was based upon hypotheticals and had nothing to do with the Subject Property at hand.

Moreover, there is no case cited by the City to stand for the proposition that the cost of the assessment necessarily constitutes the improved value to the property. In fact, this is the very reason why there is an appeal process associated with a city’s right to levy a special assessment in the first instance. By allowing the City to maintain that the cost of the assessment is a “*de facto*” value for purposes of determining improvement, there would be absolutely no reason in the world why there would be an appeal process for an owner to contest a special assessment.

III. THE CITY ADMITS AMERICAN DISCLOSED ITS EXPERT, WHEREAS THE CITY ADMITTEDLY DID NOT.

As evidenced by the City's brief, the City admits to having been given three (3) pages of the appraisal performed by Anthony Ruzek ("Ruzek"), a commercial appraiser working for Mark A. Oehrlein Appraisals, Inc. ("Oehrlein Appraisals"), who had prepared the expert report dated October 2, 2009. As result of the foregoing, the Appellants had identified the expert and identified the appraised value with respect to the disclosures made well in advance of the trial. Therefore, the City's suggestion that they were "ambushed" by the appraisal report and the testimony of Ruzek belies the fact that the expert appraisal and identification of the expert had been provided in the past. The City had the ability to depose Ruzek in advance of trial.

The weight of the evidence is wholly contrary to the Findings of Fact and Conclusions of Law of the District Court, which relied on the legal conclusions of the City's expert, Patrick Todd. Mr. Todd's testimony was either inappropriately allowed due to the City's failure to disclose Todd as an expert, or Todd's testimony was irrelevant as it admittedly had nothing to do with the market value of the Property. However, the District Court relied on Todd's testimony in reaching both its factual and legal conclusions. These findings are not supportable and must be overturned.

CONCLUSION

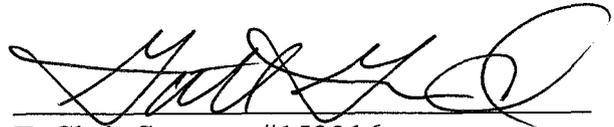
In light of the foregoing, as well as the arguments more fully set forth in Appellant's principal brief, Appellant, American Bank of St. Paul respectfully requests

that this Court reverse the decision of the District Court, set forth in the Findings of Fact,
Conclusions of Law and Order, dated July 30, 2010.

Respectfully submitted,

ANASTASI & ASSOCIATES, P.A.

Dated: April 1, 2011.

A handwritten signature in black ink, appearing to read "T. Chris Stewart", written over a horizontal line.

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CERTIFICATION OF BRIEF LENGTH

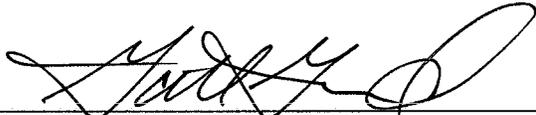
City of Minneapolis,

Respondent.

I, Garth G. Gavenda, one of the attorneys for Appellant, American Bank of St. Paul, hereby certify that Appellant's Response and Reply Brief conforms to the requirements of Rule 132.01, Subd. 3(B), of the Minnesota Rules for Civil Appellate Procedure. The length of Appellant's Response and Reply Brief is 3942 words. Appellant's Reply Brief was prepared using Microsoft Word 2007.

ANASTASI & ASSOCIATES, P.A.

Dated: April 1, 2011,



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