STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1261

In Re: Improvement of Watonwan County Ditch #62

Filed April 1, 2013
Affirmed
Kirk, Judge

Watonwan County District Court
File No. 83-CV-09-666

Steven J. Vatndal, Law Office of Steven J. Vatndal, Mankato, Minnesota (for appellants Mark Rentz, Mark Klinkner, and Russell Warling)

Gerald W. Von Korff, Rinke Noonan, St. Cloud, Minnesota (for respondent Watonwan County)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

This appeal seeks to resolve an agricultural drainage dispute between appellants, a group of landowners in Watonwan County, and the drainage authority of respondent Watonwan County. The landowners argue that the drainage authority's dismissal of their petition for improvements to the drainage system servicing their land ought to be reversed because the district court failed to recognize that the drainage authority ignored

certain evidence and acted arbitrarily in violation of Minn. Stat. § 103E.095, subd. 2 (2012). Because we conclude that the drainage authority did not ignore evidence and act arbitrarily, we affirm.

FACTS

Watonwan County Ditch No. 62 is a system of tiled conduits that drains water from approximately 2,200 acres of gently rolling farmland in Watonwan County. Ditch 62 carries the water into Judicial Ditch No. 13, which serves both Watonwan and Brown counties. Ultimately, the water carried from the area served by Ditch 62 reaches the Watonwan River.

Although referred to as a "ditch," the water in Ditch 62 runs entirely underground using century-old pipes until it reaches its outlet at the open-trench Judicial Ditch 13. Apart from a minor improvement in the 1970s, Ditch 62 has not been upgraded since its installation in the 1910s.

According to the landowners, this lack of improvement to Ditch 62 has rendered it outdated and lacking in sufficient capacity for the size of the watershed. By one estimate, Ditch 62 carries only 30% of the capacity recommended for the land it services. The landowners claim that this has caused water overflows, flooding, erosion, and poor crop yields.

In October 2007, members of the Klinkner, Rentz, and Warling families filed a petition with the drainage authority seeking improvements to Ditch 62 (the Klinkner

petition).[1] The Klinkner petition proposed constructing a new outlet into Judicial Ditch 13 running across a neighboring farm. It also proposed constructing an open-trench ditch running along an existing road, and upgrading the tiling of some of the westernmost branches feeding into Ditch 62. The drainage authority considered the Klinkner petition at its meeting on October 16, where it heard testimony from a nonpetitioner (an owner of one of the farms over which the open trench would pass) who urged the board to table the Klinkner petition and consider whether larger, systemic improvements were needed. The drainage authority appointed an engineer to the project proposed in the Klinkner petition.

On December 20, the drainage authority reconvened for a preliminary hearing on the Klinkner petition. An attorney representing landowners served by Ditch 62 who oppose the Klinkner petition presented several legal arguments to challenge the petition. The drainage authority recessed the hearing, requesting that attorneys for both the proponents and opponents of the Klinkner petition submit their legal arguments on the Klinkner proposal for further consideration by the drainage authority. In February 2008, the drainage authority convened again, considered the legal arguments for and against the Klinkner petition, issued findings pursuant to Minn. Stat. § 103E.261, subd. 5 (2012), ordered the engineer to make a detailed survey with plans and specifications on the Klinkner petition, and appointed viewers.

On April 30, a group of landowners who did not support the Klinkner petition filed another petition with the drainage authority (the Beck petition). The Beck petition

[1] The Klinkner, Rentz, and Warling families are the landowners who are bringing this appeal.

proposed building a completely tiled, underground ditch that would supplement existing Ditch 62 infrastructure. The Klinkner and Beck petitions were competing petitions: if the drainage authority adopted one petition, the other petition would be moot.

A short time later, the drainage authority received a letter from an attorney it retained to advise it on Minnesota's drainage laws, who opined that it would be more cost effective simply to assign the engineer working on the Klinkner petition to consider the proposals raised in the competing Beck petition. Nevertheless, the drainage authority appointed a different engineering firm to the Beck petition. The Beck petition engineer prepared his report and presented it to the drainage authority on August 4. After hearing discussion between proponents of the Klinkner petition and proponents of the Beck petition, the authority issued findings, ordered the engineer to make a detailed survey with plans and specifications on the Beck petition, and appointed viewers.

