STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1959

Gayle Gaumer, et al.,
Appellants,

vs.

City of Edina,
Respondent.

Filed July 5, 2011
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CV-09-29038

Gayle Gaumer, Wilson Law Firm, Edina, Minnesota (for appellants and attorney pro se)

Thomas M. Scott, Campbell Knutson, Eagan, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

HUDSON, Judge

Appellants, a group of Edina homeowners, appeal from a district court order rejecting their challenge to a special assessment levied by respondent City of Edina. Appellants argue the district court erred as a matter of law by concluding that (1) respondent has the legal authority to include in the assessment the cost of engineering

and clerical services performed by municipal employees and calculated as a percentage of the total cost, and (2) respondent has the legal authority to include capitalized interest in the assessment. We affirm.

FACTS

On November 2, 2009, the Edina city council adopted Amended Resolution No. 2009-91, levying a special assessment for improvements to the city's Highland neighborhood. The total cost of the improvement was $1,310,800. Of that amount, the city assessed $689,477.63 for construction costs and paid the balance out of its utility funds. In addition to the construction costs, the city assessed $103,421.64 for project-related engineering and clerical work performed by city employees. The engineering costs, calculated as approximately 13% of the $689,477.63 construction costs, totaled $89,632.09, and the clerical costs, calculated as 2% of the construction costs, totaled $13,789.55. The city also included capitalized interest, calculated as approximately 7.5% of the construction costs, or $47,313.14, and $500 for miscellaneous expenses. The total amount assessed was $840,712.52.

Appellants filed a complaint in district court appealing the special assessment. Before trial, the parties stipulated that the city did not act arbitrarily, oppressively, or unreasonably as a matter of fact by including the in-house services and capitalized interest in the assessment. Thus, the issue at trial was whether the inclusions were authorized as a matter of law under relevant Minnesota statutes. *See* Minn. Stat. §§ 429.011–.111 (2008 & Supp. 2009) (authorizing municipalities to make local improvements and levy assessments to pay for the cost of those improvements). The

district court held that they were; it also concluded that, because the assessment was not an unlawful taking under 42 U.S.C. § 1983 (2006), appellants were not entitled to recover attorney fees under 42 U.S.C. § 1988(b) (2006), which authorizes fee awards to prevailing parties in section 1983 cases. This appeal follows.

D E C I S I O N

"A special assessment is a tax, intended to offset the cost of local improvements such as sewer, water and streets, which is selectively imposed on the beneficiaries of such products." *Buettner v. City of St. Cloud*, 277 N.W.2d 199, 201 (Minn. 1979). In reviewing a city's decision to levy a special assessment, we do not substitute our judgment for that of the city council; we determine whether the council was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably; we also determine whether the evidence could reasonably support or justify the council's decision. *Vill. of Edina v. Joseph*, 264 Minn. 84, 93, 119 N.W.2d 809, 815 (1962). "[W]hen an assessment for a local improvement has been made by the proper municipal board or officers under due legislative authority and in the regular course of procedure such assessment is prima facie valid, and the burden rests upon the objector to prove its invalidity." *Id.* at 95, 119 N.W.2d at 816–17.

On appeal from a special assessment, we must "either affirm the assessment or set it aside and order a reassessment." Minn. Stat. § 429.081 (2010). Appeals from special assessments are "wholly statutory, there being no common-law right to such appeal, and . . . the conditions imposed by the statute must be strictly complied with. The conditions

will not be extended by construction." *Wessen v. Vill. of Deephaven*, 284 Minn. 296, 298, 170 N.W.2d 126, 128 (1969) (citation omitted).

Each of appellants' challenges to the assessment concerns the application of a statutory provision to the undisputed facts. Statutory interpretation is a question of law, which we review de novo. *See Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). The goal of all statutory construction is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). When interpreting a statute, we must first determine whether the statute's language is clear and unambiguous. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). Statutory words and phrases must be construed according to the rules of grammar and common usage. *See* Minn. Stat. § 645.08(1) (2010). "Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted," and this court applies the plain meaning of the statutory language. *Hans Hagen Homes, Inc. v. City of Minnetonka*, 728 N.W.2d 536, 538 (Minn. 2007). A statute is ambiguous if the language is susceptible to more than one reasonable interpretation. *Schroedl*, 616 N.W.2d at 277.

