

STATE OF MICHIGAN
IN THE SUPREME COURT

HIGHLAND-HOWELL DEVELOPMENT
CO., LLC,

Appellant,

v

TOWNSHIP OF MARION,

Appellee.

Supreme Court
Docket No. 130698

Court of Appeals
Docket No. 262437

Michigan Tax Tribunal
No. 307906

**AMICUS CURIAE BRIEF OF
THE MICHIGAN TOWNSHIPS ASSOCIATION**

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TABLE OF CONTENTS

Index of Authorities.....	iii
Introduction	1
Issue 1 --- What was the specific “benefit” conferred on Highland’s property by the special assessment confirmed in 1996?.....	1
A. Case law shows the legal “benefit” conferred on property by a confirmed special assessment for a public improvement is the availability of the improvement to the property; not the particular construction plan for the improvement.....	1
B. The Public Improvements Act pervasively distinguishes between the benefit conferred by the “improvement” and the specific “plan” by which the improvement is made available to the benefited property. Appellant’s contrary statutory argument is completely without merit.	4
Issue 2 --- Was the specific benefit conferred on Highland’s property by the special assessment confirmed in 1996 reduced by the informal change in the improvement plan or by the township’s May 13, 2004 resolution?	7
Issue 3 --- Are the plan changes reviewable by the Michigan Tax Tribunal under MCL 205.731(a), either as informally approved, or as formally approved by the May 13, 2004 Township Board resolution?.....	8
A. Informal changes in the plans are not reviewable by the MTT under MCL 205.731(a) because they were not “final” decisions.....	8
B. The May 13, 2004 resolution ratifying changes to the construction plans, but making no change to the assessment roll or to the special assessment on Highland’s property, is not reviewable by the MTT under MTT 205.731(a) because it is not “relating to . . . special assessments”.	9
Issue 4 --- What remedy, if any, does Highland have if the change in the improvement plan after confirmation of the special assessment roll reduced the value that accrued to the subject property such that the benefit became unreasonably disproportionate to the amount assessed?	10
Concluding Comments	11

INDEX OF AUTHORITIES

MICHIGAN SUPREME COURT

<u>Blades v Genesee County Drain District No. 2</u> , 375 Mich 683 (1965)	3
<u>Kadzban v City of Grandville</u> , 442 Mich 495 (1993)	2

MICHIGAN COURT OF APPEALS

<u>Stybel Plumbing v City of Oak Park</u> , 40 Mich App 108 (1972)	2
--	---

MICHIGAN COMPILED LAWS

MCL 41.721	6
MCL 41.722	4, 5
MCL 41.723	6
MCL 41.724	6
MCL 41.725	8, 9
MCL 205.731	8, 9, 10, 12

INTRODUCTION

The Michigan Townships Association was honored to accept the Court's unsolicited invitation (June 30, 2006 Order) to file an amicus curiae brief on three issues to be addressed by the primary parties at oral argument on Appellant's application for leave to appeal. Upon granting the application for leave the Court's December 29, 2006 Order identifies four specific issues to be briefed by the parties. We are pleased to address these four issues on behalf of the over 1,200 township members of the Michigan Townships Association, including Appellee Marion Township.

ISSUE 1 --- WHAT WAS THE SPECIFIC "BENEFIT" CONFERRED ON HIGHLAND'S PROPERTY BY THE SPECIAL ASSESSMENT CONFIRMED IN 1996?

This issue was addressed to some extent in our initial brief dated October 9, 2006 with respect to the first issue the Court requested in its June 30, 2006 Order be addressed by the parties. However, we welcome this opportunity to now more directly shed some legal light on this issue, as it is the "linchpin" of Appellant's (Highland's) argument and critical to the proper adjudication of this case.

A. Case law shows the legal "benefit" conferred on property by a confirmed special assessment for a public improvement is the availability of the improvement to the property; not the particular construction plan for the improvement.

