# STATE OF MICHIGAN

# COURT OF APPEALS

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| HURON DEVELOPMENT, L.L.C., a/k/a TRAPPERS COVE APARTMENTS,<br><br>Petitioner-Appellant, | UNPUBLISHED<br>September 19, 2013 |
| v | No. 303618<br>Tax Tribunal |
| CITY OF LANSING,<br><br>Respondent-Appellee. | LC No. 00-298757 |

Before: WILDER, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Petitioner appeals as of right the Tax Tribunal's order upholding the special assessments that respondent levied against petitioner's real property. Because the Tribunal did not commit an error of law or adopt a wrong legal principle, its factual findings were supported by competent, material, and substantial evidence, and the Tribunal's lengthy delay in issuing its opinion did not deny petitioner its right to procedural due process, we affirm.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

At issue in this case are special assessments that respondent levied against petitioner's real property in tax year 2003 for curb, gutter, and storm sewer improvements to Dunckel Road. Petitioner's property consists of two parcels of real property, which, together with a third parcel that was not specially assessed, are commonly known as the Trappers Cove Apartments. Petitioner's parcels total approximately 50 acres and contain a community building, a swimming pool, and 789 of the 965 apartment units in the complex. Edward Rose Realty, Inc. owns the third parcel ("the Edward Rose property"), which consists of approximately ten acres and 176 apartment units. Petitioner and Edward Rose Realty, Inc. are two separate entities within the "Edward Rose organization." The properties are managed as one using the same management company, but the proceeds are accounted for separately.

Petitioner began developing its property in 1979, including constructing Trappers Cove Trail, a public street that runs through the apartment complex off of Dunckel Road. Trappers Cove Trail contains a curb, gutter, and storm water drainage system that adequately handles storm water from Trappers Cove Trail and the parking lots within the complex. Petitioner's property also contains a storm water detention pond and contours for water drainage into the pond. Petitioner paid approximately $110,000 to construct the detention pond in 1986 and has

maintained the pond at its expense. The Edward Rose property, which was developed in a subsequent phase of the apartment complex development after petitioner developed its property, does not drain into the detention pond.

Petitioner's property abuts Dunckel Road.[1] At some point, respondent determined that Dunckel Road should be widened from two to five lanes, including the installation of curb, gutter, and storm sewer improvements to the road. On or about May 1, 2003, respondent provided notice of a public hearing regarding the special assessments levied against petitioner's property and other abutting property. The gross amounts of the special assessments pertaining to petitioner's two parcels were $12,782.66 and $35,680.63, respectively. Petitioner filed a written objection to the special assessments and paid the assessments in full, under protest. Thereafter, petitioner filed a petition with the Tax Tribunal challenging the special assessments. Following a two-day hearing, the Tribunal upheld the assessments.

## II. STANDARD OF REVIEW

"This Court's ability to review decisions of the Tax Tribunal is very limited." *President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 630; 806 NW2d 342 (2011). Absent fraud, our review of a Tax Tribunal decision is limited to "whether the tribunal committed an error of law or adopted a wrong legal principle." *W A Foote Mem Hosp v City of Jackson*, 262 Mich App 333, 336; 686 NW2d 9 (2004). This Court will not disturb the Tribunal's factual findings "as long as they are supported by competent, material, and substantial evidence on the whole record." *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 490-491; 618 NW2d 917 (2000). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

## III. LEGAL ANALYSIS

"Special assessments are presumed valid." *Kane v Twp of Williamstown*, ___ Mich App ___; ___ NW2d ___ (2013) (Docket No. 311182, issued July 11, 2013), slip op at 2. Although a special assessment resembles a tax, it is not a tax. *Id.* Rather, "a special assessment is imposed to defray the costs of specific local improvements, rather than to raise revenue for general governmental purposes." *Kadzban v City of Grandville*, 442 Mich 495, 500; 502 NW2d 299 (1993).

