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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Deborah Holter,	) **SUPREME COURT NO. 20190277**
	)
Petitioner-Appellant,	)
	) Morton County Case
vs.	) Civil No. 30-2017-CV-01003
	)
City of Mandan, a political Subdivision of the State of North Dakota,	)
	)
Respondent-Appellee.	)

BRIEF OF APPELLEE CITY OF MANDAN

APPEAL FROM MEMORANDUM OPINION ON APPEAL DATED JUNE 28, 2019

THE HONORABLE CYNTHIA FELAND, DISTRICT JUDGE
STATE OF NORTH DAKOTA
MORTON COUNTY
SOUTH CENTRAL JUDICIAL DISTRICT

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Paragraph No.

North Dakota Century Code

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STATEMENT OF THE ISSUES

[¶1] The decision of the Special Assessment Commission related to the special assessments for Mandan Street Improvement District No. 199 were not arbitrary, capricious, or unreasonable and the assessments did specifically benefit the property of the Appellant.

STATEMENT OF THE CASE

[¶2] Pursuant to the provisions of Section 40-22-10, N.D.C.C., the City of Mandan, on March 3, 2015 approved a resolution approving the engineer's report and authorizing the construction of a street improvement in Street Improvement District No. 199 ("SID #199") (App. 32); and approved the feasibility and evaluation of improvements for said SID #199, Project No. 2014-28 (App. 33); and adopted a resolution declaring the necessity of said improvement to be paid by the levy of special assessments on the property benefited thereby, as required by Ch. 40-23, N.D.C.C. (App. 34).

[¶3] Thereafter, the City advertised for bids, determined there were insufficient protests to bar the construction of the improvement in the district, approved the plans and specifications for the district included amended engineer's report and advertising for bids and the project was constructed. (App. 34-68).

[¶4] After construction of the project, the Special Assessment Commission of the City of Mandan met on July 7, 2017, to consider the assessment of benefits for Street Improvement District No. 199 (App. 79-82). Appellant Holter protested the assessments for certain properties she owned within the district. (App. 111).

[¶5] The City of Mandan published a Notice of Hearing of Objections to Special Assessments for said SID #199, which notice of assessments specified the properties that "in the opinion of the Commission are especially benefited by the construction performed in SID #199 of the City of Mandan . . . ." (App. 86-94). The Holter property is Parcel Nos. 1480, 1486 and 1490 (App. 91).

[¶6] On October 17, 2017, the City of Mandan Board of City Commissioners met and approved the special assessments for SID #199 for Parcels 1480, 1486 and 1490 owned by Appellant Holter (App. 140).

[¶7] After briefing by both parties, District Judge Cynthia Feland affirmed the actions by the City of Mandan relating to the special assessments for SID #199, and dismissed the appeal.

[¶8] This appeal followed.

ARGUMENT

[¶9] Holter's appeal appears to be premised on two issues: (1) that the assessment against her property is not "fair" because the assessment exceeds the benefit, and (2) that the City's policy in assessing the benefit to various tracts in the improvement district does not comply with state law.

[¶10] As previously pointed out, the Special Assessment Commission did find at its August 9, 2017 meeting that the various properties were benefited by the amount assessed against each tract. (App. 95). Secondly, at the meeting of the City Commission on September 5, 2017, where the Commission first considered the confirmation of the assessments for SID #199, the minutes reflect that:

> Ms. Holter agreed there is a benefit of the road but the benefit is not $50,000. . . . Ms. Holter stated that it is largely divergent (sic) and that she expects to be assessed and that she did not contest this project when it came up because the road does need to be fixed.

(App. 98).

[¶11] The North Dakota Supreme Court has visited the issue of special assessments a number of times. Initially, we offer the following language from a 1988 case, *Haman v. City of Surrey,* 418 N.W. 2d 605 (N.D. 1988):

> We are not a super grievance board. Our function, like the trial court's function, is to assure that local taxing authorities do not act "arbitrarily, oppressively, or unreasonably . . . ." *Soo Line Railroad Company v. City of Wilton,* 172 N.W.2d 74, 75 (N.D. 1969). We do not try the special

assessment case anew. *Buehler v. City of Mandan,* 239 N.W.2d 522, 527 (N.D. 1976).