The viewers submitted their reports on the Klinkner and Beck petitions. They found that the Klinkner proposal provided for net benefits of $255,634.71. In his final report, the engineer on the Klinkner petition estimated that the proposed improvement would cost $522,759, offset by $311,064 in separable maintenance for a net cost of $211,695. The Klinkner petition engineer concluded that the benefits of the project outweighed its costs by $48,305.

Over the course of multiple sessions between June 8 and August 19, 2009, the drainage authority held a final hearing on both the Klinkner and Beck petitions. During these sessions, the drainage authority heard testimony from, among others, the viewers and engineers, landowners, and attorneys representing both sets of petitioners.

On August 19, the drainage authority found that the costs of both petitions exceeded their benefits, requiring dismissal of the petitions pursuant to Minn. Stat. § 103E.341, subd. 1 (2012). The drainage authority's findings of fact and order, issued on September 1, reflected its conclusion that, despite the Klinkner engineer's final estimate showing a net benefit, the costs of the Klinkner petition exceeded its benefits because several costs were underestimated. The additional expenses that the drainage authority added to the project caused the costs to exceed the benefits by $24,440.66.

The landowners appealed the decision of the drainage authority to the district court, pursuant to Minn. Stat. § 103E.091 (2012). The district court affirmed the drainage authority, and the landowners now appeal to this court.

D E C I S I O N

"Minnesota's laws pertaining to drainage ditches are a complex matrix adopted with the intent of reclaiming agricultural land by disposing of excess water that renders the land untillable, and fairly allocating the costs among benefited landowners." *In re Improvement of Murray Cnty. Ditch No. 34*, 615 N.W.2d 40, 45 (Minn. 2000) (citation omitted). When a ditch is originally constructed, each parcel that receives an economic benefit from the drainage system is assigned a benefit amount that is recorded on an official roll called a drainage lien statement. Minn. Stat. § 103E.601, subd. 2(4) (2012). Thereafter, repairs made to the ditch are borne proportionally by the parcels benefiting from the drainage system. Minn. Stat. § 103E.735, subd. 1 (2012). Costs for improvements to the system, as distinct from repairs, are borne on a prorated basis by "each tract of property affected in direct proportion to the benefits." Minn. Stat.

§ 103E.601, subd. 1 (2012). The responsibility for constructing and maintaining a drainage system falls to the local drainage authority. Minn. Stat. § 103E.011, subd. 1 (2012).

On appeal of the findings of fact and conclusions of a drainage authority, "we review the evidence to determine if there is sufficient evidence to sustain the finding the same as we do in any other case. Where the evidence is conclusive against the finding, it cannot stand." *Seidlitz v. Cnty. of Faribault*, 237 Minn. 358, 362-63, 55 N.W.2d 308, 311-12 (1952). Decisions regarding the necessity and propriety of draining land are "addressed to the judgment and discretion of the tribunal having jurisdiction of the matter" and they "will be disturbed by the courts only when the evidence, taken as a whole, furnishes no legal basis for the decision of such tribunal." *Black v. Nw. Nat'l Bank of Minneapolis*, 283 Minn. 86, 88, 167 N.W.2d 147, 149 (1969) (quotation omitted).

A drainage authority that has issued an order is subject to an appeal to the district court. Minn. Stat. § 103E.095, subd. 1. The district court must hold a trial:

> At the trial the findings made by the board are prima facie evidence of the matters stated in the findings, and the board's order is prima facie reasonable. If the court finds that the order appealed is lawful and reasonable, it shall be affirmed. If the court finds that the order appealed is arbitrary, unlawful, or not supported by the evidence, it shall make an order, justified by the court record, to take the place of the appealed order, or remand the order to the board for further proceedings.

Id.

"Where the [district] court reviewing an agency decision makes independent factual determinations and otherwise acts as a court of first impression, this court applies the 'clearly erroneous' standard of review. Where, on the other hand, the trial court is itself acting as an appellate tribunal with respect to the agency decision, this court will independently review the agency's record." *In re Improvement of Cnty. Ditch No. 86 v. Phillips*, 614 N.W.2d 756, 760 (Minn. App. 2000) (quotation omitted), *rev'd on other grounds*, 625 N.W.2d 813 (Minn. 2001).

