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

Charles H. Carman
Petitioner,

v

MTT Docket No. 328949

Village of Northport,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith, III

ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

ORDER AFFIRMING NORTHPORT SPECIAL ASSESSMENT DISTRIC 2005-1

FINAL OPINION AND JUDGMENT

I. INTRODUCTION

Petitioner, Charles Carman, is appealing the inclusion of his property in a special assessment district ("SAD") known as the village of Northport Special Assessment District 2005-1 ("the District"), which was approved by Respondent, Village of Northport. Petitioner is seeking a declaration that the Tribunal reduce the special assessment roll on his property to $0, based on his contention that the proposed improvements provided no benefit to his property.

II. PROCEDURAL HISTORY

On October 15, 2007 Respondent filed a Motion for Partial Summary Disposition pursuant to MCR 2.116 (C)(8) and MCR 2.116(C)(10) contending that Petitioner has failed to identify in his petition any specific laws violated by Respondent. On November 29, 2007, the Tribunal held a status conference between the parties in the above captioned case. Resulting from the status conference was the decision that this case and forty-four other cases share

common issues of fact and law surrounding Respondent's creation of the District. As such, forty-four cases relating to formation of the District were placed in abeyance pending the decision on the formation issue in the above captioned case.

On February 20, 2008 the Tribunal partially granted Respondent's Motion for Partial Summary Disposition filed on October 15, 2007. The Tribunal agreed with Respondent that the "Headlee" issue and "Taking" issue should properly be dismissed; however, the Tribunal disagreed with Respondent regarding the "formation" issue because the remaining issues presented in Petitioner's Petition involved questions of fact that have not yet been resolved by the Tribunal. The remaining issues after the Tribunal's February 20, 2008 Order were as follows: (i) whether the SAD was properly formed, and (ii) whether the benefit to the property at issue from the improvements is proportional to the cost of the improvements. As such, the Tribunal ordered a hearing on the formation and benefit issue to commence on March 25, 2008.

On May 7, 2008, Petitioner filed his Motion to Withdraw Challenge to Formation of Special Assessment District. Petitioner decided not to pursue the formation challenge to the sewer SAD; however, Petitioner preserved his claim relating to whether the benefit of the special assessment is proportional to the cost of the improvements. By Order dated May 16, 2008, the Tribunal (i) found Petitioner had shown good cause to dismiss his appeal relative to the formation of the SAD, (ii) required parties to file and exchange valuation disclosures, and (iii) established a hearing to determine whether the benefit of the special assessment is proportional to the cost of the improvements.

After granting two adjournments, the hearing in the above-captioned case took place at the Lansing Office of the Michigan Tax Tribunal on August 5, 2008. Petitioner was represented by Joseph M. Rogowski, II of Berry, Reynolds & Rogowski, PC. Steven H. Lasher of Foster,

Swift, Collins & Smith PC represented Respondent. On August 5, 2008, Petitioner called and testimony was heard from the following witness; James Shiffer, Project Engineer; Gregory King, Administrative Coordinator for the Village of Northport; Kathryn Wilson, Assessor; and Andrew Reed, author of Petitioner's appraisal. Also on August 5, 2008, Respondent called and testimony was heard from Barbara Von Voigtlander, Village Trustee; Glen Gotshall, author of Respondent's Summary Appraisal; and, Gregory L. King. Charles H. Carmen was unable to testify on August 5, 2008 due to an illness. As such, on August 25, 2008, Mr. Carman's testimony was heard before Judge Susan Grimes Munsell at 33493 West Fourteen Mile Road, Suite 100, Farmington Hills, Michigan.

On September 22, 2008, Petitioner filed its Post-Hearing Brief. On October 6, 2008, Respondent filed its Post-Trial Reply Brief. Also on October 6, 2008, Petitioner filed a Post-Hearing Reply Brief.

PETITIONER'S CONTENTIONS

Petitioner contends that he should not have been subject to the special assessment created by the Village of Northport. Rather, Petitioner claims "Respondent has embarked on an ambitious sewer project that [Respondent] acknowledges is for the benefit of the public by improving the waters of Grand Traverse Bay." (Petitioner's Post Hearing Brief; page 3) In addition, according to Petitioner, Respondent appraiser's benefit analysis is both analytically and factually flawed. Petitioner insists that the reliable matched pair analysis performed by Petitioner's appraiser proves that the sewer project has no impact on the market value of Petitioner's property.

