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

Barbara K. Nelson,
Petitioner,

v

MTT Docket No. 435137

Tuscarora Township,
Respondent.

Tribunal Judge Presiding
Preeti P. Gadola

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Barbara K. Nelson, appeals the special assessment levied by Respondent, Tuscarora Township, against Parcel Nos. 161-I31-013-013-00 and 161-I13-013-020-00. Lawrence P. Hanson, Attorney, represented Petitioner, and Robert C. Kerzka, Attorney, represented Respondent.

A hearing on this matter commenced on January 13, 2014, and resumed on March 6, 2014. Petitioner's witnesses were Barbara K. Nelson and Robert H. Morris. Respondent's witnesses were Michael E. Ridley and Ken Arndt. Petitioner and Respondent filed post-hearing briefs on March 27, 2014, and reply briefs on April 3, 2014.

The Tribunal finds that the subject property benefits from the special assessment and that the amount assessed is proportional to the benefit conferred upon the subject property. As such, the subject property's final special assessment as established by the Tribunal is:

Parcel Number: 161-I31-013-013-00

Type of Special Assessment	Special Assessment to be Levied
Sanitary Sewer	$8,000

Parcel Number: 161-I13-013-020-00

Type of Special Assessment	Special Assessment to be Levied
Sanitary Sewer	$8,000

PETITIONER'S CONTENTIONS

Petitioner contends that when the assessment was originally approved, the projected cost was only $4.2 million. However, the final construction costs for the revised sewer system, pursuant to the signed bids, were $5.9 million. Pursuant to MCL 41.724, an additional hearing was required to provide property owners with a due process opportunity to object to the significantly higher costs. Petitioner contends that Respondent's assessment is invalid based upon the failure to hold the additional hearing addressing the change in cost and, contrary to Respondent's contentions, the additional hearing is required even though the assessment on the subject property was not increased.

Petitioner also contends that the special assessment will not add to the value of the subject property, and therefore, the amount assessed is not proportionate to the benefit received. Respondent's appraisal demonstrates a very modest increase in value and does not meet the standard of *Dixon Rd Group v City of Novi*, 426 Mich 390; 395 NW2d 211 (1986). Petitioner, Ms. Nelson, argues that the sewer was not needed and provides no benefit to the subject property which has been historically serviced by a fully functional septic system. Ms. Nelson contends that no one from the Township inspected the subject property to determine that the septic was inadequate. She is also concerned about any potential loss of trees on her property due to the sewer installation.

Petitioner further contends that the Residential Equivalent Units ("REUs") were not assigned appropriately to the properties within the district. Petitioner further contends that the

district boundaries are not rational or explained. More specifically, Petitioner states that the district was the result of "gerrymandering", meaning that Respondent purposefully set the boundaries to include and exclude certain properties. "The geographical layout of the SAD [special assessment district] is not a nice neat square; it crosses under a major interstate, under two rivers, and jogs and meanders to pick up a nonsensical group of parcels. . . . The numerous riverfront parcels along Club Road are not included." *Id*. at 13. In addition, Petitioner contends that Respondent set forth that Burt Lake State Park would be a user of the system. However, Burt Lake State Park's acreage is not within the SAD and the State Park will not be paying for its proportional share of the cost. See *id.* at 19. Petitioner further contends that charges from operation and maintenance ("O&M") are excessive.

PETITIONER'S ADMITTED EXHIBITS

P-1 Special Assessment District Documents

- P-1A Tuscarora Township Sanitary Sewer Use Ordinance #28
- P-1B Resolution No. S/2013-1 Establishing Sewer Rates
- P-1C 5/22/13 Tuscarora Township Letter to Sewer District Property Owners
- P-1D Sewer Bid and Estimates comparison
- P-1E Gourdie Frasure Communications
- P-1F Special Assessment Resolution No. 4
- P-1G Minutes of the December 3, 2013 Tuscarora Township Board Meeting
- P-1H Notice of Hearing on Special Assessment Improvements
- P-1I Notice of Review of Special Assessment Roll

P-2 REU Calculations and Analysis

- P-2A Township analysis of other community REU calculations
- P-2B Analysis of O&M Rates, Revenues & Costs GFA #11354 Rev Nov. 25, 2013
- P-2C State of Michigan criteria for Subsurface Sewage Disposal
- P-2D June 4, 2010 email from Mike Ridley
- P-2E November 5, 2013 email from USDA

