

**OHRTMAN REVOCABLE TRUST v.
PALO ALTO COUNTY BOARD OF SUPERVISORS**

**RAY W. OHRTMAN REVOCABLE TRUST, et al., Plaintiffs-
Appellants,
v.
PALO ALTO COUNTY BOARD OF SUPERVISORS, et al.,
Defendants-Appellees.**

No. 8-479/07-1921.

Court of Appeals of Iowa.

Filed December 17, 2008.

Robert Goodwin of Goodwin Law Office, Ames, for appellants.

James Hudson of Hudson Law Firm, Pocahontas, for appellees.

Heard by Vogel, P.J., and Miller, J., and Zimmer, S.J.^[*]

VOGEL, P.J.

The district court approved the Palo Alto County Board of Supervisors' ("the Board") decision to annex approximately 45,000 acres of land in order to make it a part of Drainage District 80. The plaintiffs, Ray W. Ohrtman Revocable Trust, and others, also known as the Upper Cylinder Creek Watershed landowners, appeal the land annexation decision, arguing that the improvements and facilities of Drainage District 80 provide no material benefit to their land. We agree and reverse.

I. Background

In order to make the farmland of Palo Alto County productive, artificial drainage districts have been created. Drainage District 80, created in 1916, is a watershed located in the eastern part of the county, and includes approximately 12,000 acres of land. The neighboring land is comprised of different watersheds, and Drainage District 80 claims to receive drainage from approximately 45,000^[1] acres of these surrounding lands through open ditches and tiles. The Board is seeking to annex these lands to make them a part of Drainage District 80.

The Cylinder Creek plaintiffs include 131 landowners with approximately 18,000 acres of land located in the watershed of Upper Cylinder Creek, bordering Drainage District 80 to the north and east. The northern portion of the watershed measures approximately ten miles east to west, and the southern portion approximately one mile. The area is made tillable by several private drainage districts which drain into Cylinder Creek. The Creek accepts and restricts the flow of water downstream as it meanders for two and one-half miles through designated wetlands and grass buffer strips. Cylinder Creek eventually connects to Drainage District 80 at "Lateral Z," at the southern-most point of the Upper Cylinder Creek watershed. Lateral Z also accepts drainage from the expansive lands to

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the north and west, approximately 12,000 acres already in Drainage District 80 and 27,000 additional acres to be annexed that drain into the "upper main open ditch." This confluence of water at Lateral Z then continues to flow south and east four miles through the 1916 straightened Cylinder Creek, now known as the "lower main open ditch," and on another seven miles to the outlet of the Des Moines River. Cylinder Creek landowners object to the annexation as they maintain nothing proposed by the Board's engineer will benefit the drainage of their lands.

In 2003, the Board appointed the engineering firm of Kuehl & Payer, Ltd. to report on concerns of Drainage District 80. Engineer Donald Etlar surveyed the land and recommended an extensive cleanout, regrading and repair of an area not affected by this litigation, the "upper main open ditch," mentioned above. He also proposed new construction south of Drainage District 80, for flood control purposes affecting lands between the lower main open ditch and the outlet of the Des Moines River. With this later proposal, he noted the possible annexation of additional lands, including the Upper Cylinder Creek Watershed area. Following a hearing in 2005, the Board approved Etlar's 2003 and 2005 reports recommending annexation of the additional lands to Drainage District 80. The Upper Cylinder Creek Watershed landowners appealed this decision to the district court. They retained two engineers, Michael J. Ryan and Gary E. Sindelar, to review Etlar's reports and recommendations. Both engineers maintained that the proposed annexation would not provide a benefit to the landowners in the Upper Cylinder Creek Watershed. After a bench trial, the district court affirmed the Board's decision by finding the plaintiffs' lands: (1) are benefited by the 1916 "improved outlet brought closer," and (2) will be benefited by any "future cleanout of Lateral Z and the lower main open ditch," resulting from increased water flow. The plaintiff landowners appeal.

II. Standard of Review

This lawsuit was filed and tried in equity; therefore we review de novo. Iowa R. App. P. 6.4; Commercial Sav. Bank v. Hawkeye Fed. Sav. Bank, 592 N.W.2d 321, 326 (Iowa 1999). We examine the entire record and adjudicate anew rights on issues properly before us. Commercial Sav. Bank, 592 N.W.2d at 326. In doing so, we give weight to the trial court's factual findings, especially when considering the credibility of witnesses, although we are not bound by them. Iowa R. App. P. 14(f)(7).

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 v. Franklin County Auditor, 514 N.W.2d 431, 435 (Iowa 1994).

