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

Indian River Trading Post,
Petitioner,

v

MTT Docket Nos. 15-006036

Tuscarora Township,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On June 20, 2014, the Tribunal issued its Final Opinion and Judgment in MTT Docket No. 434500, concluding that Respondent's imposition of a special assessment in the amount of $88,000 ($8,000 per REU for 11 REU's) for sewer improvements on Parcel Number 161-025-200-044-00 was invalid as that parcel did not benefit from said improvements. Respondent did not appeal the Tribunal's Final Opinion and Judgment in MTT Docket No. 434500.

In September 2015, Petitioner was notified by Respondent that Petitioner was required to "hook up" to the sewer system by ordinance and in doing so was required to pay a "Benefit Fee" in the amount of $72,000 ($8,000 per REU for what has now been determined to be 9 REU's). Petitioner appeals the imposition of this "Benefit Fee" by Respondent.

In its Order dated February 23, 2016, the Tribunal required the respective parties to file Motions for Summary Disposition on or before June 30, 2016, and to file responses to those motions on or before July 21, 2016.

On June 30, 2016, Petitioner filed a motion requesting that the Tribunal enter summary judgment pursuant to MCR 2.116(C)(10) in its favor in this case.

On June 30, 2016, Respondent filed a motion requesting that the Tribunal enter summary judgment pursuant to MCR 2.116(C)(4) and (C)(7) in its favor in this case.

Both parties filed responses to the opposing parties' summary disposition motions on July 21, 2016.

Oral Argument on the parties' respective motions was held on September 27, 2016.

The Tribunal has reviewed the Motions, responses, Oral Argument transcripts, and the evidence submitted and finds that granting Respondent's Motion for Summary Disposition and denying Petitioner's Motion for Summary Disposition is warranted at this time.

PETITIONER'S CONTENTIONS

In support of its Motion and Response, Petitioner contends that the "benefit fee" imposed by Respondent in an amount equal to the special assessment previously determined to be invalid by the Tribunal is either (i) an improper collateral attack on the Tribunal's prior opinion, or (ii) an unlawful tax pursuant to Michigan law. Petitioner disputes Respondent's contention that the Tribunal previously ruled on this issue in its Final Opinion and Judgment in MTT Docket No. 434500 because the "propriety of monthly O&M fees and connection fees was never challenged or materially addressed in the original proceeding." In support, Petitioner references its Petition, the Tribunal's Prehearing Statement, and the transcript of the hearing, all of which Petitioner contends do not discuss the connection fee issue. Petitioner contends that the Tribunal erroneously included in its Final Opinion and Judgment in MTT Docket No. 434500 a discussion and conclusion regarding Respondent's imposition of a "benefit fee" or connection fee.

Petitioner further contends that the Tribunal has jurisdiction in this matter pursuant to MCL 205.735a(6), as its petition was filed within 35 days of Respondent's September 28, 2015 notice of the "benefit fee" to be imposed on the subject parcel.

Petitioner further contends that because the Tribunal has already concluded that the sewer project confers no benefit on the subject property, the imposition by Respondent of a "Benefit Fee" in the exact amount of that special assessment would render the Tribunal's judgment meaningless.

Finally, Petitioner contends that Respondent's "Benefit Fee" is, in reality, an unlawful tax under *Bolt v Lansing*.[1] Petitioner contends that Respondent has failed to satisfy any of the three criteria established in *Bolt*, as the fee was not imposed to defray the costs of regulatory activity, the fee is imposed to pay for the infrastructure of the sewer system and not for services rendered, and payment of the fee is compulsory rather than voluntary.

At Oral Argument, Petitioner also added that collateral estoppel applies to bar the "Benefit Fee" as the Tribunal's prior decision clearly indicates that the improvement does not benefit the subject property. Petitioner further contends that the facts at hand are distinguishable from *Graham v Kochville Twp*[2] because here, this is a mandatory assessment. It is more akin to *In re Petition for Foreclosure of Certain Parcels of Property*[3] as the money is to defray the cost of capital expenditures and it is not a voluntary improvement.