Highland's position in this case is predicated in its entirety on the premise that the specific benefit conferred on its property by the special assessment confirmed in 1996 was the specific "construction design that included a trunk line across the property", and "not merely the availability of, or access to, sanitary sewer service". See, for example, Appellant's Brief On Appeal, Page 23 (underlining added for emphasis).

Case law ignored by Highland shows the error of this underlying premise. The legal “benefit” conferred on property by special assessments for public utility improvements is precisely the availability of the improvement, even if the improvement is constructed in such a manner as to be abutting the benefited property, rather than running through the property.

For example in Stybel Plumbing, Inc. v City of Oak Park, 40 Mich App 108, 110 (1972) the Court of Appeals opined as follows in a special assessment case:

“It is settled in this state that the benefit of any given public project is measured by its available potential, not the immediate use to which it can be put.” (underlining added for emphasis).

The nature of the “benefit” supporting special assessments was recognized by this Court in the case referenced in the statement of the first issue in the December 29, 2006 Order: Kadzban v City of Grandville, 442 Mich 495 (1993). In that case the Court stated:

“Street and utility improvements are common bases for special assessments. In numerous instances, abutting property has been specially assessed the cost of paving a road or installing a sewer system. 442 Mich at 500-501 (underlining added for emphasis).

This pronouncement expresses the seemingly self-evident truth that property “abutting” a sewer system is benefited and thus subject to special assessment. This Court has thus explicitly recognized that a sewer system need not involve a particular construction design that includes a trunk line across the property to which the sewer is made available in order for that property to receive a “benefit”, as Highland continues to erroneously insist without any supporting authority.

A prior decision of this Court also directly acknowledges that the availability of an abutting sewer line constitutes a “benefit” to the adjacent property, even though

connecting laterals must be constructed to the line, at the property owner's expense, to carry sewage from the property to the sewer line. This point from Blades v Genesee County Drain District No. 2, 375 Mich 683 (1965) is best made in the Court's own words:

“It is true that here a sewer trunk line is to be installed to which plaintiffs will not have immediate access unless connecting laterals are constructed. However, the construction of the trunk line will make available for the benefit of plaintiffs' properties and others that which is not now in existence, namely, a line to which such laterals may be connected to carry sewage from their properties. Without its construction such benefit would not be available to these properties. To deny that this constitutes a benefit to plaintiffs' properties differs only in degree from saying that a sewer in the street running along plaintiff's properties would not benefit them because plaintiffs had not elected to make the necessary connections thereto. To those who might urge that, traditionally, on the typical American farm scene there is no need for indoor plumbing or a modern sewer system, defendants point out that the very accessibility of the indicated service, created by the trunk line, would make lands theretofore usable only as farm lands more desirable for development into platted, residential areas, and, thus, create an enhanced value of the lands. We cannot say as a matter of law that this is not so. 375 Mich at 688 (underlining added for emphasis).

The essence of Highland's argument confuses the practical benefit to Highland from a particular construction plan, with the legal “benefit” to the property from the “improvement” itself. Locating a sewer line through the subject property as originally proposed, rather than abutting the property pursuant to the revised plan, may well have been to the practical or financial benefit of Highland if it “reduced the amount of infrastructure Highland would have to construct”. Appellant's Brief on Appeal, page 26. However, such practical benefit to Highland is not determinative of the legal “benefit” to the property from the improvement. The above-discussed case law makes clear that

this legal “benefit” is precisely the availability of the sewer service to the subject property.

Highland completely ignores all of the above-discussed cases directly addressing the availability of or access to sewer service as the legal “benefit” conferred on property by the confirmed special assessment, and does not cite a single case directly supporting its contrary proposition.

B. The Public Improvements Act pervasively distinguishes between the benefit conferred by the “improvement” and the specific “plan” by which the improvement is made available to the benefited property. Appellant’s contrary statutory argument is completely without merit.

