

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

Gary and Linda Fiscus,
Petitioners,

MTT Docket No. 342251

v

Township of West Bloomfield,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

OPINION AND JUDGMENT

Petitioners, Gary and Linda Fiscus, appeal a special assessment for dredging of the Mallard Court canal levied by the Township of West Bloomfield and the Upper Long Lake-Lake Board against the real property owned by Petitioner (Parcel No. 18-12-226-003). David B. Marmon, attorney, represented Petitioners; and Derk W. Beckerleg, attorney, represented Respondent.

A hearing on this matter was held on April 11, 2011.¹ Petitioners' witnesses were Gary Fiscus, Petitioner; Joanne Watts, Petitioner in MTT Docket No. 342645; and Thomas Rudofski, Appraiser. Respondent witnesses were Bill Griffin, Assessor for Bloomfield Township and Dan Sears, Appraiser for West Bloomfield Township. On May 11, 2011, Respondent filed a "Post-Trial Brief" and Petitioner filed a "Post-Hearing Brief."

The special assessment for dredging of the Mallard Court canal was originally established by West Bloomfield Township, Bloomfield Township and the Upper Long Lake – Lake Board in October 2007, with properties determined to be located on the canal assessed \$16,092.61 and lake front properties assessed \$5,279.64.

¹The subject appeal and an appeal filed by Joanne Watts (MTT Docket No. 342645) were heard at the same time, as the facts and issues in both cases are the same.

Because of increased costs, the special assessment was increased in October 2010 to \$21,165.32 for “canal” properties and \$9,179.14 for “lake front” properties. It is Petitioners’ position that their property did not benefit from the improvements financed by the special assessment or, in the alternative, did not benefit to the same extent as other canal properties because their property is not physically located on the canal, but has access to the canal through an easement, and, as such, they should not be required to pay the same special assessment as that assessed against canal properties. For the reasons set forth herein, the Tribunal finds that the subject property benefited from the special assessment proportionately to the cost of the special assessment, and the benefit received by Petitioners is equivalent to the benefit received by other canal properties. Therefore, the special assessment levied against the subject property in the amount of \$21,165.32 is affirmed.

GENERAL PROPERTY DESCRIPTION

The property at issue is known is located at 2557 Middlebelt Road, West Bloomfield Township, Oakland County, Michigan, has a property identification number 18-12-226-003, and is also known as Lot 23 of the Upper Long Woods Subdivision No. 2. The subject property has direct access to the Mallard Court canal through a private access easement. The Mallard Court canal flows directly into Upper Long Lake. Five properties, including the subject property, have access to the Mallard Court canal through this private access easement.

PETITIONERS’ CONTENTIONS

Petitioners contend that the benefit of the Mallard Court canal dredging special assessment to Petitioners is not “reasonably proportionate” to the cost of the special assessment levied against Petitioners’ property. (Brief, p. 10). Specifically, Petitioners contend that the evidence shows that “no additional value” was added to the subject property by having lake

access, “let alone improving lake access through dredging.” (Brief, p. 10). In the alternative, Petitioners contend that “the Tribunal should reassess the properties in conformity with the way that like situated properties are assessed. It should either assess each property at 1/5 the current amount to reflect five properties sharing one canal front, or alternatively again, assess each property at the lower tier rate for canal access property.” (Brief, p. 10).

Petitioners state that under Michigan law (*Dixon Road Group v City of Novi*, 426 Mich 390, 403; 395 NW2d 211 (1986)), a special assessment must “have a reasonable relationship between the amount of the special assessment and the amount of the benefit.” (Brief, p. 5). Here, Petitioners contend that Mr. Rudofski’s appraisal concludes that the canal access through the easement “did not increase the market value of the subject property,” (Brief, p. 6) and therefore “a benefit to the property of zero clearly is unreasonable.” (Brief, p. 5). Further, Petitioners take exception to Respondent’s appraisal evidence that determined the benefit of lake access to the subject property, through the easement providing access to the canal, was \$69,300. Specifically, Petitioners contend that Respondent’s appraisal was not appropriate because (1) it measured the “benefit” of the special assessment as of 2007 rather than as of 2010, when the revised special assessment amount of \$21,165 was established, (2) its analysis focused on lake access properties rather than on the benefits of dredging the canal, (3) certain of the adjustments made by the appraiser were inaccurate, (4) in analyzing comparable sold properties without canal access to a lake, the appraiser failed to select comparables from the same or neighboring subdivisions as the subject, and (5) the appraisal provided “absolutely no analysis of the value added to any parcel by dredging.” (Brief, pp. 9, 10).

