STATE OF MICHIGAN

COURT OF APPEALS

CHARLES H. CARMAN, Petitioner-Appellant,	UNPUBLISHED July 31, 2012
v VILLAGE OF NORTHPORT, Respondent-Appellee.	No. 297059 Tax Tribunal LC No. 00-328949

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

In 2006, respondent approved the implementation of a special assessment district in the Village of Northport to develop a sewage system. Respondent imposed a special assessment of $10,100 against petitioner's property, which is located within the special assessment district. Petitioner brought this action in the Tax Tribunal challenging the inclusion of his property in the special assessment district, and also challenging the special assessment, including a $5,800 connection fee that was imposed when petitioner connected to the sewer system. The Tax Tribunal upheld the special assessment and ruled that the $5,800 charge was a valid fee that was not part of the special assessment. Petitioner appeals as of right. We affirm.

I. STANDARD OF REVIEW

The standard by which this Court reviews decisions of the Tax Tribunal is summarized in *Briggs Tax Serv, LLC v Detroit Pub Sch,* 485 Mich 69, 75; 780 NW2d 753 (2010), as follows:

> The standard of review of Tax Tribunal cases in multifaceted. If fraud is not claimed, this Court reviews the Tax Tribunal's decision for misapplication of the law or adoption of a wrong principle. We deem the Tax Tribunal's factual findings conclusive if they are supported by "competent, material, and substantial evidence on the whole record." But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo. [Footnotes omitted.]

This appeal also involved the question whether the special assessment includes the $5,800 cost to connect to the sewer system. Whether the $5,800 charge is a "fee" or part of the special assessment involves a question of law, which this Court reviews de novo. *Bolt v City of Lansing,* 459 Mich 152, 158; 587 NW2d 264 (1998); *Graham v Kochville Twp,* 236 Mich App 141, 150; 599 NW2d 793 (1999).

II. FEE OR SPECIAL ASSESSMENT

Petitioner first argues that the amount of the special assessment is actually $15,900 because, in addition to the assessed amount of $10,100, he was also required to pay a connection fee of $5,800 to connect to the sewer system. The tribunal did not err in ruling that the $5,800 charge was a valid fee that was not part of the special assessment.

In *Bolt*, 459 Mich at 161-162, the Supreme Court discussed the difference between a "fee" and a "tax":

> Determining whether the storm water service charge is properly characterized as a fee or a tax involves consideration of several factors. 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." *Saginaw Co, supra* at 210; *Vernor v Secretary of State,* 179 Mich 157, 164, 167-169; 146 NW 338 (1914). A "tax," on the other hand, is designed to raise revenue. *Bray v Dep't of State,* 418 Mich 149, 162; 341 NW2d 92 (1983).
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> "Exactions which are imposed primarily for public rather than private purposes are taxes. Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed." [Citations omitted.]
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> In resolving this issue, this Court has articulated three primary criteria to be considered when distinguishing between a fee and a tax. The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose. *Merrelli v St Clair Shores,* 355 Mich 575, 583-584; 96 NW2d 144 (1959), quoting *Vernor, supra* at 167-170. A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service. *Id.; Bray, supra* at 160. As was summarized in *Vernor,*
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> "To be sustained [as a regulatory fee], the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies. [*Id.* at 167.]"
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> In *Ripperger,* this Court articulated a third criterion: voluntariness. Quoting from *Jones v Detroit Water Comm'rs,* 34 Mich 273, 275 (1876), the *Ripperger* Court stated:
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> "'The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. No one can be compelled to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an

> indebtedness, like that enforced on mechanics' contracts, or against ships and vessels. The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them.'
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> "We believe the same reasoning that was applied to water charges in the above-mentioned case should be applied to sewage charges in the present case. [*Id.* at 686.]"
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> Thus, one of the distinguishing factors in *Ripperger* was that the property owners were able to refuse or limit their use of the commodity or service.[12]
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> [12] The *Ripperger* Court also noted that the amount paid reflected the price of the service received, thus reiterating the second criterion that the fee must be proportionate to the cost of the service. Accordingly, rather than standing for the proposition that sewage charges are always user fees, as the Court of Appeals majority contended, 221 Mich App at 86-87, *Ripperger* actually articulated relevant criteria for determining whether a charge is a fee or a tax.
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In *Graham,* 236 Mich App at 150, this Court applied this test from *Bolt* to determine whether a charge was a special assessment or a fee. This Court stated:

> "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.'" [*Bolt*] at 161 (citation omitted). 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 Grandville,* 442 Mich 495, 500; 502 NW2d 299 (1993)."

In this case, the tribunal did not err in ruling that the first two criteria for a fee were met. First, the $5,800 payment is based on a regulatory purpose, that being the implementation of the sewer system and connecting it to homes in the special assessment district. The fact that the money is being used to cover the costs of the sewer system does not mean that it must be characterized as a special assessment. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham,* 236 Mich App at 151. Only those property owners who connect to the new sewer system are being asked to pay that fee. The sewer services provided confer a specific benefit only on those property owners who connect to the sewer system, even though the system otherwise exists to benefit the community as a whole and to protect surrounding bodies of water.

