69294-1

69294-1

No. 69294-1

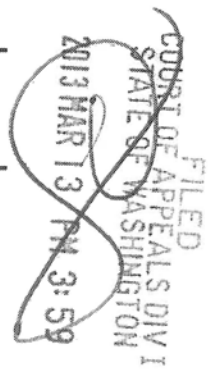
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

DENIS FURY, et al.,
Appellants,

v.

THE CITY OF NORTH BEND,
Respondent

APPELLANTS' REPLY BRIEF



Todd W. Wyatt, WSBA #31608
Stuart Carson, WSBA #26427
Attorneys for Appellants
CARSON & NOEL, PLLC
20 Sixth Avenue NE
Issaquah, WA 98027
Tel: 425.837.4717 / Fax: 425.837.5396

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page**

Statutes, Codes, and Civil Rules **Page**

I. ARGUMENT

A. This Court Reviews the Superior Court Decision De Novo.

The City appears to misunderstand the Owners' position on the standard of review. The City cites case law concerning the standard of review that the Superior Court applies when sitting as a court of appeal. Brief of Respondent ("BR") at 8-9. The Owners do not dispute those standards or that the standards apply as well to this Court's analysis of the administrative record. The Owners' brief—*see* Appellants' Brief ("AB") at16-17—merely pointed out that this Court, on review of the Superior Court's decision, applies a de novo standard to the *Superior Court's* decision. No deference, in other words, is paid to the ruling of the Superior Court. The City cites no contrary authority.

B. The City's Employees Purchase of a Gravity System Instead of a Vacuum System Invalidates the Current Assessments.

In its brief, the City makes a number of arguments regarding the City staff's change of the improvement from a vacuum sewer system to a gravity sewer system. None of these arguments can overcome the following undisputed facts:

(1) by its own terms, ULID No. 6 was specifically created for a vacuum system, which is not the subject of the assessments currently before this Court;[1]

(2) the change from a vacuum system to gravity system is not a minor or merely technical change—compare, for example, the map of the

[1] *See, e.g.,* CP 80-84 (Ordinance 1293); Hearing Exhibit 1 at page 15 of the PDF (a diagram of the original vacuum system, attached to this brief as Appendix A).

system used by the City to gain approval of ULID No. 6 (Appendix A), with the map of the final project (Hearing Exhibit 8, attached as Appendix B), showing different pipes, on different streets, with different service areas and with no vacuum collection stations as planned when passing ULID No. 6;[2] and

(3) the change to a gravity system was never approved by the Council.[3]

These facts alone justify annulment of the assessments under RCW 35.44.250. The assessments are imposed for an improvement never adopted or vetted by the statutory ULID process. The City's specific assertions to the contrary are addressed below.

1. No ULID has ever been created for a gravity sewer system.

The City contends that as long as the "purpose" of an improvement does not change, municipalities are free to modify on the fly what exactly the improvement will be and how it will be constructed. BR at 18-19, 23-27. Under the City's reasoning, *any* change in the price, structure, or type of sewer system would be allowed so long as the "purpose" of building a sewer system is met and the special benefits of the project to property owners exceed the cost.[4] The City's argument fails for multiple reasons.

---

[2] *See also* Hearing Transcript, page 338, lines 1-4; Hearing Exhibit 1, at page 21 of the PDF (noting that the preliminary cost estimate of the gravity system was approximately $9 million more than the vacuum system).

[3] Hearing Transcript, page 51, line 16 through page 52, line 1.

[4] Hearing Transcript, page 338, line 1 though page 339, line 9.

First, if all a municipality was bound to do was to stay true to the "intent" or "purpose" that it wished to achieve through an improvement, there would be little point to the ULID statutes. Cities would be free to change, with no public input or recourse, the improvement particulars and the public would be forced to pay for whatever a city purchased. Under the City's interpretation, if an improvement district ordinance described a project as a two lane country road, a city could "modify" the project to build a six lane superhighway with lights and cloverleaf off-ramps and send the bill to the landowners within the road-improvement district. The purpose of both projects remains to build a "road" and the city only "modified" the plan. This result is no more absurd than the conclusion the City asks this Court to reach now.

