STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Huron Development, LLC,
Petitioner,

MTT Docket No. 298757

v

Tribunal Judge Presiding
Patricia L. Halm

City of Lansing,
Respondent.

OPINION AND JUDGMENT

At issue in this case is a special assessment for curb, gutter and storm sewer levied by the City of Lansing (Respondent) as part of the Dunckel Road Reconstruction Project, against property owned by Huron Development, LLC (Petitioner). It is Petitioner's position that its property did not benefit from the improvements financed by the special assessment and, as such, it should not be required to pay the special assessment. For the reasons set forth herein, the Tribunal finds that the subject property benefited from the special assessment and that the relief requested by Petitioner is denied.

GENERAL PROPERTY DESCRIPTION

The property at issue is known as the Trappers Cove Apartments and is located at 3001 Trappers Cove Trail in the City of Lansing, Ingham County, Michigan. The Trappers Cove Apartments complex consists of three parcels of real property, Parcel Nos. 33-01-01-35-401-015, 33-01-01-35-476-002 and 33-01-01-35-451-003. However, only Parcel Nos. 33-01-01-35-401-015 and 33-01-01-35-451-003 (the subject property) were included in the special assessment district as only these two parcels are contiguous to Dunckel Road. The subject property is located east and south of Dunckel Road, west of US-127, and north of Jolly Road and Beaujardin Road.

Trappers Cove Trail is a public road that winds through the complex, beginning at Dunckel Road at its eastern edge and ending at Beaujardin Road at its southern edge.

The Trappers Cove Apartments complex contains 24 apartment buildings with 965 garden level residential apartments. Located on the complex are community facilities and a swimming pool. The two parcels under appeal contain 20 of the 24 apartment buildings and 789 of the 965 apartments as well as the community facilities and swimming pool. The apartment units not under appeal have the ability to use the community facilities and the swimming pool. The buildings were built between 1979 and 1989 and contain four different styles of apartments.

The subject property contains 49.56 acres with two storm water detention ponds that are connected to each other. The ponds are approximately 5.85 acres in size, with an average depth of five feet.

SUMMARY OF PETITIONER'S CASE

As previously indicated, Petitioner asserts that the subject property did not benefit from the improvements financed by the special assessment. Petitioner presented several witnesses in support of its position, the first being Mr. Larry McKnight. Mr. McKnight holds the MAI designation from the Appraisal Institute, is certified by the State of Michigan as a general real estate appraiser and as a real estate broker, and was a former level III assessor. Mr. McKnight prepared Petitioner's appraisal, Petitioner's Exhibit P14[1].

According to Mr. McKnight, the highest and best use of the subject property as improved is its current use, e.g., rental, multi-family, residential. The property's highest and best use, if vacant, would be land available for multi-family development.

[1] Hereinafter, Petitioner's exhibits will be denoted with a "P"; Respondent's exhibits will be denoted with an "R".

In valuing the subject property, Mr. McKnight testified that while he considered the three typical approaches to valuing property, e.g., income, sales comparison, and cost, he did not consider the cost approach to be valid given the age of the buildings. Mr. McKnight further testified that because the subject property is an income-producing property, he focused on the income approach and utilized the sales comparison approach as a test for reasonableness. Utilizing the income approach, Mr. McKnight concluded to a value of $30,430,000 for the subject property.

While he utilized the sales comparison approach as a test for reasonableness, Mr. McKnight did not conclude to a value utilizing this approach. Instead, Mr. McKnight considered the market for the subject property and stated that in his opinion, "the comparable properties provide the framework from which to find a comfort level with the $30,400,000 value indication developed in the Income Approach." (P14, p30) Given this, Mr. McKnight concluded to a value for the subject property before the special assessment improvements of $30,430,000.