> There is a clear distinction between what are termed general taxes and special assessments. The former are burdens imposed generally upon property owners for governmental purposes without regard to any special benefit which will inure to the taxpayer. The latter are sustained upon the theory that the value of the property in the special assessment district is enhanced by the improvement for which the assessment is made. [*Id.* (citations and quotation marks omitted).]

[1] The Edward Rose property does not abut Dunckel Road, and, accordingly, was not included in the special assessment district.

Thus, "special assessments are permissible only when the improvements result in an increase in the value of the land specially assessed." *Id*. at 501. Further, "there must be some proportionality between the amount of the special assessment and the benefits derived therefrom." *Dixon Rd Group v City of Novi*, 426 Mich 390, 401; 395 NW2d 211 (1986). "Therefore, in order to be validly imposed, the special assessment must benefit the properties it is assessed against in proportion to the benefit the properties receive." *Kane*, ___ Mich App at ___, slip op at 2-3. Absent a proportionate relationship, "the special assessment would be 'akin to the taking of property without due process of law.'" *Id*. at 2, quoting *Kadzban*, 442 Mich at 502.

"[M]unicipal decisions regarding special assessments are presumed to be valid," *Kadzban*, 442 Mich at 502, and "'generally should be upheld,'" *id*., quoting *Dixon Rd Group*, 426 Mich at 403. The petitioner challenging the special assessment has the burden of rebutting the presumption of the validity of the special assessment. *Storm v City of Wyoming*, 208 Mich App 45, 46; 526 NW2d 605 (1994). In order to rebut the presumption, the petitioner must present credible evidence showing that the assessment is invalid. *Kadzban*, 442 Mich at 505. "Without such evidence, a tax tribunal has no basis to strike down special assessments."[2] *Id*. After a petitioner presents evidence rebutting the presumption of validity, "the burden of going forward with evidence shifts to the city." *Id*. at 505 n 5. "At that point, the city must . . . present evidence proving that the assessments are reasonably proportionate in order to sustain the assessments." *Id*. "If a petitioner fails to meet the burden of proving the special assessments invalid, the tax tribunal may not make a determination de novo of the benefit and substitute its judgment for that of the municipality." *Storm*, 208 Mich App at 46-47.

Regarding the increase in the market value of property as a result of special assessment improvements, this Court has stated:

> The essential question is not whether there was any change in market value, but rather whether the market value of the assessed property was increased as a result of the improvement. See *Kadzban, supra* at 501; *Dixon Rd, supra* at 400-401. 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

[2] We reject petitioner's argument that the Tribunal misstated the burden of proof and applied an incorrect burden of proof when it stated that a petitioner challenging a special assessment bears a "heavy burden of proof." A review of the Tribunal's opinion and judgment shows that it did not misstate the burden of proof or apply an incorrect burden of proof. Rather, the Tribunal simply acknowledged that a petitioner challenging a special assessment "carries a heavy burden of proof" because of the presumption that a special assessment is valid. This Court has previously acknowledged that fact. See *Konfal v Charter Twp of Delhi*, 91 Mich App 147, 151-152; 283 NW2d 677 (1979) ("One who challenges a special assessment carries a heavy burden of proof, since there is a presumption that the levy is valid.")

> improvement, but rather it is between the market value of the assessed property *with* the improvement and the market value of the assessed property *without* the improvement. The former comparison measures the effect of time, while the latter measures the effect of the improvement. [*Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 496-497; 597 NW2d 858 (1999) (emphasis in original).]

Further,

> [w]hen reviewing the validity of special assessments, it is not the task of courts to determine whether there is "a rigid dollar-for-dollar balance between the amount of the special assessment and the amount of the benefit . . . ." [*Dixon Rd Group*, 426 Mich] at 402-403. Rather, a special assessment will be declared invalid only when the party challenging the assessment demonstrates that "there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements." *Id.* at 403. [*Kadzban*, 442 Mich at 502.]