Highland attempts to infer some significance from the statutory distinction between “services” in the context of certain types of improvements financed by special assessments, and the physical “construction” of sewer improvements. The apparent point here, as best we can discern one, is that the statutory focus on the physical construction of a sewer recognizes that the “construction” of the improvement is a controlling factor in determining benefit; while the mere availability of “services” is itself the “benefit” derived from other types of improvements authorized by the statute to be undertaken pursuant to the special assessment process. Appellant’s Brief On Appeal, pp. 24-25.

Frankly, the utterly feeble nature of this argument well-illustrates the lack of merit in the underlying premise upon which Highland’s entire position is based. It is indeed true that MCL 41.722(1)(a) refers to the physical “construction” of storm or sanitary sewers in the context of that particular type of “improvement” under the Public Improvements Act. It is also true that the references to certain other types of improvements authorized to be undertaken through the special assessment process do

not include the word “construction”, such as the provisions pertaining to the “collection and disposal of garbage and rubbish” [MCL 41.722(1)(f)] and the “eradication or control of aquatic weeds and plants” [MCL 41.722(1)(l)].

However, any rational observer will recognize that the legislature did not use the word “construction” in the context of such service-oriented improvements as trash pickup and lake weed control for the obvious reason that such activities inherently do not involve any construction. Any rational observer will also recognize that the legislature included the word “construction” in the context of sewers because sewer systems necessarily do involve the construction of the infrastructure inherent in that type of improvement. Highland’s effort to parlay this aspect of the Public Improvements Act into some sort of significance on the “benefit” issue is a telling indication of the weakness of their argument, and is contrary to the scheme of the Public Improvements Act.

Other provisions of the Public Improvements Act not directly addressed by Highland are consistent with the existing cases discussed above recognizing the legal “benefit” conferred by a special assessment is derived from the availability of the improvement to the specially assessed property, generally, rather than by the specific manner in which the improvement is made available to the benefited property. This is most apparent from the provisions of the Act pervasively distinguishing between the public “improvement”, and the “plans” for the improvement.

The preamble of the Public Improvements Act generally states the purpose of the Act is to provide for the making of certain "improvements" by townships; and, among other things, "to provide for assessing the whole or a part of the cost of improvements

against property benefited". Consistent with this purpose Section 1 of the Act expressly empowers the township board to make an "improvement" named in the Act¹, and to determine that the cost of the "improvement" shall be defrayed by "special assessment against the property especially benefited by the improvement". MCL 41.721 (underlining added for emphasis). Notably, the Act does not refer to a special assessment against property benefited by the plans.

Section 3 of the Act addresses petitions for the "improvement", and objections to the "improvement". MCL 41.723. Under Section 4 of the Act, if the township board decides to proceed with the "improvement", the board must cause to be prepared "plans" for the "improvement", and an estimate of the "costs" of the "improvement". If upon receipt of such plans and estimate of the costs of the "improvement", the township board still desires to proceed with the "improvement", the board tentatively declares its intention to make the "improvement", and tentatively designates the special assessment district against which the costs of the "improvement" or a designated part of the "improvement" is to be assessed. MCL 41.724(1).

The township board then holds a hearing preceded by notice. The purpose of the hearing as established by Section 4 of the Act is three-fold: (1) to hear objections to the "petition", where a petition was required; (2) to hear objections to the "improvement"; and (3) to hear objections to the proposed "special assessment district". MCL 41.724(2) and (3). While the notice for this hearing is required to state that the "plans" describing the "improvement" and the location of the "improvement" and "cost" estimates are on file with the Township for public examination, the Act itself clearly specifies only a right of

¹ Section 2 of the Act includes a lengthy list of such authorized "improvements", including at subsection (1)(a) the construction of storm or sanitary sewers. MCL 41.722.

objection to the three above-stated matters. The Act does not create any right of objection to the specific "plans" for the improvement.

The legislature's pervasive use of the word "improvement", and separate references to the "plans" for the "improvement" and the estimated "cost" of the "improvement", discloses that the legislature did not intend "improvement" to mean the same thing as the "plans" for that improvement. (Note: we further dissected this important distinction as it carries through the rest of the process prescribed by the Act in our previous brief.)

