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

West Michigan Development Co.,
Petitioner,

v

MTT Docket No. 461412

Crockery Township,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING PETITIONER'S MOTION TO AMEND PETITION

ORDER GRANTING PETITIONER'S MOTION TO FILE SECOND AMENDED PETITION

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On September 11, 2015, Petitioner filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Petitioner contends the vacant parcels subject to the special assessment receive no benefit that is different from the community as a whole, Respondent's calculated shortfalls in revenue for each year were miscalculated, and the 2014 redetermination resolution was not done with the required notice. On October 2, 2015, Respondent filed a response to the Motion.

On September 11, 2015, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor, contending that Petitioner has failed in its burden of proving that the amount of the special assessment exceeds the benefits and all notice requirements regarding the 2014 redetermination were done correctly. On October 2, 2015, Petitioner filed a response to the Motion.

On October 28, 2015, Petitioner filed a motion requesting that the Tribunal allow it to include the 2015 special assessment, following Respondent's September 28, 2015 redetermination resolution. Respondent did not file a response to this Motion.

On November 18, 2015, Petitioner filed a motion requesting to amend its 2015 petition. In support of this Motion, Petitioner states that subsequent to its October 28, 2015 Motion, Respondent, on or about October 19, 2015, adopted another resolution revising the amounts to be assessed for the 2016 tax year.

On November 27, 2015, Respondent filed a response to the motion, stating that Petitioner is adding new allegations and legal theories not contained its original Petition.

The Tribunal has reviewed the Motions, responses, and the evidence submitted and finds that Petitioner's Motion to Amend its Petition and Motion for Leave to File Second Amended Petition shall be granted and the 2015 redetermination resolution shall be included in this case. The Tribunal further finds Petitioner's Motion for Summary Disposition shall be denied and Respondent shall be granted summary disposition under MCR 2.116(C)(10).

PETITIONER'S CONTENTIONS

In support of its Motion, Petitioner contends the special assessment does not relate to the sewer system itself or the cost of constructing; it relates to the annual cost for the operation and maintenance of the sewer system for improved properties within the district. Petitioner states this special assessment was only levied against vacant properties in the Hathaway Lakes Development and these vacant parcels receive no benefit that would justify the special assessment because the special assessment is for the operation and maintenance of the sewer system for *other* properties. Petitioner argues the existing system lacks the capacity to serve all of the properties that have been specially assessed; the existing system has the capacity to serve 306 Residential Equivalent Units ("REUs"), with 30 already allowed by Respondent to those outside the development, leaving 276 REUs available for the development. Petitioner states the Hathaway Lakes Development will contain 528 REUs, resulting in 252 REUs (60% of the property specially assessed) included in the special assessment that the sewer system will not have the capacity to serve. Petitioner further contends that although Respondent is contractually required to build a wastewater treatment plant with a capacity of no less than 140,000 gallons per day, the capacity of the plant was and remains at only 75,000 gallons per day. Petitioner argues, "even if there had been sufficient capacity for all of the specially assessed properties to connect to the treatment plant at all relevant times, the mere operation of a sanitary sewer system for

other properties does not benefit or increase the market value of the vacant lots subject to this special assessment."

Petitioner further argues that even if it is determined that the vacant parcels received a benefit from the operation of the sewer system, there was no *special* benefit provided that was different from the benefit to the community as a whole. Petitioner contends that any benefit to the vacant parcels was the same benefit other vacant parcels in the sewer district were receiving that are required to connect to the sewer system but were not specially assessed. Petitioner states this reflects a lack of uniformity and equality of the special assessment. Petitioner further argues that any benefit will not be realized until sometime in the future if the parcels connect to the sewer system and under Michigan law, "a potential future benefit 'is not a valid basis for finding a benefit to the property justifying an assessment imposed by the township on the property owner at this time' "[1]