Petitioner first argues that the Tribunal erred by refusing to apply the rule set forth in *Johnson v Inkster*, 401 Mich 263; 258 NW2d 24 (1997), in which our Supreme Court held:

> [W]here an existing road is adequate for the use of local residents and businesses and its widening and improvement is designed to benefit primarily the public at large and to ameliorate conditions caused by its increased use of the road, there is no special benefit to residential owners warranting a special assessment. [*Id.* at 271.]

In that case, however, the assessments at issue were against nonabutting property rather than property abutting the road that was widened. *Id.* at 267 n 1. Thus, *Johnson* is distinguishable from the instant case. Although petitioner argues that Justice LEVIN's opinion in *Kadzban* clarified that *Johnson*'s holding is not limited to nonabutting property, the majority opinion in *Kadzban* rejected that argument and distinguished *Johnson* in part on the basis that "*Johnson* involved nonabutting property owners[.]" *Kadzban*, 442 Mich at 507 n 6. Accordingly, petitioner's reliance on *Johnson* is misplaced.

Petitioner also argues that the Tribunal's attempts to distinguish *Brill v Grand Rapids*, 383 Mich 216; 174 NW2d 832 (1970), and *Fluckey v City of Plymouth*, 358 Mich 447; 100 NW2d 486 (1960), lack merit. Both cases involved the widening of a road. *Brill*, 383 Mich at 219-220; *Fluckey*, 358 Mich at 448-449. The Tribunal did not err by distinguishing *Brill* on the basis that the road before its expansion was a "country road" that served an "excellent residential district." The road in *Brill* was a 20-foot road that served a local residential district and there was no through or heavy traffic. The road was widened to 44 feet, and the homes of residents along the road were much closer to the four lanes of traffic than they were to the two lanes of traffic previously. *Id.* In *Fluckey*, 358 Mich at 448, 451, the road was converted from a 22-foot "sleepy country road into a 4-lane thoroughfare for heavy traffic" in a "high-class residential district[.]" In this case, Dunckel Road cannot be characterized as a "sleepy country road" and the residential area, including the Trappers Cove Apartments, cannot be characterized as a "high-class residential district." The evidence showed that traffic on Dunckel Road was increasing and

that, during peak hours, "it was a parking lot out there." Moreover, the apartment complex was characterized as a "blue collar type of community" that housed a large student population. Accordingly, the Tribunal did not err by distinguishing *Fluckey* from the instant case.

Petitioner also contends that the Tribunal erred by rejecting petitioner's market value appraisal that Larry McKnight prepared. The Tribunal based its decision on the fact that McKnight's appraisal did not value the property both with and without the special assessment improvements, which was necessary to determine whether the improvements resulted in an increase in the value of the property. The evidence supported the Tribunal's decision. McKnight testified that he reviewed sale comparables and was questioned as follows:

> *Q.* And what was the purpose of that analysis or that observation?
>
> *A.* Well, it was to try to identify *whether or not there was any measurable difference in price of the sale properties based upon having the on-site storm water detention facilities or being dependent upon municipal facilities.*
>
> *Q.* And what did you conclude or what—do you want to go through your observations in that regard?
>
> *A.* Well, the bottom line perspective was that I did not believe that there was any measurable difference in value for having the improvements that are the subject of this matter in front of the Court.
>
> The—some of the storm water detention areas were so totally self-contained, some were in connection with municipal systems and some did not have on-site pondage. There was no identifiable up or down difference in the sale prices with the difference in these types of facilities.
>
> *Q.* So is it fair to state that a buyer in the market would not have valued the property after the assessments and the installation assessments differently than it would have prior to the installation of the assessments?
>
> *A.* That is my opinion. [Emphasis added.]
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> * * *
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> *THE COURT:* And I think then the question was before the improvements were made to the subject property, such as there's no curb and gutter, did you have any comparable sales without curb and gutters that you could compare?

*THE WITNESS:* Well, your Honor, I used the most recent and most similar transactions that I felt were relevant to this type of property.[3]

*THE COURT:* All right. That is fine.

