90027-2

Court of Appeals No. 69294-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

DENIS FURY, et al.,

Petitioners,

vs.

THE CITY OF NORTH BEND,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT AND INTRODUCTION

Respondent City of North Bend ("North Bend" or "City") asks this Court to deny review of the decision of Division I of the Court of Appeals designated in Section II of this Answer. Appellants' ("the Owners") Petition for Review ("Petition") fails to satisfy the criteria governing acceptance of review set forth in RAP 13.4(b).

In this case, a group of property owners petitioned the City to form a utility local improvement district in order to construct a sewer system to serve their respective properties. After review of the request, the City approved construction of a vacuum sewer system.

Subsequently, the City received requests from additional property owners also seeking sewer service. In order to accommodate both the original request for service, and the later request, the City had to construct a gravity sewer system.

Following construction of the system, the City calculated the assessment due from each property owner to pay for the cost of constructing the system. Notice of the assessments was sent to each property owner advising them of the amount of their assessment and advising each owner that the amount of their assessment could be contested by means of a hearing process authorized by State law.

Ultimately, some property owners challenged their respective assessments in court. The outcome of their efforts is set forth in the decision of the Court of Appeals which is now under review. The substance of that decision was to return the matter to the City with directions to reassess the subject properties.[1]

Under well-established case and statutory law, cities are specifically authorized to conduct reassessments. The decision of the Court of Appeals is wholly consistent with established law and does not present any matter of substantial public interest justifying review here. This Court should uphold the Court of Appeals' well-reasoned decision and deny Owners' Petition.

II. DECISION OF THE COURT OF APPEALS

Division I of the Court of Appeals filed its decision on October 21, 2013. A copy of the decision of the Court of Appeals is included in Owners' Petition, Appendix at 1-16, Fury, et. al. v. City of North Bend, No. 69294-1-1, slip op. (Div. I, 2013) ("Fury"). Owners' Motion for Reconsideration and Motion to Publish were denied on January 8, 2014. A copy of that order is included in Owners' Appendix at 17.

[1] This appeal is brought by a small minority of the property owners who received sewer service. The vast majority of property owners chose not to challenge their assessments and those assessments are not affected by this appeal.

III. RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Should review be denied when the requirements of RAP 13.4(b)(1) and (2) are not met, and because the decision of the Court of Appeals is fully consistent with the decisions of this Court, other divisions of the Court of Appeals and statutory law?

B. Should this Court deny review when the requirements of RAP 13.4(b)(3) and (4) are not met because the decision of the Court of Appeals does not raise a significant question of law nor are any issues of substantial public interest at stake?

IV. STATEMENT OF THE CASE

This case involves the construction of a sewer line within the City of North Bend. A petition was filed by a group of landowners requesting that a sewer system and related improvements be extended to provide service to their properties. The filing of the petition led to the filing of a second petition by additional property owners who wanted to receive sewer service. The second petition resulted in the formation of a utility local improvement district by the North Bend City Council, designated as ULID No. 6, and the construction of a multi-million dollar sewer line designed to provide sewer service to over 400 parcels of property.

Following construction of the sewer line, the City sent individual notices of proposed assessments to the benefitted property owners identifying their respective share of the costs for construction of the system. Individual assessments are appealable, and a hearing was conducted over a two-day period (November 10 and December 20, 2011) for the purpose of hearing protests to the assessment roll. Out of the 400-plus parcels within the improvement district, only 35 property owners filed protests of their assessments.

During the hearing, Ron Garrow, the City's Public Works Director, testified that once the total service area was identified (which included the properties set forth in both of the petitions), it was determined that a vacuum sewer system could not accommodate the expected flows. (Tr Vol. I, at 13 – 15). According to Mr. Garrow, "[T]he flows from the properties to be served was going to exceed the capacity of what a vacuum system could handle and therefore the design had to be changed to a gravity system." Id.

Following the hearing, the Hearing Examiner filed his recommendation with the City Council to approve formation of the utility district utilizing a gravity sewer system.[2] Ten of the property owners, including the five Owners now before this Court, appealed the Hearing

[2] Tr Vol. I, Exhibit 88.

Examiner's recommendation to the City Council.

