STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Indian River Trading Post,
Petitioner,

v

MTT Docket No. 434500

Tuscarora Township,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Indian River Trading Post, appeals a special assessment for sanitary sewer levied by Respondent, Tuscarora Township, against Parcel No. 161-025-200-044-00. Joseph M. Rogowski, II, Attorney, represented Petitioner, and Robert C. Kerzka, Attorney, represented Respondent. A hearing on this matter was held on April 28, 2014. Petitioner's witnesses were Jerry Johnston and David Burgoyne. Respondent's witnesses were Michael Ridley and Kenneth Arndt.

The Tribunal finds that the subject property does not benefit from the special assessment. As such, the subject property's final special assessment as established by the Tribunal is:

Parcel Number: 161-025-200-044-00

Type of Special Assessment	Special Assessment to be Levied
Sanitary Sewer	$0

PETITIONER'S CONTENTIONS

Petitioner contends that the subject property is in a worse economic position with the sewer assessment than without the sewer. There has been nothing presented to the Tribunal to suggest that the availability of sewer is a benefit to the subject property. In addition, there are many errors with regard to the special assessment including miscalculations of REU

assignments. Petitioner's credible appraisal clearly demonstrates that there is no positive benefit conferred upon the subject property based upon the special assessment. Therefore, the special assessment is invalid with regard to the subject property as the law indicates that there must be a benefit to the assessed property.

PETITIONER'S ADMITTED EXHIBITS[1]

P-1 Appraisal Report of David Burgoyne for MTT 434500

P-2 Appraisal Report of David Burgoyne for MTT 434502

P-3 Tuscarora Township Sewer Special Assessment Roll

P-4 Tuscarora REU Methodology Formula & Tuscarora Chart used to assign REU

P-5 4/11/2012 Tuscarora Township Board Meeting Minutes

P-6 12/14/12 Email exchange with USDA

P-7 10/31/13 Email exchange with USDA

P-8 10/29/13 Email exchange with USDA

P-9 5/15/12 Email from Mike Ridley

P-10 FAQ and 12/2/13 Petition

P-11 Current site plan of Indian River Trading Post

P-12 Site plan reflecting alleged new parking availability with MDOT property

P-13 Site plan with new parking on Trading Post property only

P-14 Site plan showing existing conditions on east end of property

P-15 11/13/13 Letter from Cheboygan County Planning & Zoning

P-16 12/12/13 Application to Amend site plan

[1] The parties stipulated to the admission of all exhibits in MTT Docket Nos. 434500 and 434502. See Transcript at 6.

