IN THE COURT OF APPEALS OF IOWA

No. 8-077 / 07-0876
Filed March 26, 2008

JAMES A. ALLEN, RICHARD F. ALLEN, and TERRANCE J. ALLEN,
Plaintiffs-Appellants,

vs.

WEBSTER COUNTY BOARD OF SUPERVISORS, In Their Capacity as Trustees of Drainage District 219,
Defendant-Appellee.

Appeal from the Iowa District Court for Webster County, Joel E. Swanson, Judge.

The plaintiffs appeal from the district court's order upholding the decision of the Webster County Board of Supervisors. **AFFIRMED.**

Robert W. Brinton of Brinton, Bordwell & Johnson, Clarion, for appellants.

Eric J. Eide of Law Office of Eric J. Eide, P.L.C., Fort Dodge, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

The plaintiffs appeal following a bench trial upholding the decision of the Webster County Board of Supervisors concerning Webster County Drainage District 219. We affirm.

I. Background Facts and Proceedings.

This case involves Webster County Drainage District 219, which was established in 1915 and covers approximately 2400 acres in northwest Webster County. District 219 is a tile district, as opposed to an open ditch drainage district, with a 4.2 mile main tile running the length of the district from northwest to southeast. There is a single assessment schedule for the district rather than a separate assessment for each of the lateral tiles, meaning all land within the district is assessed for any expenses incurred in the district based upon the original classification schedule.

Dolores, Dennis, and Joseph Lawler own approximately 216 acres in the district. The Lawler family first filed a petition with the Webster County Board of Supervisors (the Board) as Trustees of Drainage District 219 in May 1992, seeking relief for inadequate drainage to some of their land in the district legally described as the NW ¼, SE ¼, Section 36, Deer Creek Township, Webster County. This request resulted in a report by Brent Johnson, P.E., of McClure Engineering concluding the tile serving the land in question was adequate to provide sufficient drainage, but noting that surface runoff from 1200 acres upstream contributed to drainage issues on this Lawler parcel. At the time, the Board directed further review be undertaken and a 1995 report stated that improved surface drainage would increase the efficiency of the district tile system

towards its intended purpose of removing excess subsoil moisture. This second report suggested construction of a shallow waterway to divert upstream surface flow before it reached the Lawler parcel. The Board did not act on this second report, although a third report was submitted by Johnson in 1996 proposing construction of a dike and waterway system to divert surface water before it reached the Lawler's parcel. The dike proposal would also benefit the entire district by increasing the drainage efficiency of the main tile. Again, no action was taken by the Board on the 1996 report and dike proposal.

The Lawlers again sought relief by petitioning the Board in April 2002 pursuant to Iowa Code section 468.126 (2001), to which the Board employed John R. Milligan, P.E. to investigate and propose plans to address the Lawler's drainage issues. Milligan filed his report in October 2005, recommending the construction of a dike and waterway system similar to that proposed by Johnson's 1996 report. Milligan also prepared a right-of-way and damage assessment report, which the Board approved in March 2006 following public hearing. More analysis was undertaken by appraisers to assess the compensation for land taken in the proposed dike system, based upon the proportionate share of damage to the individual landowners. The proposed project would straighten a dike, as well as an existing natural waterway within the district, to restore the efficiency of the main tile by reducing incoming surface water. The estimated total project cost (minus a now excised cost for "Reclassification") would be approximately $25,000, or about $9.70 per acre.

The plaintiffs, James, Richard, and Terrance Allen, are also landowners within the district. The Allens have vigorously contested the findings of the

engineers and the necessity for any changes to the district's drainage system to be borne by the district and not the Lawlers personally. Following adoption of the Milligan report by the Board, the Allens appealed to the district court, which found the Allens' contentions without basis in law or fact. The Allens now appeal, arguing on four grounds detailed below.

II. Scope and Standards of Review.

This case involves a direct appeal from the Board's proceedings, *see* Iowa § 468.83-.84, which is tried as an equitable proceeding before the district court. *Id.* §§ 468.91; *Hicks v. Franklin County Auditor*, 514 N.W.2d 431, 435 (Iowa 1994). Our review is therefore de novo. Iowa R. App. P. 6.4.

When reviewing drainage proceedings of boards of supervisors, we have applied three principles: the drainage statutes shall be liberally construed for the public benefit; strict compliance with statutory provisions is required to establish a drainage district, while substantial compliance is sufficient as to repairs or improvements; and the procedural requirements should not be too technically construed. *Hicks*, 514 N.W.2d at 435 (citing *Voogd v. Joint Drainage Dist. No. 3-11,* 188 N.W.2d 387, 390 (Iowa 1971)). With these principles in mind, we consider the arguments now on appeal.

III. Issues on Appeal.

A. Repair versus Improvement.

The first issue on appeal is whether the Milligan report proposes a repair or an improvement within the meaning of the statutory provisions. This question is one of fact. *See, e.g., McGuire v. Voight,* 242 Iowa 1106, 1109, 49 N.W.2d 472, 473 (1951). The district court concluded the project was repair work, for

which the benefits will outweigh the costs. We agree. There is both a substantive and a procedural difference between a "repair" proceeding and an "improvement" proceeding:

> The board at any time on its own motion, without notice, may order done whatever is necessary to restore or maintain a drainage or levee improvement in its original efficiency or capacity, and for that purpose may remove silt and debris, repair any damaged structures, remove weeds and other vegetable growth, and whatever else may be needed to restore or maintain such efficiency or capacity or to prolong its useful life.