Petitioner further states the "shortfalls" indicated by Respondent are "complete fabrications" because Respondent did not account for the revenue generated from existing users of the system.[2] More specifically, Petitioner argues the resolution approving the special assessment claimed anticipated revenue from sewer rates and charges for connected properties of $51,646; however, Respondent's projected revenue did not include most categories of revenue specifically enumerated in Respondent's sewer ordinance. Petitioner argues, "Respondent ignored revenue from Ready to Serve Fees, Service Charges, Asset Management Fees, Late Charges, Inspection Fees and Facilities Reserve Charges . . . ."[3] Petitioner states Respondent's budget states anticipated revenue of over $88,000 for those charges, and if included, the claimed shortfall of $27,360 would be eliminated. Petitioner contends a special assessment can be invalidated for fraud or mistake and here, the special assessment was the result of a mistake in estimating the revenue and calculating the shortfall. Petitioner argues the actual amount of the special assessment was incorrect and not proportionate to any purported benefit to the vacant parcels. Further, Petitioner states Respondent's valuation disclosure fails to make the right valuation comparison or quantify in any way the benefit; instead, Respondent's valuation attempts to value the vacant parcels with and without the sewer system itself.

[1] P Motion at 15, citing *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 335; 802 Nw2d 353 (2010).
[2] *Id* at 2.
[3] *Id* at 6.

Regarding the subsequent year assessment, Petitioner contends the special assessment was not adopted by Respondent's September 30, 2014 deadline. Petitioner states a redetermination resolution was adopted on October 13, 2014, which added language to the 2013 resolution that originally required redetermination and adjustment annually on or before September 30. Petitioner further contends that the required notice of the redetermination was not given. Petitioner states that the estimated revenue in the 2014 resolution was again understated by Respondent. For 2014, Petitioner states that only 160 additional REUs could be constructed, even though Petitioner had the legal right to construct 412 additional REUs.

Response to Respondent's Motion

In its response to Respondent's Motion for Summary Disposition, Petitioner states the affidavit submitted with its valuation disclosure is not lay opinion but is the opinion of an expert, a licensed real estate broker and residential builder who has been personally involved with the Development. Further, Petitioner states that its expert is not addressing the benefit of the special assessment but instead his "opinion goes to the threshold issue of whether there was any benefit whatsoever to the vacant parcels that were specially assessed."[4] Petitioner contends, "[b]ecause, at all relevant times, the majority of the property that was being specially assessed by Respondent could not have connected to the sewer system due to inadequate capacity, there was no benefit to those parcels."[5] Petitioner states that Respondent's expert has failed to refute these claims.

Petitioner further contends Respondent's Resolution 2013-27 contained language that explicitly stated that the amount to be assessed was subject to periodic redetermination and adjustment annually on or before September 30, that Respondent did not adopt a special assessment for the 2015 tax year by September 30, 2014, but instead, adopted a redetermination resolution, 2014-22, on October 13, 2014 which altered the language of Resolution 2013-27. Petitioner asserts this is a "failed attempt at a new special assessment" without notice or any of the procedural prerequisites for a special assessment.[6] Petitioner also states that the scope of MCL 41.735c, cited by Respondent, "is not clear" and Respondent's interpretation "would

[4] P response at 8.
[5] *Id* at 8-9.
[6] *Id* at 12.

literally give Townships unfettered discretion to form special assessment districts and would seriously implicate the due process rights of affected property owners."[7] Petitioner further argues that while MCL 41.735c does not require a hearing to form an assessment district, there is no provision that exempts Respondent from an obligation to hold a hearing to confirm the special assessment roll under MCL 41.726 and 41.724a.

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends it is contractually obligated to provide sewage treatment for the benefit of the vacant parcels included in the special assessment; developed properties are also contributing their proportionate share by payment of user fees and charges. Respondent contends Petitioner has failed to meet its burden of proof that the amount of the special assessment exceeds the benefit. Respondent argues that none of the valuation disclosures submitted by Petitioner contain any market evidence "let alone any market evidence comparing the value of the subject properties before and after they had access to the Improvements."[8] Respondent asserts the valuation disclosure includes an affidavit with "the self-serving conclusory lay opinion of the developer"[9] indicating the parcels included in the special assessment have not received a benefit, which has not been supported by evidence as to the value of the parcels. Respondent cites to both Tribunal and Court of Appeals' decisions regarding the insufficiency of lay opinion testimony to meet Petitioner's burden of proof.[10]

Respondent further argues that, as a matter of law, it was not required to provide the notice claimed by Petitioner under the relevant statute to be applied. Respondent states the sewer system was constructed and financed by Ottawa County, pursuant to an agreement under the County Public Improvement Act, with the operation and maintenance of the sewer system also contracted for under this Act. Respondent states the special assessment was levied under MCL 41.735c, which supersedes the requirements with respect to a petition and hearing that are contained in sections 3 and 4 of the Public Improvements Act (MCL 41.723 and 41.724). Respondent contends "[t]he requirement to provide the notice 'redetermination to be made without further notice' is plainly contingent upon the necessity of holding a section 4(2) hearing