Furthermore, Petitioner argues that the amount of assessment in dispute is not $10,100, rather the assessment in dispute is $15,900. Petitioner claims that Respondent is making an

attempt to "improperly re-characterize a portion of the actual special assessment costs as a capital connection fee." (Petitioner's reply brief; page 3)

RESPONDENT'S CONTENTIONS

Respondent contends that the improvement funded by the special assessment confers a special benefit upon Petitioner's property beyond that provided to the community as a whole. Further, according to Respondent, the amount of the special assessment conferred on Petitioner is reasonably proportionate to the benefits Petitioner derives from the improvement. Respondent contends that regardless that the dispute regarding whether the connection fee is valid is not properly before the Tribunal, the connection fee is not part of the $10,100 sewer special assessment. Respondent also argues that Petitioner's appraiser's matched pair analysis was not credible. Rather, Respondent insists that Mr. Gottshall's appraisal supports Respondent's argument that the sewer special assessment meets the requirements set out in relevant statutory and case law.

APPLICABLE LAW

Respondent moves for partial summary disposition pursuant to MCR 2.116(C)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed to state a claim upon which relief can be granted. Summary disposition should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery. *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n,* 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion for summary disposition under section (C)(8), the court must accept as true all factual allegations in support of a claim, as well as all inferences that can fairly be drawn from the facts. *Meyerhoff v Turner Construction Co,* 202 Mich App 499, 502; 509 NW2d 847 (1993).

Respondent also moves for partial summary disposition pursuant to MCR 2.116(C)(10), which states that when "there is no genuine issue as to any material fact, then the moving party is entitled to judgment or partial judgment as a matter of law." There is no specific Tribunal rule governing motions for summary disposition. As such, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such a motion. TTR 111(4).

In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated that "[a] motion for 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 section (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. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that in reviewing a motion for summary disposition under subsection (C)(10) 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. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving 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. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

The Tribunal has carefully considered Respondent's Motion for Partial Summary Disposition under MCR 2.116(C)(8) and (10), and based on the pleadings and other documentary evidence filed with the Tribunal, determines that granting Respondent's Motion is appropriate.

A special assessment is not a tax. Rather, a special assessment "is a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area." *Kadzban v City of Grandville,* 442 Mich 495, 502; 502 NW2d 299 (1993). Special assessments are "sustained upon the theory that the value of the property in the special assessment district is enhanced by the improvement for which the assessment is made." *Knott v City of Flint,* 363 Mich 483, 499; 109 NW2d 908 (1961). Municipal decisions regarding special assessments are generally presumed to be valid. *In re Petition of Macomb Co Drain Comm'r,* 369 Mich 641, 649; 120 NW2d 789 (1968). A "special assessment will be declared invalid only when a 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." ' *Kadzban, supra* at 502, quoting *Crampton v Royal Oak,* 362 Mich 503, 514-516; 108 NW2d 16 (1961).

The Michigan Supreme Court has established a three-prong, conjunctive test for determining whether a charge is a valid user fee or a disguised tax. *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998). A valid user fee (1) serves a regulatory purpose as opposed to

a revenue-raising purpose; (2) is proportionate to the necessary costs of the service; and (3) is voluntary. *Id.* Furthermore, the determination is to be made by considering all three prongs as a whole; a weakness as to one prong does not prevent the charge from being a fee. *Id.*

Generally, a charge for connection to a public utility is a fee and not a tax or special assessment. *Graham v Township of Kockville*, 236 Mich App 141; 599 NW2d 793 (1999). In *Graham*, the Court of Appeals found that a water line connection charge is a fee, and not a tax, because it meets the three prongs set forth in *Bolt*. *Id.* At 156. The connection charge served a regulatory purpose despite the construction being paid for by the charge because the main purpose of the charge was regulatory in that without connection to the water line, there would be no access to the water; therefore, the charge regulated access to the water. *Id.* At 154. There was no evidence showing the charge in *Graham* to be unrelated to the costs of regulation, therefore, it was presumed to be reasonably related to those costs. *Id.* Finally, the connection charge was voluntary because "those who decide to connect must pay the fee and those who choose not to connect are not required to pay the fee." *Id.* At 155.