On March 20, 2012, the City Council considered the appeals and the Examiner's recommendations. The City Council accepted most of the Examiner's recommendations, and its decision was formalized by adoption of Ordinance No. 1452 confirming the assessment roll.[3]

A. Owners File Suit in Superior Court.

Five of the appellants, collectively the owners of 16 of the 400-plus parcels within the ULID boundary,[4] appealed the City Council's decision to Superior Court. After a hearing, the Superior Court ruled that "Owners did not have a meaningful opportunity to review written materials presented during the City's rebuttal before the Hearing Examiner, and . . . this matter is remanded to the North Bend Hearing Examiner for further hearing." Certified Appeal Board Record ("CABR") at 151-52. The Superior Court remanded the matter to the Hearing Examiner for a limited hearing on (1) review of the written materials presented during the City's rebuttal, and (2) examination of the City Planning Department employees who provided information to the City's witnesses. CABR 151-52. Owners then appealed the order of remand to the Court of Appeals. CABR 153-54.

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[3] The ordinance is attached to Appellants' Court of Appeals Brief as Appendix B.

[4] Parsons owns 1 parcel; Fury/Tanner Way own 5 parcels; Dahlgren owns 1 parcel; Weber owns 7 parcels; Thorntons own 2 parcels. See Tr Vol. I, Exhibit 88.

B. Owners Appeal to the Court of Appeals.

The Court of Appeals reversed the trial court and annulled the assessments against the Owners because it found that the City adopted the assessments on a "fundamentally wrong basis." The Court found that when the ULID was expanded to accommodate additional parcels, and a gravity system replaced the vacuum system, the City should have adopted a new ordinance specifying the change in design to a gravity system. Fury at 2, 15. The Court further found that, absent a new ordinance, the Owners did not have the opportunity to protest the increased cost that resulted from changing the design. Id. The Court annulled the Owners' assessments but ruled that the City could pursue a reassessment. Id.

Owners then filed a motion for reconsideration and to publish. Both were denied by the Court. Petition, Appendix at 17.

V. ARGUMENT FOR DENIAL OF REVIEW

This Court should deny discretionary review because Owners' Petition fails to satisfy the criteria for acceptance of review set forth in RAP 13.4(b).

A. Criteria Governing Acceptance of Discretionary Review.

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

B. The Decision of the Court of Appeals is Consistent with Decisions of This Court and Other Divisions of the Court of Appeals.

Owners claim that allowing a reassessment conflicts with decisions of the Supreme Court and the Court of Appeals, and with Washington statutes, but cites no supporting authority. Petition at 8 – 15. Instead, Owners "imagine how reassessment could occur on remand" and argue that any of these options would conflict with precedent and statutes. Petition at 9. In doing so, Owners have failed to satisfy RAP 13.4(b)(1-2).

1. Reassessments are specifically authorized under RCW 35.44.280 and case law.

The Court of Appeals' ruling is completely consistent with State law. RCW 35.44.280 provides:

> In **all** cases of special assessments for local improvements wherein the assessments are not valid in whole or in part for want of **form, or insufficiency . . . or nonconformance with the provisions of law, . . . the city or town council may reassess the assessments . . . . This shall apply . . .**

> **to an original assessment . . . [that] has been set aside, annulled, or declared void . . . .** [Emphases added.]

Moreover, case law is equally clear that the City is not foreclosed from reassessing the property here. Doolittle v. City of Everett, 114 Wn.2d 88, 107, 786 P.2d 253, 263 (1990), referencing RCW 35.44.280; RCW 35.44.310; Eggerth v. Spokane, 91 Wash. 221, 157 P. 859 (1916); In re West Wheeler Street, 97 Wash. 669, 167 P. 41 (1917).

2. Irregularities are not fatal under RCW 35.44.300.

In addition to the reassessment authorization expressly provided in RCW 35.44.280, other state statutes specifically declare that irregularities in the establishment and formation of improvement districts do not prohibit reassessments. RCW 35.44.300, entitled "[I]rregularities not fatal", provides:

> **The fact that** the contract has been let or that **the improvement has been made and completed in whole or in part shall not prevent the reassessment from being made, nor shall the omission or neglect of any office or officers to comply with the law, the charter, or ordinances governing the city or town as to petition, notice,** resolution to improve, **estimate,** survey, **diagram,** manner of letting contract, or execution of work or **any other matter connected with the improvement and the first assessment thereof operate to invalidate or in any way affect the making of a reassessment.** [Emphases added.]

In other words, even if an improvement has been completed, a reassessment can nonetheless still be made.