[7] *Id* at 13-14.
[8] R Motion at 10.
[9] *Id*.
[10] See *Id* at 10 -11.

for the purpose of hearing objections."[11] Respondent argues that under MCL 41.735c, a hearing on objections was not permitted and Respondent had no obligation to provide notice for a hearing it was not required to conduct. Respondent also states that although not required, the Notice of Special Assessment provided to Petitioner did state the special assessment was subject to periodic redetermination.

Response to Petitioner's Motion

In response to Petitioner's Motion for Summary Disposition, Respondent states Petitioner's argument is factually inaccurate, as the current equipment has a capacity of 75,000 gallons per day, and once 80% of the average daily flow of wastewater is utilized, Respondent will install the additional necessary equipment to reach the ultimate capacity of 140,000 gallons per day. Respondent contends Petitioner has been unable to identify any parcel that requested or attempted to connect to the sewer system but was not able to do so. Respondent argues that Petitioner's assertions would require Respondent to install additional equipment before it is needed which would increase the operation and maintenance costs, thus increasing the special assessment.

Respondent further contends its decision "to fix the boundaries of the SAD to exclude properties connected to the sewer system was not fraudulent, arbitrary or capricious."[12] Respondent contends that the connected properties pay for operation and maintenance of the sewer system through payment of fees and charges, pursuant to the Township Sewer Ordinance, with each connected user paying from $5.25 to $5.40 per 1,000 gallons of water usage plus $288 each year for the Readiness to Serve Charge. Respondent argues this is significantly more than the $102.70 per REU under the special assessment in 2013 and $73.51 in 2014. Respondent further states there are two sewer service districts in the township; the Primary Service District is solely for the Development and the Service District includes all other land within Section 16 and 17 of the township. Respondent states that vacant properties in the Service District do not have a contractual right to connect to the sewer system, unlike the properties in the Primary Service District. Further, it is mandatory under Section 303 of the Sewer Ordinance that properties in the Primary Service District connect to the sewer system as they are developed. Respondent

[11] *Id* at 13.
[12] R response at 5.

contends that there is no genuine issue of material fact "that the Township properly excluded vacant properties in the Service District from the SAD because, unlike the subject properties, those properties do not have a contractual right or legal obligation to connect to the sewer system."[13]

Respondent also contends that even if the subject properties are not receiving a present benefit, the future benefit is sufficient to justify the special assessment. Respondent states that Petitioner's allegation that a future benefit is not sufficient to sustain the special assessment is not supported under the applicable law. Respondent, citing to two published decisions by the Court of Appeals, argues that the developers have the contractual right to construct a certain number of homes with those homes also having the contractual right to connect to the sewer system. According to Respondent, "[i]n addition to the present benefits of an available public sewer system, the subject properties will clearly be benefitted by the sewer system in the future when they are developed as residential homes, and that benefit is clearly sufficient under Michigan law to impose a special assessment."[14]

Respondent argues that Petitioner's fraud argument is without merit and further "the issue is not material to this special assessment appeal because, as a matter of law, a shortfall in sewer revenue is not a prerequisite to imposing the special assessment."[15] Respondent states the special assessment exists to defray its contractual obligations to Ottawa County in operating and maintaining the sewer system as permitted under MCL 41.735c. Respondent further contends Petitioner's argument is based on an unsupported proposition that all revenue generated under the Sewer Ordinance must be allocated to operation and maintenance of the sewer system. However, Respondent states that under the Sewer Ordinance, "only the Commodity Fee and the Readiness to Serve Charge must be allocated to year-to-year operation and maintenance."[16] Respondent states that operation and maintenance are not the only expenses and other revenues are allocated to other expenses.

[13] *Id* at 7.
[14] *Id* at 8.
[15] *Id*.
[16] *Id* at 9.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[17] In this case, the parties moves for summary disposition under MCR 2.116(C)(10).