To determine a value for the subject property after the special assessment improvements were completed, Mr. McKnight reviewed information obtained from sales of comparable properties. According to Mr. McKnight:

> All of the interviews that we made led us to the opinion that there was no way to identify that there was any difference in value to these properties with the large amounts of on-site storm water detention areas (like the subject property) versus those properties that were dependent upon municipal services. This lack of observation was in both directions. It was impossible to identify whether or not there was any lesser value to these properties having to be dependent upon their – on-site facilities versus a municipal system; and, it was impossible to tell if the aesthetics of having these large pond areas added to the value of the properties, although at least some complexes likely had rent premiums for pond views. (P14, p31)
>
> Clearly, based upon our review of the rent comparables in the subject marketplace, some with and some without ponds, it is our opinion that the rents for the subject property could not be increased based upon the additional road

> improvements that are the basis for the special assessment under appeal. And, as the underlying premise of value, for apartment complexes like the subject and comparable properties is based upon the amount of revenue that they can produce, if the rents cannot be increased due to these public improvements, in our opinion, there is not any benefit to the subject property by virtue of the improvements. If there is no economic benefit to the subject property, it stands, therefore, that there is no increase in value to the property either. (P14, p32)

With this, Mr. McKnight concluded to same value for the subject property before and after the special assessment improvements, specifically $30,430,000.

Petitioner's next witness was Mr. Raymond Brinks. Mr. Brinks was employed by Manifold Services, Inc. (Manifold), in the position of vice-president and accounting manager. According to Mr. Brinks, Manifold "was created and exists to develop and manage the properties out of the Kalamazoo office of the Edward Rose organization," of which Petitioner is an entity. (T1[2], pp166-167) Mr. Brinks testified as to the construction history of Trappers Cove Apartments and clarified that the subject property and Parcel No. 33-01-01-35-476-002[3], while known as Trappers Cove Apartments, are owned by two separate entities. Mr. Brinks stated that they are managed as one complex, but accounted for separately. (T1, p172) Mr. Brinks also testified as to the costs Petitioner incurred restoring the subject property after the special assessment improvements were completed[4].

Mr. Michael Weber, the regional manager for Manifold, testified next. Like Mr. Brinks, Mr. Weber also testified as to some of the repairs that were required after the special assessment improvements were installed. Additionally, Mr. Weber testified that rents charged at Trappers Cove Apartments were increased in April 2003, and that the increase in vacancy rates that year

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[2] T1 refers to the transcript from the first hearing day; T2 refers to the transcript from the second day of hearing.
[3] As will be discussed, Respondent's appraiser included this parcel of property in his appraisal even though it was not part of the special assessment district.
[4] This number is not included in this Opinion and Judgment as the number reported also contains fees paid to Petitioner's appraiser.

was such that another rent increase would not be tolerated without a further increase in the vacancy rate. When questioned, Mr. Weber stated that the vacancy rate in 2003 was high for Trappers Cove Apartments and that the typical vacancy rate was between 3 and 5%.

Mr. Weber then testified as to the special assessment improvements. To his recollection, there had never been a complaint as to dust from the shoulders of Dunckel Road. Mr. Weber also testified that, in his opinion, the widening of Dunckel Road made it more difficult to make a left turn onto Dunckel Road from Trappers Cove Trail.

Petitioner's next witness was Mr. Oscar Findley, who was employed as a facilities consultant for Manifold. Mr. Findley testified as to the maintenance required by the detention ponds and the costs of this maintenance.

Mr. James Hall, a landscape architect employed by Manifold, was called to testify next. Mr. Hall began his employment with Manifold in 1976 and, as such, was part of the initial planning for Trappers Cove Apartments. Mr. Hall explained the difference between a retention pond and a detention pond.

> A retention pond is one that retains water on site and is designed to hold it on site until it evaporates or percolates through the soil or dissipates that way. It has no real...outlet on it...A detention pond is to detain the water until such a time as it can be metered at a rate no greater than before pre-development on it. (T1, p233)

According to Mr. Hall, the pond located on the subject property is a detention pond.

Mr. Hall testified that when the Trappers Cove Apartment project first started, the area in which the detention pond is located was a wetland. When asked whether Respondent required that the wetland be turned into a detention pond, Mr. Hall responded that the City of Lansing did not require this; instead, Petitioner requested a permit from the DNR to turn the wetlands into a detention pond. Mr. Hall stated that the purpose of this conversion was "aesthetic," and also that this type of pond facilitates drainage of storm water. (T1, p243) When asked whether the

detention pond would have been constructed if the improvements to Dunckel Road had been completed at the same time the Trappers Cove Apartments were constructed, Mr. Hall stated: "I would think so, yes." (T1, p144)

Petitioner next called Mr. Craig Torstenson to testify as to the detention pond and the storm water system located on the subject property. Mr. Torstenson was employed by Manifold in the engineering department. Mr. Torstenson testified that, in his opinion, the special assessment improvements resulted in negligible, if any, "measurable, discernible or practical economic benefit to the subject property." (T1, p254)

