

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BUILDING CODE DIVISION

In the Matter of the Appeal
of Knutson Construction Company
of the Final Decision of the
City of Bloomington

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on December 2, 4 and 5, 1986 at the Office of Administrative Hearings, 400 Summit Bank Building, 310 Fourth Avenue South, Minneapolis, Minnesota. The final post-hearing brief was filed on January 9, 1987, at which time the record was closed.

Gilbert S. Buffington, Special Assistant Attorney General, 204 Administration Building, St. Paul, Minnesota 55155, appeared specially on behalf of the Building Code Division of the Minnesota Department of Administration and its Director, Richard Brooks. Timothy M. O'Brien, from the firm of Hart, Bruner, O'Brien & Thornton, Attorneys at Law, 1221 Nicollet Mall, Suite 700, Minneapolis, Minnesota 55403, appeared on behalf of the Appellant, Knutson Construction Company. David R. Ornstein, Associate City Attorney, City of Bloomington, Municipal Building, 2215 West Old Shakopee Road, Bloomington, Minnesota 55431-3096, appeared on behalf of the Respondent, City of Bloomington.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Administration shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Commissioner Sandra J. Hale, Administration Building, 50 Sherburne Avenue, St. Paul, Minnesota 55155,

STATEMENT OF ISSUES

The issues to be determined in this proceeding are: (a) which party has the burden of proof; (b) whether the City of Bloomington properly valued the construction of Olympic Place for the purposes of assessing a building permit fee; and (c) whether the City of Bloomington is estopped from contesting the Appellant's valuation of Olympic Place because of an agreement concerning a method to resolve this dispute.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Knutson Construction Company is a general contracting business which has been in operation for approximately 77 years. On April 22, 1984, Knutson received the plans and specifications for construction of a shell structure, glass curtain wall construction, and an adjacent parking ramp for the Olympic Place project, a nine-story office building. The owner of the proposed office building was Shelard Companies, Inc. Knutson had received the plans and specifications for the project for the purpose of making a bid on the construction.

2. Arnie Grismer, a project estimator for Knutson since May of 1979, was assigned the responsibility to prepare the competitive bid proposal for Olympic Place. The scope of the project was only to construct the shell structure and not to do any finishing work. Mr. Grismer made a determination of the cost of materials, labor cost and added an estimated \$200,000 of profit for the Company. In addition, the bid proposals of many subcontractors were included into the total cost. This bid estimation process consumed approximately 160 hours of Mr. Grismer's time.

3. On May 11, 1984, Knutson submitted its bid to Shelard Companies, Inc. in the amount of \$6,444,000. Four other bids were submitted by Knutson's competitors, including bids of Lovering Associates, Inc. in the amount of \$6,407,000; Krause Anderson Construction Company in the amount of \$6,534,000; and Witcher Construction Company in the amount of \$6,596,700. Lovering Associates, Inc. subsequently withdrew its bid, leaving Knutson as the low bidder at \$6,444,000. There is no evidence in the record to show that this bid process was anything other than an arms-length transaction.

4. On May 22, 1984, Knutson and Shelard entered into a construction contract wherein Knutson agreed to perform all the work shown on the plans and specifications for Olympic Place for the sum of \$6,444,000. This amount included a contractor's fee of \$200,000.

5. On June 27, 1984, Knutson submitted an application for a building permit to the City of Bloomington together with the plans and specifications for the work to be covered by the permit. The application listed the building valuation as \$6,444,000.

6. The construction price of \$6,444,000 did not include architectural fees, engineering costs, legal fees, interest expense on building funds during the period of construction, processing fees or service charges, the cost of the land, or the cost of any change orders which might occur during

construction. The architectural fees which were paid by Shelard were in the amount of approximately \$270,000.

7. After a question arose as to the proper valuation of the proposed construction, Shelard submitted a copy of the general construction contract, a sworn construction statement, and a copy of AIA Document G703, which reflects the scheduled values of respective portions of the work to the City of Bloomington.

8. The City, using building valuation data and a formula prepared by the International Conference of Building Officials (ICBO), valued Olympic Place at \$9,431,000 for the purpose of determining the building permit fee. The ICBO

drafts and promulgates the Uniform Building Code (UBC) which has, in large part, been adopted by the State of Minnesota and is in use state and nation-wide. The ICBO valuation procedure uses average cost figures for different types of building construction and includes a "regional modifier" for most states. The cost figures represent finished construction, however, and not a shell construction as reflected in the construction contract for Olympic Place. The ICBO valuation factors are revised on a quarterly basis.