P-3 Summary of REU Disparities

P-4 District 4 Health Department Communication (March 28, 2012 Letter)

P-5 Documents from the Committee to Bring Wastewater Treatment to Indian River

- P-5A Information Packet and Petition for Wastewater Treatment
- P-5B The Sewer Fact Sheet
- P-5C Gourdie Frasure Sewer District Boundary – Standard Gravity Collection System
- P-5D Email Communications
- P-5E August emails from USDA to Mike Ridley regarding O&M

P-6 Summary of Incorrect Statements by Township and/or Committee relating to SAD

- P-6A December 26, 2013 article in Resorter Newspaper
- P-6B December 2, 2013 letter to Tuscarora Township Board

P-7 IRCEDA Sewer Committee Phase I District Plan

P-8 Communication between Committee and Township regarding cost

- P-8A 2008 emails between Committee and MDNR
- P-8B July 10, 2008 cost estimated with and without Burt Lake State Park
- P-8C September 4, 2008 letter from Gourdie Frasure to MDNR regarding participation
- P-8D Email from Keith Chelli MDNR
- P-8E May 22, 2009 letter from Keith Cheli to Mike Ridley
- P-8F March 4, 2011 letter from Ronald Olson to Mike Ridley
- P-8G March 1, 2012 Draft Sewer Agreement between State of Michigan and Township
- P-8H Emails between MDNR employees and Township
- P-8I July 22, 2013 email from Gourdie Frasure to Township with attached letter
- P-8J July 29, 2013 email from Gourdie Frasure to Township with attached budget
- P-8K November 18, 2013 letter from Ronald Olson to Mike Ridley

P-9 Letter and Emails from USDA to Tuscarora Township

- P9A November 19, 2013 Letter and email from USDA to Mike Ridley

P-10 Miller Canfield memo 5-9-2008

P-11 Respondent's Appraisal of Lincoln Property

PETITIONER'S WITNESSES

Barbara K. Nelson

Barbra K. Nelson, Petitioner, testified that she has had her real estate license for 17 years. She indicated that the subject property consists of two properties, including her home, which fronts on River Street, and a rental, which fronts on Juno Street. The two properties join at the back. Transcript at 195. Petitioner has owned her home since 1972 and inherited the rental about five years ago from her father. The property she grew up in is across the street from the rental property and is not included in the special assessment district. *Id.* at 196. The subject parcels currently have a septic system that functions and only needs periodic maintenance to get the tank pumped. Petitioner estimated that this would cost about $195 for every four or five years. *Id.* at 198. Ms. Nelson testified that no one from the Township inspected her system to determine if sewer hookup was necessary.

Ms. Nelson testified that she did not believe that the subject would increase in value based upon the installation of the municipal sewer system. Rather, she indicated that she believes that the property will lose value. *Id*. at 199. She testified regarding her garden and large pine trees that she was concerned would be lost due to the installation of the sewer system. *Id*. at 196. She also indicated that she feels that the expense of the system is "so much more than the value [she is] going to get out of it." *Id*. at 199. Petitioner also testified that she did not have her own appraisal of the subject property with and without the improvement. *Id.* at 200-01.

Robert H. Morris

Robert H. Morris, Petitioner's rebuttal witness, testified that he is retired now from his position of Manager of the Harbor Springs Area Sewage and Disposal Authority. He testified that he is also a resident of the subject township and is familiar with the special assessment. When he worked for Harbor Springs Area Sewage and Disposal Authority, he was "responsible for budgets for six municipalities that made up the authority." Transcript at 305. Mr. Morris testified that the Harbor Springs Area was approximately 10 to 14 miles from the subject jurisdiction. *Id*. The Tuscarora Township special assessment district is only about 5 percent of the size of the Harbor Springs Area Authority. *Id.* at 306.