Further, it is long-established that a reassessment can be made even where the work was ordered and done without any initial jurisdiction or power in the city. Nichols v. City Spokane, 91 Wash. 235, 237, 157 P. 863 (1916). In Nichols, the Court found that a reassessment upon an enlarged district can be completed based on the authority granted by the legislature. Id. In the early case of Frederick v. Seattle, 13 Wash. 428, 43 P. 365 (1896), construing the 1896 statute which provided for a reassessment to pay the cost of a public improvement where the original assessment had been held void, the Court held that the "Legislature intended to provide for a reassessment in all cases where the assessment had been held to be void, whether for irregularities or for want of prerequisites which went to the jurisdiction of the council to levy the assessment and to order the work done," and that such legislation was constitutional. Id. at 430-31.

3. Owners have never rebutted the presumption that the improvement was a benefit to their properties.

All properties included in a utility district are assessed based on the special benefits to such properties as a result of the improvements constructed by the utility district. RCW 35.44.010. Special benefits are determined by comparing the fair market values of each property before and after the improvements are made. Bellevue Assocs. v. City of

Bellevue, 108 Wn.2d 671, 675, 741 P.2d 993 (1987). An appellate court "presume[s] that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair." Abbenhaus v. City of Yakima, 89 Wn.2d 855, 861, 576 P.2d 888 (1978).

This presumption may be rebutted by presentation of expert appraisal evidence. Id. If the challenging party presents expert appraisal evidence showing that the property is not specially benefited by the improvement, the burden shifts to the city to prove that the property is so benefited. Id. That proof must rest upon competent evidence and must prove the difference between the fair market value of the property immediately before and after the improvement. Bellevue Plaza, Inc. v. City of Bellevue, 121 Wn.2d 397, 404, 851 P.2d 662, 665 (1993).

Whether property has been specially benefitted by an improvement, and a measure of the extent of such benefit, are questions of fact to be proven by expert testimony. In re Indian Trunk Sewer System, 35 Wn. App. 840, 842, 670 P.2d 675 (Division III, 1983). Property owners who wish to dispute a city's determination of special benefit must provide appraisal testimony that there is no difference between the fair market value of the property before and after installation of the

improvements. Id.; Douglass v. Spokane County, 115 Wn. App. 900, 908, 64 P.3d 71, 75-76 (Div. III 2003).

Although appraisers appeared on behalf of two of the Owners, their testimony did not address the subject of special benefits.[5] Rather, their testimony primarily focused on the economic recession and its possible impact on property values. Accordingly, Owners have failed to provide competent evidence to support their contention that the new sewer system does not benefit their properties.

4. Analysis.

a. Allowing a reassessment does not render RCW 35.44.020 meaningless.

RCW 35.44.020 identifies the requirements of the cost and expense summary for every local improvement assessment. The purpose of this section is to give property owners notice of the improvements and the ability to protest if they disagree with the assessment amount. As previously noted, the City originally approved a vacuum sewer system but changed to a gravity system in order to accommodate additional properties within the district. (Fury at 2, 15.)

If the City had not changed the system from vacuum to gravity, the ULID would not have been feasible. While the Court of Appeals acknowledged this fact, the Court nonetheless found that the City was

[5] The three remaining owners failed to present any expert testimony.

required to adopt a new ordinance implementing the change in order to comply with the requirements of RCW 35.44.020. Id. at 2, 13, fn. 29; 14-15.

RCW 35.44.280 specifically anticipates instances like those presented here, where cost estimates, notice requirements under RCW 35.44.020, or other errors occur. The statute is unremarkable, and serves only to codify the state Supreme Court's previous reasoning in determining that the Legislature may authorize a reassessment even when work was ordered and done without any initial jurisdiction or power in the city. Nichols, 91 Wn. 235, 237, citing Kuehl v. City of Edmonds, 91 Wash. 195, 157 P. 850 (1916).

All of the cases cited here by Owners are distinguishable. Owners cite George v. City of Anacortes, 147 Wash. 242, 265 P. 477 (1928), for the proposition that a municipality cannot set forth the particulars of an improvement and then substantially change them. Petition at 10. However, the Court of Appeals found that Owners' reliance on George was misplaced. Fury at 13. In George, the Court found that the city changed the location of the water system improvement. The Court rejected the city's change because the ordinance had detailed the specific street where the main was to be located, and the record presented "no change of situation requiring a departure from the plan, lack of feasibility,

or any reason other than a desire to substitute a different plan than that submitted to the people." George, 147 Wash. at 246. Here, while the change to a gravity system materially increased the cost, that change in cost was forced by feasibility concerns that a vacuum sewer system would not meet the projected capacity of the expanded ULID. Further, the remedy awarded to the property owners in George was to order the city to install the main in the original location. This type of remedy is not available here because the dispute arose after the gravity system had already been constructed. Fury at 13.