P-17 Notice to Taxpayers of Intent to Issue Bonds

P-18 1/16/12 Tuscarora Township Board Special Meeting Minutes

P-19 Tuscarora Township Sewer Ordinance

P-20 REU Allocation Chart

P-21 3/7/13 Article in Straitsland Resorter

P-22 Deposition Transcript of Mike Ridley

P-23 Deposition Transcript of Jeff Swadling

P-24 Deposition Transcript of Brian Boals

P-25 Report by Committee to Bring Wastewater Treatment to Indian River

P-26 Water meter readings at Trading Post and Huron Distributor

P-27 Indian River Trading Post 2012/2013 Financials

P-28 Indian River Sewer & Drain Committee FAQ

P-29 Resolution Amending Special Assessment Resolution No. 2

P-30 2/7/12 Meeting Minutes

P-31 2/9/13 Meeting Minutes

P-32 3/6/12 Meeting Minutes

P-33 4/1/12 Meeting Minutes

P-34 Cheboygan County Zoning Ordinance No. 200

P-35 Indian River Trading Post & Huron Distributor Water Usage

P-36 Oil Satellite Operating Agreement

P-37 Agreement Amending Oil Satellite Operating Agreement

P-38 Hunter Construction Invoice for Drainfield replacement

P-39 4/23/13 McDonald's Letter to Amend the Oil Satellite Operating Agreement

P-40 Sewage System Application & Permit

P-41 MDOT permit for septic field

P-42 McDonald's Sales & Rent Report

P-43 Hunter Construction Inc. Proposal #324

P-44 Hunter Construction Inc. Proposal #325

P-45 Warehouse site plan

P-46 Notice of Hearing on Special Assessment

P-47 Respondent's Valuation Disclosure

PETITIONER'S WITNESSES

Jerry Johnston

Jerry Johnston is the president of Alpena Oil, the parent corporation of Indian River Trading Post, and he serves as the secretary and director of Indian River Trading Post. Mr. Johnston testified that: (i) he has been involved in the real estate market for many years in various ways and that, in his experience, having a septic system was never an issue or deterrent to purchasing property (See Transcript at 21), (ii) the subject property is a co-branded site including a Shell gas station and convenience store and McDonald's restaurant (Transcript at 55), (iii) the subject property has a septic field which is co-owned by MDOT (Transcript at 25), (iv) the subject property currently has 75 parking spaces which is enough for zoning regulations and business use (Transcript at 30-33), (v) there is ample room to expand parking currently, without the removal of the septic field (Transcript at 35-36), (vi) Petitioner does not own the entirety of the septic field and MDOT, the other owner, may or may not allow Petitioner to add

parking (See Transcript at 37), (vii) there is no need for additional parking, thus, the potential additional parking achieved by eliminating the septic field is not a benefit to the subject property (Transcript at 36), (viii) the REUs attributable to the subject property were incorrectly calculated based upon Respondent's assignment chart and the square footage of the subject property (See Transcript at 29), (ix) the septic system was updated in 2008 and has a life expectancy of 20 to 25 years, and the septic field has an indefinite life expectancy (Transcript at 48), (x) the lease with McDonald's was executed in 1999, and the rental rate is based upon McDonald's gross revenue and is capped for each 5-year lease period (See Transcript at 51), (xi) prior to July 1, 2014, the rent was capped at $79,000, but would be at $120,000 without the cap (Transcript at 52-53), (xii) McDonald's prefers freestanding locations but, at the time of the execution of the lease, there were not suitable parcels to accommodate a McDonald's including the required septic field (Transcript at 55-56), (xiii) with the sewer system, smaller parcels can accommodate a freestanding McDonald's given that there is no longer a need for the septic field which has reduced Petitioner's bargaining position and has required Petitioner to reduce his rental cap (See Transcript at 56), (xiv) in his opinion, the sewer does not have a positive effect on the subject property but "has a negative effect" and "transfers value from . . . [the subject to the] neighbor's property . . ." (Transcript at 58).

David Burgoyne

David Burgoyne, Petitioner's expert in real estate appraisal, testified that: (i) he performed a with and without appraisal of the subject property (Transcript at 129), (ii) the potential for additional parking does not add value to the subject as there is no evidence that the additional parking could be added since the property is not owned by Petitioner and that there is

no need for additional parking (See Transcript at 132-134), (iii) he concluded that the value of the subject property with the sewer improvement is lower than its value without the sewer improvement (Transcript at 132), (iv) he calculated his values under the income approach and found that the subject is "sort of a special property" and that there is insufficient market data—sales of co-branded fast food and gas stations—to conduct the sales comparison approach (Transcript at 136), (v) in his income approach *without* the sewer improvement he used (a) the rental rate of $80,000 under the McDonald's lease and used an estimated market rent of $65,000 for the convenience store portion of the property since the lease is between related parties for a total income of $145,000 per year for the subject property (Transcript at 137), (b) vacancy at $10,000 (Transcript at 138), and (c) the capitalization rate of 10 percent based upon the published rates from realtyrates.com given the fast food rate of 11.07 percent and 9.89 for retail convenience gas stores (Transcript at 138, 140), (vi) in his income approach *with* the sewer improvement, he modified the approach to include (a) a $20,000 reduction for the cost to remove the septic tanks including the cost to "pump them out . . . crush them and backfill" (Transcript at 142-43) and (b) a higher capitalization rate of 10.5 percent based upon the increased risk associated with the possibility McDonald's may choose to find a freestanding property rather than a lease (Transcript at 146), (vii) he also provided a general sales analysis to indicate that the generalized trend indicates that commercial properties with sewer in northern Michigan sell at slightly lower rates than those without sewer (See Transcript at 148-49).