Mr. Morris testified that there were large differences in cost between the subject special assessment district and what the Harbor Springs Area Authority assessed. More specifically, he testified that the cost per REU in the Harbor Springs Area ranged from $88.21 to $167 per year and O&M costs ranged from $13.92 to $24.92 per year while the subject SAD costs are much higher. *Id.* at 307, 309. Mr. Morris stated that the difference can be attributed to the number of REUs assessed in the Harbor Springs Area, 3,374, versus the subject SAD with only "300–something." *Id*. at 309. He said that he believes, based upon the way he did budgeting, the projected costs in Gourdie-Fraser's budget were too low. He also stated that the budget was incomplete, is labeled as such, as it does not include repair and replacement. *Id.* at 310. He stated that he discussed his budgetary concerns with officials from the United States Department of Agriculture (USDA) and the Michigan Department of Environmental Quality (MDEQ) and they have similar concerns. See *id.* at 312-14. Mr. Morris further testified that he developed a budget and projects that the actual cost will be about $14,863 per REU and O&M costs of $1,800 per year over the 40-year lifespan. *Id*. at 314-15. This results in significantly higher costs of $72,800

over maintaining the functioning septic system at $9,000 for the same 40-year timeframe. *Id.* at 317.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner has not met her burden of proof in this case. More specifically, the burden in a special assessment case "is a heavy one as there is a legal presumption that the special assessments levied against their property are valid." Respondent's Brief at 13 [citing *Ficus v West Bloomfield Twp*, 19 MTTR 652 (Docket No. 342251, August 2, 2011)]. Respondent contends that, given the high burden, Petitioner has failed to establish that the special assessment is not reasonable or is disproportional. Petitioner did not present an appraisal to support her contentions and "Petitioner Nelson never testified to her opinion of [the before and after values] even though she is the owner of the property and has been working as a licensed real estate salesperson for 17 years." Respondent's Reply Brief at 5. Respondent contends that its appraisal does show the value of the property with and without the improvement and that the special assessment is supported.

Respondent also contends that there was no need for an additional hearing after the bids were returned indicating an increase in cost exceeding 10 percent. This is due to the fact that the assessments on the properties were not increased. Respondent secured additional funding and the increase in cost was not passed on to Petitioner. Respondent contends that "Petitioner was informed of this assessment, the Petitioner was provided a hearing at the Township on April 11, 2012 to protest the assessment and then file an appeal to the Tax Tribunal" and as such, Petitioner was provided sufficient notice and opportunity with respect to the special assessment

and an additional hearing on the increased cost would have provided no additional benefit. See Respondent's Brief at 19.

Respondent also contends that the assessment was uniform. Petitioner erroneously relies upon a unique property, the only supermarket, to compare the assignment of REUs. Respondent contends that the testimony on record indicates that similar residential properties were all assigned 2 REUs and Petitioner has not met her burden of proof to demonstrate that the special assessment was not uniform. *Id*. at 21. Respondent also contends that numerous comparables were provided in testimony to support that the assessment was uniform.

Finally, Respondent contends that Petitioner failed to present any evidence or testimony to show that the district boundaries were the result of fraud or mistake. Respondent cites *Crampton v City of Royal Oak*, 362 Mich 503; 108 NW2d 16 (1961) to contend that Petitioner was required to show "fraud or mistake or that the action of the municipality was arbitrary or capricious. . . . This was a citizen's driven petition and 67% of the land mass in the special assessment district signed the petition for the sewers in this area." Respondent's Reply Brief at 12.

RESPONDENT'S ADMITTED EXHIBITS

R-1 Appraisal of Kenneth Arndt

R-2 Booklet: The Committee to Bring Wastewater Treatment to Indian River

R-3 Special Assessment Resolution No. 4

R-4 List of Parcel Number, Owner, and Address for Special Assessments

R-5 Special Assessment Roll for Tuscarora Township for Year 2013 SAD

R-6 List of REUs assigned to parcels

R-7 Stipulated Order of Dismissal 53rd Circuit Court Case No. 12-8316-CZ

R-8 Final Opinion and Judgment in MTT Docket No. 434794

R-9 List of REU determinations in other communities

R-10 List of REU determinations for Tuscarora Township

R-11 February 12, 2014 letter from Scott Smith to James J. Turner

R-12 February 21, 2014 letter from William Creal to James J. Turner

RESPONDENT'S WITNESSES

Michael E. Ridley

Michael E. Ridley, Respondent's supervisor and assessor, testified that his involvement with the special assessment at issue began when he joined the ad hoc committee to bring wastewater treatment to Indian River after being elected township supervisor. Transcript at 203. This committee prepared a booklet to explain the process and provided this booklet to the members of the special assessment district before and during the petition drive. See R-2. Mr. Ridley testified that in order to obtain approval for the district, 51 percent approval was required to create the district and, in fact, the committee received 67 percent. Transcript at 204.