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[18] In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.[19]

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party.[20] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[21] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[22] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[23] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[24]

CONCLUSIONS OF LAW

As a result of prior litigation in Ottawa County Circuit Court, Petitioner's predecessor and Respondent entered a stipulated Satisfaction of Judgment resulting in a Sewer, Water and Development Agreement providing for the construction of a wastewater management treatment

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[17] See TTR 215.
[18] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).
[19] See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[20] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[21] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[22] *Id.*
[23] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[24] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

plant to serve the Hathaway Lakes Development, totaling 528 REU's. The terms of the Agreement required a wastewater treatment plant with a capacity of 40,000 gallons of wastewater per day, allocated to the Development, with Respondent being permitted to allow other users to connect if the capacity was not being utilized.

In 2013, following s public hearing, a special assessment district was established against all vacant parcels in the Development. The October 14, 2013 resolution approving the special assessment, Resolution No. 2013-27 states, "the amount to be assessed to each parcel shall be subject to a periodic redetermination and adjustment annually by resolution of the Township Board on or before September 30 . . . ."[25]

On October 13, 2014, Respondent adopted a redetermination resolution, Resolution 2014-22, for the 2015 tax year, which cited Resolution 2013-27, with the included modification (in italics) "the amount to be assessed annually to each parcel shall be subject to a periodic redetermination and adjustment annually by resolution of the Township Board on or before September 30 [*or shortly thereafter*] . . . ." [Emphasis added.][26]

The 2014 Resolution further indicated operation and maintenance costs of $127,000, estimated revenues from sewer usage, asset management and service charges of $98,700, leaving a total assessment of $28,300 assessed to 385 units at $73.51 per unit.[27]

Motions to Amend to add subsequent year special assessment

Petitioner filed a Motion to amend this appeal to include the 2015 redetermination resolution, Resolution No. 2015-25. Subsequently, the amount of the special assessment was recalculated and Petitioner requested a second amended appealing Resolution No. 2015-27. Respondent objects on the grounds that Petitioner is attempting to add new allegations. Respondent, however, did not specify what allegations in the Motion and amended petition have not previously been raised. The Tribunal has reviewed the Motion and amended petition, and finds the issues raised are pending before the Tribunal on the parties' cross-motions for summary disposition. Further, the 2015 redetermination resolutions involve the same parcels currently pending in this appeal. Therefore, Petitioner's Motions shall be granted and the 2015 redetermination resolutions are included in this appeal and decision.

[25] R 1-F.
[26] R 1-H.
[27] R 1-H.

Motions for Summary Disposition

Petitioner first contends that the subject properties receive *no benefit* from the special assessment, which was created for the costs of operation and maintenance of the sewer system for improved properties, not the vacant parcels in the Development subject to the special assessment. The resolution confirming the special assessment stated, "the properties included within the District are benefitted by the operation and maintenance *and the immediate availability of the Sewer System*." [Emphasis added].[28] The Court of Appeals has held that "the improvement subject to the special assessment must confer a benefit on the assessed property and not just the community as a whole" and "the amount of the special assessment must be reasonably proportionate to the benefit derived from the improvement."[29] Petitioner asserts the benefit to the subject parcels is no different from the benefit to the community as a whole; both receive no benefit from the special assessment. Clearly, the special assessment at issue does not confer a benefit on the entire Township, as the sewer system is designated specifically for use by the Development (with Respondent being allowed to connect additional properties outside the Development pursuant to Sewer, Water and Development Agreement). Respondent argues that there is a benefit to the vacant parcels, as "[p]roper maintenance and operation of the sewer system . . . is necessary to keep the sewer system available; it is self-evident that a dilapidated and inoperable sewer system is not available on demand."[30]

The "improvement" subject to the special assessment is not the sewer system itself, but the continued operation, maintenance and immediate availability of the sewer system to all parcels within the Development. Petitioner asserts, however, that access to the sewer system was not immediately available to its vacant parcels as Respondent did not construct the treatment plant at its full capacity of 140,000 gallons per day, but instead there is a capacity of only 75,000 gallons. Petitioner argues the majority of the parcels subject to the special assessment could not have connected to the sewer system given its capacity as constructed. Respondent contends that under the terms of the Sewer, Water and Development Agreement, once 80% of the average daily flow is being utilized, it will install the necessary additional equipment to treat the total capacity the wastewater treatment plant was designed for. Respondent points out that Petitioner

[28] R 1-F.
[29] *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 355; 802 NW2d 353 (2010).
[30] R Response at 4.

has been unable to identify any parcel that wanted to connect to the system but was not able to at the systems current constructed capacity. Respondent states that installing the additional equipment before it is needed would result in increased operation and maintenance costs.