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner has the burden of proof and has failed to meet this burden to establish that the subject property is not benefitted by the improvement. Respondent

contends that the subject property benefits from an environmental standpoint. Respondent also contends that Petitioner's appraiser did not use similar comparables and did not reliably adjust the comparable properties in the appraisal resulting in an unreliable valuation. Further, Respondent contends that Petitioner will be able to add additional parking to the subject property without the sewer septic field which will result in higher revenue, conferring a clear benefit. Therefore, Respondent contends that the assessment does benefit the subject property and should be affirmed.

RESPONDENT'S ADMITTED EXHIBITS[2]

R-1 Booklet: The Committee to Bring Wastewater Treatment to Indian River

R-2 Special Assessment Resolution No. 4

R-3 List of Parcel Number, Owner, and Address for Special Assessments

R-4 Special Assessment Roll for Tuscarora Township for Year 2013 SAD

R-5 List of REUs assigned to parcels

R-6 Stipulated Order of Dismissal, 53rd Circuit Court Case No. 12-8316-CZ

R-7 Final Opinion and Judgment in MTT Docket No. 434794

R-8 List of REU determinations in other communities

R-9 List of REU determinations for Tuscarora Township

R-10 Appraisal of Kenneth R. Arndt

[2] The parties stipulated to the admission of all exhibits in MTT Docket Nos. 434500 and 434502. See Transcript at 6.

RESPONDENT'S WITNESSES

Michael Ridley

Michael Ridley is Respondent's supervisor and assessor. Mr. Ridley testified that: (i) the original estimate of cost of the special assessment was around $4.2 million while the actual bids were approximately a million dollars higher (Transcript at 97, 99), (ii) the system design was changed to lower the bid, primarily, by changing the amount of pipe used and the depth (See Transcript at 98), (iii) there was no notice or additional hearing with respect to the increase in cost (See Transcript at 100), (iv) the increase in overall cost did not increase the cost of $8,000 per REU assessed because Respondent received grant money from the USDA for the additional cost (Transcript at 100), (v) the estimated operational and maintenance charges are at $27 per REU which can be adjusted after the first two years based upon metering (Transcript at 103-104), (vi) no partial REU assignments were made and there was no specific standard as to whether REUs were rounded up or down (See Transcript at 109-111), (vii) there may be a mathematical mistake with regard to the REU calculation for the subject property, but that he deferred to Respondent's appraiser on this issue (Transcript at 112-113).

Kenneth R. Arndt

Kenneth R. Arndt, Respondent's expert in real estate appraisal, testified that: (i) he conducted a combination of the sales comparison approach and income approach in valuing the subject property (See Transcript at 173-74), (ii) the gas station and convenience store portion were valued by evaluating sales of gas stations with convenience stores attached to them in Northern Michigan, and the McDonald's portion was valued using the income approach only (Transcript at174), (iii) the subject value with and without the improvement was $948,000

(Transcript at 174), (iv) he talked to employees at the McDonald's, and they stated that additional parking was needed and that the current configuration was congested (Transcript at 176), (v) he believes that the sewer improvement will allow for the addition of parking spaces which will produce revenue and is a benefit to the subject property (See Transcript at 177-78), (vi) it is possible that McDonald's will move out into an independent store with more parking (See Transcript at 179-80), (vii) his appraisal report indicates that there is no market benefit derived from the addition of the sewer improvement (Transcript at 192).

FINDINGS OF FACT

1. The subject property is located at 6153 M-68 in the county of Cheboygan.
2. The subject property is commercial and is used as a Shell gas station and convenience store and a McDonald's restaurant.
3. The subject building is 6,680 square feet overall, with 1,930 being leased to McDonald's and 4,750 used for the gas station and convenience store operation.
4. The special assessment at issue in this appeal was imposed under MCL 41.721 et seq., PA 188 of 1954.
5. The special assessment at issue was initiated by petition of record owners of land in the proposed special assessment district. The proposed district was approved by the owners of 67 percent of the landmass, in excess of the 51 percent required under MCL 41.723.
6. Respondent provided notice of the hearing held for the purpose of confirming the special assessment roll by publishing notice twice in the Straitsland Resorter, Indian River, Michigan, with the first publication being at least 10 days prior to the hearing, and by

mailing notice of the hearing by first class mail to all record owners or persons of interest in property in the special assessment district, at least 10 days prior to the hearing.