Mr. Ridley testified that he did not believe MCL 41.724 required a subsequent hearing because the statute says "to be assessed" and the loan amount has not changed and will not affect the amount to be assessed to the property owners. *Id*. at 214-16. He also testified the state park is not included in the assessment because state-owned property cannot be assessed and the project is not contingent upon the state park participation. *Id*. at 216. Finally, he testified no fractions were utilized in assigning the REU, "if it was greater than one, it was rounded up to two" and that this was done uniformly to each of the properties in the district. *Id*. at 217. Mr. Ridley provided examples of many properties that were assessed and compared them to the subject

property indicating that the subject property was treated in a uniform manner with the other properties in the district. See *id*. at 216-24. He further stated that he believes that the sewer system "cleans up the environment, it improves land use, and it increases property value." *Id*. at 230.

Ken Arndt

Ken Arndt, Respondent's expert witness for real estate appraising, testified that he is a licensed appraiser in the state of Michigan and has been appraising real estate since 1986. Transcript at 243-47. He stated that he and his associate, Laura Boerema, inspected the exterior and interior of the subject property and reviewed photographs of the subject together. *Id*. at 248-49. The sales comparison approach was developed for this property and the comparable properties were selected by both appraisers. *Id.* at 249. Mr. Arndt testified that he concluded to a value of $101,000 with the sewer improvement, a $5,000 increase over the value without the sewer improvement. *Id.* Mr. Arndt testified that he used a matched pair analysis to determine if there was a premium attached to having a sewer system. *Id*. at 250. "[B]asically, when you get all done looking at all the data . . . we think there's about a 5 percent premium with this feature." *Id*. at 251.

FINDINGS OF FACT

1. The subject property is located at 6091 River Street in the county of Cheboygan and contains two parcels.
2. The subject contains two homes: one that Petitioner utilizes as her house and the second, a guest house, is used as a rental property.
3. The special assessment at issue in this appeal was imposed under MCL 41.721 et seq., PA 188 of 1954.

4. The special assessment at issue was initiated by petition of record owners of land in the proposed special assessment district. The proposed district was approved by the owners of 67 percent of the landmass, in excess of the 51 percent required under MCL 41.723.
5. Respondent provided notice of the hearing held for the purpose of confirming the special assessment roll by publishing notice twice in the Straitsland Resorter, Indian River, Michigan, with the first publication being at least 10 days prior to the hearing, and by mailing notice of the hearing by first class mail to all record owners or persons of interest in property in the special assessment district, at least 10 days prior to the hearing.
6. Petitioner had notice of the hearing held on April 11, 2012, and properly protested at that hearing.
7. The improvements proposed by the special assessment consist of the acquisition, construction and installation of sanitary sewer system improvements in the special assessment district and related improvements, structures, equipment and appurtenances, necessary to collect wastewater from properties in the proposed special assessment district and convey the wastewater to a treatment facility at the township's industrial park.
8. The subject property was assigned 2 REUs at $8,000 per REU. Therefore, the total amount of the special assessment assessed to the subject property is $16,000.
9. The special assessment roll was confirmed at the hearing on April 11, 2012.
10. The budget set for the special assessment was approximately $4.2 million at the time of confirmation.
11. The final budget after the bidding process was increased in excess of 10 percent.

12. An additional hearing was not held under MCL 41.724(4) regarding the increased overall cost of the special assessment.
13. The original assessment rate of $8,000 per REU remained unchanged even considering the increase in the overall assessment cost.
14. Respondent filed an appraisal in support of the increase in market value of the subject property given the special assessment improvement.
15. Petitioner failed to provide any evidence of value such as an appraisal other than Petitioner's lay testimony.

CONCLUSIONS OF LAW

The Tribunal finds that the first issue is whether an additional hearing was required under MCL 42.724. The special assessment at issue was confirmed on April 11, 2012. Petitioner properly protested the assessment at that hearing and timely filed its petition with the Michigan Tax Tribunal. Petitioner contends that (1) Respondent was required to hold an additional hearing under MCL 41.724(4) given the increase in the overall cost of the assessment; (2) the subject property does not receive a benefit as the property had sufficient septic systems in place or, alternatively, that if a benefit is conferred that it is not proportional to the cost assessed; (3) the district boundaries are not appropriately set and erroneously exclude properties which should be in the district, including the State Park, resulting in higher assessments upon the subject property; (4) the REU assignment by Respondent is not uniform and/or excessive; and (5) the cost of the connection fees and the O&M expenses are excessive. The Tribunal has considered the evidence and testimony on record in the above-captioned case and finds that Petitioner has failed to meet her burden of proof to demonstrate that the special assessment does not benefit the subject property or that the benefit is not proportional to the cost, as fully discussed below. As such, the

Tribunal confirms the special assessment amount of $8,000 per parcel for a total assessment of $16,000 on the subject property.