In its Post-Hearing Brief, Petitioner argues that:

> In cases involving road widening and especially those instances in which a road is widened from 2 to 4 or 5 lanes along with the installation of curb, gutter, storm sewer or storm drainage facilities the benefit of such improvements is deemed to be that of the community at large and abutting property owners may not be specially assessed for such improvements. (Petitioner's Post-Hearing Brief, p17)

In support of this argument, Petitioner relies on *Johnson v Inkster*, 401 Mich 263; 258 NW2d 24 (1977); *Brill v City of Grand Rapids*, 383 Mich 216; 174 NW2d 832 (1970); *Fluckey v City of Plymouth*, 358 Mich 447; 100 NW2d 486 (1960); and *Tack v City of Roseville*, 67 Mich App 34; 239 NW2d 752 (1976).

Finally, Petitioner also argues that "[t]he special assessments must fail because by the City's own admission they were arbitrary, discriminatory and disproportionate. . . ." (Petitioner's Post-Hearing Brief, p21) This argument is made in response to statements made by the City Engineer's testimony explaining how the special assessment for storm sewers is calculated. Mr. Johnson's testimony is discussed more fully below.

SUMMARY OF RESPONDENT'S CASE

In support of its position that the subject property benefited from the special assessment improvements, Respondent submitted an appraisal prepared by Mr. Terrell R. Oetzel. Mr. Oetzel holds the MAI designation from the Appraisal Institute.

According to Mr. Oetzel, the highest and best use of the subject property, if vacant, is for multi-family development. As improved, the subject property's highest and best use is its current use, e.g., rental apartments. Although Mr. Oetzel and Mr. McKnight reached the same conclusions as to the subject property's highest and best use, they disagreed as to what the subject property actually included. According to Mr. Oetzel:

> The two parcels upon which subject is assessed contain approximately 51.45 acres and 789 residential apartments. The total land area of subject property is approximately 61.25 acres and contains 965 residential apartments. The 965 residential rental apartment project has use of the common streets within the project, the common utilities within the project, and the common community building, office, and maintenance facility. The highest and best use of the property is to be sold as a 965-unit rental apartment development. In that part of the project that is not part of the special assessment was excluded, the buyer would have to construct some type of community/office/maintenance building to maintain those [176] units.
>
> Therefore, for purposes of this appraisal, it is my opinion that the highest and best use is the larger parcel containing 61.25 acres of land and 965 units. I have therefore considered the entire parcel when valuing subject property before the special assessments. In valuing subject property after the special assessments, I have considered only that area that is affected by the special assessment in analyzing and estimating the market value of subject property. (R1, p2)

In other words, Mr. Oetzel appraised the entire Trappers Cove Apartment complex consisting of three parcels of property, namely the two parcels of property valued by Mr. McKnight and Parcel No. 33-01-01-35-476-002. Additionally, Mr. Oetzel's conclusion as to the subject property's market value included the value of the personal property located on the subject

property, i.e., kitchen appliances, etc. This property was valued at $1,000 per unit, or $965,000. (R1, p18)

In valuing the subject property before the special assessment improvements, Mr. Oetzel determined that the most applicable appraisal method to use in appraising the subject property is the income approach. Therefore, this method was given the most weight in his appraisal. Utilizing the income approach, Mr. Oetzel concluded to a value for the subject property of $31,170,000.

Mr. Oetzel also recognized the applicability of the sales comparison approach; however, he utilized this method only as a secondary approach. This approach resulted in a value of $33,300,000.00. According to Mr. Oetzel, the cost approach is not applicable in this case due to the age of the buildings; therefore, this method was not utilized. Because Mr. Oetzel determined that the income approach produced the most reliable indication of the subject property's value, he concluded to a final value, including the value of the personal property, before the special assessment improvements of $31,170,000.00.