[¶12] Deference for decisions of special assessment commissions stems, in part, from the constitutional doctrine of separation of powers. *Cloverdale Foods Co. v. City of Mandan,* 364 N.W.2d 56, 59 (N.D. 1985). We have recognized that a special assessment commission is "in essence a legislative tribunal created by legislative authority for the purpose of (1) determining the benefits accruing to the several tracts of land in an improvement district by reason of the construction of an improvement and (2) assessing the costs and expenses thereof against each tract in proportion to the benefit received." *Cloverdale, supra,* at 60, citing, *Hale v. City of Minot,* 52 N.D. 39, 201, N.W. 848 (1924).

[¶13] In Section 40-23-07, N.D.C.C., the Legislature granted special assessment commissions the authority to apportion assessments according to the benefits each parcel of land receives. *Cloverdale, supra,* at 60. While assessments levied against each lot must be limited to a "just proportion," *Northern Pacific Railway Co. v. City of Grand Forks,* 73 N.W.2d 348, 351 (N.D. 1955), the process of quantifying benefits accruing to each lot inevitably rests on the judgment and discretion of the special assessment commission. There simply is no precise formula for quantifying benefits.

[¶14] From a 1952 case, "generally, all presumptions are in favor of the validity of assessments for local improvements, and the burden is on persons attacking the validity of assessments to show that they were invalid." *Reed v. City of Langdon, 78 N.D. 991, 54 N.W.2d 148, 150 (1952).*

[¶15] In prior cases, this Court has said that whether a property benefits from an improvement does not depend only on the property's present use; rather, possible future uses may also be considered:

> It is natural for the average property owner to resent the burden thus laid upon him, and he easily persuades himself that the thing for which he is asked to pay is a detriment, rather than a benefit, to his land, and ordinarily it is not difficult for him to find plenty of sympathizing neighbors who will unite in supporting his contention. Indeed, the benefits to be derived in such cases are ordinarily not instant upon the inception or completion of the improvement, but materialize with the developments of the future. They are none the less benefits because their full fruition is postponed, or because the present use to which the property is devoted is not of a character to be materially affected by the improvement.

Haman, 418 N.W.2d at 608, (quoting *Soo Line R.R. v. City of Wilton*, 172 N.W.2d 74, 83 (N.D. 1969)).

[¶16] "The Special Assessment Commission has discretion to choose the method to decide benefits and apportion assessments, and it was not required to limit the assessments on the basis of a property's current use and the benefits it currently receives from the improvement. *See, Haman,* 418 N.W.2d at *608*". *Bateman v. City of Grand Forks,* 2008 ND 72, 747 N.W.2nd 117, p. 17.

[¶17] In this case, Holter's property is in fact vacant and has 300' of frontage on the newly paved street under SID #199. What potential uses that property might have in the future

is not known, but certainly as vacant property it could reasonably be developed in the future. Thus, the "benefit" that it receives is not determined solely by the assessment.

[¶18] Holter's second issue is that the Special Assessment Commission treated properties in the district differently based on whether they simply fronted on the street or whether it was a corner lot. In 2015, the State Legislature passed a new section to NDCC Chapter 40-22, specifically NDCC Chapter 40-22-01.2 that required a municipality of the size of the City to adopt a written policy for cost allocation among properties benefitted by a special assessment project. The City adopted such a policy on January 19, 2016, and the policy is found at App. 150. Specifically with regard to street assessments and corner lots, paragraph 3.6 of the policy provides as follows:

> Corner lots are assessed at a rate of one-half the unit cost if only one street abutting the lot/parcel is constructed or improved. When the second street is constructed, one-half the unit cost can be assigned to the lot or parcel abutting that street thus allowing equality amongst the surrounding properties.

[¶19] Note specifically that the policy adopted by the City regarding corner lots is to allow ". . . equality among the surrounding properties."

[¶20] The Holter assessments can be found in the Assessment Role found at App. 203. Specifically tracts No. B20-1, B20-2 and B20-3. Each of the tracts consist of 100' of frontage on Third Street NE. The assessment for each is $15,928.40.