---

[1] *Bolt v Lansing*, 459 Mich 152; 587 NW2d 264 (1998).
[2] *Graham v Kochville Twp*, 236 Mich App 141; 599 NW2d 793 (1999).
[3] *In re Petition for Foreclosure of Certain Parcels of Property*, unpublished opinion per curiam of the Court of Appeals.

RESPONDENT'S CONTENTIONS

In support of its Motion and Response, Respondent contends that in concluding in MTT Docket No. 434500 that the sewer project did not benefit the subject property, and therefore, vacating the special assessment imposed on the subject property, the Tribunal also addressed the issue raised by Petitioner in this appeal. Specifically, Respondent contends that the Tribunal concluded in that prior docket that a connection fee established by the Township was not a tax pursuant to *Bolt*, and therefore, the Tribunal lacked jurisdiction over this issue. As a result, Respondent contends that Petitioner's appeal in this matter is barred by the doctrine of *res judicata.*

Respondent further contends that even if the Tribunal had not previously ruled on this issue, given the facts associated with Respondent's imposition of a "benefit fee" on the subject property pursuant to its ordinance, the Tribunal would once again rule that the "benefit fee" or connection fee is a fee and not a tax, and, as such, any appeal of such a fee is outside the jurisdiction of the Tribunal.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[4] In this case, Petitioner moves for summary disposition under MCR 2.116(C)(10) and Respondent moves for summary disposition under MCR 2.116(C)(4) and (C)(7).

MCR 2.116(C)(4)

Dismissal under MCR 2.116(C)(4) is appropriate when the "court lacks jurisdiction of the subject matter." When presented with a motion pursuant to MCR 2.116(C)(4), the Tribunal must consider any and all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties.[5] In addition, the evidence offered in support of or in opposition to a party's motion will "only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion."[6] A motion under MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust its administrative remedies.[7]

MCR 2.116(C)(7)

Under MCR 2.116(C)(7), the claim is barred because of "release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of action."

---

[4] See TTR 215.
[5] *Id.*
[6] MCR 2.116(G)(6).
[7] See *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43; 620 NW2d 546 (2000).

In *RDM Holdings, LTD v Continental Plastics Co*,[8] the Michigan Court of Appeals addressed a motion for summary disposition filed under MCR 2.116(C)(7). In *RDM,* the court stated:

> [T]his Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.][9]

MCR 2.116(C)(10)

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[10] In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.[11]

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party.[12] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[13] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[14] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[15] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[16]

---

[8] *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678; 762 NW2d 529 (2008)
[9] *Supra* at 687.
[10] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).
[11] See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[12] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[13] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[14] *Id.*
[15] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[16] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

CONCLUSIONS OF LAW

The Tribunal has carefully considered Petitioner's Motion under MCR 2.116 (C)(10) and Respondent's Motion under MCR 2.116(C)(4) and (C)(7) and finds that granting Respondent's Motion under MCR 2.116(C)(4) and denying Petitioner's Motion is warranted.

As discussed above, in its Final Opinion and Judgment issued June 20, 2014, the Tribunal determined that Petitioner's property did not specially benefit from the sewer project and held that the special assessment imposed by Respondent on the subject property should be reduced from $88,000 to $0. In that Final Opinion and Judgment, the Tribunal also held that:

a. the increased cost did not affect the proportionality of the assessment to the subject property;
b. the REU's were erroneously set at 11, rather than the proper 9 REU's; and
c. the connection fee and O&M expenses are not within the jurisdiction of the Tribunal as they are fees not established under the property tax laws and were, therefore, outside of the jurisdiction of the Tribunal.