In the section of his appraisal in which he discusses the subject property's value after the special assessment improvement, Mr. Oetzel included a statement prepared by Respondent's Public Service Department. While too lengthy to include in its entirety, the following information is considered to be of particular importance:

> Existing Conditions:
>
> Dunckel Road was a badly deteriorated concrete pavement consisting of two travel lanes with gravel shoulders and open drainage. The width was approximately forty-two feet from shoulder point to shoulder point plus the additional width for ditches (open drainage) on either side of the roadway. The existing level of service for motorists using Dunckel Road was poor. Almost 18,000 vehicles per day are using Dunckel Road with a projection of over 25,000 vehicles per day by the year 2022. Turning movements at Trappers Cove Trail were measured at 2,575 vehicles per day. The close proximity to Cavanaugh

Road intersection with Trappers Cove Trail intersection also contributed to motorist conflicts. Turning movements by motorists on a two-lane roadway require the trailing motorists to slow down or stop and wait until the vehicle ahead makes their turn. This contributes to backups. Impatient motorists were maneuvering onto the shoulders to get around left-turning motorists, producing dust and a potential dangerous situation, not to mention illegal movement of a motor vehicle.

In relation to the special assessment for Huron Development LLC, the computed amounts are based on a portion of the project costs along with property frontage length common to Dunckel Road. This is in conformity with state law and city ordinances. Further, in a letter dated March 28, 1979, Edward Rose Realty, Inc. requested waivers of the requirements for the plat approval that included improvements on Dunckel Road abutting Trappers Cove and consisting of widening, curb & gutter, storm sewer, and sidewalk until such time as specific need is shown. This letter concluded with the sentence: "If at some time in the future a need arises for any of these improvements we are agreeable to paying, by assessment, our share of the costs for their installation." Now, it is time for Huron Development LLC to pay its share. It is important to note that the prior commitment was a condition to allow the approval of the Trappers Cove Apartment site plan and to permit the construction of the apartment complex development. (R1, p60)

Improved Conditions:

The existing concrete road was completely removed and replaced with a four and five lane bituminous surfaced roadway with two adjoining bicycle lanes (one on each side of the roadway) along with curb and gutter and storm sewer. The five-lane section was built from Jolly Road northerly to north of Trappers Cove Trail. A center turn lane is now available at Trappers Cove Trail, Cavanaugh Road, Hazelwood Street, Beaujardin Street, and Jolly Road along with two through lanes in each direction. The remaining alignment is four lanes up to the U.S. -127 ramps. Curb & gutter and storm sewer are an integral part of the road improvement that are necessary to effectively carry rain runoff from the roadway surface. The width of the five-lane roadway is 67 feet from back of curb to back of curb. The alternative to this option was to construct gravel shoulders and open ditches. The shoulder and ditch option would require 71 feet from shoulder edge to shoulder edge plus additional width on each side to accommodate ditches. The ditches would [require] approximately 15 feet and more additional width on each side of the roadway, producing a total construction width of over 100 feet. In some areas, additional Right-of Way may have been required which would add additional costs to the project. The City installed curb & gutter and storm sewer to use less width and avoid the need for additional Right-of-Way. (R1, p61)

Traffic Flow:

The improvements were designed to improve traffic flow along Dunckel Road. This includes a smoother flow of traffic through the Trappers Cove Trail intersection. The improvements have a positive impact on 2,575 vehicles per day entering and leaving Trappers Cove Trail from Dunckel Road that include less traffic conflicts and improved facility service. In other words, of the approximately 18,000 vehicles using Dunckel Road each day, 2,575 of these vehicles (14 percent) emanate from Trappers Cove Trail. There are 788 Huron Development Corporation apartment units served from Trappers Cove Trail (533 one bedroom and 255 two bedroom apartments). These tenants benefit from the use and improvements of Dunckel Road. Mathematically, 14 percent of the $1.7 million project costs equates to approximately $238,000. (R1, p62)

If there were no access to Dunckel Road, the 2,575 motorists passing thru the intersection would be traveling approximately an additional half mile each day to take the alternative route. Using a travel rate of $0.38 per mile, this is an additional cost of approximately $500 per day, equating to $182,500 per year. Access to Dunckel Road from Trappers Cove Trail is a benefit each and every day.

Safety:

The Dunckel Road – Trappers Cove Trail intersection improvement allows for safer turning movements. From 1999 through 2003 there were 22 crashes at the intersection. (R1, p63)

According to the Public Service Department, the special assessment improvements were estimated to cost $1.7 million. Of this, the FHWA contributed approximately $1.2 million, while the City of Lansing contributed approximately $335,000. Adjoining properties were assessed the remaining $175,192.52. Of this, the subject property was assessed $48,463.29.

The Public Service Department summarized the benefits of the special assessment improvements as follows: fewer traffic accidents at the intersection of Dunckel Road and Trappers Cove Trail; improved travel time; less airborne dust; improved driving surface; improved maneuverability for motorists; improved safety for bicyclists and pedestrians; improved curb appeal.

