Michigan Law Review

Volume 52 | Issue 5

1954

MUNICIPAL CORPORATIONS-SPECIAL ASSESSMENTS-METHOD OF REVIEW WHERE A SPECIAL ASSESSMENT IS LEVIED ON A RAILROAD RIGHT-OF-WAY

Judson M. Werbelow S.Ed.
University of Michigan Law School

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—METHOD OF REVIEW WHERE A SPECIAL ASSESSMENT IS LEVIED ON A RAILROAD RIGHT-OF-WAY—Defendant municipality made surface and curb improvements on a street located near plaintiff railroad's right-of-way. Four parcels of land, each containing a house, separated the right-of-way from the street on which the improvements were made. Plaintiff's right-of-way contained a single set of railroad tracks over which plaintiff's trains traveled. Property owners in the improvement district were assessed a total of $13,220.90 for the improvements, $4,715.53 of this special assessment being levied on plaintiff's right-of-way. Plaintiff brought suit to enjoin collection of that part of the special assessment which was levied on its property. The trial court found that the improvement did not benefit the plaintiff's right-of-way and granted the injunction. On appeal, *held,* affirmed. After reviewing the evidence, it was found that the right-of-way was not benefited by the street improvements, and therefore the special assessment on the plaintiff's property was void. *Chicago & N.W. Ry. Co. v. Omaha,* 156 Neb. 705, 57 N.W. (2d) 753 (1953).

The theory of special assessments is that property peculiarly benefited by municipal improvements should bear the cost of the improvement to the extent that it is specially benefited.[1] Various tests have been used to determine whether or not property has been benefited by a municipal improvement. Generally the courts look to the difference in the value of the property immediately before and immediately after the improvement.[2] However, within this general rule there is a split of authority as to whether future benefits and adaptability of the property to more profitable uses are to be taken into consideration[3] or whether the ques-

[1] Norwood v. Baker, 172 U.S. 269, 19 S.Ct. 187 (1898); 14 MCQUILLIN, MUNICIPAL CORPORATIONS §38.01 (1950)

[2] G. T. Fogle & Co. v. King, 132 W.Va. 224, 51 S.E. (2d) 776 (1948); Board of Education of School Dist. No. 2 of Town of Alexander v. Village of Alexander, 92 N.Y.S. (2d) 471 (1949).

[3] Chicago & N.W. Ry. Co. v. Omaha, 154 Neb. 442, 48 N.W. (2d) 409 (1951); Minneapolis, St. P. & S. St. M. Ry. Co. v. City of Minot, 51 N.D. 313, 199 N.W. 875 (1924); Howard Park Co. v. Los Angeles, (Cal. 1953) 259 P. (2d) 977; Appeal of Public Service Elec. & Gas Co., 18 N.J. Super. 357, 87 A. (2d) 344 (1952); Gingles v. City of Onawa, 241 Iowa 492, 41 N.W. (2d) 717 (1950); Phil., B. & W. R.R. v. Hazen, 73 App. D.C. 37, 116 F. (2d) 543 (1940).

tion of benefits is limited to a consideration of the land in its present use.[4] One court has taken the point of view that generally future benefits are taken into consideration, but where the property is restricted by law to its present use the benefit must inure to the restricted use.[5] In the principal case, it was doubtful that the plaintiff's right-of-way would benefit from the street improvement, regardless of whether or not future benefits were considered. The improvement would not benefit the property in its present use and the interest of the plaintiff in the property was one that would revert to the grantor if used for other than railroad purposes. Nevertheless, the City of Omaha, acting under legislative authority, had seen fit to levy a special assessment on plaintiff's right-of-way. How is a court to treat such an assessment, which implies a finding that the right-of-way will benefit from the street improvement? Again there is a lack of uniformity in the courts. A number of courts hold that the question of special benefits is a legislative question and view the finding of the duly authorized assessing body as conclusive unless it is arbitrary, unreasonable or fraudulent.[6] This approach has been held to be constitutional when attacked on due process grounds.[7] What appears to be a minority of the courts approach the question of special benefits as a judicial question and make findings of fact as to whether or not the property has received a special benefit.[8] It is suggested that the minority approach reflects a greater sensitivity to the theory of special assessments and due process provisions.[9] A factor in the decisions seems to be the degree of objectivity which the legislature provides in its method of assessment.[10] Thus the legislature may increase the conclusiveness of its determination by specifying as objective a standard as possible for use in levying the assessment. A distinguishing feature in the cases seems to be that those courts which include future benefits when evaluating the property after the improvement tend to