7. Petitioner had notice of the hearing held on April 11, 2012, and properly protested at that hearing.
8. The improvements proposed by the special assessment consist of the acquisition, construction, and installation of sanitary sewer system improvements in the special assessment district and related improvements, structures, equipment and appurtenances necessary to collect wastewater from properties in the proposed special assessment district and convey the wastewater to a treatment facility at the township's industrial park.
9. The subject property was assigned 11 REUs at $8,000 per REU. Therefore, the total amount of the special assessment assessed to the subject property is $88,000.
10. The special assessment roll was confirmed at the hearing on April 11, 2012.
11. The budget set for the special assessment was approximately $4.2 million at the time of confirmation.
12. The final budget after the bidding process was increased by approximately 1 million dollars, in excess of 10 percent of the original budget.
13. An additional hearing was not held under MCL 41.724(4) regarding the increased overall cost of the special assessment.
14. The original assessment rate of $8,000 per REU remained unchanged even considering the increase in the overall assessment cost because the increased cost was to be paid for through a USDA grant.

15. Petitioner's appraiser performed a "with and without" the sewer improvement analysis.
16. Petitioner's appraiser determined that the true cash value of the subject property without the improvement was $1,350,000 and $1,285,000 with the improvement.
17. Petitioner's appraiser determined that the sewer improvement had a negative impact on the value of the subject property rather than a positive impact.
18. Respondent's appraiser also prepared an appraisal valuing the subject with and without the improvement and concluded that the value of the subject property remained at $948,000, even with the addition of the sewer improvement.
19. Respondent's appraiser testified that the subject benefits from the special assessment because additional parking can be added in place of the existing drain field which will lead to increased revenue.

CONCLUSIONS OF LAW

The special assessment at issue was confirmed on April 11, 2012. Petitioner properly protested the assessment at that hearing and timely filed its Petition with the Michigan Tax Tribunal. Petitioner contends that: (1) the subject property does not receive a benefit from the special assessment given its appraisal which shows a decrease in its value with the sewer; (2) Respondent was required to hold an additional hearing under MCL 41.724(4) given the increase in the overall cost of the assessment; (3) the REU assignment by Respondent is not uniform, and the assignment to the subject is excessive; and (4) the cost of the O&M expenses are excessive. The Tribunal has considered the evidence and testimony on record in the above-captioned case and finds that the special assessment imposed on the subject property is invalid, as discussed below.

Petitioner first contends that the subject is not benefitted from the special assessment, making it contrary to law. In *Kadzban v City of Grandville*, 442 Mich 495; 502 NW2d 299 (1993), the Michigan Supreme Court stated that "a special assessment can be seen as remunerative; it is a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area." *Id*. at 500. Improvements "funded by a special assessment must confer a special benefit upon the assessed properties beyond that provided to the community as a whole." *Ahearn v Bloomfield Twp*, 235 Mich App 486, 493; 597 NW2d 858 (1999).

In *Dixon Road Group v City of Novi*, 426 Mich 390; 395 NW2d 211 (1986), the Michigan Supreme Court held that special assessments are permissible only when the improvements result in an increase in the value of the land specially assessed. *Id*. at 400. The Court further held "that a determination of the increased market value of a piece of property after the improvement is necessary in order to determine whether or not the benefits derived from the special assessment are proportional to the cost incurred." *Id*. at 401. Citing *Kadzban* and *Dixon Road*, the *Ahearn* Court further explained what is required.

> The essential question is not whether there was any change in market value, but rather whether the market value of the assessed property was increased as a result of the improvement. Common sense dictates that in order to determine whether the market value of an assessed property has been increased *as a result of* an improvement, the relevant comparison is not between the market value of the assessed property *after* the improvement and the market value of the assessed property *before* the improvement, but rather it is between the market value of the assessed property *with* the improvement and the market value of the assessed property *without* the improvement. The former comparison measures the effect of time, while the latter measures the effect of the improvement. [*Id*. at 496. [Citations omitted.]]