Thus, in response to the Court's first question, the established jurisprudence of this state, and the Public Improvements Act itself, makes quite clear that the specific "benefit" conferred on Highland's property by the special assessment confirmed in 1996 was the availability of sewer service to the property, whether by a sewer line running across the benefited property, or abutting that property. Highland has indisputably received this "benefit".

ISSUE 2 --- WAS THE SPECIFIC BENEFIT CONFERRED ON HIGHLAND'S PROPERTY BY THE SPECIAL ASSESSMENT CONFIRMED IN 1996 REDUCED BY THE INFORMAL CHANGE IN THE IMPROVEMENT PLAN OR BY THE TOWNSHIP'S MAY 13, 2004 RESOLUTION?

We respectfully submit the answer to this question is provided pursuant to the well-established jurisprudence and statutory scheme reviewed above with respect to the first issue. The specific legal "benefit" to the subject property was the availability of sewer service to the property, whether provided by a sewer line running through the property or abutting the property. That "benefit" was not reduced by the change in the construction plans for the improvement, whether as informally approved, or as formally

approved pursuant to the May 13, 2004 resolution of the Township Board. In either scenario the sewer improvement was available to Highland's property.

ISSUE 3 --- ARE THE PLAN CHANGES REVIEWABLE BY THE MICHIGAN TAX TRIBUNAL UNDER MCL 205.731(a), EITHER AS INFORMALLY APPROVED, OR AS FORMALLY APPROVED BY THE MAY 13, 2004 TOWNSHIP BOARD RESOLUTION?

MCL 205.731(a) specifies the Tax Tribunal's exclusive and original jurisdiction shall be:

"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 property tax laws." (underlining added for emphasis).

The above-underlined words emphasize the three components of the statute directly relevant to this issue posed by the Court: a (1) "final" decision (2) "relating to" (3) "special assessments".

A. Informal changes in the plans are not reviewable by the MTT under MCL 205.731(a) because they were not "final" decisions.

For purposes of discussion on this issue we will assume, arguendo, the Tribunal conclusion in the related case between these parties---that the Township did not conform to the procedural requirements of MCL 41.725(b) when it attempted to amend or change the approved plans for the project without adopting a resolution. MTT Docket No. 261431. (Proposed Opinion and Judgment adopted by March 19, 2004 Opinion and Judgment, Appellee's Appendix page 64b.) Thus, in the context of MCL 205.731(a), the informal change in the construction plans did not constitute a "final" decision or determination subject to review by the Tribunal.

B. The May 13, 2004 resolution ratifying changes to the construction plans, but making no change to the assessment roll or to the special assessment on Highland's property, is not reviewable by the MTT under MTT 205.731(a) because it is not "relating to . . . special assessments".

The Township has previously concluded in its August 10, 2006 Supplemental Brief that the May 13, 2004 Township Board resolution, formally ratifying the previous informally-approved changes to the construction plans for the improvement, is tantamount to a resolution approving plan changes under MCL 41.725. As we are not aware of any relevant subsequent Board resolution, we will accept, arguendo, that the May 13, 2004 resolution was a "final" decision of the Township Board, for purposes of that component of MCL 205.731(a).

However, the May 4, 2004 resolution was nevertheless not "relating to . . . special assessments", and was therefore not subject to review by the Tribunal under MCL 205.731(a). That resolution, ratifying the changes in the construction plans, was approved nearly 8 years after the special assessment on the subject property was confirmed by the Township Board resolution adopted December 2, 1996. In related Docket No. 261431 before the MTT the Tribunal correctly found that "neither the official nor unofficial changes to the *plans* rendered the December 2, 1996 confirmation of the *roll* invalid, nor did it render any assessment on an individual property invalid" (italics in original; underlining added for emphasis). Appellee's Appendix p. 50b.