Owners also cite Sane Transit v. Sound Transit, 151 Wn.2d 60, 68, 85 P.3d 346 (2004), for the proposition that taxpayer funds cannot be used to construct a substantially different public project than the one approved by voters. Petition at 10. That case involved a public project approved by voters in multiple counties, unlike the ULID at issue here, which taxes only the benefited property owners. In addition, the Sane Transit decision did not even address reassessments. Here, the Court of Appeals correctly found the Sane Transit decision inapplicable. Fury at 13.

At page 10 of the Petition, Owners also cite to Hayes v. City of Seattle, 120 Wash. 372, 207 P. 607 (1922), which is likewise distinguishable from this case. In Hayes, the Supreme Court addressed whether Seattle, after passing an ordinance adopting an extension of its

street car system, could modify the details of the plan, abandon the extension of improvements as provided in the original plan, and extend the line on a different street and in another direction. There, the Court found that "[t]he change proposed does not deal with the details of the original plan; it is an entire departure from that plan in so far as this extension is concerned." Id. at 374-75. Here, the plan never changed – the sewer was located as originally proposed, only using gravity rather than vacuum.

Also at page 10 of the Petition, Owners cite to O'Byrne v. City of Spokane, where the city council passed an ordinance providing for improvements to a street system, including a freeway which was to intersect a high school site. 67 Wn.2d 132, 406 P.2d 595 (1965). Voters approved the ordinance. Thereafter, the city council adopted another ordinance moving the freeway to avoid the intersection with the high school. The Court ruled that the change of freeway was a major deviation from the ordinance approved by the voters and was not within the discretion of city council. Id. at 137. Both O'Byrne and Hayes are distinguishable from the case at bar. Here, the City only changed one detail of the plan, substituting a gravity system for a vacuum system. The service area did not change nor did the stated purpose of the ordinance – to create a sewer ULID for a clearly identified area.

b. City has the authority to modify an existing publicly approved ULID.

Owners cite no authority to support their argument that the City lacks the authority to modify or revoke an approved ULID. The plain terms of RCW 35.44.280 entitle the City to conduct a reassessment.

c. Reassessments can be made after an improvement is built.

Owners reference Douglass, 115 Wn. App. at 913, to support their contention that a reassessment after construction is inappropriate. Petition at 11, 14 – 15. Owners' argument is contrary to RCW 35.44.250, RCW 35.44.280, and RCW 35.44.300.

Douglass is clearly distinguishable from the present case. In Douglass, the Court ruled that an assessment was invalid because the Douglasses did not receive any special benefit from the sewer improvement. None of the flow from the Douglass' properties entered into any portion of the improvements constructed after the ULID was adopted. Douglass, 115 Wn. App. at 913. The improvements were backdated and levied without proper notice to the Douglasses. Id.

Here, Owners do, in fact, receive a special benefit now that they have access to a fully constructed sewer system, and the City will now provide notice of the gravity system as directed by the Court of Appeals.

Finally, in Douglass there was no reference to a reassessment – because, as the Court ruled, there was no special benefit to assess. Here, Owners failed to meet their burden to prove that their properties were not specifically benefitted.

d. Owners will not lose their protest rights under RCW 35.43.100.

Owners also contend that they will lose their protest rights under RCW 35.43.100, because the improvement has already constructed, citing Buckley v. City of Tacoma, 9 Wash. 253, 37 P. 441 (1894). Petition at 6, 13.

Buckley is plainly distinguishable from the case at bar. Tacoma passed a resolution which stated that the "[C]ity council hereby declares its intention to improve N street . . . at the expense of the abutting owners. . . ." Buckley, 9 Wash. at 258. However, that resolution did not provide any details about the construction, when it would take place ***or who was directly affected.*** Id. After passing the resolution, Tacoma completed the construction work and subsequently passed a second resolution which retroactively assessed property owners for the N Street project. Id. The court found that Tacoma failed to provide proper notice, and, as a result, to allow such a process would be "to cut off from property owners all knowledge of what they will be expected to answer for, and to deprive

them of the opportunity to remonstrate in sufficient numbers if they see fit." Id. at 262.

In contrast to the Buckley decision, the Owners here, along with many other property owners, had ample notice of the proposed improvement, and were in fact among the parties who filed the petition requesting that the City create the ULID in the first place.

e. Error is not so fundamental that defect cannot be cured.

Owners also contend that failure to adopt a new ordinance was such a fundamental error that it cannot be cured. Petition at 14, 17-18. Owners argue that in similar cases the courts have simply annulled assessments and not mentioned reassessments. Petition at 14. All of the cases Owners cite, however, concern instances where the property owners were able to show that their properties did not receive any benefits from the improvements.