However, in determining whether the benefits are proportional to the cost, the *Kadzban* Court advised that:

> When reviewing the validity of special assessments, it is not the task of courts to determine whether there is 'a rigid dollar-for-dollar balance between the amount of the special assessment and the amount of the benefit . . . .' Rather, a special assessment will be declared invalid only when the party challenging the assessment demonstrates that 'there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements.' [*Id*. at 302-303. [Citations omitted.]]

In a case where a special assessment is challenged, the question of which party has the initial burden of proof is well settled. In *Kadzban*, *supra*, the Michigan Supreme Court stated that "to effectively challenge special assessments, plaintiffs, at a minimum, must present credible evidence to rebut the presumption that the assessments are valid. Without such evidence, a tax tribunal has no basis to strike down special assessments." *Id*. at 505. In other words, the burden of proving that the assessed property does not receive a benefit sufficient to justify the imposition of the assessment rests with the party challenging the assessment. *Graham v City of Saginaw*, 317 Mich 427, 435; 27 NW2d 42 (1947).

Furthermore, one who challenges a special assessment carries a heavy burden of proof because of the presumption that the levy is valid. *Konfal v Delhi Township*, 91 Mich App 147; 283 NW2d 677 (1979). It is a well-settled principle that municipal decisions regarding special assessments are presumed to be valid and that "the decisions of municipal officers regarding special assessments 'generally should be upheld.'" *Kadzban* at 502. Where credible evidence is presented, the burden of going forward shifts and the municipality must "present evidence proving that the assessments are reasonably proportionate in order to sustain the assessments." *Kadzban* at 505.

In this case, both parties presented appraisal which demonstrate that the market value of the subject property will not increase as a result of the improvement. Petitioner's appraisal indicates that it is a "before and after" appraisal. However, Petitioner's appraiser testified that his intent was to value the subject with and without the improvement, consistent with the holding in *Ahern, supra*. To value the subject, Petitioner's appraiser analyzed the existing lease with McDonald's to find that rent was capped, during the relevant period, at $79,350 per year. P-1 at 30. This was rounded to $80,000 and an additional rent of $65,000 was used for the convenience store portion which is approximately 6 percent of gross convenience store sales. P-1 at 32. After applying expenses of $10,000 for management fees and vacancy, the net operating income (NOI) was determined to be $135,000. *Id*. Petitioner's appraiser analyzed the capitalization rates published by RealtyRates.com and found that average rates for convenience stores ranged between about 8.5 and 10 percent while average capitalization rates for fast food restaurants ranged between about 11 and 12 percent. *Id*. at 34. He also evaluated Detroit area capitalization rates and ultimately found that a capitalization rate of 10 percent was supported given the subject's "quantity and quality of income, and the positive synergistic impact" of the McDonald's name. *Id*. at 36. Applying the 10 percent capitalization rate to the NOI of $135,000 results in a true cash value of $1,350,000 without the improvement. *Id*. at 37. With the improvement, Petitioner's appraiser found that the capitalization rate shall be increased to 10.5 percent. *Id*. at 63. This accounts for the increased risk associated with the possibility that McDonald's may choose to find a freestanding property rather than a lease. Transcript at 146. This risk is also supported by Respondent's expert's testimony that McDonald's may seek a freestanding store as co-branded McDonald's sites are uncommon. See Transcript at 179-80.

Petitioner's appraiser also reduced the "with sewer" valuation by $20,000, to account for the cost to remove the septic system. P-1 at 50. Therefore, Petitioner's appraiser concluded that with the sewer improvement, the subject property's value decreases to $1,285,000. *Id*. at 52. Petitioner's appraiser concluded that the sales comparison approach was not a reliable indicator of value for the subject as there were no sales of truly comparable properties (i.e., gas station/convenience stores co-branded with a fast food restaurant). Nevertheless, he conducted a general market analysis of commercial properties and compared the sales prices of those properties with sewer and without sewer to find a general trend of properties with sewer sold for less than the properties with septic systems. See Transcript at 148-149. See also P-1 at 44. "This data also indicates that a slight premium might exist for commercial properties serviced by on-site septic systems." P-1 at 44.