Second, the fee appears to be consistent with the actual cost of connecting to the sewer system. "[R]evenue derived from regulation, i.e., a fee, must be proportionate to the cost of the regulation, although we presume that the amount of the fee is reasonable unless the contrary is established." *Graham,* 236 Mich App at 151. "Similar to a tax, a special assessment is also an

exaction to raise revenue, although it is imposed on particular real property for a local purpose or improvement of direct benefit to that property." *Id*. at 151-152.

Petitioner has not shown that the cost is out of line for the cost of connecting to the system. Rather, he asserts that the $5,800 amount is being paid toward the sewage collection and treatment system. While there was testimony that the connection charges paid for the wastewater treatment facility, that is insufficient to overcome the presumption that the amount charged as a fee is reasonably related to the costs of the regulation. *Graham,* 236 Mich App at 154. This case is similar to *Graham*, 236 Mich App at 152-153, which involved fees or special assessments for the extension of a water line to certain property owners. Without the extension of the water system, the property owners would not have access to municipal water. Therefore, the charges were deemed fees because they were primarily regulatory in nature, although the revenue that was raised also helped pay for the construction of the water main extension and the extended water lines only benefitted certain citizens.

The more troublesome aspect for respondent is whether the fee is a voluntary payment. Petitioner argues that respondent's ordinance makes it mandatory for property owners to connect to the sewer system and, therefore, they are required to pay the $5,800 fee. This appears to be accurate because property owners are only required to pay the $5,800 charge if they connect their property to the sewer system, but it also appears that property owners who intend to occupy their land must connect to the sewer system, in lieu of relying on septic systems. The only way a property owner can avoid paying the $5,800 fee is by not developing the land. In that situation, the owner must still pay the special assessment of $10,100, but need not pay the $5,800.

While it cannot be said that the $5,800 payment is entirely voluntary, this Court explained in *Graham,* 236 Mich App at 151, that when applying the above three criteria, "the Supreme Court cautioned that these criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee." On this basis, we do not believe that the Tax Tribunal erred in treating the $5,800 charge as a "fee" when its overall purpose is primarily regulatory.

III. BENEFIT TO PETITIONER'S PROPERTY

Petitioner next argues that the Tax Tribunal erred in finding that the special assessment was valid because the sewer project conferred a benefit on his property that was different from the benefit to the community as a whole. We disagree.

A special assessment imposed by a municipality is presumed to be valid. *Kadzban,* 442 Mich at 502. "A special assessment will be deemed valid if it meets two requirements: (1) the improvement subject to the special assessment must confer a benefit on the assessed property and not just the community as a whole and (2) the amount of the special assessment must be reasonably proportionate to the benefit derived from the improvement." *Michigan's Adventure, Inc v Dalton Twp,* 290 Mich App 328, 335; 802 NW2d 353 (2010). Referring to the Supreme Court's decision in *Kadzban*, this Court in *NH Motel Enterprises, Inc v City of Troy (On Remand),* 205 Mich App 459, 462-463; 518 NW2d 505 (1994), explained:

> The [*Kadzban*] Court stated that a special assessment may 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 that accrues to the land as a result of the improvements. *Id*. [at 502], citing *Dixon Rd Group v Novi,* 426 Mich 390, 403; 395 NW2d 211 (1986). To rebut the presumption that the special assessment is valid, a petitioner must present at a minimum credible evidence. *Kadzban* at 505. After a petitioner presents evidence effectively rebutting the presumption of validity, the burden of going forward shifts to the city, which, in order to sustain the assessments, must present evidence proving that the assessments are reasonably proportionate. *Id.*, n 5.

Initially, we disagree with petitioner's claim that the tribunal did not consider his argument that the sewer project added no actual value to his property and was instead primarily intended to preserve and benefit Grand Traverse Bay, and thus conferred a benefit on the entire community, not just those properties in the special assessment district. The tribunal's decision reflects that it was aware of petitioner's argument, but concluded that the sewer system added value to petitioner's property different from any benefit conferred on the community at large. Accordingly, petitioner is not entitled to relief on this basis.

A special assessment is a levy on property designed to defray the costs of local improvements that confer local and peculiar benefits upon property within a defined area. *Kadzban*, 442 Mich at 500. A special assessment cannot be imposed to defray the costs of local improvements that do not confer any special benefit upon the individual property owner beyond the benefit that is conferred on the community as a whole. *Id.* at 500-501. It is well settled that special assessments are presumed to be valid and that decisions of municipal officers to impose a special assessment should generally be upheld. *Id*. at 502. In general, special assessments are an appropriate means of funding the original construction of sanitary sewers. *Ahearn v Bloomfield Twp,* 235 Mich App 486, 495; 597 NW2d 858 (1999).