Petitioner further contends that a *future* benefit cannot be the basis for a present assessment, citing *Dix-Ferndale Taxpayers Ass'n v Detroit*.[31] Petitioner also cites *Michigan Adventure*, in which the Court of Appeals stated, "although the sewer line *may* somehow benefit the property in the future, that is not a valid basis for finding a benefit to the property justifying an assessment imposed by the township on the property owner at this time."[32] In *Dix-Ferndale*, the Michigan Supreme Court determined that a remote future benefit cannot be the basis for a present special assessment, as any benefit was dependent on an extension of the road widening, "if the street is widened at some future date, there will accompany it an assessment for benefits conferred thereby. Further, in *Michigan Adventure*, the Court of Appeals determined "the sewer line would not benefit petitioner's property because the property does not require a sewer line—petitioner disposes of its sewage by means of operational sewage lagoons"[33] and that the sewer line would not benefit the property in the future, given the soil and the wetland protections. Neither *Dix-Ferndale* nor *Michigan Adventure* support Petitioner's position; in *Dix-Ferndale*, the special assessment was imposed for a hypothetical future road widening improvement and in *Michigan Adventure*, the property did not require access to the sewer line, having its own system already in place. In the present case, the sewer system is already in existence, Petitioner is required to connect its vacant parcels to this system once they are developed, and Respondent is required to make the sewer system available to these parcels. Unlike *Dix-Ferndale* and *Michigan Adventure*, there is no hypothetical future improvement and no alternate system, already in place, that Petitioner is using or that Petitioner would be permitted to use.

The Tribunal finds there is some benefit to the vacant parcels for the operation, maintenance and availability to connect to the sewer system. At such time as Petitioner decides to develop additional REU's, those REU's will benefit from access to a properly maintained sewer system. Respondent is contractually obligated to make the sewer system available to all REU's in the Development and there is no indication that Petitioner has ever requested to

[31] *Dix-Ferndale Taxpayers Ass'n v Detroit*, 258 Mich 390; 242 NW 732 (1932).
[32] *Michigan Adventure*, 290 Mich App at 336.
[33] *Michigan Adventure*, 290 Mich App at 336.

connect an REU to the system and was unable to do so based on the current capacity of the system. Further, other vacant parcels in the Township do not have the contractual right to connect to the system located in Respondent's Primary Service District, but under the Sewer Ordinance, Petitioner's vacant parcels within this District are required to connect to the system as those parcels are developed. Therefore, Respondent properly excluded vacant parcels from the special assessment district that had no right to connect to the system and would receive no benefit from the special assessment. Respondent also properly excluded the already improved parcels within the District, as the improved parcels are already contributing to the operation and maintenance of the sewer system through the usage charges, which are higher than what is charged to the vacant parcels subject to the special assessment.

Petitioner next argues the special assessment was the result of a mistake and can be invalidated.[34] Petitioner contends that Respondent mistakenly calculated the shortfall in both special assessments, as Respondent did not take into consideration all of the available revenue. Petitioner states if all fees and charges were included, there would have been a surplus in both years and not a shortfall. The October 14, 2013 resolution approving the special assessment, Resolution No. 2013-27 states, in relevant part:

> WHEREAS, the cost to operate and maintain the Improvements far exceeds the rates and charges paid by the existing customers connected to and utilizing the Improvements in the Development;
>
> WHEREAS, the estimated annual cost of the Improvements for 2014 is $109,006, and the anticipated revenue derived from sewer rates and charges for properties that are connected to the Sewer System is $51,646; and
>
> WHEREAS, an estimated $30,000 is available from other Township sources to cover operation and maintenance costs of the Sewer System, *leaving a shortfall in funds* to pay for operation and maintenance costs of the Sewer System in the amount of $27,360;
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> ***
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> WHEREAS, in accordance with Act 342, Act 188 and the O&M Contract, the Township Board intends to spread a portion of the cost of the Improvements, *representing the amount of estimated annual shortfall* between (a) the cost of operation and maintenance for the Sewer System due by the Township to the County pursuant to the O&M Contract, (b) available funds from other Township sources, if any, and (c) revenues derived from rates and charges paid by users connected to the Sewer System, plus the Township's administrative, legal, publication and mailing costs associated with the proceedings under Act 188,

[34] See P Motion at 10.