Respondent also submitted it with and without appraisal which indicates no change in the subject property's value with the assessment. Respondent's appraiser concluded to a value of $948,000 with and without the improvement. To value the gas station/convenience store portion of the subject, Respondent's appraiser used the sales comparison and income approaches; and to value the McDonald's portion of the subject, he utilized the income approach. In the income approach for the convenience store, Respondent's appraiser utilized projected rent of $50,000 with operating expenses for management and vacancy for a NOI of $47,000. He utilized the capitalization rate of 10.5 percent to determine a rounded value of $448,000 for the gas station and convenience store. R-10 at 57. For the restaurant, Respondent's appraiser estimated sales and utilized 8 percent of the sales to calculate the estimated rental rate of $62,000. R-10 at 35, 60. Expenses such as management fees, landlord repairs, and maintenance for the NOI of $54,160.

Id. Respondent's appraiser utilized a cap rate of 10.86 percent to conclude to a rounded true cash value of $500,000. *Id*. Thus, Respondent's overall value conclusion was $948,000. Respondent's appraiser further concluded that "the assessment will not change the value of the property assemblage." *Id*. at 60.

The Tribunal has evaluated both approaches and finds that neither appraisal concludes that the "value of the assessed property was increased as a result of the improvement" as required by the court in *Ahern*. *Id*. at 496. Both appraisals utilize similar capitalization rates ranging from 10 to 10.86 percent. Petitioner's appraisal properly accounts for the increased risk in the subject property given the availability of additional locations for freestanding McDonald's restaurants. Petitioner's appraisal properly values the subject and indicates a reduction in value with the improvement. P-1 at 52. The reduction was, in part, due to Petitioner's appraiser's inclusion of a $20,000 cost to remove the septic tanks. However, he did not cite any authority that indicates the septic tanks must be removed given the addition of sewer. Nevertheless, the subject property valuation, even excluding the additional cost for septic removal, reflects a reduction in value given the increased risk and change in capitalization rate. Further, the decline in value with the improvement is also supported by the generalized market trend in commercial sales. See P-1 at 44. Further, Respondent's appraisal indicates that there will not be an increase in market value with the improvement. See R-10 at 60. Therefore, the Tribunal finds that the sewer improvement does not confer a benefit upon the subject property.

Respondent's appraiser testified that even without a market benefit, the subject realized a benefit as he believes that the sewer improvement will allow for the addition of parking spaces which will produce revenue. See Transcript at 177-78. Respondent's appraiser, in part, based his

opinion on discussions with employees of the McDonald's who stated that additional parking was necessary. Transcript at 176. Petitioner's representative testified that Petitioner does not own the entirety of the septic field and MDOT, the other owner, may or may not allow Petitioner to add parking. See Transcript at 37. He further indicated that there is no need for additional parking and that there is ample room to expand parking currently, without the removal of the septic field. Transcript at 35-36. The Tribunal finds that any potential benefit gained from the mere possibility of adding parking spaces is too speculative and cannot be quantified. The additional parking is only a possibility, *if* the septic field is removed, and *if* the owner of the property consents to it being converted into parking spaces. Further, any *potential* additional income to the McDonald's does not necessarily relate to increased income derived from the subject property. McDonald's rental rate is capped and increased revenue would not increase the rental income received by Petitioner. Therefore, the Tribunal finds that the potential for additional parking is not a benefit to the subject property.

Given the above, the Tribunal finds that Petitioner has met its burden of proof under the above-cited case law. As there is no benefit to the subject property, the Tribunal finds that there is a substantial and unreasonable disproportionality between the $88,000 assessed and the $0 increase in value or, more appropriately, the negative value accrued as a result of the improvement. See *Kadzban* at 302-303.

Given the finding that the subject is not benefitted by the special assessment, Petitioner's contentions regarding the need for an additional hearing and REU assignment are no longer at issue. Nevertheless, the Tribunal shall address each of Petitioner's contentions. Regarding

Petitioner's contention that an additional hearing was required, the Tribunal finds that MCL 41.724 (4) states:

> If at any time during the term of the special assessment district **an actual incremental cost increase exceeds the estimate therefore by 10% or more**, notice shall be given as provided in section 4a and a hearing afforded to the record owners of property to be assessed. [Emphasis added.]