[¶21] As an example of how the City's policy equalizes assessments between property owners can be found at App. 200, specifically Tracts B19-4 and B19-5. Tract B19-4 is a corner lot. Tract B19-4 is assessed for one-half of the frontage on one street at a quantity

of 25' and one-half of the frontage on the side street, the street along side of the lot, or 70' (one-half of 140') for a total quantity assessment at 95' for an assessment of $15,131.98. In other words, similar to the benefit/assessment of the Holter lots that have 100' of frontage on Third Street NE.

[¶22] In 14 *McQuillin Mun. Corp.* (3rd Ed. Rev. 1970), we read:

> The rule that a method of assessment cannot be arbitrary, and must have some relation to the benefits appears reasonable. It would seem that the legislature is competent to judge of benefits. This is assumed by the current of authority. A public improvement having been made, the question of determining the area benefited by such improvement is generally held to be a legislative function, and such legislative determination, unless palpably unjust, is usually conclusive, and not subject to judicial interference unless arbitrariness, abuse or unreasonableness be shown. The prohibition is that special taxes or local assessment shall not be levied in excess of the benefits conferred, whether by the valuation, front foot, area, or any other method. (§ 38.02, pp. 19-20)
>
> . . . where the assessment exceeds the value of the benefits to the property assessed, it is, as to the excess, a taking of property without due process of law, as contemplated by the federal and state constitutions; . . . ." (§ 38.124, p. 300)
>
> *McQuillin* also states:
>
> Where no rule of apportionment is prescribed by statute or charter, the municipality may adopt 'any mode that would be fair and legal' and such

as would secure an assessment in proportion to the benefits accruing as nearly as practicable. 'Absolute equality is not to be expected.'

. . . While municipal authorities usually have a wide discretion in the apportionment of assessments, . . . the method prescribed by law must be strictly followed . . . ." § 38.121, p. 293)

[¶23] The Supreme Court has stated in a most recent case on this issue as follows:

A municipality has broad discretion to choose the method used to decide what benefits a property receives from an improvement and to apportion the costs to individual properties. *Bateman*, 2008 ND 72, ¶*16*, 747. N.W.2d 117. A municipality may adopt any method to apportion benefits that is fair and legal and secures an assessment that is in proportion to the benefits as nearly as possible when no rule of apportionment prescribed by statute or charter exists. *Serenko v. City of Wilton*, 1999 ND 88, ¶ 21, 593 N.W.2d 368. "[T]he process of quantifying benefits accruing to each lot inevitably rests on the judgment and discretion of the special assessment commission. There simply is no precise formula for quantifying benefits." *Id.* (quoting *Haman v. City of Surrey*, 418 N.W.2d 605, 608 (N.D. 1988)). Assessments may be apportioned according to "frontage, area, value of, or estimated benefits to, the property assessed, or according to districts or zones, or on any other reasonable basis that is fair, just and equitable." *Serenko,* at ¶ 21 (quoting 63 C.J.S. *Municipal Corporations* § 1423, at 1212; now at 64 C.J.S. *Municipal Corporations* § 1618, at 356-357 (2011)).

[¶24] However, "[t]he method used to apportion the assessment cannot be arbitrary and must have some relation to the benefits." *Bateman*, at ¶ 16. The assessment to an individual property cannot exceed the benefits the property receives from the improvement. *Id.* at ¶ 20.

CONCLUSION

[¶25] The Special Assessment Commission and the City Commission of Mandan, in accordance with State law and the City's policy determined the benefit of Special Improvement District #199 improvements to the Holter Property, and properly assessed the cost of the benefit to the Holter property. The assessments are not arbitrary or capricious and this Court should affirm the decision of the district court.

[¶26] Dated this 29th day of November, 2019.

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Certificate of Compliance with Rule 32

[¶27] The undersigned, as attorney for the Respondent/Appellee in the above matter, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, the above brief was prepared with proportionally-spaced, 12 point font typeface, and the total number of pages of the above brief totals 15 pages, inclusive.

By: /s/ *Malcolm H. Brown*
Malcolm H. Brown (#02842)

Certificate of Service

[¶28] I hereby certify that on November 29, 2019, I electronically filed the following document:

1. Brief of Appellee City of Mandan

with the Clerk of the North Dakota Supreme Court and electronically served it on the following:

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Certificate of Service

[¶27] I hereby certify that on November 25, 2019, I electronically filed the following document:

1. Brief of Appellee City of Mandan

with the Clerk of the North Dakota Supreme Court and electronically served it on the following:

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