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

GERALD A. VAN HASSEL, a/k/a
DALTON ENTERPRISES,
Petitioner,

v

MTT Docket No. 324160

DALTON TOWNSHIP,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

**OPINION AND JUDGMENT**

This case involves the special assessment of a parcel of real property located in Dalton Township, County of Muskegon. J. Scott Timmer, of the firm of Miller, Johnson represented Petitioner. Joshua Wease of the firm Wease Halloran, PLC, represented Respondent. The hearing was held on February 9 and 10, 2009.

This is a Special Assessment Appeal (SA) for sanitary sewer levied by the Township of Dalton. The parties, in a Joint Stipulation of Facts filed in this matter, have stipulated as follows:

Petitioner owns real property in Dalton Township identified as parcel # 61-07-600-000-0012-00 ("property") and having the address of 3345 Whitehall Road, Muskegon, MI 49445. Parcel No. 61-07-600-000-0012-00 was assessed 10 Residential Equivalency Units ("REUs") at a cost of $7,500 per REU, for a total of $75,000. The property was also assessed a connection fee of $500 per REU for a total of $5,000.

Petitioner requests the Tribunal to invalidate the SA indicating that sewer assessment amounts are not reasonably proportionate to the benefit to Petitioner's property. Petitioner further contends the assessment violates the Headlee Amendment and requests the Tribunal invalidate the SA on that basis. Petitioner also claims that Respondent did not follow the statutory requirements for the special assessment.

Respondent requests the Tribunal to affirm the SA. At the conclusion of Petitioner's proofs, pursuant to MCL 2.504(B)(2), Respondent moved for dismissal because Petitioner had not met his burden of proof. The Tribunal, pursuant to the above-referenced rule, denied the motion (declined to render judgment until the close of the evidence) and Respondent proceeded to close its proofs.

Prior to the commencement of the hearing, both parties filed briefs regarding Petitioner's assertion that imposition of the Special Assessment in question on Petitioner's property violated the Headlee Amendment and the applicability of the Headlee Amendment to this matter in particular and special assessments in general.

The Headlee Amendment, Const 1963, art 9, §31 states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above the rate authorized by law or charter when this section is ratified, without the approval of a majority of qualified electors of the unit of Local Government voting thereon. If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on the new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property …increases by a larger percentage than the increase in the General Price Level

> from the previous year, the maximum authorized rate applied thereto in each unit of Local Government shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the General Price Level, as could have been collected at the existing authorized rate on the prior assessed value.
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. Const 1963, art 9 § 31.

Special Assessments are not taxes. *Kadzban v Grandville*, 442 Mich 495, 500; 502 NE2d 299 (1993) citing *Knott v City of Flint*, 363 Mich 483, 497; 109 NW2d908 (1961) and, as a result, the Headlee Amendment does not apply as it applies solely to tax levies.

The Michigan Supreme Court has identified the characteristics of "special assessments." In *Blake v Metropolitan Chain Stores*, 247 Mich 73,77; 225 NW 587 (1929), the court observed that "[t]he differences between a special assessment and a tax are that (1) a special assessment can be levied only on land; (2) a special assessment cannot . . . be made a personal liability of the person assessed; (3) a special assessment is based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality." See also *Niles Twp v Berrien County Bd of Comm's*, 261 Mich App 308, 323-324 (2004).

Petitioner, in an attempt to apply Headlee to special assessments, relies on the Michigan Supreme Court's decision in *Bolt v City of Lansing*, 459 Mich 152 (1998), where it struck down a user fee imposed by the City of Lansing on the basis that it was a tax and not a true user fee. Petitioner's reliance on *Bolt* is misplaced as the user fee imposed in *Bolt* was found to be primarily for public rather than private purposes and, as a result, was a tax.

In addition, the Michigan Attorney General concluded that ad valorem special assessments were not subject to the provisions of the Headlee Amendment (OAG 1979-80, No 5562). This conclusion was based on the fact that "[a] charge imposed only on property owners benefitted has been held to be a special assessment and not a tax." The opinion cited *Blake v Metropolitan Chain Stores*, 247 Mich 73, 77 (1929), as authority that a special assessment is not a tax.

The Tribunal concludes as a matter of law that Petitioner's contention that the special assessment in question violates the Headlee Amendment is without merit.

In support of Petitioner's position that the amount of Petitioner's sewer special assessment is not reasonably proportionate to the benefit to Petitioner's properties, Petitioner presented three primary witnesses: Cindy Larsen of the Muskegon Chamber of Commerce, Randy Klingel and Gerald Van Hassel.