An explanatory statement included on the ICBO cost sheet reads:

At the request of numerous building officials, Building Standards offers the following building valuation data representing average costs for most buildings. Because residential buildings are the most common for many cities, two general classes are considered for these, one for "average" construction and the other for "good." Adjustment should be made for special architectural or structural features and location of the project. Often higher or lower unit costs may result.

The unit costs are intended to comply with the definition of "valuation" in Section 423 of the Uniform Building Code and thus include architectural, structural, electrical, plumbing, and mechanical work, except as specifically listed below. It also includes the contractor's profit which should not be omitted.

The determination of plan check fees for projects reviewed by the International Conference of Building Officials will be based on valuation computed from these figures.

9. Although Knutson disputed the City's valuation of Olympic Place, it paid a fee of \$43,302.43 based on the \$9,431,000 figure under protest. That fee amount includes \$23,760 as a building permit fee, \$2,376 for a certificate of occupancy, \$15,444 as a plan check fee and \$1,721 as a state surcharge.

10. Pursuant to Minn. Stat. 16B.70, a surcharge is added to the permit fees collected by municipalities which is paid to the state to offset the costs of administering the state building code. This surcharge, like the building permit, is graduated based on the valuation of the construction. In February of each year, the Building Code Division (BCD) mails out "Building Valuation Data" to municipalities "for use in computing the building permit surcharges for remittances to the State or for comparison with valuations submitted by the applicant for permits." City Ex. 13. This valuation data is the same as the ICBO valuation data but is only updated once per year. Approximately 400 municipalities use the BCD data to assess surcharges and most also use it to value construction for building permits. The BCD cost sheet states, that, "The unit costs are intended to include architectural, structural, electrical, plumbing and mechanical work, except as specifically listed. . . ." City Ex. 13.

11. In calculating the \$9,431,000 valuation for Olympic Place, the City deducted the amount of \$10.00 per square foot from the ICBO calculation for the office building portion of the construction as an offset for the

anticipated finishing costs. The average square foot finishing cost figure as established by the permits issued subsequent to the "shell" construction was

approximately \$15.00 per square foot. The City issued the finishing cost permits based on the value of the work as stated by the applicants.

12. During the construction of Olympic Place, change orders in the amount of approximately \$170,000 were issued by Shelard. Consequently, the total price for the structure paid by Shelard to Knutson was approximately \$6,604,000. That figure includes a profit to Knutson in the amount of only \$65,000, due in part to an increased expense for liability insurance.

13. Negotiations between the City and Knutson continued because the dispute concerning the valuation of the Olympic Place construction could not be resolved. Consequently, on December 18, 1984 during a meeting between representatives of Shelard, Knutson and the City of Bloomington, the City proposed a review of the final certified building costs as a basis to reconsider the valuation question. However, on December 28, 1984, Tim Skusa, Plan Check Engineer for the City, wrote to Arnie Grismer, advising him that the City would not change its calculation for the Olympic Place construction.

14. On January 25, 1985, Knutson filed a "Notice of Appeal" pursuant to "the provisions of Minn. Stat. 16.863" with the Commissioner of Administration. App. Ex. L. However, a Notice and Order for Hearing was not issued until October 16, 1986.'

15. On February 5, 1985, Jan Gasterland, Assistant Manager of the Building and Inspection Division for the City, wrote a letter to Knutson which stated, in part:

. . . Our final decision is that the fees will remain as charged and paid by Knutson Construction Company with the following option:

If you still feel overcharged at the time of substantial completion, you may allow the City of Bloomington to audit the construction companys records at the expense of the construction company. If the true costs are less than the city's estimate a proportional refund will be given. If the true costs are more than the city's estimate a proportional additional fee will be charged.

I trust this will be acceptable to you and that this will finally put this matter to rest.

16. On October 10, 1985, Alan Johnson, an auditor employed by the City of Bloomington, conducted an audit of Knutson's certified costs of construction. Knutson made all of its records available to Mr. Johnson for this purpose. As a result of this audit, Mr. Johnson concluded that the actual costs paid by Shelard to Knutson for the work Knutson had performed was \$6,604,000. However, because architectural fees were not included in these costs, Mr.