Petitioner has not shown that the only purpose of the sewer system was to benefit the community as a whole by cleaning up Grand Traverse Bay. Respondent's evidence demonstrated an increase in the values of properties located within the special assessment district. Petitioner accurately asserts that an ultimate purpose of all sewer systems is typically to improve the environment. Indeed, our Supreme Court recently held in *Dep't of Environmental Quality v Worth Twp,* ___ Mich ___; ___ NW2d ___ (Docket No. 141810, decided May 17, 2012), that a municipality can be held liable when raw sewage is discharged into state waters by private citizens living within that municipality, even if the municipality is not directly responsible for the discharge. Therefore, the proper discharge of sewage is clearly a matter of general public concern. However, this does not mean that the sewer project in this case did not confer any specific benefit on petitioner's property.

The tribunal found that the sewer system increased the value of petitioner's property from having access to the sewer system, both in terms of his use of his property and its market value. The tribunal's finding is supported by competent, material, and substantial evidence. This was sufficient to support the special assessment against petitioner's property because it showed that it had benefited in a way that was different from the community as a whole.

IV. APPRAISAL EVIDENCE

Petitioner next argues that the tribunal erred in accepting the testimony of respondent's appraiser, Glenn Gotshall, that the sewer system increased the value of petitioner's property by as much as $25,000, of which $15,000 was attributed to a 50 by 100 foot portion of petitioner's property that Gotshall believed could be sold as a separate lot.

Contrary to what petitioner asserts, it was not undisputed that there was no market in Northport for a vacant lot 50 by 100 feet in size. Gotshall testified that he believed there was a market for lots that size, but that there had not been any recent sales due to a lack of supply. Further, Gotshall did not testify that the $15,000 added value was attributable solely to petitioner's ability to sell off such a lot. Rather, he explained that a septic field on petitioner's property limited his ability to either sell a 50 by 100 foot portion or make other improvements on the existing property, but that the sewer system eliminated the need for the septic field, and thereby increased the utility of the property, including the option of selling a 50 x 100 foot portion. Gotshall stated that either having an extra large lot or being able to take out the large septic drain field to enable petitioner to make other improvements to the property site added approximately $15,000 in value to the property.

Petitioner also argues that Gotshall's appraisal methodology did not support the tribunal's conclusion that his property increased in value due to the installation of the sewer system, and that the tribunal erred by discrediting petitioner's appraisal evidence.

To determine if petitioner's property had benefited from the special assessment and that the special assessment was reasonably proportionate to the benefit derived from the improvement, "[a] key question is whether the market value of the property was increased as a result of the improvement." *Michigan's Adventure,* 290 Mich App at 335.

> 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. [*Id.* at 335, quoting *Ahearn,* 235 Mich App at 496.]

Respondent's appraiser, Gotshall, and petitioner's appraiser, Andrew Reed, used different methods to arrive at their results. Gotshall explained that he generally used sales of properties in Northport 22 months before sewers were installed and 22 months after they were installed to determine whether there had been an increase in the value of petitioner's property. He compared those properties to comparable ones that were sold both before and after the installation of the sewers, making adjustments for differences in the various properties and market conditions. Gotshall testified that he also spoke with recent purchasers of properties in the area and with real estate agents. He reviewed 12 purchases and the buyers had either paid the special assessment or knew they would have to pay it when they bought their properties. He spoke to eight of the purchasers and all but one were in favor of the sewer system and believed that it would benefit their properties over the long term. He concluded that property values increased once the sewer

project was approved and, therefore, the sewer project benefitted the properties in the special assessment district.

Conversely, Reed concluded that the sewer installation provided no benefit to petitioner's property. To arrive at values both before and after the sewer had been installed, Reed used matched sales of properties from other communities, Suttons Bay and Leland. He did not use sales in Northport because he believed there was too much uncertainty related to the sewer project, so he instead focused on other communities that had existing sewer systems. In comparable properties in those other communities, where the only difference was the availability of sewer service, he did not find an appreciable difference in their values. Reed thus concluded that there was no benefit to petitioner from the availability of sewer service. He actually found that buyers were willing to pay more for properties in Leland that did not have sewer service.

The tribunal found that Gotshall's appraisal was a reliable indicator of the value added to the properties where sewer service was recently made available. The tribunal rejected petitioner's appraisal because it failed to take into account the timing of the comparable sales and changes in market conditions. For instance, the two comparable sales from Suttons Bay that Reed used involved sales in August 2007 and October 2005. The tribunal found that Reed's appraisal did not take into account "[a] myriad of market conditions within the date of valuation and the comparable sales dates could influence the value of each comparable." The tribunal concluded that without making the appropriate adjustments for those conditions, petitioner's approach to valuing the properties failed to isolate the impact that the sewers actually had on the property values. For that reason, the tribunal found that Reed's opinion was not reliable. Therefore, petitioner did not meet his burden of proving, with reliable documentary evidence, that there was substantial disproportionality between the cost and the benefit of the sewer system on petitioner's property.

This Court must affirm the tribunal's factual findings where they are supported by competent, material, and substantial evidence on the whole record. *Briggs Tax Serv,* 485 Mich at 75. The record contains competent, material, and substantial evidence to support the tribunal's findings regarding the reliability and accuracy of the parties' competing appraisals. Accordingly, we must affirm the tribunal's decision.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Donald S. Owens