Petitioner contends that the "cost" is the cost of the project in total while Respondent contends that the "cost" is the amount assessed to Petitioner. Here, the Tribunal finds that the increase in the cost of the assessment did not result in a higher assessment on the subject property. This is, in part, due to the additional outside funding secured by Respondent to cover any increased cost. As such, the increased overall cost does not affect the proportionality of the assessment to the benefit conferred on the subject property, which was evaluated fully above. The Tribunal finds that the purpose of the additional hearing is to provide the record owner an opportunity to protest the increase in its individual assessment. Therefore, when the amount assessed to the property is unchanged, as it is here, no additional hearing is necessary. Furthermore, even if an additional hearing was required at the local level, the cure is to provide Petitioner with notice and an opportunity to be heard on the issue which has been provided to Petitioner in this proceeding.[3] As such, the lack of an additional hearing does not invalidate the special assessment. Rather, the Tribunal finds that no additional hearing was required or, in the

[3] In *Highland-Howell Dev Co, LLC v Marion Twp*, 478 Mich 932; 733 NW2d 761 (2007), the taxing jurisdiction made modifications to the improvement plans which were adopted years after the confirmation of the special assessment. The Court held that "under the circumstances of this case, petitioner was required to challenge, for the first time, the validity of a special assessment . . . in the MTT." *Highland-Howell Dev Co, LLC v Marion Twp*, unpublished opinion per curiam of the Court of Appeals issued March 1, 2011 (Docket No. 294617). While the modification in this case occurred closer in time to the confirmation of the special assessment roll, the principal from *Highland-Howell* still applies. Even if Respondent's failure to conduct an additional hearing after discovering the increased overall costs deprived Petitioner of its due process rights, the cure is to provide Petitioner notice and an opportunity to be heard on the issue. Like *Highland-Howell*, this opportunity to be heard can be afforded to Petitioner—for the first time—at the Tribunal.

alternative, Petitioner has been provided an opportunity to object to the increased cost of the assessment during this proceeding.

Petitioner also contends that the REU assignment to the subject property is not uniform and is excessive. The subject property was assigned 11 REUs. However, Mr. Johnson testified that if the calculations from Respondent's assignment chart (R-9) and the correct square footage are utilized, the subject should only be assessed 8.3 REUs. See Transcript at 28-30. The Tribunal finds that the square footage is contested and must be determined to properly calculate the REUs to be assigned. The most reliable indicator of square footage is Petitioner's appraisal which indicates that the subject building is 6,680 square feet with 4,750 used for the gas station and convenience store operation and 1,930 being leased to McDonald's. P-1 at 20. As such, the Tribunal finds that the assignment of 3.375 REUs for the convenience store and 4.825 for the McDonald's is consistent with the calculation of REUs using the assignments for "Gas w/mart" and "Restaurant." [4] Respondent's assessor testified that each portion, or use, was individually rounded up. Transcript at 109-10. Petitioner contends that the rounding up of each of these calculations results in an excessive assessment. However, the Tribunal finds that the rounding up of *all* partial REUs is consistent and results in a uniform assessment. Therefore, the subject was excessively assigned 11 REUs and should be assigned only 9 REUs. Petitioner also contends that the subject property was metered and that the metering indicated a maximum use of 3.9 REUs. See Transcript at 74. Petitioner contends, therefore, that its REU assignment is excessive and should be reduced. Petitioner's contentions are based, in part, upon the fact that Ken's Market's

[4] R-9 indicates that for the gas station with convenience store, which was assessed as "Gas w/mart," 1 REU plus 0.5 REUs per 1,000 square feet of area were assigned. For the McDonald's portion of the subject property, 2.5 REUs were assigned per 1,000 square feet for the restaurant area. See R-9.

REU assignment was reduced. However, the Tribunal finds that Ken's Market was assigned 0.23 REUs per 1,000 square feet as a supermarket. Transcript at 94. See also R-9. Although Ken's Market's allocation was modified after the feasibility study, it was assigned REUs on a standardized basis. See Transcript at 94-95. The Tribunal finds that Petitioner failed to present sufficient evidence to indicate that the metering of the subject should have resulted in a lower REU assignment. Nevertheless, the assignment of 11 REUs was in error and is, therefore, excessive. The subject shall be assigned 9 REUs. This conclusion does not, however, affect the Tribunal's determination that the special assessment is invalid with respect to the subject property.