In that decision the Tribunal also correctly concluded that "although the entire cost of the project increased after the roll was confirmed, the \$3,250,000 assessment upon the subject that appeared on the roll (confirmed December 2, 1996) did not change". Appellee's Appendix p. 50b.

As neither the formal resolution changing the construction plans nor the informal changes to the plans had any effect whatsoever on the confirmed special assessment roll, generally, or on the special assessment on the subject property, neither of those decisions were “relating to . . . special assessments” for purposes of MCL 205.731(a). Therefore, neither of those decisions, whether “final” or otherwise, are reviewable by the Tribunal pursuant to this statutory authority.

ISSUE 4 --- WHAT REMEDY, IF ANY, DOES HIGHLAND HAVE IF THE CHANGE IN THE IMPROVEMENT PLAN AFTER CONFIRMATION OF THE SPECIAL ASSESSMENT ROLL REDUCED THE VALUE THAT ACCRUED TO THE SUBJECT PROPERTY SUCH THAT THE BENEFIT BECAME UNREASONABLY DISPROPORTIONATE TO THE AMOUNT ASSESSED?

The answer to this question follows rather inextricably from the proper answer to the first question, as discussed above. Pursuant to that discussion we must candidly state our opinion that this fourth question is itself predicated on the same incorrect assumption upon which Highland’s entire argument is premised --- that the “benefit” from the special assessment on the subject property was derived from a specific construction plan, rather than from any plan that would make sewer service available to the subject property. We have shown above that this premise is not consistent with well-established case law, or with the Public Improvements Act itself.

Since the “benefit” to the subject property is the availability of sewer service, and the change in the construction plans after confirmation of the special assessment roll had absolutely no effect on the availability of the sewer improvement to Highland’s property, or on the amount of Highland’s special assessment, it is impossible to conclude that the legal “benefit” to the subject property became unreasonably

disproportionate to the amount assessed because of the change in the construction plans. One simply cannot get from one point to the other, as a matter of law.

Thus, the short but correct answer to this question may well be there is no “remedy” because there was no legal “wrong” to remedy.

A more complete response to this question is provided by the history of this controversy itself, evidencing Highland’s numerous opportunities to seek judicial relief relating to the change in the plans in both the Circuit Court and in the Michigan Tax Tribunal. Any resulting determination that Highland’s claims did not have a sufficient basis to prevail does not diminish the reality of Highland’s right to seek relief in the Circuit Court (or the MTT) based on a change in the plans for the sewer project. Highland sees the failure of those efforts as evidence of no remedy for a “wrong”. More accurately, those efforts did not culminate in the remedy desired by Highland because there was no legal wrong entitling Highland to the remedy it desired.

CONCLUDING COMMENTS

Case law establishes the legal “benefit” conferred on property by a confirmed special assessment for a public improvement is the availability of the improvement to the specially assessed property, not the specific plan by which the improvement is made available to the property. This principle of law is also inherent in the Public Improvements Act, which pervasively distinguishes between the public “improvement” and the “plans” for the improvement. Highland received this “benefit”, whether from a sewer line constructed through the subject property as proposed in the original plans, or by a sewer line abutting the property pursuant to the revised plans.

Highland's "benefit" from the sewer improvement---the availability of sewer service to the property---was not reduced by any of the changes in the plans, whether informal or formal, because in either scenario the sewer was made available to the property.

The informal plan changes are not reviewable by the Michigan Tax Tribunal under MCL 205.731(a) because they were not "final" decisions. The Township Board resolution formally ratifying the changes in the construction plans is also not reviewable by the Tribunal under this statutory provision, and neither are the informal plan changes, because they are not "relating to . . . special assessments". Neither the formal nor informal changes to the plans had any effect on the confirmed special assessment roll, generally, or on the special assessment on the subject property.

There is no further remedy available to Highland for the change in the plans for the improvement, because those changes did not reduce the "benefit" to the subject property from the availability of the sewer service, so there was no legal wrong to remedy.

Respectfully submitted,

Date: _____

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