III. Material Benefit to Upper Cylinder Creek Watershed Landowners

Under the Iowa Code, after the establishment of a drainage district, if a board is convinced additional lands contiguous to the district are benefited by the improvement, it may adopt a resolution of necessity for the annexation of such additional land. Iowa Code § 468.119 (2007).^[2] It must appoint an engineer to examine such additional lands and

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make a survey and plat thereof showing the condition of drainage and specify the character of the benefits received. *Id.* If the report recommends the annexation of the lands or any portion of them, the board shall consider the report, plats, and profiles and if satisfied that any of the lands are materially benefited by the district and that annexation is feasible, expedient, and for the public good, it shall proceed in all respects as to notice, hearing, appointment of appraisers to fix damages and as to hearing on the annexation. Iowa Code § 468.120.^[3] It is clear from the applicable statutes and our case law, that in order to annex land, the Board must show a benefit, if not a "material" benefit to those landowners whose land is being annexed. *See* Iowa Code §§ 468.119, 468.120.

By the language of the statute the land to be included in the district must in some way be affected by the improvement, and, to benefit it, necessarily this must increase its value, either by relieving it of some burden, or by making it adapted for a different purpose, or better adapted for the purpose for which it is used. It is manifest, then, that a prerequisite to the inclusion of any tract of land in the district proposed by the engineer is that it will in all reasonable probability derive some special benefit from the improvement.

Zinser v. Bd. of Sup'rs of Buena Vista County, 137 Iowa 660, 670, 114 N.W. 51, 56 (1907).

Plaintiff-Appellants assert that their lands will not be benefited by the annexation to Drainage District 80.

IV. Proving a Benefit to Plaintiffs' Lands

Etler's 2003 report, covering 57,000 acres, including 18,000 acres of plaintiffs' lands, stated that over the years, "[v]irtually all of this land has been altered to increase runoff and much of it has been better drained to improve crop production." He recommended two improvements: (1) repair and cleaning out of the upper main drainage ditch, which undisputedly would not in any manner affect plaintiffs' lands; (2) a "new drainage district be established to construct [outlet flood control] and that Drainage District 80 not be the vehicle through which those improvements are constructed."^[4] His report did not specify any "material" or "special" benefit to the landowners of Upper Cylinder Creek Watershed beyond their current drainage systems.

The district court concluded that the plaintiffs' land benefited from the 1916 straightening of the lower portion of Cylinder Creek within Drainage District 80 by "providing an improved outlet brought closer." However, Etler's report and testimony clearly did not make that assertion, except as noted in the most general terms for all the areas he recommended for annexation. Plaintiffs' expert, Sindelar, focused his analysis on whether Drainage District 80 provided any benefit specifically to the Upper Cylinder Creek Watershed landowners. He testified that even the early work done by Drainage District 80 did not benefit the plaintiff landowners, as their land already drained into Cylinder Creek and followed its natural outlet to the Des Moines River. He noted that the improvement in straightening the lower portion of Cylinder Creek was mainly to provide drainage, not to plaintiffs' land, but to land within Drainage District 80 and the expansive region to the north and west, including the diverted flow of water from Five Mile Lake.

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The district court also found that because more water was cast from the northern part of the watershed, more siltation occurs in the lower open main ditch. Thus the benefit the court found was that the ditch would require cleanout in the future. The issue of siltation was raised for the first time before the district court and the testimony included the increased water flow from the entire 57,000 acres, including plaintiffs' 18,000 acres. The plaintiffs contend the district court failed to recognize that the two and one-half mile stretch of the meandering Cylinder Creek was both a natural flow restrictor and siltation catch basin for the water draining from their lands. Their experts described this area as flat, with designated wetlands and grass buffer strips, which causes the water to "meander" and create a "bottleneck" or a natural flow restrictor before it enters Lateral Z. When questioned whether a cleanout of the lower main ditch would benefit Cylinder Creek landowners, Ryan responded, "[n]ormal buildup of sediment on that lower main is not going to — a cleanout of that is not going to benefit the Cylinder Creek watershed." Sindelar added:

[A]s stream velocity slows, whatever silt load or sediment load is in the stream will drop out. It will deposit because the water slows and velocity, therefore the energy level drops. So the amount of material in the water drops to the bottom and the sides and so forth. In the upper area of Cylinder Creek you have a little more velocity so you can carry a little bit more siltation, and little bit more erosion. But once you get to that two-and-a-half mile section, we have the effect of the stream slowing in velocity so much of the sediment would drop out in that segment and not be carried further down. That doesn't mean all of it will be but certainly it has that effect of being a — in waste water terms a siltation basin kind of effect.