I

Appellants argue that Minn. Stat. § 429.031, subd. 1(d) (2010), prohibits the city from including engineering and clerical services performed by municipal employees in

the assessment when the cost of those services is calculated as a percentage of the total project.[1] We disagree.

Minn. Stat. § 429.031 (2010) describes the process preceding a resolution that orders an improvement. Subdivision 1(b) provides, in relevant part:

> Before the adoption of a resolution ordering the improvement, the council shall secure from the city engineer or some other competent person of its selection a report advising it in a preliminary way as to whether the proposed improvement is necessary, cost-effective, and feasible and as to whether it should best be made as proposed or in connection with some other improvement.

Subdivisions 1(c) and 1(d) set out the factors the council must, and must not, consider in determining the compensation for the person preparing the preliminary report, if that person is not a city employee:

> (c) If the report is not prepared by an employee of a municipality, the compensation for preparing the report under this subdivision must be based on the following factors:
>
> (1) the time and labor required;
>
> (2) the experience and knowledge of the preparer;
>
> (3) the complexity and novelty of the problems involved; and
>
> (4) the extent of the responsibilities assumed.
>
> (d) The compensation must not be based primarily on a percentage of the estimated cost of the improvement.

The word "compensation" does not appear elsewhere in Minn. Stat. § 429.031. Therefore, by the statute's plain language, the "compensation" in subdivision 1(d) is the

[1] For clarity, and because chapter 429 has not been amended since 2009, we refer to the current version of the relevant statutes.

same "compensation" contemplated in subdivision 1(c): it is "the compensation for preparing the [preliminary] report under this subdivision." Subdivision 1(d) thus limits subdivision 1(c) by specifically prohibiting the compensation paid to a non-municipal employee retained to prepare a preliminary report on a proposed improvement from being based primarily on a percentage of the total cost.

Appellants argue that 1(c) and 1(d) are discrete and independent provisions and that subdivision 1(d) is not intended to limit subdivision 1(c). They contend that while subdivision 1(c) explicitly applies to non-municipal employees, subdivision 1(d), which has no limiting language, applies to both municipal and non-municipal employees and applies to any service performed at *any stage* of the improvement process. Therefore, appellants argue, subdivision 1(d) applies to compensation paid to municipal employees even after the adoption of a resolution ordering an improvement. Appellants conclude that subdivision 1(d) thus prohibits the city from calculating the municipal employees' compensation as a percentage of the total cost of the project, as respondent did.

But appellants' construction of subdivision 1(d) is strained and cannot be reconciled either with subdivision 1(c) or with the rest of section 429.031. First, it is contrary to the statute's plain meaning to assign one meaning to "compensation" as it appears in subdivision 1(c) and a wholly different meaning to the same word in subdivision 1(d). *See* Minn. Stat. § 645.16 (stating that "[e]very law shall be construed, if possible, to give effect to all its provisions"). We believe that the legislature intended the word "compensation" to be restricted in both subdivisions to compensation paid to non-municipal employees. Second, section 429.031 unambiguously addresses preliminary

reports prepared prior to the adoption of the resolution. Therefore, we also disagree with appellants' suggestion that one provision of the section—subdivision 1(d)—should be read in isolation to apply to improvements performed after the adoption of the resolution, especially because subsequent improvements are addressed in a separate provision. *See* Minn. Stat. § 429.041 (2010) (describing procedure for work performed after the city council has determined to make the improvement).

Moreover, a city's authority to calculate engineering costs as a percentage of the total assessment cost has been confirmed by Minnesota courts. *See, e.g., In re Improvement of Lake of the Isles Park*, 152 Minn. 29, 39, 188 N.W. 54, 58 (1922) (holding that "items covering engineering and engineering equipment were properly included as a part of the actual cost of the [improvement], although the engineers were regularly salaried officers and employees of the city and the city owned the equipment"); *see also Burns v. City of Duluth*, 96 Minn. 104, 105–06, 104 N.W. 714, 714 (1905) (noting that a city was authorized to add "the expenses of surveys, plans, specifications, and superintendence," calculated as 10% of the cost of the entire project, to the total price of a local improvement). Appellants acknowledge the caselaw undermining their argument, but contend that the caselaw was superseded by the enactment of subdivisions 1(c) and 1(d) in 1996. *See* 1996 Minn. Laws ch. 402 § 1, at 543. But, as the district court correctly noted, these subdivisions do not apply to the compensation paid to the *in-house* engineering and clerical workers at issue here. Accordingly, this argument has no bearing on the propriety of the city's actions.