*THE WITNESS:* Probably the single strongest emphasis of observation with these comparables was the storm water drainage related issues in the ponds that were on these properties and how that integrated with the question being asked to be solved.

Moreover, McKnight stated in his appraisal:

> In Exhibit 6, following the sale comparables, the reviewer will find similarly titled and numbered information sheets for Comparables 6, 7, 19, 24, 25, 28 and 29. With the exception of No. 28, all of these information sheets have photographs *noting the storm water drainage pond and/or lake* on the comparable properties. These information sheets also give the sale date, sale price per unit and the overall capitalization rate before reserves for replacements were considered as an operating expense. The reviewer will note that *all of these sales, based upon the preceding discussions and observations from the Sales Comparison Approach, could not be distinguished as having any greater or lesser sale price and capitalization rate than those properties that did not have these types of on-site storm water detention areas*. All of the interviews that we made led us to the opinion that *there was no way to identify that there was any difference in value to these properties with the large amounts of on-site storm water detention areas (like the subject property) versus those properties that were depend[e]nt upon municipal services. This lack of observation was in both directions. It was impossible to identify whether or not there was any lesser value to these properties having to be dependent upon their on-site drainage facilities versus a municipal system; and, it was impossible to tell if the aesthetics of having these large pond areas added to the value of the properties, although at least some complexes likely had rent premiums for pond views*.
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> * * *
>
> Clearly, based upon our review of the rent comparables in the subject marketplace, some with and some without ponds, it is our opinion that the rents for the subject property could not be increased based upon the additional road improvements that are the basis for the special assessments under appeal. [Emphasis added.]

[3] McKnight later clarified his testimony and pointed out one particular sales comparable, which was an apartment complex that sold in 2000 without any curb and gutter improvements. McKnight testified that that was his only comparable without curb and gutter improvements.

Thus, McKnight's appraisal improperly focused on the value of properties with and without on-site storm water detention ponds and did not engage in the correct comparison, i.e., properties with and without curb, gutter, and storm sewer improvements. Because petitioner did not present any evidence regarding the value of the property with and without the special assessment improvements, the Tribunal did not err by rejecting petitioner's appraisal. Further, because petitioner failed to present credible evidence rebutting the presumption of the validity of the special assessments, the Tribunal had no basis to strike down the special assessments and the burden of going forward with evidence never shifted to respondent. *Kadzban*, 442 Mich at 505. "If a petitioner fails to meet the burden of proving the special assessments invalid, the tax tribunal may not make a determination de novo of the benefit and substitute its judgment for that of the municipality." *Storm*, 208 Mich App at 46-47. Accordingly, "[o]n this basis alone, the decision of the Tax Tribunal was correct and should be upheld." *Kadzban*, 442 Mich at 505. Therefore, the Tribunal did not commit an error of law or adopt a wrong legal principle by rejecting petitioner's appraisal evidence.

Despite that petitioner failed to carry its burden of proof and that, as such, the burden never shifted to respondent, petitioner asserts several arguments challenging respondent's evidence and criticizing the Tribunal for relying on such evidence. The Tribunal's decision, however, was supported by competent, material, and substantial evidence. Respondent's appraiser, Terrell Oetzel, engaged in the correct analysis by comparing the value of the property with and without the special assessment improvements. He conducted a "mini-study" that showed that properties fronting on streets with curb, gutter, and storm sewer improvements generally sell for significantly more per acre than properties fronting on unimproved streets.[4] Oetzel acknowledged that it was difficult to measure an increase or decrease in the value of the property because it was an improved $30,000,000 property, and the special assessments totaled only $48,463, or less than two-tenths of one percent of the total value of the property. Oetzel opined, however, that if rents for the 789 units on petitioner's property were increased by only $1 per month, the increase would result in a $95,000 increase in value, which is substantially more than the cost of the special assessments. Thus, Oetzel concluded that the special assessment improvements resulted in an increase in market value at least great enough to cover the cost of the special assessments. Although Oetzel testified that rents were at market level and McKnight testified that rents were either at or slightly below market level, no evidence indicated that increasing rents by $1 per month would place rents above market level. Considering that the special assessments totaled less than two-tenths of one percent of the total value of the property and Oetzel's "mini-study" indicated that properties fronting on improved streets sell for significantly more per acre than properties fronting on unimproved streets, the Tribunal's decision was based on competent, material, and substantial evidence. At a minimum, petitioner failed to demonstrate that "'there is a substantial or unreasonable disproportionality between the