For example, Owners cite, at pages 11 and 14 of the Petition, to Douglass, but the Court there was clear that Douglass received no special benefit from the sewer improvement. 115 Wn. App. at 907 – 910. Owners also cite, at page 14 of the Petition, to Kusky v. City of Goldendale, 85 Wn. App. 493, 499-500, 933 P.2d 430, 434 (Division III, 1997), in support of their argument. There, however, the Court found that an expert's testimony proved that the Kusky property was not specially

benefitted by the LID improvements. Id. Finally, Owners also cite to In re Indian Trunk Sewer System to support their position, but again the Court there found that the City failed to overcome expert testimony demonstrating an absence of special benefit to the landowners' property. In re Indian Trunk Sewer System, 35 Wn. App. at 843. Here, Owners' property is indisputably benefitted by the construction and operation of the new sewer system.

C. This Case Does Not Present Significant Questions of Law and There Are No Substantial Public Interests at Stake.

Owners request that this Court ignore the plain language of Washington statutes concerning local improvement districts, and over 100 years of case law, in order to prohibit the City from conducting a reassessment. No basis exists to grant Owners' request.

Reassessments are prohibited only when properties have not received a special benefit from the improvement or the initial formation ordinance lacks necessary detail. Neither situation is present here. Like the petitioners who contested the original estimate for an improvement which was subsequently revised through a reassessment in Kuehl, Owners here contend that the City is not entitled to a reassessment and, if one is ordered, that they will be deprived of due process rights. Kuehl, 91 Wn. at 207. This Court, however, has recognized for over 100 years that the

Legislature has given cities the authority to conduct reassessments when, as here, properties are specially benefited by an improvement. Id. at 199 – 200, 207 – 208.[6]

D. Owners Waived Any Argument that the City Is Not Entitled to Conduct a Reassessment Under RCW Chapters 35.43 and 35.44.

Owners acknowledge that a city may proceed with a reassessment after an assessment is nullified. RCW 35.44.280. *See* Appellants' Brief at 39 – 41; Appellants' Reply Brief at 18 – 19. In their Brief on appeal, Owners argued for annulment of the assessments, but nowhere did they argue that the City is prohibited from making a reassessment. Owners fail to address the provisions in RCW 35.44.280 and 35.44.300 in their Petition, other than in passing. This new argument was not properly raised in Owners' initial appeal and is accordingly waived.

VI. CONCLUSION

This Court should deny review. The Court of Appeals correctly applied state statute and precedent when deciding that the City is entitled to reassess the subject properties. Owners have failed to satisfy the criteria in RAP 13.4(b). Accordingly, Supreme Court review is

[6] "If the system of local assessments on the property benefited to pay the actual cost of local improvements is wrong in theory, it is for the people to correct that wrong by amending the Constitution, or for the Legislature to repeal the laws plainly conferring the power on the city. It is not for the courts by any process of judicial attrition through strained construction to seek to wear away the power granted in plain terms." Kuehl, 91 Wn. at 207.

unwarranted, and Owners' Petition should be denied.

RESPECTFULLY SUBMITTED this 10th day of March, 2014.

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By _____

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DECLARATION OF SERVICE

I, Kathy Swoyer, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 10th day of March, 2014, I served a true copy of the foregoing Answer to Petition for Review on the following individuals using the method of service indicated below:

Todd W. Wyatt Stuart Carson Carson & Noel, PLLC 20 Sixth Ave. NE Issaquah, WA 98027	☐ First Class, U.S. Mail, Postage Prepaid ☒ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: stuart@carsonnoel.com todd@carsonnoel.com; dana@carsonnoel.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of March, 2014, at Issaquah, Washington.

Kathy Swoyer

OFFICE RECEPTIONIST, CLERK

From: Kathy Swoyer <KathyS@kenyondisend.com>
Sent: Monday, March 10, 2014 2:42 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: todd@carsonnoel.com; dana@carsonnoel.com; stuart@carsonnoel.com; Bruce Disend; Jay Long
Subject: Filing in Case No. 69294-1
Attachments: PLD - Answer to Petition for Review.pdf

Dear Sir/Madam:

Please accept for filing the attached Answer to Petition for Review, in Supreme Court Case No. unassigned, Court of Appeals No. 69294-1, Denis Fury v. The City of North Bend. It includes the Declaration of Service.

This is being filed by John P. Long, Jr., WSBA No. 44677, e-mail address is jay@kenyondisend.com, telephone number is 425-392-7090.

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