Additionally, a service charge is generally a valid user fee, and not a tax or special assessment. *Ripperger v Grand Rapids*, 338 Mich 682; 62 NW2d 585 (1954). Service charges are simply the price paid for a commodity and are intended to regulate the use of the commodity. *Id.*

In a special assessment case where the cost of the assessment was 2.6 times greater than the property's increase in value, the Michigan Supreme Court ruled that the cost of the assessment must be reasonably proportionate with the benefit and that the subject assessment was not reasonable. *Dixon Rd Group v City of Novi*, 426 Mich 390, 403; 395 NW2d 211 (1986). In *Dixon*, the court 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 benefit derived from the special assessment is proportional to the cost incurred." *Id.* at 401. The court further held that assessments should generally be upheld and should only be invalidated when there is a "substantial excess" between cost and benefit. The court stated:

> While we certainly do not believe that we should require a rigid dollar-for-dollar balance between the amount of the special assessment and the amount of the benefit, a failure by this Court to require a reasonable relationship between the two would be akin to the taking of property without due process of law. Such a result would defy reason and justice. Therefore, we conclude that while decisions made by municipalities with respect to special assessments generally should be upheld, this Court will intervene where there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements. *Id.* at 402-403.

In a case where the Tax Tribunal determined that a special assessment was invalid, the Michigan Supreme Court reversed based on the petitioners' failure to present sufficient evidence. *Kadzban* v *City of Grandville*, 442 Mich 495; 502 NW2d 299 (1993). In *Kadzban*, the court explained the relationship between general taxes and special assessments:

> 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**. *Id* at 500. [*Emphasis added*]

The *Kadzban* court reiterated the point made in *Dixon Rd Group* that the judgment of the municipality is presumed to be valid when the court stated:

> Our decision in *Dixon Rd* did not modify the well-settled principle that municipal decisions regarding special assessments are presumed to be valid . . . . We said in *Dixon Rd*, and we reiterate here, that the decisions of municipal officers regarding special assessments 'generally should be upheld'. . . . Moreover, our decision did not alter the deference that courts afford municipal decisions . . . . *Kadzban*, 442 Mich at 502.

The *Kadzban* Court further noted that petitioners have the burden of proving that an assessment is invalid, and that if the burden is not met, the Tribunal may not make a determination de novo of the benefit thereby substituting its judgment for that of the municipality:

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

In *Cieslak et al v Farmington Hills*, 9 MTT 37 (1995), the Tribunal held:

> To effectively challenge a special assessment, a party at a minimum must present credible evidence to rebut the presumption that the assessment is valid; without such evidence, the Tax Tribunal has no basis to strike down a special assessment . . . . Where such evidence is presented, the burden of going forward with evidence shifts . . . . At this point, the city must, under *Dixon Rd*, present evidence proving that the assessments are reasonably proportionate in order to sustain the assessments . . . . The question whether and how much the market value of a property has increased as a result of the improvements is factual, to be determined on the basis of the evidence presented. *Cieslak*, 9 MTT at 45. See also *Steinhauer v Norton Shores*, 10 MTT 347 (1997).

CONCLUSIONS OF LAW

Because Respondent's Motion to Withdraw Challenge to Formation of Special Assessment District was granted, the only issue remaining to be decided in this case is to determine whether the benefit of the special assessment is proportional to the cost of the improvements. Again, Petitioner has the burden of proving that a "substantial excess" exists between the cost and benefit on the special assessment imposed by Respondent's sewer system. Based on the pleadings, testimony and other documentary evidence filed with the Tribunal it is evident that Petitioner failed this burden. Not only did Petitioner fail to prove that the "capital connection fee" was part of the special assessment and not a separate charge, but the Petitioner

also failed to provide the Tribunal with reliable documentary evidence that demonstrates a "substantial excess" between the cost and benefit on the special assessment imposed by Respondent's sewer system.

Again, to be considered a valid user fee, the fee must (1) serve a regulatory purpose as opposed to a revenue-raising purpose; (2) be proportionate to the necessary costs of the service; and (3) be voluntary. *Bolt* at 152.

When the village charges a fee for connecting to the sewage system, the purpose is clearly to regulate and control the use of the sewage system. Without the extension of the main sewer line and the connection to such line, the citizens of the new sewage line would not have access to the main sewage system. Even though the connection fee essentially raises money, the money is used towards the cost of connection, a regulatory purpose, not a revenue-raising purpose.