'Minn. Stat. 16.863 (1982) was repealed by 1984 Laws, ch. 544, 90 and replaced with Minn. Stat. 166.67 (1984), the statute under which this case was commenced by the Department of Administration.

Johnson requested that he be allowed to audit Shelard's records to complete the audit process. Shelard would not permit Mr. Johnson to audit its books, however. Consequently, the City did not make any refund to Knutson for any portion of the permit fees which it had paid.

17. In November of 1986, the City hired a real estate appraiser, Culver E. LaSalle, to perform an appraisal of the replacement cost of the Olympic Place construction as of June of 1984. This appraisal did not include tenant improvements, or finishing costs, or the cost of the land. The appraisals did include costs for architectural, engineering and surveyor fees. Mr. LaSalle used two valuation services, the Boeckh Valuation System and the Marshall Valuation System, as the basis for his appraisals. In addition, Mr. LaSalle used the sales of comparable office buildings in the area to corroborate his estimated value. Mr. LaSalle's appraisal of the replacement cost for Olympic Place in June of 1984 was \$9,400,000,

18. In addition to the Olympic Place project, there are four other building constructions in the Bloomington area where the valuations derived from the ICBO valuation data is significantly different from the construction cost as stated by the general contractors.

19. The City of Bloomington has in the past accepted general contractors' statements as to the value of construction work for the purpose of issuing permits. However, the City uses the ICBO valuation data as a way to ensure uniformity of building permit fees. Use of the ICBO data negates the need for audits and appraisals and guards against "Inside deals" made between owners and contractors to lessen the cost of construction, and thus the permit fees.

20. Some municipalities in the state have adopted ordinances which require the use of the ICBO valuation data to compute building permit fees. The City of Bloomington has not adopted such an ordinance, however.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Department of Administration have jurisdiction in this matter pursuant to Minn. stat. 16B.67 and 14.50 (1984).2

2. The Appellant, Knutson Construction Company, has the burden of proof to show by a preponderance of the evidence that the actions taken by the City of Bloomington to value the Olympic Place construction were improper.

3. The City is not estopped from implementing its valuation of Olympic Place because of the dispute resolution methodology offered to Knutson and acted on by the City.

'Although Minn. Stat. 16B.67 does not mandate that the appeal herein be heard pursuant to the Administrative Procedures Act, this matter clearly falls within the definition of "contested case" found at Minn. Stat. 14.02, subd. 3 (1984).

4. The Appellant has proved that the City's valuation of the Olympic Place construction was improper.

S. The proper valuation of the Olympic Place construction for the purpose of assessing permit fees should have been \$6,874,000, the audited contract amount plus the architectural fees.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Department of Administration issue an Order valuing the cost of construction of Olympic Place at \$6,874,000 for the purposes of the issuance of permit fees in June of 1984.

Dated this 9th day of February, 1987.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, No Transcript Prepared.

MEMORANDUM

The Administrative Law Judge has concluded that the Appellant in this matter, Knutson Construction Company, has the burden to show that the City's valuation of the Olympic Place construction was improper. Minn. Rule 1400.7300, subp. 5, states that, "The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard." In this case, Knutson Construction Company is challenging the validity of the City's valuation and proposing that the valuation be changed to reflect what it feels is the actual cost of construction. In applying the cited rule, the Appellant clearly has the burden of proof. Knutson has cited no law to the contrary. In *Lyons v. City of Minneapolis*, 63 N.W.2d 585, 589 (Minn. 1954), the Minnesota Supreme Court specifically held that persons attacking the validity of license fees have the burden of proving that the fees are excessive.

The Appellant next argues that the City is estopped from using the ICBO valuation because it agreed to reconsider and make a refund after an audit of Knutson's books. In order for estoppel against the City to apply, Appellant must prove that the City made representations or inducements upon which

Knutson relied to its detriment and that Knutson will be harmed if the claim of estoppel is not allowed. *Brown v. Minnesota Department of Public Welfare*, 368 N.W.2d 906 (Minn. 1985); *Ridgewood Development Company v. State*, 294 N.W.2d 288 (Minn. 1980); *Mesaba Aviation v. County of Itasca*, 258 N.W.2d 877 (Minn. 1977). In this case, the City did make a representation or inducement to Knutson Construction Company that a refund would be given for excess permit fees if an audit showed that the valuation for Olympic Place Was less than the amount used by the City. At the time this "agreement" was made, Knutson had already paid the permit fees and took no further actions to its detriment in reliance on the City's proposal. Consequently, the City's failure to adhere to its proposal did not result in any additional harm or prejudice to Knutson because the assessed fees had already been paid. Consequently, the doctrine of equitable estoppel is not applicable in this case because there was no detrimental reliance.