Ms. Larsen testified that as head of the Muskegon Chamber of Commerce for the last ten years she became aware of the Dalton sewer project in early 2006 and that Dalton Township is economically disadvantaged. She had begun to receive calls from some of her members that the proposed sewer and its costs were causing problems, together with a general concern that the cost of the project would cause businesses to go out of business, and used as an example Harvest Hall, which was the predecessor to Petitioner.

Randy Klingel, a licensed builder and realtor/broker, testified that he was familiar with the sewer assessment and felt that the sewer line that was installed was far in excess of the requirements for

the properties subject to the special assessment and felt that a portion of the cost of the main line portion should have been allocated to future users added to the sewer system.

Gerald Van Hassel testified that he is the owner of Dalton Enterprises. He stated that the subject property consisted of a 10-unit apartment building that he had owned since 1982, that there is a well-functioning septic system on the subject property, and the economic conditions in the area are such that he is unable to raise rents to offset the cost of the assessment. Further, Mr. Van Hassel stated that the individual units do not have washers or dishwashers partly due to the small size of the units and also because the building has one washer in the laundry room. He indicated that the installation of the sewer did not increase the value of the property in his mind.

Respondent's Witnesses:

Respondent called six witnesses: Terry Broemer, Thomas Traciak, John Warner, Mary Ellen Sherwood, Stephanie Barrett, and Brian P. Beaty, MAI.

Terry Broemer is a licensed professional engineer. He testified that he was responsible for the design and engineering of the subject sewers and the connection into the existing county interceptor sewers. The sewer was designed in conformance with the county master plan that considered existing population and zoning. He indicated that in planning for a project of this nature he was to determine how much sewage was going to be generated. It is generally accepted in the industry to plan for future expansion together with increased use. Part of his function on this project was to estimate project cost. In estimating project cost he considered the cost of pipe, depth at which that pipe needed to be placed, amount of roadway restoration cost,

presence of ground water, and size of pipe to be installed. He indicated that it was generally accepted practice to plan for the future and it is his understanding that the policy of the Department of Environmental Quality is to include for expansion because in the long run it is cheaper to do so.

Thomas Traciak, who was employed by the township as its financial advisor for this project and the bond issue for this project, testified that he has been involved in 175 to 200 special assessment projects, with about half involving sewers.

He explained the function of a financial advisor is to advise what enabling act should be utilized for the project, what form the bonds were going to be and proper sizing for the bonds. He stated that a number of financing alternatives were available, but for new projects (sewers) with no history, special assessment bonds are, in his opinion, preferable and, further, utilizing a conduit issuer such as the County Public Works Department operating under P.A. 1957, No 185 (MCL 123.731 et seq.), could result in lower interest rates and costs of issuance. He stated that assessments can be calculated in one of several ways; based on front footage, acreage, residential equivalency units ("REUs") and with sewers, commonly accepted method of allocation of project costs is by REUs with the goal to pay for the costs of the system (bonds) by the payment of the special assessment tap-in and future connection fees, which would be paid in the event that a property not subject to the special assessment would connect in ("buy in") to the system and that the revenue to be generated by this method did not exceed the cost of the project. Although he recommended the utilization of REUs as the method to determine the amount of the individual special assessments, he did not formulate or advise the use of a particular REU

method as there are 20 to 30 different REU tables in existence that a governmental unit could utilize.

John Warner, who is employed by the County of Muskegon as Deputy Director of the Department of Public Works, testified that he is a Civil Engineer and licensed professional engineer and that the county was asked to manage the Dalton Township Sewer Project and the project was formed under P.A. 1957, No. 185 (MCL123.731 et seq.). See R-3 (Resolution Approving DPW Contract dated September 12, 2005 by Dalton Township Board) and R-6 (DPW Contract dated October 1, 2005 between the County of Muskegon through its Board of Public Works, the Charter Township of Muskegon, the Township of Egelston and the **Township of Dalton**) (emphasis added). On September 27, 2005, the Board of Commissioners for Muskegon County by resolution authorized Muskegon County Wastewater Management System-Number One -Charter Township of Muskegon, Township of Egelston and Township of Dalton, Bonds 2006-(General Obligation Limited Tax). (R-4)

Warner stated that under this arrangement the township makes payment to the County Department of Public Works from revenues received from the special assessment and tap-ins in an amount necessary to satisfy its obligations under its contract with the Department of Public Works. The local units own the system and have access to the county interceptor.