[4] Although petitioner argues that the property at issue in this case fronted on Trappers Cove Trail rather than on Dunckel Road, the apartment complex as a whole fronts on Dunckel Road. In order to enter the apartment complex from the direction of Dunckel Road, a driver must turn onto Trappers Cove Trail from Dunckel Road. The several buildings within the complex may then be accessed by turning onto various roads within the complex from Trappers Cove Trail.

amount assessed and the value which accrue[d] to the land as a result of the improvements." *Kadzban*, 442 Mich at 502, quoting *Dixon Rd Group*, 426 Mich at 403. Thus, petitioner failed to show that the special assessments were invalid. *Kadzban*, 442 Mich at 502.

Petitioner argues that Oetzel erroneously included in his appraisal the Edward Rose property, which was not part of the special assessment district. Oetzel included the Edward Rose property in his appraisal because all three parcels were operated together as one apartment complex and were managed by one company. Oetzel also noted that a portion of the rents from units on the Edward Rose property are contributed toward community facilities, such as the swimming pool. In any event, even if Oetzel erred by including the Edward Rose property in his appraisal, any error is harmless given that petitioner failed to rebut the presumption that the special assessments were valid.

Petitioner also argues that the Tribunal erred by failing to determine that the "income approach" to valuation was the most accurate method of valuation. The three most common methods of valuation are the "capitalization-of-income approach, the sales-comparison or market approach, and the cost-less-depreciation approach." *President Inn Props, LLC*, 291 Mich App at 639 (quotation marks and citation omitted). Petitioner's reason for asserting this argument is unclear considering that both McKnight and Oetzel agreed that the income approach was the best indicator of the property's value and that the sales comparison approach was relevant only as a means of testing the value obtained through the income approach. The Tribunal reviewed McKnight's and Oetzel's appraisals generated using the income approach and did not indicate that a different approach would have been more appropriate. The Tribunal did not commit an error of law or adopt a wrong legal principle.

Petitioner next contends that the Tribunal erred by severing the cost of the curb, gutter, and storm sewer improvements from the cost of the Dunckel Road project as a whole and assessing only the costs of the curb, gutter, and storm sewer improvements against abutting landowners. Petitioner asserts that the curb, gutter, and storm sewer were "integral components" of the project as a whole, which was for the benefit of the public at large. Respondent assessed less than ten percent of the total cost of the Dunckel Road project, and assessed only 2.7 percent of the cost of the project against petitioner despite that approximately 14 percent of the traffic on Dunckel Road was attributable to the apartment complex. Respondent assessed only the costs of the curb, gutter, and storm sewer improvements because those costs are relatively stable in a construction project and respondent could provide property owners with a fairly accurate estimate of what the assessments would be. Petitioner offers no authority for the proposition that a city must assess the entire cost of a project against abutting property owners rather than only a portion of the cost. In any event, any error is harmless given that petitioner failed to produce evidence rebutting the presumption that the special assessments were valid.