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

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

Petitioner contends that the "cost" is the cost of the project in total while Respondent contends that the "cost" is the amount assessed to Petitioner. The Tribunal finds that even if an additional hearing was required at the local level, the cure is to provide Petitioner with notice and an opportunity to be heard on the issue.

In *Highland-Howell Dev Co, LLC v Marion Twp*, 478 Mich 932; 733 NW2d 761(2007), the taxing jurisdiction modified the improvement plans and in doing so, eliminated a trunk line which traversed the subject property in that case. This modification was formally adopted years after the confirmation of the special assessment. The Michigan Supreme Court held that the Tribunal had jurisdiction to hear the objection to the modification, even though the petition was not filed within 30 days of the confirmation of the special assessment roll "[b]ecause when the special assessment roll was confirmed, petition had no basis to object because the plan included the trunk line through petitioner's property." *Id*. at 933. The case was remanded to the Tribunal for further proceedings on the issue of proportionality and after the entry of the Tribunal's opinion was again appealed to the Michigan Court of Appeals. The Court of Appeals held that:

> The effect of respondent's actions was to prevent petitioner from objecting to the revised plans as well as the special assessment that was not based on the revised plans. That is, petitioner was not permitted to raise an objection that the special assessment was disproportionate after the change in the project plans, as the

> Supreme Court's remand order indicated. Thus, under the circumstances of this case, petitioner was required to challenge, for the first time, the validity of a special assessment that was formulated from the original plans—rather than from the revised plans—in the MTT. [*Highland-Howell Dev Co, LLC v Marion Twp*, unpublished opinion per curiam of the Court of Appeals issued March 1, 2011 (Docket No. 294617).]

While the modification in this case occurred closer in time to the confirmation of the special assessment roll, the principal from *Highland-Howell* applies here. The Tribunal finds that even if Respondent's failure to conduct an additional hearing after discovering the increased overall costs deprived Petitioner of its due process rights, the cure is to provide Petitioner notice and an opportunity to be heard on the issue. Like *Highland-Howell*, this opportunity to be heard can be afforded to Petitioner—for the first time—at the Tribunal. As such, the failure to conduct a hearing on the issue of the increased cost estimates does not invalidate the special assessment. Rather, the Tribunal finds that Petitioner has been provided an opportunity to object to the increased cost of the assessment during this proceeding. Therefore, the deprivation of due process at the local level, if any, has been cured as the Tribunal has considered Petitioner's objections to the overall cost increase and evaluated the proportionality of the assessment to the benefit conferred, including the increased overall cost in the rendering of this Final Opinion and Judgment.

Here, the Tribunal finds that the increase in the cost of the assessment did not result in higher assessment on the subject property. This is, in part, due to the additional outside funding secured by Respondent to cover any increased cost. As such, the increased overall cost does not affect the proportionality of the assessment to the benefit conferred on the subject property, which is evaluated fully below.

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, 500; 502 NW2d 299 (1993). A special assessment is valid if it is found that the improvement confers a benefit on the assessed property and that the amount assessed to the subject property is reasonably proportionate to the benefit derived from the improvement. *Id*.; See also *Dixon Rd Group v City of Novi*, 426 Mich 390, 401; 395 NW2d 211 (1986). The Supreme Court in *Dixon Rd Group* held that to determine the benefit conferred on the subject property, the Tribunal must consider the value of the property before the improvement and after the improvement. *Id*. at 398-401. The relevant comparison is the market value of the assessed property with the improvement and the market value of the assessed property without the improvement. *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 496; 597 NW2d 858 (1999). In addition, the Court in *Kadzban* held that:

> . . . *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. When reviewing the validity of special assessments, it is not the task of courts to determine whether there is "a rigid dollar-for-dollar balance between the amount of the special assessment and the amount of the benefit. . . ." . . . Rather, a special assessment will be declared invalid only when the party challenging the assessment demonstrates that "there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements." [*Id*. at 502.]