On March 4, 2014, Respondent adopted Resolution S/2013-1, which established a Benefit Fee to be paid by a property owner "before a premises can be connected to the System to pay for the sewer mains, treatment facilities, and other portions of the System . . . [t]his fee may be offset or reduced, as the case may be, by the amount of special assessment paid, if any." The amount of the benefit charge was determined to be $8,000 per REU, which was identical to the amount of the special assessment.[17]

The first issue is whether res judicata or collateral estoppel precludes Petitioner from filing this appeal or warrants judgment in favor of Petitioner. The Courts have held:

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.[18]

In this case, the only issue is whether the matter "was or could have been resolved in the first [case]." Here, the hearing in the prior action was held on April 28, 2014. Although the hearing occurred after the adoption of the resolution, the Tribunal finds that valuation disclosures were filed far before this and that Petitioner did not have notice of the specific fee to be assessed to it until the September 2015 letter. Contrary to Respondent's contentions, the Tribunal finds that the September 2015 letter was, in fact, Petitioner's first actual notice of the fee to be assessed to it. As a result, the matter regarding the fee actually assessed to Petitioner in September 2015 could not have been litigated in the April 28, 2014 hearing. In addition, the Tribunal has

---

[17] Pursuant to the Tribunal Final Opinion and Judgment in MTT Docket No. 434500, Respondent reduced the number of REU's attributable to the subject property for purposes of imposition of the Benefit Fee to 9.
[18] *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (internal citations omitted).

reviewed the prior record (MTT Docket No. 434500) and finds that the "Benefit Fee" as indicated in Respondent's Ordinance was not actually litigated or discussed. There was mention of a "connection fee" in association with the Operation and Maintenance fees; however, the Tribunal finds that the mere listing of "connection fee" was superfluous as there was no specific testimony or evidence regarding the March 4, 2014 Resolution or Benefit Fee.[19]

Petitioner also contends that the doctrine of collateral estoppel should be applied to render a determination in its favor given the Tribunal's prior ruling that the assessment does not benefit the subject property. The Courts have held that:

> Generally, for collateral estoppel to apply three elements must be satisfied: (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment;" (2) "the same parties must have had a full [and fair] opportunity to litigate the issue;"[2] and (3) "there must be mutuality of estoppel."[20]

Like the issue of res judicata, the Tribunal finds that the issue of the Benefit Fee was not actually litigated in the prior case because it was not assessed to Petitioner until September 2015, and the Benefit Fee at issue here was not the subject of that litigation. As such, the Tribunal finds that the parties did not have a full and fair opportunity to litigate whether the Benefit Fee imposed under Respondent's ordinance was a fee or improper tax, and as such, the doctrine of collateral estoppel does not apply.

Finally, the Tribunal finds that it must address whether the Benefit Fee is within its jurisdiction. The Tribunal's jurisdiction includes: "A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state."[21] Thus, it must be determined whether the Benefit Fee is merely a fee outside of the Tribunal's jurisdiction. As briefed by the parties, the Supreme Court in *Bolt* held that:

> 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.[22]

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.[23] The parties also have cited to *Graham*

---

[19] The Tribunal finds that its reference to a "connection fee" appears to have been in error. However, the timeframe for a Motion for Reconsideration to correct this apparent error has long passed. Nevertheless, the listing of "connection fee" does not relate to the specific Benefit Fee at issue in this case.
[20] *Monat v State Farm Ins Co*, 469 Mich 679, 682–84; 677 NW2d 843 (2004) (quoting *Storey v Meijer, Inc,* 431 Mich 368, 373 n. 3; 429 NW2d 169 (1988)).
[21] MCL 205.731(a).
[22] *Id.* at 161, citing *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 210; 591 NW2d 52 (1998).
[23] *Bolt,* 459 Mich at 161-162.

v Kochville Twp,[24] in which the Court held that 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."[25]