Mary Ellen Sherwood, the township clerk, testified regarding her role as township clerk and to the procedures she followed in complying with notice requirements to establish the special assessment district. She stated that the May 8, 2006 meeting of the township board (the meeting

at which the board indicated its intent to create a special assessment district, the estimated cost thereof, and directed the Supervisor and Assessing Officer to make a special assessment roll) (R-7) was a regular meeting of the board. Since it was a regular meeting, she had published notice of all 2006 regular meetings at the beginning of the year by posting at the township hall and publishing in the Muskegon Chronicle, and for the May 30th meeting, by publishing twice and making two mailings to all property owners in the special assessment district by regular mail, although only one was required, and pursuant to Act 185, confirmed the special assessment roll at that meeting. (R13).

Stephanie Barrett, the township zoning administrator and public works clerk since 2003, explained that she is responsible for special land use and new construction permits and during the relevant period in question acted as deputy supervisor and was involved in assigning REUs to property within the special assessment district. She utilized an REU table that she obtained from Muskegon Township (P56). She explained that when a property was being used for two or more purposes she would look to the primary use of a property as set forth in the assessing records or, in the event that a special use permit had been approved, she would look to the special use. She indicated that the REU schedule was not intended to be all inclusive. Further, once the assessment roll was approved and REUs established, the REUs and inferentially the special assessment amount would not change. By way of example, the Hodges Hall property, at the time that REUs were allocated, had a special use permit as a banquet hall, whereas subsequently the property was sold to be used as a church, which has a lower REU unit value than does a banquet hall.

She acknowledged on cross-examination that subsequent to certification of the roll on May 30, 2006, as a result of the county checking various properties for size, use, etc., that certain changes were suggested in the REU allocation (P53-p's 1-6), but no reallocation occurred since the roll had already been confirmed on May 30, 2006. (R-13)

The witness also explained that certain changes in use of property require both a special use permit from the township and in some instances, such as a restaurant, either connection with the municipal sewer system or construction of something more than a septic system and that the ability of a property to tap into the project sewer will expand the potential uses of a property.

Brian P. Beaty, MAI, after being qualified as an expert, testified in support of an "Appraisal Consulting Report" (R-1) that he had prepared dated August 15, 2007 with an effective date of December 31, 2006, concluding that "the subject property's special assessment is proportional given the typical enhancement resulting from the installation of a public sewer system viewed in the market, as supported by our research and analysis." He explained the scope of his assignment to include the collection of current tax, assessment, building, and zoning data; discussions with local assessors regarding their experience with the impact of a municipal sewer on property; research of commercial and industrial land sales in nearby municipalities which, like Dalton Township, have a partial municipal sewer system. Those municipalities included Roosevelt Park, Fruitport, Norton Shores, Kent and Sparta in Muskegon and Kent counties. The data was all obtained from assessment records. The land sales with municipal services were compared to the land sales without municipal services to determine a typical benefit enhancement attributable to the municipal services; the enhancement was analyzed to extract the

effect of municipal sewer only, as all but one of the analyzed sales with municipal sewer contained both municipal sewer and water; and comparison of the subject property special assessment to the typical enhancement.

Mr. Beaty studied 28 commercial and seven industrial sales. He indicated that his analysis of sales of commercial land with municipal services ranged from $0.71 to $22.95 per square foot and sales of commercial land without municipal services ranged from $0.62 to $2.97 per square foot. In his comparison of average price per square foot of each of the sub-categories, he utilized an enhancement of 387% with the median rates showing an enhancement of 363%. He also presented an analysis of price on a front-foot rather than a per square foot basis with an average and median price per front-foot of 142% and 134%, respectively.

Because his assignment was to determine what enhancement, if any, the subject property received due to the installation of sewer service only, and since many of the properties he analyzed had both water and sewer, the cost to install each service was considered. In addition, he contacted developers to determine the importance of each service when marketing their developments. He concluded based on his investigation that he attributed 75% of the total enhancement to the presence of the sewer system, which was translated to an enhancement attributable to the presence of a sewer system ranging from 100% to 290% of land value.

He explained that his analysis of enhancement of land value only, rather than both land and improvements, was the accepted methodology to employ for this type of assignment.

Mr. Beaty further reviewed records of the Dalton Township Assessor, which reported a true cash value of the subject property (land only) of $33,800 as of December 31, 2006, and the special assessment balance of $53,775.

He further reviewed records of the Dalton Township Assessor, which reported a true cash value of the subject property (land only) of $50,600 as of December 31, 2006, and the special assessment balance of $75,000. Petitioner's counsel, on cross-examination, questioned the witness's conclusion that the property was enhanced by the sewer project, using the first pages of the property record card (P-5), which showed no increase in value between 2006 and 2007.