Here, Petitioner has not presented any valuation evidence, such as a valuation disclosure or appraisal, to demonstrate the market value with and without the improvement to support its position that the special assessment is not proportional. Petitioner only offered lay witness testimony, which she contends is sufficient to support its contentions. Ms. Nelson testified

regarding her opinion that the expense of the system is "so much more than the value [she is] going to get out of it." Transcript at 199. In *Dalton Enterprises v Dalton Twp*, unpublished opinion per curiam of the Court of Appeals issued July 22, 2010 (Docket No. 291789), the Court held that the Tribunal properly found that the petitioner's lay witness testimony was not "sufficient credible evidence to overcome the presumption of validity" and there was no basis to strike down the special assessment. *Id*. [citing *Kadzban,* at 505.] Similar to *Dalton*, the only evidence Petitioner provided was her opinion. The Tribunal is unable to conclude that Ms. Nelson's opinion is sufficient to meet her burden of proof.

In addition to the expense being excessive, Ms. Nelson also indicated that she was concerned about the value of her trees if they will be removed to install the system. However, Mr. Ridley testified that every effort would be made to keep her trees and that if the trees must be removed, that there is some budget for refurbishing. See Transcript at 234-35. Therefore, the trees may be replanted if removed for installation to replace any potential loss in value. It is not clear that the trees would need to be removed and Ms. Nelson did not present market evidence establishing any actual loss in value if the trees were to be removed that could not be remedied by the replanting. As such, Petitioner has not demonstrated that the loss of trees, if any, would cause the special assessment to be disproportionate.

Notwithstanding the above, Respondent has submitted its before and after appraisal of the subject property. Respondent's appraisers used the sales comparison approach to value the subject property. Transcript at 249. The sales of similar Indian River homes were used to value the subject without the improvement. A $10,000 positive adjustment was utilized to account for the additional house (i.e., rental home) located on the subject property. See R-1. The appraisers concluded to a value of $96,000 for the subject parcels without the special assessment

improvement. See R-1 and Transcript at 249. The Tribunal finds that this value is supported by the sales submitted in the sales comparison approach. More specifically, while some of Respondent's sales have relatively high gross adjustments, Comparable No. 2 has the least gross adjustments indicating its similarity to the subject property. This sale has an adjusted sales price of $96,000, clearly supporting Respondent's appraiser's value conclusion.

With regard to the improvement, Respondent's appraiser conducted a matched pair analysis of vacant lots with and without sewer improvements. See R-1 and Transcript at 250. The appraiser considered 6 pairs to find:

> The matched pair data supports a slight bias to the sewer. Matched Pair A sales are located in Indian River and therefore are given most consideration. . . . In conclusion, it is our opinion that a 5% premium is supported for property within the sewer assessment district over the non-assessment comparables. [R-1 at 6.]

As such, the appraisers found that the estimated market value of the subject with the sewer assessment is $101,000. See R-1 and Transcript at 249. The Tribunal has reviewed this analysis and finds that, given the data documented in the appraisal, the appraiser's conclusion is supported on record.

Mr. Ridley, Respondent's assessor, testified that, in addition to the increase in market value, there are empirical benefits to the special assessment. He also testified that the benefits of the assessment are that it "cleans up the environment, it improves land use, and it increases property value." Transcript at 230. However, the Tribunal finds that the environmental and possible future "benefit" associated with the improvement is an overall community benefit and is not the individualized benefit required by the Court in *Kadzban*. More specifically, the *Kadzban* Court held that:

> not every street improvement primarily benefits the property that abuts the street. Indeed, in some instances, an "improved" street, e.g., one that is widened from a

> two-lane residential street to a four-lane thoroughfare, may be a detriment to abutting property. In such instances, we have invalidated special assessments because the assessed property received no special benefit in addition to the benefit that was conferred upon the community as a whole. [*Id.* at 501. [citing *Fluckey v Plymouth,* 358 Mich 447; 100 NW2d 486 (1960); *Knott v City of Flint,* 363 Mich 483; 109 NW2d 908 (1961); and *Brill v Grand Rapids,* 383 Mich 216; 174 NW2d 832 (1970).]]

Here, the Tribunal finds that there is an actual benefit, or increase in market value, to the subject property as required by the holding in *Kadzban*, which is demonstrated by Respondent's appraisal.

As indicated above, the *Kadzban* court held that the benefit need not be a dollar-for-dollar balance and that "a special assessment will be declared invalid only when the party challenging the assessment demonstrates that 'there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements.'" *Id*. at 502, [quoting *Dixon* at 403.]