Similar findings in his report conclude that "[n]othing that is done south of the Cylinder Creek connection with Lateral Z can in any way benefit the landowners in the Upper Cylinder Creek watershed." The Board's expert, Etler, gave only general conclusions as to any benefit the plaintiffs could receive by annexation, and the plaintiffs' experts clearly took the opposite position, supported by analysis specific to their land. We are instructed both in the statutes and our case law:

If, owing to its location, the construction of a ditch will not drain the land any more or differently than is done by the existing swale or swamp, or render it more accessible, or affect its immediate surroundings, then it is not benefited, even though the ditch may carry off the water.

Zinser, 114 N.W. 51 at 56.

Even the Board's expert, Etler, admitted in his testimony that repair of Cylinder Creek below the bottleneck would not change the volume of water from plaintiffs' lands coming through the two and one-half miles of drainage from the meandering Cylinder Creek above Lateral Z. Although the Board sees a benefit in annexing the Upper Cylinder Creek Watershed by increasing its tax base, Etler agreed that those landowners would not see a benefit to the drainage of their land by the annexation. As the *Thompson* court reasoned, landowners should not be taxed without receiving a benefit for surface water running through the lower main ditch.

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The fallacy which seems to have operated upon the mind of the joint board and of its engineer is one we encounter not infrequently; that is, that a landowner is under some continuing obligation to "pay the freight" upon his own surface waters after they have left his lands and until they reach an ultimate outlet. No such obligation exists. On the contrary, he may freely avail himself of the topography of his land, and may discharge his surface waters wherever gravitation naturally carries them, without further concern on his part as to where they go, for they are no longer his. There is no final outlet for the surface waters of this state this side of the gulf. If a drainage district which discharges its waters in an adequate outlet, either one mile or ten miles removed from Cedar Creek, is still liable for the dredging of such creek, because at a remote point its waters pass into it, then by the same logic it could be charged with benefits in the construction of the jetties at the mouth of the Mississippi.

Thompson v. Bd. of Sup'rs of Buena Vista County, 201 Iowa 1099, 1106, 206 N.W. 624, 626-627 (1925) (internal citations omitted).

Moreover, strict compliance with statutory provisions is required to establish a drainage district. *Hicks*, 514 N.W. 2d at 435. On our de novo review, we agree with the plaintiffs that the Board has failed to show that they, as the landowners of Upper Cylinder Creek Watershed, will materially benefit by this annexation, as required by Iowa Code section 468.120. Therefore, we reverse the decision of the trial court.

REVERSED.

[*] Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

[1] Of the 45,000 acres to be annexed, 27,000 lie to the north and west and are not part of this lawsuit. Only the benefit to the 18,000 acres of the Upper Cylinder Creek Watershed is in dispute, and brought by the Plaintiffs to this action.

[2] Iowa Code section 468.119 provides in part:

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After the establishment of a levee or drainage district, if the board becomes convinced that additional lands contiguous to the district, and without regard to county boundaries, are benefited by the improvement or that the same are then receiving benefit or will be benefited by a repair or improvement to said district as contemplated in section 468.126, it may adopt, with or without a petition from owners of the proposed annexed lands, a resolution of necessity for the annexation of such additional land and appoint an engineer with the qualifications provided in this subchapter, parts 1 through 5, to examine such additional lands, to make a survey and plat thereof showing their relation, elevation, and condition of drainage with reference to such established district, and to make and file with the auditor a report as in this subchapter, parts 1 through 5, provided for the original establishment of such district, said report to specify the character of the benefits received. . . .

[3] Iowa Code section 468.120 provides in part:

If the report recommends the annexation of the lands or any portion of them, the board shall consider the report, plats, and profiles and if satisfied that any of the lands are materially benefited by the district and that annexation is feasible, expedient, and for the public good, it shall proceed in all respects as to notice, hearing, appointment of appraisers to fix damages and as to hearing on the annexation; and if the annexation is finally made, as to classification and assessment of benefits to the annexed lands only, to the same extent and in the same manner as provided in the establishment of an original district. However, the annexation and classification of the annexed lands for benefits may be determined at one hearing. Those parties having an interest in the lands proposed to be annexed have the right to receive notice, to make objections, to file claims for damages, to have hearing, to take appeals and to do all other things to the same extent and in the same manner as provided in the establishment of an original district.

[4] Before the district court he testified that the downstream flood control improvements "would not improve the drainage of Cylinder Creek watershed."