## APPLICABLE LAW

Municipal decisions regarding special assessments are presumed to be valid and generally should be upheld absent a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements. *Dixon Road Group v City of Novi*, 426 Mich 390, 402-403; 395 NW2d 211 (1986). 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. *Kadzban v City of Grandville*, 442 Mich 495, 505; NW2d 299 (1993).

The Tax Tribunal must conduct a de novo proceeding at which Petitioner bears the burden of proving the special assessments are invalid. MCL 205.735(1); MSA 7.650(35); *Kadzban, supra; Dixon, supra*. If a petitioner fails to meet his burden of proving the special assessments invalid,

the Tax Tribunal may not make a de novo determination of benefit and substitute its judgment for that of the municipality. *Kadzban, supra*.

In *Dixon, supra*, the court stated 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 costs incurred.

The court further stated that:

> While we certainly do not believe that we should require a rigid dollar for dollar balance between the amount of the special assessment and the amount of the benefit, a failure by this Court to require a reasonable relationship between the two would be akin to the taking of property without due process of law. Such a result would defy reason and justice. Therefore, we conclude that while decisions made by municipalities with respect to special assessments generally should be upheld, this Court will intervene where there is a substantial or unreasonable disproportionality between the amount assessed and the value that accrues to the land as a result of the improvements. In this case, the cost of the improvements is approximately 2.6 times the increase in the value of the properties and for that reason we hold the special assessment invalid. *Id*. at 402-403.

MCL 123.754 provides in part: "After the confirmation the special assessment roll and all assessments thereon shall be final and conclusive unless attacked in a court of competent jurisdiction 30 days after confirmation."

The advantages and disadvantages of the different permitted approaches in construction of sanitary sewer systems are for the governing body …to weigh. *Gaut v City of Southfield*, 388 Mich 189; 200 NW2d 76 (1972).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Tribunal, having reviewed and considered testimony of the witnesses and exhibits, which the Tribunal finds material and credible, concludes that the Whitehall Road and River Road

Special Assessment District was lawfully created pursuant to Public Act 185 of 1957 (MCL 123.731 et seq.) and the special assessment roll (which included the subject parcels) was approved on May 30, 2006, at a Special Meeting of the Township Board.

The method of allocating the special assessment between the various properties comprising the special assessment district was by assigning Residential Equivalency Units (REUs) to each parcel and was well within the authority of the governmental unit.

There are several different tables generally accepted to determine REUs and such tables are not all inclusive and often need to be adjusted to a particular property or use. Respondent utilized an REU table obtained from Muskegon Township.

The REUs were assigned based on permissible use of the parcel or parcels at the time the roll was confirmed. The REUs assigned to the subject were based on its use as a 10-unit apartment building.

The subject property was being used as a 10-unit apartment building as of May 30, 2006.

Petitioner presented no evidence whatsoever to rebut the presumption that the special assessment in question is valid. Petitioner's only evidence consisted of his contention that the sewer in question had excess capacity, the assessments could have been less if the area which comprised the special assessment district was larger, that the project should have been financed by a millage

or user fees, and that the REU allocation was incorrect. All of the contentions, even if proven, were within the discretion of the governmental unit.

The lay opinion of the property owner that the property was worth no more after the installation of the sewer is not sufficient to overcome the presumption of proportionality, especially when coupled with the opinion expressed by Respondent's expert, Brian Beaty, that the subject property's special assessment is proportional given the typical enhancement resulting from the installation of a public sewer system.

The Tribunal finds Petitioner's attempted utilization of the first page of the various property record cards (P-5) to attempt to establish no increase in the value of the property as a result of the installation of the sewer is not credible, because only the first page of a multiple-page property record card was introduced and the record card (see center of page under public improvements) indicates that no sewer was present. Further, the Tribunal finds that for the purpose of impeaching Respondent's expert, the exhibit is given no weight as it is dated subsequent (11/25/08) to the date and effective date of the expert's analysis.

Upon review of P.A. 1957 No. 185 (MCL 123.731), the Tribunal finds no merit in Petitioner's argument that the statute requires the actual contract to construct the improvement be between the Board of Public Works and the Contractor. Assuming that the statute does require such a contractual relationship, the remedy for such violation would be for a party in interest to challenge the contract in Circuit Court. Even if the contract were successfully challenged, such

successful challenge would not affect the validity of the special assessment district and this special assessment in particular.

Petitioner has failed to present credible evidence to refute the presumption that the special assessment is valid; the Tribunal has no basis to make a de novo determination of benefit and to substitute its judgment for the municipality.

**JUDGMENT**

IT IS ORDERED that the special assessment subject to this appeal is AFFIRMED.

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

MICHIGAN TAX TRIBUNAL

Entered: February 26, 2009 By: Kimbal R. Smith III, Tribunal Judge