Finally, Petitioner contends that the cost of the connection fee and the O&M expenses are excessive rendering the assessment disproportionate. The Tribunal's jurisdiction includes: "A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state." MCL 205.731(a). Thus, it must be determined whether these charges are merely fees, which are outside of the Tribunal's jurisdiction. In *Bolt v City of Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998), the Supreme Court discussed the difference between a "fee" and a "tax" as follows:

> Generally, a "fee" is "exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." A 'tax,' on the other hand, is designed to raise revenue. [*Id.* at 161, citing *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 210; 591 NW2d 52 (1998).]

The *Bolt* Court also established a three-part test in distinguishing between a tax and a fee. The three criteria are: (1) a fee must serve a regulatory purpose, (2) a fee must be proportionate to the

necessary costs of the service, and (3) a fee is voluntary. *Bolt* at 161-162. The Court of Appeals held in *Graham v Kochville Twp*, 236 Mich App 141; 599 NW2d 793 (1999) that:

> As with the fee/tax distinction . . . there is also no bright-line test for distinguishing between a connection/use fee and a special assessment. "Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between amount of the fee and the value of the service or benefit.'" A special assessment is a "specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area." [*Id*. at 150. [Citations omitted.]]

The *Graham* Court further indicated that the fee/tax test set forth in *Bolt* is equally applicable to the fee/special assessment analysis.

The fees here include a connection fee, like in *Graham*, and a charge for operation and maintenance (O&M) of the system. These charges are to further a regulatory purpose rather than a revenue raising purpose. Specifically, the charges are to fund the sanitary sewer project, including the cost to connect and operate the system. This type of project is clearly to regulate public health, safety, and welfare under MCL 333.12752. See also *Wheeler v Shelby Twp*, 265 Mich App 657, 664; 697 NW2d 180 (2005). Therefore, there is no evidence that the fees are for a revenue raising purpose. With regard to proportionality, the Tribunal finds that there was no evidence presented by Petitioner to dispute that the benefits conferred *from the disputed charges* do not bear a reasonable relationship to value of the service. "[W]e presume 'that the amount of the fee is reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence,' and we find no evidence that the charge here is unreasonable." *Graham* at 154-55, citing *Vernor v Secretary of State*, 179 Mich 157, 168; 146 NW 338 (1914). Thus, the Tribunal finds that the charges are proportionate and reasonably relate to the costs. While the charges are not voluntary, the factors are to be considered "in their totality, such that a weakness

in one area would not necessarily mandate a finding that the charge is not a fee." *Graham* at 151. "[T]he lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler* at 666-67, citing *Bolt* at 167 n. 16, and *Westlake Transportation v Public Service Com'n*, 255 Mich App 589, 616; 662 NW2d 784 (2003). As discussed above, MCL 333.12752 has mandated that the connection to a sewer system is necessary in the public interest which, therefore, supports the mandatory connection and associated fees. Thus, the Tribunal finds that the first two criteria are clearly met and the third shall not render the charges a tax or special assessment. Petitioner presented no legal argument to support the position that the charges are truly an extension of the special assessment. Thus, the Tribunal finds that the charges at issue are, as Respondent contends, a fee and not a tax or extension of the special assessment. See *Wheeler* at 667. As such, the connection and O&M fees are not established under the property tax laws and are not within the Tribunal's jurisdiction.[5]

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that the special assessment does not confer a benefit upon the subject property and is, therefore, invalid with respect to the subject property. The special assessment shall be revised as stated in the Introduction section above.

JUDGMENT

IT IS ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the

[5] Notwithstanding the Tribunal's determination that the O&M charges are not within its jurisdiction to reduce, the Tribunal notes that O&M charges may be modified, including a potential reduction, upon metering. Mr. Ridley testified that after two years, meters will be connected and that rather than merely paying a flat fee for O&M, the assessed properties will only be charged for what is actually used. This may actually result in a decrease in the charges. See Transcript at 103-104.

property's special assessment as finally provided in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by the Final Opinion and Judgment within 28 days of the entry of the Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this FOJ. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09% for calendar year 2012, (iv) after June 30, 2012, through December 31, 2014, at the rate of 4.25%.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

Entered: June 20, 2014 Steven H. Lasher
krb