We conclude that chapter 429 authorizes the city's inclusion of in-house engineering and clerical services as a percentage of the cost of the overall project.

II

Appellants also argue that the city violated Minn. Stat. § 429.061 (2010) by including capitalized interest as a capital-expenditure cost in the principal of the assessment. Specifically, appellants argue that section 429.061 only authorizes the city to assess periodic interest following the resolution adopting the assessment. Appellants contend that allowing the city to include financing costs in the principal amount of the assessment violates the statutory prohibition against pre-assessment interest. We conclude that appellant's position is not supported by the statute or relevant caselaw.

Here, capitalized interest in the amount of $47,313.14 (7.5%) was included in the principal amount of the assessment. As the city engineer explained by affidavit, the interest was the financing cost that the city incurred during construction because the contractor performed the bulk of the work in 2008 and was paid as the work progressed. The assessment was not adopted until October 20, 2009, when periodic interest on the assessment commenced. The capitalized interest included in the principal amount of the assessment was calculated based on the date and amount of each payment to the contractor.

Section 429.061, subdivision 2, provides, in part, that "[t]he [adopted] assessment, with accruing interest, shall be a lien upon all private and public property included therein, from the date of the resolution adopting the assessment, concurrent with general

taxes," and that "[a]ll assessments shall bear interest at such rate as the resolution determines."

Appellants contend, and we agree, that the statute plainly prohibits the city from beginning to calculate the periodic interest due on each homeowner's assessment before the date the assessment is adopted. *See, e.g.*, Minn. Stat. § 429.061, subd. 1(5) (stating that "the notice mailed to the owner must state in clear language . . . the time within which prepayment may be made *without the assessment of interest*"); *see also id.*, subd. 2 (stating that "[t]o the first installment of each assessment *shall be added interest on the entire assessment from a date . . . not earlier than the date of the resolution*"); *id.*, subd. 3 (stating that "[t]he owner of any property so assessed may, at any time prior to certification of the assessment or the first installment thereof . . ., pay the whole of the assessment . . . , with interest accrued . . ., except that *no interest shall be charged if the entire assessment is paid within 30 days from the adoption thereof. . . .*" (Emphases added.)

But appellants also contend that the legislature intended to prohibit the city from including capitalized interest (necessarily incurred prior to the resolution) as a capital expenditure cost in the principal of the assessment. This second contention is not supported by the statute. From the plain language of the statute, it is clear that the "interest" referred to in the provisions cited by appellants is the periodic interest homeowners must add to each installment payment made after the resolution adopting the assessment. *Id.* But the statute neither specifically authorizes nor prohibits the city from including capitalized interest in the principal.

The United States Supreme Court has noted that "[a]ccepted accounting practice and established tax principles require the capitalization of the cost of acquiring a capital asset." *C.I.R. v. Idaho Power Co.*, 418 U.S. 1, 12, 94 S. Ct. 2757, 2764 (1974) (footnote omitted). "The general proposition that good accounting practice requires capitalization of the cost of acquiring a capital asset is not seriously open to question." *Id*. at n.8, 94 S. Ct. at 2764 n.8. And "[i]t has long been recognized, as a general matter, that costs incurred in the acquisition or disposition of a capital asset are to be treated as capital expenditures." *Woodward v. C.I.R.*, 397 U.S. 572, 575, 90 S. Ct. 1302, 1305 (1970). "The law could hardly be otherwise, for such ancillary expenses incurred in acquiring or disposing of an asset are as much part of the cost of that asset as is the price paid for it." *Id*. at 576, 90 S. Ct. at 1305.

The city here added capitalized interest to the principal amount of the assessment as a cost incurred in constructing the improvement. In light of the statute's silence on this issue, and the established legitimacy of this practice, we conclude that the city lawfully included capitalized interest as a capital expenditure cost in the principal of the assessment. Although appellants are correct that the city may not begin calculating interest on their periodic assessment payments until the resolution date, they are incorrect that the city was prohibited from including financing costs incurred prior to the resolution date in the assessment.

Finally, we conclude that because the city acted lawfully in assessing the costs of the assessment, there was not, as appellants contend, an unlawful taking of individual

properly rights under 42 U.S.C. § 1983, and appellants are therefore not entitled to recover attorney fees under 42 U.S.C. § 1988.

Affirmed.