In determining whether the value of the subject property increased after the special assessment improvements were made, Mr. Oetzel recognized that this case presents a particularly difficult fact scenario.

> In this case, we are dealing with a property that has an estimated value of $31,170,000 before the special assessment. The question is, what is the value of the property after the special assessment. The special assessment is only $48,463, which is only approximately two tenths of 1% of the overall value of subject property. Therefore, it is obviously difficult to measure an increase or decrease in value. (R1, p66)

Adding to this difficulty is the unavailability of property to utilize in a before and after comparison.

> The appraiser is not aware of any comparables from the standpoint of being able to locate a sale of a comparable with a two lane deteriorating major access to the property for one sale and then a resale of the property after a four lane road, with center turn lanes and concrete curb and gutter, were installed at the property. (R1, p66)

Therefore, to determine the value of the subject property after the special assessment improvements were made, Mr. Oetzel developed two hypothetical situations. In the first situation, Mr. Oetzel increased the rent in the 789 apartments that were included in the special assessment district by $1.00 per month per apartment. This resulted in an increase in the subject property's value of $95,000, for a total value of $31,265,000. In the second situation, Mr. Oetzel increased the rent by $.50 per month per apartment. This resulted in an increase in the subject property's value of $45,000, for a total of $31,215,000. To paraphrase, it was Mr. Oetzel's conclusion that even a small increase in market rent would be justified given the improvements and that this increase would offset some, if not all, of the special assessment.

Mr. Oetzel then completed what he referred to as a "mini study."

> This mini study indicated that properties without concrete curb and gutter, still vacant, and with an unimproved street sold for between $11,000 and $44,000 per

> acre. Once the properties were improved, the price per acre went from $86,000 to $102,000 per acre. (R1, p70)

With this mini study, Mr. Oetzel concluded that property on improved streets with curb, gutter and storm sewer sell for more money than those without these improvements.

In addition to Mr. Oetzel, Respondent called two witnesses. The first witness was Mr. Dean Johnson who was employed by Respondent as the City Engineer. Mr. Johnson testified that:

> ...the assessment process is just a generalized method to recoup just a small portion of the project cost and assign them to the adjoining benefitting properties. It isn't meant to imply that there is a storm water benefit exclusively. It is a project benefit. And we use it to simply apportion a small part of the project cost to the adjoining property owners...In this particular case the project benefits include a wider cross-section moving from a two-lane to a five-lane section. (T2, p259)

Mr. Johnson further testified that instead of assessing a portion of the total cost of the project, they assess a portion of the cost of the curb and gutter and storm sewers because the stability of the cost of these items enables them to provide property owners with a relatively accurate assessment. According to Mr. Johnson, curb and gutter is assessed on a front foot basis, while storm sewer assessments are determined by multiplying the number of front feet by a depth of 140 feet. Mr. Johnson testified as to how the assessment for storm sewers is obtained.

> Storm assessments are a little more complicated and at some point – this is a legacy system that was in place long before I started, so I don't know all of the logic behind its existence.
>
> But storm assessments take the front footage and then multiply by a depth of 140 feet. That's somewhat arbitrary. And I can only speculate for that 140 feet. It's my opinion that it evolved to that because it's a situation where parcel two has the same front footage as parcel one and this resident may complain they are paying the same front footage as parcel one and this resident may complain they are paying the same amount as this person and his lot is four times bigger.
>
> So in order to normalize or average out those costs somebody decided, well, we'll go back 140 feet, but no more. That way this person is not paying an excessive

> amount, but he's paying more than this person because that's a typical residential parcel.
>
> In a case like Dunckel Road where every parcel is 140 feet or more, their storm sewer assessments are all uniform because if you divide them all by 140 feet it simply is proportional to the front footage. So that depth factor goes away in most cases.
>
> This system lends itself to single-family parcels and residences. It disproportionately under assesses high density residential units. Trappers Cove has 700-and-some units, over 1,000 people. A single-family home would have one or two incomes paying for this amount. So on a cost-per-resident basis this discriminates against single-family units and disproportionately under assesses high density units. On an assessment cost per value of property it greatly under assesses high density units. (T2, pp263 – 264)

Mr. Johnson also testified as to the benefits the special assessment improvements bestowed upon the subject property. According to Mr. Johnson, 2.7% of the project cost was assessed to Petitioner, while 14% of the traffic count for Dunckel Road was directly attributable to the Trappers Cove Apartments. (T2, p261) Mr. Johnson also testified that the special assessment improvements were not intended to improve off-site drainage. (T2, p281)

Respondent's next witness was the City Assessor, Mr. David Tijerina. Mr. Tijerina testified as to some of the calculations of the special assessment and as to a conversation he had with another of Respondent's assessors.