Citing the testimony of Respondent’s witness Griffin (Transcript, p. 164), Petitioners contend that two tiers of assessments were established (“canal lots” and “lake front lots”) and

that the distinction between the tiers was “whether or not the owner can dock his boat on the canal.” (Brief, p. 3). Petitioners contend that the evidence clearly establishes that although the subject property is one of five properties with access to the canal through an easement,² because of space limitations only three of those five properties can dock their boat on the canal at any one time. Petitioners again cite the testimony of witness Griffin (Transcript, pp. 164, 165) that “if it were true that all five parcels could not dock their boats at the same time, the value added to their properties by the special assessment would be less than the value added to the canal properties that could always dock their boats.” (Brief, p. 3). Therefore, “as the canal abutters have roughly the same canal frontage as the easement shared by the petitioners and others, . . . the petitioners should be assessed each at 1/5 the amount of the canal abutters.” (Brief, p. 4). In the alternative, Petitioners argue that the subject property is more akin to lake front properties than canal properties and should be assessed accordingly because “neither petitioner has an absolute, transferable right to dock his or her boat on the easement” (Brief, p. 5).

PETITIONER’S ADMITTED EXHIBITS

- P-2 Appraisal report as of December 31, 2009 – Thomas R. Rudofski.
- P-3 Plat map.
- P-4 Restated Articles of Incorporation – Upper Long Lake Woods Civic Association, Inc.
- P-5 Notice of Public Hearing dated September 15, 2010.
- P-6 Notice of Public Hearing dated October 23, 2007.

²Neither party could produce a copy of the purported easement. (Transcript, p. 72). Exhibit R-13, plat map, reflects a “private easement” abutting Lots 22 -26. Witness Watts testified that they were informed of the easement by the sellers of the property when they purchased the property in 1992. (Transcript, p. 73). Witness Fiscus testified that he was informed of the easement by his real estate agent when he purchased his property in 1993.

PETITIONER'S WITNESSES

Gary Fiscus

Gary Fiscus, Petitioner, testified that he owns Lot 23 as shown on the plat map (Exhibits R-13 and P-3). As the owner of Lot 23, Mr. Fiscus testified that (1) he has access to the boat launch through the payment of dues to an association, (2) his property is not located on the Mallard Court canal, (3) he has access to the Mallard Court canal through an easement that grants such access to five lots, (4) his property was assessed \$21,165 for the dredging of the Mallard Court canal, (5) boat traffic occurred on the Mallard Court canal prior to the dredging of the canal and after dredging of the canal, (6) he docks his boat at a dock owned by Petitioner, (7) the boundaries of the easement allow for no more than three (3) boats to be docked on the canal at any one time, (8) there exists no mechanism for determining which of the five lots with the easement can dock their boats on the canal, and (9) Petitioner's boat can be docked on the canal "for the entire season." (Transcript, pp. 25 – 54, 75 - 77).

Joanne Watts

Joanne Watts, Petitioner in the companion case, MTT Docket No. 342645, testified that she owns Lot 25 as shown on the plat map (Exhibits R-13 and P-3). As the owner of Lot 25, Ms. Watts testified that (1) she has owned the subject property since 1992, (2) her property was assessed \$21,165 for the dredging of the Mallard Court canal, (3) she cannot see the canal from the subject property, (4) she is allowed access to the boat launch as a dues paying member of the association, (5) five lots have access to the easement, which allows access to the Mallard Court canal, (6) two boats can use her dock and one (1) boat can use a boat well on Lot 26, (7) there is no mechanism in place to determine which of the five lots on the easement can use the three

spaces available for docking a boat on the canal, (8) since she has owned the subject property there has never been an issue regarding the number of boats that could dock on the canal through the easement because the number of property owners wanting to dock their boats on the canal has never exceeded three. (Transcript, pp. 54 – 74).