The landowners point to five ways that the drainage authority's decision was arbitrary and unsupported by the evidence. We address each of their contentions in turn.

A. Accuracy of the linear foot cost estimate.

The landowners contend that the drainage authority acted arbitrarily and without sufficient evidence when it did not make a downward revision to the project costs after the engineer on the Klinkner petition reduced the linear foot price of the ditch from his original estimate of $30 to $27.93. The landowners concede that the drainage authority was not *compelled* to accept the amended estimate. However, because the drainage authority offered no explanation as to why it did not accept the amended estimate, the landowners claim that its decision can be fairly assumed to be arbitrary and unsupported by evidence.

The drainage authority argues that it is under no obligation to accept amendments to the final engineering report, and that it was reasonably suspicious of the engineer's last-minute efforts to re-estimate the costs of aspects of the project when it otherwise appeared that the project was too expensive.

The engineer submitted the lower cost estimate when asked by the drainage authority to summarize changes to the project costs to reflect discussions that occurred after the submission of the final engineering reports. The engineer's explanation for how he reached the new, lower estimate was perfunctory. He explained that he borrowed the cost from the Beck petition, and that he received unreleased bid information from a contractor bidding an open ditch (presumably on a different project) that suggested the bid on the Klinkner petition might be lower.

In comments at the conclusion of the final hearing, one of the drainage authority commissioners opined that the engineer's design for the Klinkner petition was "designed to be the most efficient use of dollars. Perhaps compromised a little bit, for savings, the proper construction." The other commissioners agreed with this commissioner's appraisal of the Klinkner project.

Although the landowners argue that, once the cost per lineal foot was lowered to match the competing proposal, there was no longer evidence for the drainage authority to continue relying on the old number, this argument is flawed. Because the drainage authority explained that it harbored an overriding suspicion that the cost estimates in the Klinkner petition reflected a design compromised in order to achieve cost savings, it would not be arbitrary for it to reject late-in-the-game revisions to the estimates arguably designed to keep the project alive.

Moreover, it is incorrect that the reduction in the estimate left the drainage authority with only one price supported by the evidence. The engineer's justification for the reduction in the linear-foot cost was premised on meeting the competing petition and

on an unreleased bid from a contractor on a different project. The drainage authority could reasonably (and nonarbitrarily) conclude that the basis for the reduced estimate was unreliable and instead continue to apply the higher cost. The drainage authority's actions are not arbitrary or unsupported by evidence.

B. Requiring 900 feet of concrete pipe.

The landowners next argue that the drainage authority acted arbitrarily and without evidence when it amended the Klinkner petition to require that a portion of the project be built with 900 feet of concrete pipe instead of the lower-priced plastic pipe proposed by the Klinkner engineer. According to the landowners, adding 900 feet of concrete pipe reflects a misinformed decision of the drainage authority: 900 feet of concrete may have been required for the competing Beck petition, but the Klinkner petition had a different alignment with shallower pipe depths that did not require heavier-duty concrete pipe. The drainage authority contends that it heard sufficient evidence to conclude that plastic pipe was of questionable reliability and that it could properly conclude that concrete pipe was superior. Using 900 feet of concrete pipe instead of plastic pipe increased the cost of the project by $22,500.

The drainage authority asked the Klinkner engineer to provide an estimate of the costs associated with replacing a 900-foot portion of plastic pipe with concrete pipe in order to develop a comparison between the Klinkner and Beck petitions. The engineer returned with an estimate for placing concrete pipe only at certain depths of the 900-foot length, as opposed to replacing the entire portion with concrete. The drainage authority expressed frustration that it did not have in front of it an estimate for a full replacement.

The drainage authority then heard testimony from both engineers about the relative advantages and disadvantages of using plastic pipe. The Beck engineer explained that using plastic pipe was "a risk vs. cost issue." He explained that, while a plastic pipe can exhibit strength and durability, a pipe that fails may be replaced by the manufacturer under a warranty and "even if they do replace the pipe, it's pipe only . . . [but] most of the cost is in digging, it's not in the pipe material itself."