FINDINGS OF FACT

The facts in this case, except for the issue of whether the subject property benefited from the special assessment, are not in dispute. The special assessment under consideration is referred to as the "Dunckel Road Reconstruction Project, Public Service Project No. 68049, Special Assessment Roll 6737."

> The Dunckel Road Reconstruction Project took place in 2003. The section of Dunckel Road runs about 8/10ths of a mile between Jolly Road, a major east-west road on the south and to the US 127/I496 interchange on the north and east. It involved among other things a) widening of Dunckel Road from 2 lanes to 5 lanes

> between Jolly Road and Trappers Cove Trail and from 2 lanes to 4 lanes between Trappers Cove Trail and the US 127/I496 entrance ramp, b) reconstruction of the various roads that intersect with Dunckel Road along with installation of left turn lanes at Jolly Road, Beaujardin, Hazelwood, Cavanaugh Road and Trappers Cove Trail, c) removal of the existing concrete road and completely rebuilding and resurfacing the road with bituminous paving, d) elimination of the gravel shoulder drainage ditch system, and f) creation of a bike path. The Reconstruction Project was a $1.7 million [ ] project. All but about $335,000 of the cost was financed from sources other than the City of Lansing. (Petitioner's Post-Hearing Brief, pp3-4)

Respondent levied part of this Special Assessment against Petitioner's property, known as Parcel Nos. 33-01-01-35-401-015 and 33-01-01-35-451-003. Initially, the total assessment was $54,544.22. Of this, $39,405.96 ($12,194.16 for curb and gutter; $27,211.80 for storm sewer improvements), was levied against Parcel No. 33-01-01-35-401-015, and $15,138.36 ($4,684.56 for curb and gutter; $10,453.80 for storm sewer) was levied against Parcel No. 33-01-01-35-451-003. The assessments for storm sewer costs were subsequently reduced "due to prior storm sewer costs paid by the parcel owner for Trappers Cove Trail improvements." (R7, p2) The final storm sewer assessment for Parcel No. 33-01-01-35-401-015 was $23,486.47, for a new total for this parcel of $35,680.63; the final storm sewer assessment for Parcel No. 33-01-01-35-451-003 was $8,098.10, for a new total for this parcel of $12,782.66. Thus, the total special assessment was reduced from $54,544.22 to $48,463.29. (R7, p2)

The subject property is zoned as Community Unit Plan, or CUP, a zoning designation no longer recognized by Respondent. It was recommended by the staff of Respondent's Department of Planning and Neighborhood Development that the subject property's zoning designation be changed to DM-1 Residential Zoning, which is a multi-family zoning designation. (P5) However, it is unclear whether the designation was ever changed. The subject property is classified for property tax purposes as commercial property.

CONCLUSIONS OF 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 *Ahern* 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.) *Id*. at 496.

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.” (Citations omitted.) *Id*. at 302-303.

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, Petitioner challenges the special assessment and, as such, carries the initial burden of proof. To that end, Petitioner submitted an appraisal concluding to a value for the subject property “Before Proposed Dunckel Road Improvements” and “Assuming Dunckel Road Improvements Completed.” (P14, pp30-31) However, Petitioner’s appraisal contains a fatal

flaw. The appraisal does not value the subject property with and without the special assessments at issue, namely curb, gutter and storm sewer improvements. Instead, the appraisal values the subject property with and without on-site storm water detention ponds. In concluding to a value for the subject property, assuming the improvements were completed, Mr. McKnight stated in his appraisal:

> The reviewer will note that all of these sales, based upon the preceding discussions and observations from the Sales Comparison Approach, could not be distinguished as having any greater or lesser sale price and capitalization rate than those properties that did not have these types of on-site storm water detention areas. **All of the interviews that we made led us to the opinion that there was no way to identify that there was any difference in value to these properties with the large amounts of on-site storm water detention areas (like the subject property) versus those properties that were dependent upon municipal services.** This lack of observation was in both directions. It was impossible to identify whether or not there was any lesser value to these properties having to be dependent upon their on-site drainage facilities versus a municipal system; and, it was impossible to tell if the aesthetics of having these large pond areas added to the value of the properties, although at least some complexes likely had rent premiums for pond views. (Emphasis added.) (P14, p31)