> against the properties benefited by the immediate availability of the Improvements . . . . [Emphasis added].[35]

It is clear from the resolution adopting the special assessment that the purpose of the special assessment was to cover the "amount of estimated annual shortfall" between the cost of operating and maintaining the sewer system and the available Township funds and revenue collected from existing users of the sewer system. Further, the anticipated revenue is derived from "rates and charges paid by users connected to the Sewer System . . . ." The Sewer Ordinance defines sewer rates and charges as the "Connection Fee, Inspection and Administration Fee, User Charge (including the Commodity Fee, Readiness to Serve Charge, Asset Management Fee, Facilities Reserve Charge, and Debt Service Charge), User Surcharge, Miscellaneous User Fee and the civil penalty imposed pursuant to Section 308, and all interest and penalties thereon."[36]

For the 2013 special assessment, the estimated revenue "from sewer system rates and charges"[37] was $51,646. For the 2014 special assessment, the estimated revenue was $98,700, which consisted of "sewer usage, asset management and service charges."[38] Neither the 2013 nor the 2014 special assessment included revenue from all sources identified under the sewer rates and charges as defined in Section 255 of Respondent's Sewer Ordinance. Respondent states that "only the Commodity Fee and the Readiness to Serve Charge must be allocated to year-to-year operation and maintenance. Respondent further argues that other revenues are lawfully allocated to other expenses, such as the Debt Service Charge.

Respondent contends there was no fraud or mistake and that a shortfall in revenue "is not a prerequisite to imposing the special assessment."[39] Instead, Respondent claims the special assessment was "imposed to defray Respondent's contractual obligations to Ottawa County for operation and maintenance of the sewer system pursuant to Section 15c of the Public Improvement Act . . ."[40] and the Act does not require a shortfall in funds for a special assessment. MCL 41.735c states:

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[35] R-F.
[36] P-H.
[37] P-J.
[38] P-L.
[39] R Response at 8.
[40] *Id*.

> The township board may determine that the whole or any part of an obligation of the township assessed or contracted for pursuant to Act No. 342 of the Public Acts of 1939 . . . shall be defrayed by special assessments against the property specially benefited thereby and in such case, the special assessments may be levied and collected in accordance with this act except as herein provided . . . .

Respondent entered into an agreement with Ottawa County on February 1, 2007, under which the County provided for the acquisition, financing, and construction of the sewer system with Respondent being required to pay the costs and expenses of the operation and maintenance of the sewer system and improvements.[41] Respondent states that at the time the Agreement was executed between Petitioner and Respondent, it was projected that there would be a sufficient number of properties in the Development that would be connected to the system, thereby allowing Respondent to pay for the cost. Respondent states, however, that the projected number of units were not developed and connected. As a result, Respondent claims it was unable to meet its payment obligations to Ottawa County and Respondent was required to enter a Finance Agreement with Ottawa County to finance the costs of operating and maintaining the sewer system and improvements.

In *Kadzban v Grandville*,[42] the Michigan Supreme Court held:

> A special assessment is a levy upon property within a specified district. Although it resembles a tax, a special assessment is not a tax. . . . In contrast to a tax, a special assessment is imposed to defray the costs of specific local improvements, rather than to raise revenue for general governmental purposes. . . . In other words, 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. [Citations omitted.]

The Tribunal finds that the special assessment at issue was imposed to "defray the costs of specific local improvements" which are the annual cost of operation and maintenance of the sewer system that Respondent is contractually obligated to make available to the vacant parcels at such time as they become developed. The special assessment was designed by Respondent to cover the costs of the improvement owed to Ottawa County under the terms of their agreement. The resolution adopting the special assessment did not mandate that *all* rates and charges paid by existing users connected to the sewer system be allocated to it operation and maintenance as

[41] R-1 and R 1-C.
[42] *Kadzban v Grandville*, 442 Mich 495, 500; 502 NW2d 299 (1993).

there were other financial obligations, such as repayment of the debt to Ottawa County, that also had to be taken into consideration. Accordingly, Petitioner has failed to establish that the special assessment was levied against the vacant parcels in error.