The Tribunal finds that Petitioner's claim regarding the disproportionality between the $5,000 increase in value, versus the cost of the assessment of $16,000[1] is not supported. To hold otherwise would be to hold that there is a dollar-for-dollar requirement. Petitioners also contend that the costs of the connection fee and O&M fees cause the assessment to be an even greater cost purportedly rendering the assessment even more disproportionate. These charges are separately discussed below. Moreover, the *Kadzban* Court also held 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. Here, Petitioners failed to present any competent evidence in support of their contention that the subject property special assessment

[1] $8,000 per subject parcel.

renders the total cost substantially disproportionate to the benefit conferred and relies only upon Respondent's appraisal, which shows an increase in value, and Petitioner's lay testimony discussed above.

Petitioner also attempts to establish disproportionality through its rebuttal witness testimony regarding the Harbor Springs Area special assessment. Mr. Morris testified to the vastly lower assessment cost per REU as well as the lower fees in the Harbor Springs Area. See Transcript at 307, 309. However, the Tribunal finds that this comparison is meaningless and the differences in costs are due, primarily, to the difference in size of the special assessment districts and REUs being assessed. *Id*. at 309. As such, the Tribunal finds that Petitioner has failed to meet her burden of proof and, without reliable evidence, the Tribunal cannot conclude that the special assessment is invalid.

With respect to the district boundaries, the Tribunal again finds that Petitioner failed to present reliable evidence to demonstrate that the boundaries are improper. The special assessment district was initiated by petition and 67 percent of the landmass owners signed the petition in approval of the district. Transcript at 204. In addition, Petitioner contends that the State Park will be using the improvements but, erroneously, will not be required to share in the cost. However, the Tribunal finds that the State Park is land owned by the State of Michigan and exempt from taxation under MCL 211.7l. MCL 41.734 states that any public or private corporations that are exempt from taxation *may agree* to pay the special assessment against their land. Thus, the State Park is not required to be included in the special assessment district but may elect to be included. Further, Respondent has secured additional funding to cover the excess cost which is not contingent upon the State Park's participation in the special assessment. Transcript

at 204. Thus, the Tribunal finds that Petitioner has failed to meet its burden of proof to demonstrate that the district's boundary lines were improperly set.

Petitioner also contends that the REU assignment was not uniform or is excessive to the subject property. Respondent's Exhibit R-6 indicates that 1 REU was assigned to each residence. See R-6. The subject property includes two parcels and two dwellings, or residences. As such the assignment of 2 REUs, 1 for each residence, is consistent with this assignment. Petitioner's contentions regarding the modification of the REU assignment for Ken's Market is not relevant to the subject property as that property is a grocery store and not a residential parcel like the subject property. Transcript at 50. Thus, the Tribunal concludes the assignment of 2 REUs was appropriate and is not excessive.

Petitioner in its Response to Respondent's Closing Statements ("Response") states that "the Committee To Bring Wastewater Treatment to Indian River used two different formulas [in assigning REUs]." In its Response, Petitioner included charts of alleged inconsistencies in the rounding up of REUs that were not brought up at the hearing of this matter. For example, Petitioner uses the example of "Mike and Dave's [barber shop] REU Assignment." Petitioner lists the property as a barber shop, doctor's office, apartments and residence," however there was no discussion of a residence, or the number of chairs in the shop (which allegedly changes the REU assignment), at the hearing of this matter and no certainty regarding REU assignments "off the top of my head." Transcript at 240. Respondent's supervisor was questioned regarding REU assignments for the barber shop on cross-examination and stated, "They have three REUs for the apartment[s] and one for the barber shop and one for the -- they have a total of five REUs in that building." *Id.* In its Response, Petitioner indicates that the barber shop should have 7 REUs, but it was only assigned 6. Response at 14. The Tribunal is unsure what the "correct" number of

REUs for the barbership is, why the REUs are allegedly inconsistent, and where that analysis was presented at hearing, regarding a property not even under contention. From the evidence presented at the hearing, it appears that the REU assignment for the subject property was accurate and consistent and not excessive; two REUs, one for each residence.