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

As discussed above, the fee here is a Benefit Fee which was assessed to Petitioner in September 2015. The fee was established by Respondent's adoption of Resolution S/2013-1, and indicates that it must be paid prior to connection to the system and that the fee "may be offset or reduced, as the case may be, by the amount of special assessment paid, if any." Overall, the Tribunal finds that the issue at hand mirrors the facts of the *Graham* case. In *Graham*, the taxpayer successfully appealed a special assessment levy after which the taxing authority established a "tap-in" fee to be paid by taxpayers that had not paid the special assessment. The fee was to cover the "cost of construction, engineering, testing, and administration costs of the system."[26] Like the Court in *Graham*, the Tribunal finds that the fee established here does serve a regulatory purpose. The charges are to fund the sanitary sewer project, including the cost to connect the subject property to the system. A sanitary sewer project does, in fact, serve a regulatory purpose as it is to regulate public health, safety, and welfare under MCL 333.12752.[27] Moreover, the Court in *Graham*, clearly held that a fee can raise revenue so long as "it is in support of the underlying regulatory purpose."[28] Here, the Benefit Fee is a connection fee which must be paid in order for Petitioner to connect to the system. It is not designed to benefit the public as a whole, like the fee in *Graham*, and the charge furthers the regulatory purpose. Therefore, the Tribunal finds that the fee is not merely for a revenue raising purpose.

With regard to the second factor, the Tribunal finds that Petitioner has not demonstrated that the benefits conferred from the Benefit Fee do not bear a reasonable relationship to value of the service. The *Graham* Court held that is presumed "'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."[29] Thus, the Tribunal presumes that the Benefit Fee is reasonable as Petitioner has failed to demonstrate otherwise. Moreover, the determination here is different than the determination in the prior case. Specifically, "[a] special assessment, such as the one appealed to the Tax Tribunal here, must have a direct benefit on the property assessed, but is unrelated to actual use of the goods or services provided, while a

---

[24] *Graham, supra.*
[25] *Id.* at 150 (citations omitted).
[26] *Graham*, 236 Mich App at 145.
[27] See also *Wheeler v Shelby Twp*, 265 Mich App 657, 664; 697 NW2d 180 (2005).
[28] *Graham*, 236 Mich App at 151.
[29] *Graham*, 236 Mich App at 154-55, quoting *Vernor v Secretary of State*, 179 Mich 157, 168; 146 NW 338 (1914).

fee is related to the cost of the actual goods or services provided."[30] Thus, the prior determination that the special assessment did not provide a proportional increase to the value of the subject property is irrelevant. Given the above, the Tribunal finds the second factor indicates that the charge is a fee and not a tax.

The final factor is whether the charges are voluntary. Petitioner contends that this factor is not met, and as such, the case is distinguishable from *Graham* and should be determined to be a special assessment in disguise. While the charges in this case are not voluntary, the Courts have repeatedly held that factors are not all required to be met individually and that they must be weighed. Specifically, the Court in *Graham* held that the factors are considered "in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee."[31] "[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."[32] 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, in weighing the factors, the third factor alone shall not render the charges a tax or special assessment. The Tribunal finds that Petitioner failed to fully distinguish this case from *Graham* and primarily relies upon an unpublished case. The Tribunal finds that, in addition to being unpublished, the decision in *In re Petition for Foreclosure of Certain Parcels of Property*, is conclusory regarding the factors and does not provide sufficient guidance for the Tribunal to rely upon. Overall, the Tribunal finds that *Graham*, a published decision, is instructive in this case and that the Benefit Fee is a fee and not a tax or extension of the special assessment.[33] As such, the Benefit Fee is not established under the property tax laws and is not within the Tribunal's jurisdiction.

Given the above, the Tribunal finds that Petitioner's Motion for Summary Disposition is denied and that Respondent's Motion for Summary Disposition under MCR 2.116(C)(4) is granted.

JUDGMENT

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

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

GRANTED.

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

---

[30] *Graham*, 236 Mich App at 154.
[31] *Id.* at 151.
[32] *Wheeler*, 265 Mich App at 666-67, citing *Bolt*, 459 Mich at 167 n. 16, and *Westlake Transportation v Public Service Com'n*, 255 Mich App 589, 616; 662 NW2d 784 (2003).
[33] See *Wheeler*, 265 Mich App at 667.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[34] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[35] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[36] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[37]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[38] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[39] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[40]

By _____

Entered: DEC 08 2016
krb

[34] See TTR 261 and 257.
[35] See TTR 217 and 267.
[36] See TTR 261 and 225.
[37] See TTR 261 and 257.
[38] See MCL 205.753 and MCR 7.204.
[39] See TTR 213.
[40] See TTR 217 and 267.