The drainage authority also heard testimony that plastic pipe was more appropriate for lower-depth placement, but that the Klinkner petition proposed placing the pipe an average of "a foot or less" higher than the Beck petition. When the drainage authority questioned the life expectancy of plastic pipe, the Klinkner engineer conceded that concrete pipe would last between 70 and 100 years, but that plastic pipe "has been only around for 30 years."

The landowners appear to concede that it would be reasonable for the drainage authority to require *some* of the pipe to be concrete, but their challenge rests on the contention that the drainage authority was acting arbitrarily and without evidence when it required an entire 900-foot span to be concrete. However, the drainage authority appears to have reasonably concluded that—given the uncertain life span of plastic pipe, the costs of replacing plastic pipe that fails, and the relative similarity in depths between the Klinkner and Beck petitions—that the proposal reflecting a 900-foot concrete span was favorable to the potentially less-durable plastic. This decision was neither arbitrary nor unsupported by evidence.

C. The drainage authority's use of separable maintenance.

The landowners next argue that the drainage authority arbitrarily ignored the Klinkner engineer's proposed amendment to the separable maintenance calculation on the project. In his final engineering report, the Klinkner engineer estimated that separable maintenance on the project amounted to $311,064. When applied to the estimated costs and benefits of the petition, the engineer estimated that the petition created a net benefit of $48,305. On July 17, 2009, the Klinkner engineer proposed amending the separable maintenance estimate by increasing it to $368,224.

Without explanation, the drainage authority did not accept the amended separable maintenance costs proposed by the Klinkner engineer in calculating the project's costs and benefits. The landowners argue that the drainage authority's failure to account for the proposed amendments was arbitrary. The drainage authority contends that its actions were discretionary and complied with the statutory framework for applying separable maintenance costs.

The drainage authority was operating within the requirements of its governing statute when it elected not to adopt the Klinkner engineer's amended separable maintenance costs. According to Minn. Stat. § 103E.215, subd. 6(b) (2012):

> [I]f the drainage authority determines that only a separable portion of the existing drainage system will be improved and that the portion needs repair, the drainage authority shall determine and assess, by order, the *proportionate* cost of the improvement that would be required to repair the separable portion of the drainage system to be improved.

(Emphasis added.) The statute does not require the drainage authority to adopt the engineer's amended estimate, and it does not require a strict arithmetical approach to allocating costs between improvements and repairs. Instead, it requires a proportionate allocation of the costs.

In explaining the drainage authority's analysis, one of the commissioners expressed reservations as to whether Ditch 62 was in need of repair. In adopting the separable maintenance numbers without further revision from the Klinkner engineer's final report, it appears that the drainage authority determined that the new costs should not be proportionately allocated to the repairs of Ditch 62.

It is unclear what happened to those costs. Based on the explanation provided by the Klinkner engineer to the drainage authority, the proposed increase to separable maintenance was not a shifting of costs already estimated within the project, but the addition of new costs. The drainage authority does not address whether it agreed that these new costs were a necessary part of the project. This court is left to guess at what conclusions the drainage authority reached, because they are not explained in its final order. However, a drainage authority commissioner did explain that he would engage in a process of weighing the validity of the new proposed separable maintenance costs. Given the deference this court affords to the decision of the drainage authority, and the drainage authority's professed process of considering the validity of the costs, it does not appear that the decision to ignore the amendments was made arbitrarily.

D. Assessment of costs and fees to the Klinkner petition.

The landowners argue that the drainage authority acted arbitrarily when it acted against the advice of its attorney and appointed an engineering firm to the Beck petition, as opposed to directing the Klinkner engineer to assess the feasibility of the Beck project. According to the landowners, this decision unnecessarily drove up the expenses of the drainage authority's activities, which is reflected in $32,845.83 of administrative costs assessed against the Klinkner project. The drainage authority argues that the costs reflect that the Klinkner petition proposed a controversial project, and that the Klinkner petitioners should have done more to achieve consensus with their neighbors before seeking the improvement.

Under Minn. Stat. § 103E.645 (2012), the various costs of the proceedings to establish or dismiss a drainage petition are chargeable to the drainage authority, which are then assessed against the proposed projects. The record does not contain an explanation of the drainage authority's decision to proceed with two engineering firms, but the landowners concede that the expenses driven by each project are allocated individually to each project. Their argument instead focuses on additional costs that cannot be calculated that arose out of the theoretical inefficiencies created by the drainage authority's separate treatment of the petitions.