Additionally, Mr. McKnight testified that he tried to "identify whether or not there was any measurable difference in price of the sale properties based upon having the on-site storm water detention facilities or being dependent upon municipal facilities." (T1, p42) However, the purpose of the special assessment improvements was not to replace the storm water detention facilities located on the subject property or to make the subject property more dependent upon municipal facilities. According to Mr. Johnson, the City Engineer:

> The curb and gutter provides benefits because it lowers the lifecycle cost of the roadway. It preserves the edges so that the roadway lasts longer. The function of the curb and gutter is to capture the storm water run-off and direct it to the storm sewer. The storm sewer and the curb and gutter are integral components. They work together. This prevents the storm water run-off from leaving the roadway and flowing into what previously existed as ditches. (T2, 260)

> The intention of this project wasn't to improve off-site drainage. (T2, p281)

Thus, it is clear that the storm sewers were intended to replace the drainage ditches located between Dunckel Road and the subject property, not to replace the detention ponds located on the subject property. Even with the subject property's detention ponds, drainage ditches along Dunckel Road were necessary. This position is supported by the fact that the apartment complex to the south of the Trappers Cove Apartment complex does not contain a detention pond. No where, not in the appraisals, the testimony or the parties' briefs, was there ever any evidence that the special assessment improvements were intended to replace or even supplement the detention ponds.

When asked if he knew where the water from the storm sewer flowed, Mr. McKnight responded "no." (T1, pp 47-48) When asked if he knew whether the water from the storm sewers flowed into the detention pond, Mr. McKnight responded that it was his understanding that "it does not drain directly into the detention pond." (T1, p48) Finally, when asked whether he considered sales of property that did not have the special assessment improvements, Mr. McKnight stated that he "used the most recent and most similar transactions that I felt were relevant to this type of property." (T1, p56) Because these transactions did not involve property with or without the special assessment improvements, the Tribunal disagrees with Mr. McKnight's statement and finds that these transactions were not relevant.

In his appraisal, Mr. McKnight states:

> Clearly, based upon our review of the rent comparables in the subject marketplace, some with and some without ponds, it is our opinion that the rents for the subject property could not be increased based upon the additional road improvements that are the basis for the special assessments under appeal...As it is our opinion that the value after the improvements is the same as the one that it was before the Dunckel Road improvements, it is our opinion that there has been no change in value to the subject property because of the Dunckel Road widening and the improvements associated with it. (P14, p32)

In this paragraph, Mr. McKnight attempts to transition his analysis of property with and without ponds into an opinion of value for the subject property before and after the special assessment improvements. The Tribunal finds this analysis is similar to comparing apples to oranges and, as such, the transition fails.

For these reasons, the Tribunal finds Mr. McKnight's value conclusions for the subject property with and without the special assessment improvements faulty and ineffectual. Moreover, because Mr. McKnight did not consider the actual special assessment improvements in his with and without analysis, the Tribunal finds that his opinion that the Dunckel Road improvements did not change the value of the subject property lacks credibility.

While flawed, Mr. Oetzel's "mini study" contains the appropriate comparison – sales of property with and without curb, gutter and storm sewer. Moreover, after completing this mini study, Mr. Oetzel opined that the sales "support the fact that property fronting on improved streets with concrete curb and gutter and storm drains sells for more on a per acre basis than those without these improvements." (R1, p70) This is the analysis that Petitioner should have presented, albeit presumably reaching a different conclusion.

Petitioner also relied upon the opinion of Mr. McKnight and several witnesses that the special assessment improvements did not justify an increase in the subject property's rents. The reasons given for this opinion were that the rents were already at market level and that an increase in rent would also increase the vacancy rate. However, in his appraisal, Mr. McKnight stated that "it is our opinion that the subject rents are **at or below** market levels for comparable sized, aged and featured properties like the subject property." (Emphasis added.) (P14, p20) Even if it is assumed that a rent increase would result in an increase in the vacancy rate, Petitioner provided no evidence or analysis on which to measure the resulting change in income.