Petitioner next argues that Donald Johnson, respondent's city engineer, admitted that the sewer assessment was "somewhat arbitrary," "discriminatory," and "disproportionate." Petitioner mischaracterizes Johnson's testimony. Johnson testified that the curb and gutter costs are apportioned on a frontage basis, but that sewer costs are assessed by taking the front footage of a property and multiplying that number by a depth of 140 feet. Johnson testified that the 140-foot figure was "somewhat arbitrary" and that that system was in place before he began working in the field. He further testified:

> In a case like Dunckel Road where every parcel is 140 feet or more, their storm sewer assessments are all uniform because if you divide them all by 140 feet it simply is proportional to the front footage. So that depth factor goes away in most cases.
>
> This system lends itself to single-family parcels and residences. It *disproportionately underassesses* high density residential units. Trappers Cove has 700-and-some units, over 1,000 people. A single-family home would have one or two incomes paying for this amount. So on a cost-per-resident basis this *discriminates* against single-family units and *disproportionately underassesses* high density units. On an assessment cost per value of property it *greatly underassesses* high density units. [Emphasis added.]

Thus, although the method at arriving at the 140-foot figure was "somewhat arbitrary," in this case every parcel was at least 140 feet, rendering the arbitrariness of the figure irrelevant. In addition, petitioner fails to demonstrate that it was subject to a disproportionately high assessment. In fact, the evidence indicated that petitioner's property was disproportionately underassessed. Thus, petitioner is entitled to no relief.

Petitioner next argues that the Tribunal erred by upholding the portion of the assessment against the northeast 281 linear feet of the property because that portion of property has a very steep slope, is a wetlands, and is unbuildable. Thus, petitioner contends, that portion of property received no economic benefit as a result of the special assessment improvements. As previously discussed, petitioner had the burden of proving that the property as a whole did not economically benefit from the improvements, but it failed to rebut the presumption that the special assessments were valid. Thus, petitioner has failed to carry its burden.

Petitioner next contends that the Tribunal erred by relying on unverified and irrelevant information contained in Oetzel's appraisal report. The information was reproduced verbatim from a statement prepared by the Public Service Department indicating the poor condition of Dunckel Road before the improvements and the improved condition of the road after the improvements. The Tribunal, in turn, reproduced a portion of the statement verbatim in its opinion and judgment. Petitioner's argument does not warrant relief considering its failure to produce evidence demonstrating that the special assessment improvements did not benefit the property. Petitioner's failure to present evidence rebutting the presumption of the validity of the assessments resulted in the Tribunal having no basis to strike down the special assessments. *Kadzban*, 442 Mich at 505. Accordingly, the Tribunal's reliance on the statement prepared by the Public Service Department and contained in Oetzel's appraisal report was irrelevant.

Finally, petitioner argues that the Tribunal's six-year delay in issuing its opinion denied petitioner its right to due process. Because petitioner did not preserve this argument for our review by raising it below, our review is limited to plain error affecting substantial rights. *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008).

Procedural due process requires "adequate notice, an opportunity to be heard, and a fair and impartial tribunal." *Hughes v Almena Twp*, 284 Mich App 50, 69; 771 NW2d 453 (2009). A party must be afforded an opportunity to present arguments and evidence in support of its

position. *Id.* In this case, petitioner was afforded an opportunity to be heard and to present evidence before an impartial tribunal. Moreover, petitioner does not contend that it was afforded inadequate notice. Rather, petitioner argues that the six-year delay between the hearing and the issuance of the Tribunal's decision resulted in a denial of due process.

Generally, a party must show material prejudice in order to establish a claim of a denial of due process. See *Dep't of Transp v Brown*, 153 Mich App 773, 784; 396 NW2d 529 (1986). Moreover, this Court has previously recognized that a delay in issuing an order, even if unreasonable, does not warrant relief absent a showing of prejudice. *Master Craft Engineering, Inc v Dep't of Treasury*, 141 Mich App 56, 65; 366 NW2d 235 (1985); *Mich Life Ins Co v Comm'r of Ins*, 120 Mich App 552, 563; 328 NW2d 82 (1982). In this case, petitioner fails to show that it was prejudiced by the delay. Petitioner paid the special assessments in full under protest before the Tribunal conducted the hearing and was in no worse position after the Tribunal issued its decision. Thus, petitioner was not prejudiced by the Tribunal's delay in issuing its opinion notwithstanding the length of the delay.

Affirmed. Respondent, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Pat M. Donofrio
/s/ Jane M. Beckering