Further, the amount of the connection fee is proportionate to the necessary costs of the sewage service. When the property owner connects to the sewer system, the property owner must pay a connection fee of $15,900. (Respondent's Exhibit No. 5). If the property owner has already paid the special assessment, the property owner receives a credit toward the connection fee. (Trial Transcript, pp 42 and 49, and Respondent's Exhibit No. 5). Petitioner argues that the $15,900 connection fee "is not a fee for service; rather, it is an allocation for capital costs for constructing the sewage system." However, nothing in the record shows that the revenue collected from connection fees represents anything more than a cost to the land owner to connect to the main sewage system. Furthermore, when considering the amount of the connection charge, there is no evidence that the fee is not proportionate to the cost to maintain the sewage system. As such, the connection fee is proportionate to the necessary cost of the service.

Finally, there is ample evidence in the record that the connection fee is voluntary. According to Northport Ordinance No. 96, each piece of property within the sewer special assessment district will pay the sewer special assessment of $10,100, even if the property is vacant. (Respondent's Exhibit No. 5) Further, "[e]very person *seeking* to connect to the System . . . will be required to pay a capital connection fee." *Id.* [*Emphasis added*]. As such, the Tribunal finds that, when considering the criteria set out in *Graham* in their totality, it is clear that the connection charge is just that, a charge; not a portion of the special assessment amount. It is now essential to decide whether a "substantial excess" between the cost and benefit on the special assessment imposed by Respondent's sewer system exists.

Petitioner argues that not only was the excess between the cost and benefit of the special assessment imposed by the special assessment substantial, but he also argues that the newly installed sewage system adds no value to his property.

Petitioner's appraiser's before and after approach supported by comparable sales data was not a reliable indicator of whether or not the ability to tap into the newly created sewage system added value to the subject property. For example, Petitioner's appraiser used a "matched-pair" analysis in his after portion of his before and after approach where he used two sales in the Village of Suttons Bay and two sales in the Village of Leland. Regardless of the fact that Petitioner's comparables were outside of the Village of Northport and subject to different market conditions which were unadjusted for, Petitioner's appraiser did not adjust for time in any of the four comparables. The two properties in Suttons Bay Village sale dates were August of 2007 and October of 2005. Further, the two properties in Leland Village sale dates were May of 2005 and September of 2007. Again, August 17, 2006 was the date that the special assessment was placed on the roll. A myriad of market conditions within the date of valuation and the

comparable sales dates could influence the value of each comparable. Without adjustments made to represent these conditions, Petitioner's approach in no way isolates the impact that having the ability to connect to a sewage system has on neither the comparables nor the subject property. As such, Petitioner's appraiser's opinion that, based on the data provided, there was no benefit to the subject property as a result of the ability to tap into the sewage system is without merit. Again, a "special assessment will be declared invalid only when a 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." ' *Kadzban, supra* at 502, quoting *Crampton v Royal Oak, 362 Mich 503, 514-516.* Petitioner failed to provide reliable documentary evidence that demonstrates a "substantial excess" between the cost and benefit on the special assessment imposed by Respondent's sewer system. However, Respondent's appraisal is a reliable indicator of whether or not the ability to tap into the newly created sewage system not only added value to the subject property, but also that the benefit of the special assessment is proportional to the cost of the improvement.

Respondent's appraiser also used a before and after approach. However, Respondent's appraiser not only used comparable properties located within the Village of Northport, but the comparable sales were adjusted for time where appropriate. Based upon reliable data, Respondent's appraiser concluded that the subject property had an estimated "without sewer" market value of $264,000 and a "with sewer" market value of $289,000. Thus, the Tribunal finds that the benefit of the special assessment is proportional to the cost of the improvement and the sewer special assessment on the subject property is affirmed. Therefore,

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

IT IS FURTHER ORDERED that Northport Special Assessment District 2005-1 is AFFIRMED.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by the Final Opinion and Judgment within 90 days of the entry of the Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (ii) after December 31, 2005, at the rate of 3.66% for calendar year 2006, (iii) after December 31, 2006, at the rate of 5.42% for calendar year 2007, (iv) after December 31, 2007, at the rate of 5.81% for calendar year 2008, and (v) after December 31, 2008, at the rate of 3.31% for calendar year 2009.

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

MICHIGAN TAX TRIBUNAL

Entered: February 24, 2010
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By: Kimbal R. Smith III