Because his before improvements income approach dismissed a rent increase without any analysis, and because his after improvements analysis did not compare properties with the same improvements, Mr. McKnight's value conclusions are not accepted.

In summary, the Tribunal finds that Petitioner did not meet its burden of proof. Petitioner simply did not present credible evidence nor did it provide the correct analysis. As a result, Petitioner did not prove that the special assessment did not confer a special benefit on the subject property or that the value of the subject property did not increase as a result of the special assessment improvements. Because Petitioner did not meet its burden of proof, the burden of going forward did not shift to Respondent.

Having said that, the Tribunal finds that two arguments made by Petitioner warrant discussion. First, in its Post-Hearing Brief, Petitioner argues that:

> If an existing road is adequate for the use of local residents and businesses, the widening of such road and the improvements associated with the widening are for the benefit of the public at large and such improvements do not provide a special benefit to abutting property owners justifying the levy of special assessment for such improvements. (Petitioner's Post Hearing Brief, p17)

In support of this argument, Petitioner cites *Johnson v Inkster*, 401 Mich 263; 258 NW2d 24 (1977); *Brill v City of Grand Rapids*, 383 Mich 216; 174 NW2d 832 (1970); *Fluckey v City of Plymouth*, 358 Mich 447; 100 NW2d 486 (1960); and *Tack v City of Roseville*, 67 Mich App 34; 239 NW2d 752 (1976).

Having reviewed these cases, the Tribunal finds that the facts of these cases are easily distinguished from the facts in this case. For example, the property at issue in *Johnson* did not abut the road that was improved. In *Brill*, the road that was widened was a "country road" serving an "excellent residential district." *Id*. at 219-220. In *Fluckey*, the street that underwent improvement was a "sleepy country road" in a "high-class residential district." *Id*. at 451.

Finally, in *Tack*, the Court of Appeals addressed the question of a special assessment improvement very similar to the one at hand. The Court stated:

> We do not agree with plaintiffs that the present dispute is controlled by *Fluckey v City of Plymouth*, 358 Mich 447; 100 NW2d 486 (1960), or *Brill v City of Grand Rapids*, 383 Mich 216; 174 NW2d 832 (1970). Though similar because they involved the conversion of a two-lane road into a multi-lane road those cases differ from the appeal before us since prior to its widening, Twelve Mile Road could hardly be called a peaceful country road or quiet residential street-a factor upon which the court in the cited cases heavily relied in concluding no special benefit was conferred. *Id*. at 40.

In this case, the subject property abuts the road at issue, which was not, and could not be, characterized as a sleepy country road. Furthermore, Petitioner's appraiser described the subject property as garden apartments, while Respondent's appraiser described the complex as a "blue collar type of community." It is not the Tribunal's intent to disparage the subject property; however, the Tribunal cannot help but find that the subject property is not a high-class residential district.

The other argument made by Petitioner that must be addressed is the argument that the special assessment must fail because it is arbitrary, discriminatory and disproportionate. To clarify, while Petitioner insinuates that these comments were applicable to all of the special assessment improvements, in fact these comments were only made about the storm sewer improvements.

Having considered Petitioner's argument and the City Engineer's testimony, the Tribunal finds that the storm sewer special assessment is not arbitrary, discriminatory or disproportionate. It is clear that Respondent's intent in applying a depth factor is to try to equalize the assessment based on the size of the lot. If all lots were the same size, this would not be necessary.

As Mr. Johnson stated, the decision to equalize at 140 feet was made prior to his employment at the City of Lansing. As such, he could not adequately explain why this number

was chosen. However, the Tribunal finds that in this case a determination as to whether 140 feet is the correct depth factor is not necessary. As Mr. Johnson testified, in this case "every parcel is 140 feet or more" in depth and "the storm sewer assessments are all uniform because if you divide them all by 140 feet it simply is proportional to the front footage." Therefore, because all properties in this special assessment district, with and without detention ponds, received the same depth factor, the storm sewer special assessment cannot be considered arbitrary, discriminatory or disproportionate. Furthermore, while in some situations the 140 foot depth factor may be applied to account for storm water run-off from adjoining properties, the same cannot be said in this case as the same depth factor was applied to all properties regardless of whether or not the property contained an on-site detention pond.

Therefore,

IT IS ORDERED that the special assessment levied against the subject property is AFFIRMED.

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

MICHIGAN TAX TRIBUNAL

Entered: March 1, 2011 Patricia L. Halm