Iowa Code § 468.126(1)(a) (2005).

> For the purpose of this subsection, an "improvement" in a drainage or levee district in which any ditch, tile drain or other facility has previously been constructed is a project intended to expand, enlarge or otherwise increase the capacity of any existing ditch, drain or other facility above that for which it was designed.

Id. § 468.126(4).

The duty imposed by Iowa Code section 468.126(1) charges the board of supervisors with keeping a drainage improvement in repair so that it will function properly and perform the services intended, and is mandatory. *Hicks*, 514 N.W.2d at 437. If the estimated cost of a repair exceeds certain limits, notice and a hearing is required. Iowa Code § 468.126(1)(c). Landowners do not have the right of dismissal by remonstrance with regard to repairs. *Id.* § 468.126(1)(d). An improvement to an existing drainage district is defined as "a project intended to expand, enlarge or otherwise increase the capacity of any existing ditch, drain or other facility above that for which it was designed." *Id.* § 468.126(4). If the estimated cost of an improvement exceeds certain limits, notice and a hearing is required and the landowners may file a written remonstrance against the proposed improvement. *Id.* § 468.126(4)(a), (b). The board must also hear

objections and determine whether there should be a reclassification of benefits for the costs of construction. *Id.*

The basis of the Allens' challenge is that the Board's approval and adoption of the Milligan report falls under the guise of a repair but is in effect an improvement, requiring different rights and obligations flowing from the classification of the project. The evidence presented before the Board and the district court supports that the Milligan report proposes a repair, rather than improvement, to the district. The district court found, and we agree, that the Milligan report's proposals will not drain additional lands, change the original plan of the district, or increase the capacity of any tile in the district. Rather, the project will restore efficiency of the main and lateral tiles serving the Lawler parcel and the district overall. Brent Johnson, P.E., testifying on behalf of the Allens, acknowledged the plan would not be considered an improvement, but a repair due to its nature and outcomes. *See Hicks*, 514 N.W.2d at 438. We agree and affirm on this issue.

B. Cost of the Project.

The Allens have the burden of proving the assessment was excessive. We do not believe they have done so. An assessment based on the engineer's report and confirmed by the district court carries with it a strong presumption of correctness and must stand unless the objecting landowner shows it resulted from fraud, prejudice, gross error, or evident mistake. *Schwarz Farm Corp. v. Board of Sup'rs of Hamilton County*, 196 N.W.2d 571, 576 (Iowa 1972) (citing *Wilkinson v. Heald*, 256 Iowa 478, 484, 127 N.W.2d 622, 625 (1964)). The objecting party must prove not only that his assessment is unfair but also what

amount is proper. The main contention during proceedings before the Board and the district court was the Allens' belief the Milligan proposal was too costly for the benefit afforded to their lands. No challenge was made that the cost was improper for the work to be done, nor was an alternative proper amount proposed by the Allens. Although James Allen testified concerning alternatives to the dike and waterway system, such as a diversion of water on the Lawler parcel to Lizard Creek, he acknowledged the primary basis for having a drainage district was to help address and manage the costs of drainage matters and precisely the issue faced by the Board in this case. We conclude the Allens failed to show the Board abused its discretion in approving the Milligan report's proposal and affirm on this ground.

C. Natural Course of Surface Waters.

The Allens also object to the Milligan report plan as altering the natural course of surface waters in the district, they believe to their detriment. Repairs to a natural watercourse which is part of the drainage system are nonetheless repairs under section 468.126. *Morrow v. Harrison County*, 245 Iowa 725, 735, 64 N.W.2d 52, 58 (1954) (citing *Hogue v. Monona-Harrison Drainage Dist*., 229 Iowa 1151, 1158, 296 N.W. 204, 208 (1941)). Drainage districts frequently utilize part of the course of a natural stream, and it is common practice to straighten, dike, or otherwise change them. *Id.* We agree with the district court's conclusion that the project will not alter the natural flow of water, but will utilize it to alleviate excessive subsoil drainage. We affirm.[1]

[1] The Allens assert a constitutional claim under the federal Takings Clause of the Fifth Amendment. As no reference in the record shows this issue was raised

D. Standard of Proof.

Finally, the Allens argue the district court failed to use the correct standard of proof on appeal. They base this argument on the district court's use of the following language: "The objections as voiced by the [Allens] fall far short of establishing by clear and satisfactory evidence that there are either more viable alternatives or that the plan of the [Board] is simply not feasible." The court then goes on to state that the Board's decision was supported by substantial evidence. The burden for objections to a board of supervisor's actions (as trustees of a drainage district) is proof by a preponderance of the evidence that the Board's action of approval amounted to fraud, was in excess of jurisdiction, or that it amounted to an abuse of discretion. *Johnson v. Monona-Harrison Drainage Dist*., 246 Iowa 537, 547, 68 N.W.2d 517, 523 (1955). We agree with the Board's contention that the district court was merely quoting language of *Johnson v. Monona-Harrison Drainage Dist*. rather than using an incorrect standard of proof, and we affirm.

AFFIRMED.

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before or ruled upon by the district court, we deem it not preserved for our consideration on appeal. *See State v. Ross*, 729 N.W.2d 806, 808 (Iowa 2007).