Petitioner contends that Respondent was required to individually inspect and determine whether the septic systems currently in existence are adequate. However, the Tribunal finds that Petitioner did not cite any authority for this position. MCL 333.12752 states that "[p]ublic sanitary sewer systems are essential to the health, safety, and welfare of the people of the state" and that "failure or potential failure of septic tank disposal systems poses a threat . . . ." The case law regarding this statute indicates that there is no need to make individual determinations that the septic systems are actually failing or inadequate. See *Bingham Farms v Ferris*, 148 Mich App 212, 218; 384 NW2d 129 (1986), [stating that the intent of the statutory provision is specifically to avoid individual evaluations of septic tanks.] Rather, the statute finds that the connection to sewer systems, where available, is necessary in the public interest. MCL 333.12752. Therefore, the Tribunal finds that Petitioner's contention is not supported and individual evaluations of the septic system are not necessary.

Finally, Petitioner contends that the cost of the connection fee and the O&M expenses are excessive rendering the assessment disproportionate. Petitioner also contends that these charges are within the Tribunal's jurisdiction under MCL 205.731 because that statute includes the word "rates." However, the section as a whole indicates that the rates must be established "under the property tax laws of this state." MCL 205.731. Thus, it must be determined whether these charges are merely fees, which are outside of the Tribunal's jurisdiction. In *Bolt v City of*

Lansing, 459 Mich 152, 158; 587 NW2d 264 (1998), the Supreme Court discussed the difference between a "fee" and a "tax" as follows:

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

The *Bolt* Court also established a three part test in distinguishing between a tax and a fee. The three criteria are: (1) a fee must serve a regulatory purpose, (2) a fee must be proportionate to the necessary costs of the service, and (3) a fee is voluntary. *Bolt* at 161-162. The Court of Appeals held in *Graham v Kochville Twp,* 236 Mich App 141; 599 NW2d 793 (1999) that:

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

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

The fees here include a connection fee like in *Graham,* and a charge for operation and maintenance. These charges are to further a regulatory purpose rather than a revenue raising purpose, specifically to fund the sanitary sewer project including the cost to connect and operate the system. This type of project is clearly to regulate public health, safety, and welfare under MCL 333.12752. See also *Wheeler v Shelby Twp,* 265 Mich App 657, 664; 697 NW2d 180 (2005). Therefore, there is no evidence that the fees are for a revenue raising purpose. With regard to proportionality, the Tribunal finds that there was no evidence presented by Petitioner to dispute that the benefits conferred from the disputed charges do not bear a reasonable

relationship to value of the service. "[W]e presume 'that the amount of the fee is reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence," and we find no evidence that the charge here is unreasonable." *Graham* at154-55, [citing *Vernor v Secretary of State*, 179 Mich 157, 168; 146 NW 338 (1914).] Thus, the Tribunal finds that the charges are proportionate and reasonably relate to the costs. While the charges are not voluntary, the factors are to be considered "in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Graham* at 151. "[T]he lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler* at 666-67, [citing *Bolt* at 167 n. 16, and *Westlake Transportation v Public Service Com'n*, 255 Mich App 589, 616; 662 NW2d 784 (2003).] As discussed above, MCL 333.12752 has mandated that the connection to a sewer system is necessary in the public interest which, therefore, supports the mandatory connection and associated fees. Thus, the Tribunal finds that the first two criteria are clearly met and the third shall not render the charges a tax or special assessment. Petitioner presented no legal argument to support the position that the charges are truly an extension of the special assessment. Thus, the Tribunal finds that the charges at issue are, as Respondent contends, a fee and not a tax or extension of the special assessment. See *Wheeler* at 667. As such, the connection and O&M fees are not established under the property tax laws and are not within the Tribunal's jurisdiction.[2]

Given the above, the Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that Petitioner has not met her burden of proof and therefore, the special

[2] Notwithstanding the Tribunal's determination that the O&M charges are not within its jurisdiction to reduce, the Tribunal notes that O&M charges may be reduced upon metering. Mr. Ridley testified that after two years meters will be connected and that rather than merely paying a flat fee for O&M, the assessed properties will only be charged for what is actually used. This may actually result in a decrease in the charges. See Transcript at 242.

assessment is valid with respect to the subject property. The special assessment shall be affirmed as stated in the Introduction section above.

JUDGMENT

IT IS ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's special assessment as finally provided in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

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

31, 2013, at the rate of 4.25%, and (v) after December 31, 2013, and through June 30, 2014, at the rate of 4.25%.

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

By: Preeti P. Gadola

Entered: 6/2/14