Thomas Rudofski

Thomas Rudofski is a licensed appraiser retained by Petitioners to “make market value appraisals” of Petitioners’ property. (Transcript, p. 80). Mr. Rudofski testified that (1) the subject property is located on an arterial roadway and is subject to higher traffic than a typical subdivision lot (Transcript, p. 100), (2) values in the area have declined over the last four to five years, (Transcript, p. 85), (3) the sales comparison approach was the only approach to value he considered (Transcript, p. 88), (4) comparable 3 (of the five comparable sales identified) was the “most similar” to the subject because it is also located on the easement (lot 26) (Transcript, p. 89), (5) comparable 3 sold on October 22, 2009 for \$149,900 after selling in July, 2009 for \$110,000 (Transcript, p. 102), (6) after an analysis of the five comparable sales identified, he determined that the true cash value of the subject property as of December 31, 2009 was \$157,000 (Transcript p. 100), (7) buyers will not pay a premium for canal access to Upper Long Lake because “there’s no evidence to say that they would at this time” (Transcript, p. 106), (8) canal access would not add any value to the subject property (Transcript, p. 94), (9) better canal access achieved through dredging would not add any value to the subject property (Transcript, p. 94), (10) a buyer would pay more for a property if they did not have to share canal access with other properties (Transcript, p. 94).

Under cross-examination by Mr. Beckerleg, Mr. Rudofski further testified that (1) he prepared the appraisal for the subject property “for the purposes of determining whether the

benefit to the Fiscus . . . propert[y] as a result of the Mallard Court Canal dredging project improvements were reasonably proportionate to the amount of special assessment” (Transcript pp. 112, 113), (2) he did not “determine whether the benefit the property received from the improvement is reasonably proportional to the amount of the special assessment that the properties were paying” (Transcript, p. 114), (3) the appraisal he prepared for this appeal “didn’t address the issue in writing of whether the amount of the special assessment was reasonable” (Transcript, p. 115), (4) “[a]nd I believe if you have a canal front home where you have a view and you have a dock right there on the edge of your property, yes, there may be a premium paid for that. But if you have no view and you have to go some distance to get to that access, I think that potential for any premium paid it diminishes greatly to almost nonexistent.” (Transcript, pp. 122, 123), (5) the purpose of the appraisal was “to arrive at the market value of the property for – for the tax appeal purpose” (Transcript, p. 127).

Upon re-direct examination by Mr. Marmon, Mr. Rudofski testified that if the canal was not dredged, it would not have any effect on the value of the subject property. (Transcript, pp. 128, 129).

RESPONDENT’S CONTENTIONS

Respondent contends that the burden of proof on Petitioners in challenging their special assessment is a heavy one, “as there is a legal presumption that the special assessments levied against” their property are valid. (Brief, p. 3). With respect to Petitioners’ contention that, at a minimum, the subject property should be specially assessed as lake front property rather than canal property, Respondent contends that Petitioners have failed to provide reasonable and sufficient evidence that Petitioners’ property should be treated as an off-canal property, which would result in an assessment of \$9,179.14. Specifically, Respondent relies on Mr. Griffin’s

testimony that the distinction between the two tiers is whether a property owner could moor their boat on the canal for the season, or whether they utilized the canal only to take their boat in and out of the water, and on the testimony of Petitioner and Ms. Watts that they are able to dock their boats from a dock installed at the end of the private easement. (Brief, pp. 4, 5). Respondent contends that:

[i]t is clear that the Petitioners' properties were properly treated as on canal properties because they had direct access to the Mallard Court canal through the private access easement that only a total of five properties could utilize and the Petitioners had in fact used the easement to directly access the Mallard Court canal for the purpose of docking their boats all boating season long from Ms. Watts' dock that extended from the private access easement into the Mallard Court canal. (Brief, pp. 6, 7).

With respect to Petitioners' argument that the special assessment levied against the subject property does not add any value to the subject properties, Respondent contends that Petitioners' appraiser failed to "perform a comparative analysis with respect to whether there was a substantial or unreasonable disproportionality between the amounts assessed and the value that accrued to Petitioners' property as a result of the Mallard Court canal improvements" (Brief, p. 7). On the other hand, Respondent contends that its appraiser properly performed a comparative analysis as contemplated by the Michigan Supreme Court (see *Dixon Road Group, supra*). Specifically, the analysis performed by Petitioners' appraiser estimated a value for the subject property with canal access and without canal access and determined the difference in values to be significantly greater than the assessment levied against Petitioners' property. (Brief, p. 9).

RESPONDENT'S ADMITTED EXHIBITS

- R-1 Supplemental Valuation Disclosure.
- R-4 Aerial photograph/map.