The general rule in Minnesota is that license or permit fees assessed by municipalities must be an amount that is reasonable and not in excess of the expenses incurred by the issuing body. *Minneapolis Street Railroad Company v. City of Minneapolis*, 52 N.W.2d 120 (Minn. 1952); *Lyons, supra*. License fees set by a city are presumed to be valid unless the party challenging those fees can offer evidence to overcome the presumption. *Lyons* at 589.

In this case, the City relies on section 304(a) of the Uniform Building Code which reads:

3This section was amended in the State Building Code (1983 Rules) to read:

1305.0800 SECTION 304.

Section 304(a) of the UBC is amended to read as follows:

UBC Section 304. (a) Permit Fees. Each municipality must adopt its own schedule of permit fees. The fee schedule of Table No. 3-A is optional for use by the local authority and is a recommended schedule. In areas outside of the enforcement authority of a city, the fee charged for the issuance of permits and inspections for single family dwellings may not exceed the greater of \$100 or .005 times the value of the structure, addition, or alteration. (Minnesota Statutes, section 16.851.)

The determination of value or valuation under any of the provisions of this code must be made by the building official. The value to be used in computing the building permit and building plan review fees is the total value of all construction work for which the permit is issued as well as all finish work, painting, roofing, electrical, plumbing, heating, air conditioning, elevators, fire-extinguishing systems, and any other permanent equipment.

However, the issue herein, valuation, is not affected by the amendment.

Fees

Sec. 304(a) Permit Fees. The fee for each permit shall be as set forth in Table No. 3-A.

The determination of value or valuation under any of the provisions of this code shall be made by the building official. The value to be used in computing the building permit and building plan review fees shall be the total value of all construction work for which the permit is issued as well as all finish work, painting, roofing, electrical, plumbing, heating, air conditioning, elevators, fire-extinguishing systems and any other permanent equipment.

The terms "value" or "valuation" are defined by section 423 of the UBC as follows:

Sec. 423. VALUE or VALUATION, of a building shall be the estimated cost to replace the building and structure in kind, based on current replacement costs, as determined in Section 304(a).

When read together, the two sections equate replacement cost and the total value of all construction work.

The real issue in this case is what figures are the true indication of the replacement cost or value of the construction work at the time the building was constructed. The Judge has determined that the audited certified costs of construction, with the addition of architectural fees, is the value that should be used in this case. The record shows that Knutson's construction bid was very close to the bids tendered by competing companies. Because all bids were based on the same plans and specifications, the Judge must assume that the cost of change orders would have been approximately the same regardless of who did the construction. The Judge has also accepted the interpretation of the Building Code Division and the ICBO that architectural fees should be included as part of the construction costs. Knutson does not dispute this inclusion.

The above-discussion should not be read to imply that the Judge has found the City's use of the ICBO valuation data to be in violation of either statute or rule.4 The City, specifically the building official, is authorized to make a "determination of value." There is no method prescribed as to how that determination should be made.' The determination of the building official

'The Judge was able to find only one reported case that even mentions use of the ICBO "Building Valuation Data." City of Kalispell v. Schaffer, 700 P.2d 1000, 1003 (Mont. 1985). That case is applicable herein only for the proposition that architectural fees are appropriately part of construction costs .

'The Building Code Division may want to consider adopting a rule which would resolve this question.

has a presumption of Validity. Lyons, supra. However, in this case, use of the average cost figures contained in the ICBO data gave an incorrect valuation. The applicable rule requires that the "value of all construction work" be the standard, not the regional average cost figures for the work as calculated by the ICBO. If the term "value" is to be interpreted to mean something other than actual cost, rules should be promulgated to adopt that meaning. In this case, Knutson has proved that the value of the Olympic Place construction, for purposes of section 304 of the UBC, is the certified construction costs with the addition of the architectural fees.

P.C.E.

'The appraisal figure offered into evidence is also based on average valuation tables much like the ICBO data.