Because the landowners cannot identify specific costs allocated to the Klinkner petition that would have been avoided had the drainage authority chosen an alternative course, it is difficult to give credence to their assertion that the costs were arbitrarily generated and unnecessarily high. Moreover, the record supports the drainage authority's

contention that both petitions were controversial, contentious, and time consuming. The final hearing extended across several sessions, and the single-spaced transcript runs to 280 pages.

Nor does it appear that the drainage authority acted arbitrarily in appointing a second engineer to the Beck petition. The drainage authority frequently expressed its desire for an "apples-to-apples" comparison of the competing projects, and it could have reasonably concluded that it would be best equipped to reach a decision on the projects if it was advised by different engineers. Again, without a record containing a full explanation of the drainage authority's decision, it is difficult to make a complete assessment of whether the decision was arbitrary. However, given the deference this court affords the drainage authority, we do not find that the drainage authority acted arbitrarily.

E. The drainage authority's calculation of land values.

The parties dispute whether the drainage authority acted arbitrarily and without sufficient evidence when it found the value of land that was taken because of the construction of the ditch was $1,200 per acre higher than the viewers' estimate, thereby increasing the project costs by $11,400. The landowners contend that the record contains insufficient evidence to support the increased price, and that the arbitrary nature of the drainage authority's actions is demonstrated by its embrace of a $4,000-per-acre price to be used in calculating the benefits to the land but a $5,200-per-acre price to be used in calculating the damages.

Property acquired for "the channel of an open ditch and [its] permanent strip of perennial vegetation" is considered damages and the owner is entitled to its fair market value. Minn. Stat. § 103E.315, subd. 8 (2012). "[C]ourts have traditionally used three methods of determining fair market value of real property: (1) market data approach based on comparable sales; (2) income-capitalization approach; and (3) reproduction cost, less depreciation." *Cnty. of Ramsey v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982). The drainage authority is given express authority to amend the viewers' report if it determines that "the viewers have made an inequitable assessment of benefits or damages to any property." Minn. Stat. § 103E.335, subd. 2 (2012).

A commissioner on the drainage authority, after hearing the viewers' report and engaging in discussion with other commissioners, indicated an interest in reviewing comparable land sales and also about "fair and equitable" determinations of land prices. The drainage authority heard testimony from a number of community members who opined that the viewers' $4,000-per-acre assessment was low, and one commissioner described his own experience with negotiating prices in a comparable land sale. The landowners argue, however, that the drainage authority's reliance on anecdotes describing property prices is not sufficient when compared with the expert real estate data provided by the viewers. The landowners also contend that an "equitable" approach to assessing the land values is impermissible.

These critiques of the drainage authority are not supported by the drainage code. The drainage authority is permitted to correct a viewers' report that contains an "inequitable assessment" of the damages that a property would suffer. Minn. Stat.

§ 103E.335, subd. 2. Moreover, the drainage code does not limit the type of evidence upon which a drainage authority may rely in making its final assessment of the costs and benefits.

The landowners additionally argue that the drainage authority's use of different land values for calculating benefits and damages was arbitrary. The benefits of a drainage project may be calculated by determining: (1) the increase in market value of property as a result of the project; (2) the increase in agricultural production as a result of the project; or (3) the increase in value of the property because of a potential different land use. Minn. Stat. § 103E.315, subd. 5(a) (2012). Thus, to determine the value of a benefit afforded by a drainage project, the viewer compares the value of the land served by a fully functioning, unimproved drainage system to land deriving the additional income associated with the increased production capacity of the land resulting from better drainage.

Damages, on the other hand, are calculated using the land's fair market value. *See* Minn. Stat. § 103E.315, subd. 8(1). The value of the damages eventually converts into a cost allocated to the project, which is then compared against the benefits accruing to the land serviced by improved drainage. *See* Minn. Stat. § 103E.601, subd. 1. As the drainage authority points out, the benefits calculation and the damages calculation rely on different formulae aimed at producing different information. The drainage authority followed the correct procedure when it calculated the benefits and the damages.

Affirmed.