R-13 Plat map.

R-33 Minutes of Upper Long Lake Board meeting of October 23, 2007.

R-40 Unapproved minutes of Upper Long Lake Board-Lake Board meeting of October 6, 2010.

RESPONDENT'S WITNESSES

Bill Griffin

Bill Griffin is a Michigan Master Assessor (level four) and has been the assessor for Bloomfield Township for four years. (Transcript, pp. 133, 134). Mr. Griffin testified that (1) the special assessment district was established to dredge the Mallard Court Canal to make sure that the canal would be navigable into the future (Transcript, p. 141), (2) two tiers of assessments were established, one for properties that utilized the boat launch to take their boat out of the water and the other for properties that were canal access or canal property that could actually moor a boat in the canal (Transcript, pp. 143, 144), (3) the subject property “would have enhanced benefit, because they can leave their boat in the water, they have instant access to an all-sports lake all summer long, and they utilize the canal to do – you know, their actual boat is actually moored on the canal” (Transcript, p. 150), (4) the new assessment roll adopted in October, 2010 was necessitated by cost overruns, legal bills and financing issues (Transcript, pp. 159, 165), and (5) the sole reason whether or not a property was in a tier for assessment purposes was the ability to dock a boat on the canal (Transcript, p. 164)

Dan Sears

Dan Sears is the chief appraiser for West Bloomfield Township, has worked for the township since 1990, and is a level three assessor (Transcript, pp. 173, 175). Mr. Sears testified

that (1) he valued the subject property as of December 31, 2006 with lake access and without lake access³ (Transcript, pp. 179, 185), (2) his valuation was as of December 31, 2006 because 2007 is the year the special assessment began to be levied as well as when the improvements commenced (Transcript, p. 217), (3) his valuation included both the sales comparison approach and the cost approach, although the cost approach was not actually used in the “with and without lake access” analysis (Transcript, pp. 187, 223), (4) he determined the value of the subject property with lake access to be \$331,800 and the value of the subject property without lake access to be \$257,600 (Transcript, pp. 197, 198), (5) he concluded that the benefit to the subject property of having lake access is \$74,200, which supported a conclusion that the subject property proportionally benefitted from the dredging of the Mallard Court canal (Transcript, p. 199), (6) properties without lake access in the subject’s neighborhood are comparable to properties in other neighborhoods that do not have lake access (Transcript, p. 209).

FINDINGS OF FACT

1. The subject property is residential real property located at 2557 Middlebelt Road, West Bloomfield, Michigan (Parcel Number 18-12-226-003), aka Lot 23, Upper Long Woods Subdivision No. 2.
2. The subject property (and four other parcels) has access to the Mallard Court canal (which provides access to Upper Long Lake) through a “private easement” reflected on the plat map for the Upper Long Woods Subdivision No. 2.
3. The parties were unable to produce a copy of the easement document that allows

³The witness testified that the terms “canal access” and “lake access” were used interchangeably in his appraisal report. (Transcript, p. 183).

the subject property to access the Mallard Court canal.

4. Petitioner was informed of the existence of the “private easement” upon purchase of the subject property in 1993 by the seller of the subject property.
5. The special assessment roll for S.A.D. 75 (West Bloomfield Township) and S.A.D. 288 (Bloomfield Township), Mallard Court Canal dredging project, was approved by the Upper Long Lake – Lake Board on October 23, 2007, providing for assessments in the amount of \$16,092.61 for “canal lots” and \$5,279.64 for “access and lake front lots.”
6. The special assessment roll for S.A.D. 75/139 (West Bloomfield Township) and S.A.D. 288 (Bloomfield Township), Mallard Court Canal dredging project, was approved by the Upper Long Lake-Lake Board on October 6, 2010, providing for assessments in the amount of \$21,165.32 for “canal lots” and \$9,179.14 for “access and lake front lots.”
7. The same properties were specially assessed in 2007 and in 2010.
8. The assessments were increased in 2010 solely because of the increase in the costs of the dredging project.
9. The purpose of the Mallard Court canal dredging project was to dredge and improve the Mallard Court canal, so that the canal could remain navigable and passable by watercraft to provide access to Upper Long Lake.
10. The subject property was specially assessed as a “canal lot” for purposes of both the 2007 and 2010 special assessments.