October 13, 2014 Special Assessment

In addition to its other arguments against the special assessment, Petitioner contends that the 2014 redetermination resolution is invalid because it was established after the September 30 deadline in the 2013 resolution and no notice was provided under MCL 41.724(2). Respondent contends that the 2014 redetermination did not require a hearing or notice because the special assessment was enacted under Section 15c of the Public Improvements Act. The relevant portion of MCL 41.735c states "[t]he requirements of section 3 with respect to requiring a petition and section 4 with respect to the hearing therein required shall not apply to any special assessments levied and collected in accordance with this section and the above described acts."
The Tribunal finds the requirements of a petition and a hearing on that petition shall not apply to special assessments levied under MCL 41.735c. The phrase "the hearing therein required" directly relates to the first part of the sentence regarding the section 3 petition; MCL 41.735c does not, however, provide that Respondent is excused from ever holding any type of hearing regarding creation and confirmation of the special assessment roll. ." The Michigan Supreme Court has stated:

> Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, "[t]he words of a statute provide 'the most reliable evidence of its intent....'[43]

"Therein" is defined as "[i]n that place or time[;] . . . [i]nside or within that thing; inside or within those things[;] . . . [i]In that regard, circumstance, or particular.[44] It is also defined as "[i]n that place, time, or thing . . . . In that circumstance or respect."[45]

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[43] *Whitman v City of Burton,* 493 Mich 303, 311; 831 NW2d 223 (2013).
[44] *Black's Law Dictionary* (10th ed. 2014).
[45] *The American Heritage Dictionary of the English Language* (5th ed. 2015).

Petitioner concedes that MCL 41.735c, in certain circumstances, does not require a hearing on the formation of a special assessment district, but argues there is no provision that excuses Respondent from notice and hearing "on the confirmation of a special assessment roll as outlined and mandated by MCL 41.726 and MCL 41.724a." MCL 41.726(1) states:

> When a special assessment roll is reported by the supervisor to the township board, the assessment roll shall be filed in the office of the township clerk. Before confirming the assessment roll, the township board shall appoint a time and place when it will meet, review, and hear any objections to the assessment roll. The township board shall give notice of the hearing and the filing of the assessment roll as required by section 4a.

Petitioner argues that because the 2014 resolution was passed after the September 30 deadline set in the 2013 resolution, the 2014 resolution "is a failed attempt at a new special assessment made not only without any notice to any affected property owner, but also made without any of the procedural prerequisites of a valid special assessment." Respondent, however, asserts that the redetermination was valid. Respondent further states that although it was not required under MCL 41.735c to provide any notice regarding redeterminations, notice was provided to Petitioner in the Notice of Special Assessment that the special assessment was subject to periodic redetermination. MCL 41.724(2) states "[i]f periodic redeterminations of cost will be necessary *without a change in the special assessment district*, the notice shall state that such redeterminations may be made without further notice to record owners or parties in interest in the property." [Emphasis added.] The Notice of Special Assessment issued October 14, 2013, included the following statement "[y]our special assessment will be billed in annual installments and will be subject to periodic redetermination in accordance with Act 188 of the Public Acts of Michigan of 1954, as amended."[46] Petitioner, however, argues that the redetermination altered the special assessment roll due to the number of parcels included in the special assessment being reduced from 21 to 10. The Tribunal finds that the statement in the 2013 Notice of Special Assessment is in conformance with the requirements of MCL 41.724(2) and Respondent was not required to provide further notice to property owners regarding future redeterminations. The reduction in the number of parcels specially assessed in the 2014 redetermination was not a change in the special assessment district that required a new hearing with notice; the change was

[46] R 1-G.

due to some parcels becoming improved or in the process of being improved. The 10 parcels specially assessed in the 2014 redetermination were part of the original 2013 special assessment and received notice that the special assessment would be subject to periodic redeterminations.

Further, although Petitioner alleges the 2014 redetermination is invalid because it was not made by the September 30 date set forth in the 2013 resolution, there is nothing in the applicable statutes that states a special assessment will be invalid if not made by the date set forth in the original resolution. Petitioner has failed to cite any applicable statute or case law that would require that the redetermination resolution be held invalid because it was not done by September 30. In addition, there was no requirement for notice or a hearing for the 2014 redetermination under MCL 41.724(2).

Given the above, the Tribunal finds there is no genuine issue with respect to any material fact regarding a benefit to the subject parcels from the special assessment. Further, the Tribunal finds there is no genuine issue with respect to any material fact regarding the 2014 redetermination resolution and Petitioner has failed to establish that the redetermination was in error. Accordingly, Respondent is entitled to summary disposition on both claims under MCR 2.116(C)(10).