[4] Chicago v. Chicago & N.W. Ry. Co., 278 Ill. 86, 115 N.E. 836 (1917); Appeal of Public Service Elec. & Gas Co., 8 N.J. Super. 376, 72 A. (2d) 426 (1950).

[5] Hinsdale Sanitary Dist. v. Hinsdale Golf Club, 363 Ill. 595, 2 N.E. (2d) 921 (1936).

[6] Struble v. Cincinnati, 83 Ohio App. 304, 82 N.E. (2d) 127 (1948); Atlantic Coastline Ry. Co. v. Winterhaven, 112 Fla. 807, 151 S. 321 (1933); Chicago & N.W. Ry. Co. v. Riverton, Freemont County, (Wyo. 1952) 246 P. (2d) 789, reh. (Wyo. 1952) 247 P. (2d) 660; Grand Rapids v. Grand Trunk Ry., 214 Mich. 1, 182 N.W. 424 (1921); Sterling Nat. Bank & Trust Co. of N.Y. v. Charleston Transit Co., 126 W.Va. 42, 27 S.E. (2d) 256 (1943); Seattle v. Seattle & Montana Ry. Co., 50 Wash. 132, 96 P. 958 (1908); Kansas City So. Ry. v. Road Improvement Dist., 266 U.S. 379, 45 S.Ct. 136 (1924).

[7] Louisville & Nashville Ry. Co. v. Barber Asphalt Paving Co., 197 U.S. 430, 25 S.Ct. 466 (1905); Branson v. Bush, 251 U.S. 182, 40 S.Ct. 113 (1919).

[8] Chicago v. Chicago & N.W. Ry. Co., note 4 supra; Maryland & Pennsylvania Ry. Co. v. Nice, 185 Md. 429, 45 A. (2d) 109 (1945); Chicago & N.W. Ry. Co. v. Omaha, 156 Neb. 705, 57 N.W. (2d) 753 (1953); City of Barre v. Barre & Chelsea R. Co., 97 Vt. 398, 123 A. 427 (1924); Naugatuck Ry. Co. v. Waterbury, 78 Conn. 193, 61 A. 474 (1905); Appeal of Public Service Elec. & Gas. Co., note 4 supra.

[9] In the principal case, the state constitution contained a due process clause, Neb. Const., art. I, §3, which had to be considered in addition to that contained in U.S. CONST., amend. XIV, §1.

[10] Chicago & N.W. Ry. Co. v. Riverton, Freemont County, note 6 supra.

treat the question of special benefits as legislative.[11] On the other hand, those courts which require the benefit to be conferred on the present use of the property tend to treat the question of special benefits as judicial.[12] This distinction appears to be sound, for the legislature is as well equipped as any other governmental body to determine the question of future benefits, whereas the courts are probably in the best position to consider whether or not special benefits are being presently conferred. Although the decisions present many divisions of authority, it seems likely that if the problem arises in a case of first impression or in a case involving new or altered assessment legislation, the various factors which have been discussed here will be taken into consideration by the court.[13]

Judson M. Werbelow, S.Ed.

[11] Louisville & Nashville Ry. Co. v. Barber Asphalt Paving Co., note 7 supra; Howard Park Co. v. Los Angeles, note 3 supra; Phil. B. & W. R.R. v. Hazen, note 3 supra.

[12] Chicago v. Chicago & N.W. Ry. Co., note 4 supra; Appeal of Public Service Elec. & Gas. Co., note 4 supra.

[13] See generally 12 MINN. L. REV. 524 (1928). For collection of cases see 37 A.L.R. 219 (1925); 82 A.L.R. 425 (1933).