11. Ms. Watts has for several years “installed” an eight foot dock on the easement at the beginning of the “season” and then removed the dock at the end of the “season.”
12. The dock can accommodate two boats, which have been boats owned by Petitioners and Ms. Watts for all of the years during which the dock was available.
13. The easement can also accommodate one additional boat in front of Lot 26.
14. At no time since Petitioners purchased the subject property in 1992 has there been an issue where more than three property owners subject to the easement have sought to dock a boat on the easement.
15. Petitioners’ appraiser determined that the true cash value of the subject property as of December 31, 2009 was \$157,000.
16. Petitioners’ appraiser did not perform a “with and without canal access” analysis.
17. Petitioners’ appraiser determined that the dredging of the Mallard Court canal had no positive impact on the value of the subject property.
18. Petitioners’ appraiser concluded that no “premium” would be paid by a buyer for canal access to Upper Long Lake.
19. Respondent’s appraiser prepared a “with and without lake access” analysis and concluded that the value of access to Upper Long Lake to the subject property as of December 31, 2007 was \$74,200.

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 *Ahearn* Court further explained what is required.

The essential question is not whether there was any change in market value, but rather whether the market value of the assessed property was increased as a result of the improvement. Common sense dictates that in order to determine whether the market value of an assessed property has been increased *as a result of* an improvement, the relevant comparison is not between the market value of the assessed property *after* the improvement and the market value of the assessed property *before* the improvement, but rather it is between the market value of the assessed property *with* the improvement and the market value of the assessed property *without* the improvement. The former comparison measures the effect of time, while the latter measures the effect of the improvement. (Citations omitted.) *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, Petitioners first challenge the benefit of the canal dredging special assessment as not being “reasonably proportionate” to the cost of the special assessment levied against the subject property. Thus, Petitioners carry the initial burden of proof. To that end, Petitioners submitted an appraisal concluding that (1) the value of the subject property was \$145,000 as of December 31, 2009 and (2) that access to the Mallard Court canal, which provides access to Upper Long Lake through an easement, did not increase the market value of the subject property. However, that appraisal failed to provide the “with and without” analysis so clearly described by the Court in *Ahearn*. Instead, Petitioners’ appraiser simply states, without any evidence or foundation, that it is his judgment that the dredging of the Mallard Court canal

did not add any value to the subject property. Petitioners also take exception to Respondent's "with and without" analysis, contending that Respondent's valuation date of December 31, 2007 was not appropriate, its focus was on the benefit of "lake access" rather than on the benefit of the canal dredging, and the selection of comparable sold properties without lake access was flawed. In this regard, the Tribunal finds that while Respondent's "with and without" analysis may have been more helpful to the Tribunal if it had utilized a December 31, 2009 valuation date, and the analysis may have certain minor flaws identified by Petitioners, the proportional benefit realized by the subject property from the canal dredging project was so much greater than the ultimate cost of the assessment, these few issues identified by Petitioners do not negate the overall conclusion reached by Respondent's appraiser. Simply, Petitioners have failed to present any credible evidence in support of their contention that the subject property did not benefit by even \$1 from the dredging project.

Petitioners' alternative contention that because the private easement can accommodate only three boats for the five lots benefitting from the easement, the assessment levied against the subject property should be reduced to either 1/5th of the "canal access" assessment or to the amount of a "lake access" assessment is also without merit. The testimony clearly establishes that Ms. Watts has placed a dock on the easement allowing Petitioners to dock their boat on the canal "for the season" and thereby gain access to Upper Long Lake without taking their boat in and out of the water each time it is used. Petitioners' ability to access Upper Long Lake through canal access is no different than any other property located on the canal, which was the sole criteria used by Respondent in establishing the two tiers of assessments. Further, the testimony establishes that the issue regarding the inability of two of the five lots to use the easement to gain

access to the canal has never arisen. The Tribunal finds that the subject property benefits from having access to the Mallard Court canal just as do those properties located on the canal.

In summary, the Tribunal finds that Petitioners did not meet their burden of proof. Petitioners simply did not present credible evidence nor did they provide the correct analysis. As a result, Petitioners 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. Petitioners have not met their burden of proof in this matter. However, even if it were determined that Petitioners had presented credible evidence such that Respondent must then present evidence proving that the assessment is reasonably proportionate, the Tribunal finds that Respondent has met that burden of proof by providing credible “with and without” lake access evidence and analysis. 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: August 2, 2011

By: Steven H. Lasher