2015 Redetermination Resolutions

The Tribunal further finds that with respect to Resolution Nos. 2015-25 and 2015-27, there is no error on the part of Respondent in establishing these redeterminations. The analysis above regarding both the initial 2013 special assessment and 2014 redetermination also applies to the 2015 redetermination. The Tribunal finds there is no genuine issue of material fact and Respondent is entitled to summary disposition under MCR 2.116(C)(10) for the 2015 redetermination resolutions.

Proportionality

The remaining issue relates to whether the benefits of the special assessment were proportional to the cost incurred. Petitioner contends that it should be granted summary disposition as the amount of the special assessment imposed was incorrect and not proportionate to any benefit to the vacant parcels. Petitioner further argues that Respondent's valuation disclosure incorrectly valued the vacant parcels with and without the sewer system itself, but the sewer system is not the "improvement" at issue. Conversely, Respondent believes that summary

disposition should be granted in its favor, contending that Petitioner has the burden of proof and has failed to offer credible evidence that the benefit to the vacant parcels was substantially disproportionate to the amount of the special assessment. Respondent contends that Petitioner's valuation disclosure contains no market evidence, only an affidavit that the properties have not been benefitted. As a result, Respondent asserts Petitioner will be unable to support this claim by competent and credible evidence at trial and Respondent should be granted summary disposition under MCR 2.116(C)(10).

In *Dixon Road,* 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.[47] 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."[48] 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. [Citations omitted.][49]

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

[47] *Dixon Road* 426 Mich at 400.
[48] *Id* at 401.
[49] *Ahearn v Bloomfield Twp*, 235 Mich App 486, 496; 597 NW2d 858 (1999).

> disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements.' [Citations omitted.][50]

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*, 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."[51] 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.[52]

Further, one who challenges a special assessment carries a heavy burden of proof because of the presumption that the levy is valid.[53] 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.'"[54]

In this case, the deadline for valuation evidence has passed and the valuation disclosure submitted by Petitioner *does not* prove that the subject vacant parcels do not receive a benefit that would justify imposition of the special assessment. Petitioner, having the burden of proof, has failed to rebut the presumption that the special assessment is valid and has no evidence to go forward on any argument regarding whether the benefit received is proportional to the cost. There is no analysis of the value with and without the improvement, and therefore, no way that Petitioner could prevail on this claim at trial. As stated by the Michigan Supreme Court in *Kadzban*, without such evidence, there is no basis for the Tribunal to strike down the special assessments. Accordingly, the Tribunal finds that summary disposition shall be granted in Respondent's favor.

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Leave to File Amended Petition is GRANTED.

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[50] *Kadzban*, 442 Mich at 302-303.
[51] *Id*. at 505.
[52] *Graham v City of Saginaw*, 317 Mich 427, 435; 27 NW2d 42 (1947).
[53] *Konfal v Delhi Township*, 91 Mich App 147; 283 NW2d 677 (1979).
[54] *Kadzban*, 442 Mich at 502.

IT IS FURTHER ORDERED that Petitioner's Motion for Leave to File Second Amended Petition is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that the special assessments at issue are AFFIRMED.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

APPEAL RIGHTS

If you disagree with the Tribunal's final decision in this case, you may either file a motion for reconsideration with the Tribunal or a claim of appeal directly to the Michigan Court of Appeals ("MCOA").

A motion for reconsideration with the Tribunal must be filed, by mail or personal service, with the $50.00 filing fee, within 21 days from the date of entry of this final decision.[55] A copy of a party's motion for reconsideration must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the motion for reconsideration was served on the opposing party.[56] However, unless otherwise provided by the Tribunal, no response to the motion may be filed, and there is no oral argument.[57]

A claim of appeal to the MCOA must be filed, with the appropriate entry fee, unless waived, within 21 days from the date of entry of this final decision.[58] If a claim of appeal is filed with the MCOA, the party filing such claim must also file a copy of that claim, or application for leave to appeal, with the Tribunal, along with the $100.00 fee for the certification of the record on appeal.[59]

By: Steven H. Lasher

Entered: December 17, 2015
klm

[55] See TTR 257 and TTR 217.
[56] See TTR 225.
[57] See TTR 257.
[58] See MCR 7.204.
[59] See TTR 213 and TTR 217.