The ULID statutes prohibit this type of scheme by requiring that (a) the public approve creation of a ULID for a particular improvement, (b) the improvement—not merely the "purpose" of the improvement—be described by the enacting ordinance, (c) the city indentify and approve the costs of the particular improvement, and (d) any public challenge of the particular improvement be commenced within 30 days of passage. *See* AB at 19-20 and citations therein. If a municipality can ignore these requirements as long as it sticks to the "purpose" of the improvement, the statutes become meaningless.

Second, the City's argument is contrary to Washington law. The City largely limits its analysis of the applicable cases to distinguishing the particular facts of each case. BR at 20, 23-27. The City misses, however,

the larger and more important point made by these precedents: once an improvement is adopted, a municipality does not have the discretion to make material changes to the project. Nor, under RCW 35.44.020(1), does a city have the authority to merely estimate and then dramatically increase the cost of an improvement. The City never contests these central points. Likewise, the City does not bother—nor reasonably could it—to argue that the change from an $11.6 million vacuum system to a $19 million gravity system is a mere minor or technical change. There is instead no dispute that the change was a material one—from "apples" to "oranges"[5]—and accordingly a violation of the principles established in Washington law. AB at 21-26 and citations therein.

For example, the key holding of *George v. City of Anacortes*, 147 Wash. 242, 244-45, 265 P. 477 (1928), is that since the city council of Anacortes had decided to include the details of an improvement within an enacting ordinance, those details were not something that could be changed "at the caprice of the city's officers." The City in the present case argues that *George* is not controlling because: (1) *George* concerned a change in location of the improvement, which is allegedly not analogous; and (2) the City acted logically, not arbitrarily, when deciding to install a gravity system.

With respect to the first point, as a matter of fact, the City is simply wrong. *Compare* Appendix A *with* Appendix B (showing, for

[5] Hearing Transcript, page 338, lines 1-4.

example, a force main in the original system and none in the gravity system, and also showing new pipes in the area colored orange in the original map on Appendix A). And, more importantly, as a matter of law, the holding of *George* is not that merely the "location" of an improvement cannot be changed at the will of city staff. Instead, *George* stands for the proposition that if a city council decides to describe with particularity the details of the improvement—whatever those details may be—those specific components of the improvement cannot be changed at the will of city employees, especially when accompanied by a dramatic increase in cost. 147 Wash. at 244-45.

The City's second point—that the City allegedly acted "logically" in this case—is irrelevant. The question before this Court is not whether it was the prudent engineering decision to change from a vacuum system to a gravity system. The question instead is whether the ULID statutes and case law permit a city's employees to make such a change when the ULID enacting ordinance specifically called for a vacuum system and the change adds $8 million in costs. As explained in the case law, the answer to this second question is "no".

The City similarly misidentifies the applicable principle in *Buckely v. City of Tacoma*, 9 Wash. 253, 37 P. 441 (1894). The point of *Buckley* is that if a municipality is allowed to materially change (or increase the costs of) an improvement after the chance to protest the improvement has expired—such as under RCW 35.43.100—it robs the public of its appeal rights. 9 Wash. at 263-64; *see also* AB at 25-27.

The City's only rationale for distinguishing *Buckely* is that "in the present case, the property owners filed a petition requesting that the City create the ULID. . . . The property owners . . . obviously had notice of the proposed sewer improvement and all of the proceedings *that led to the formation of* the ULID." BR at 21 (emphasis added). True, the Owners had notice of proceedings that led to the formation of ULID No. 6, but that is not the problem. The problem is that *after* the formation of ULID No. 6, and *after* the time to challenge ULID No. 6 had expired under RCW 35.43.100, the City staff scrapped the specific improvement authorized by ULID No. 6 and chose an entirely different plan. This violates the rules in *Buckley* and its progeny cited by the Owners.[6] AB at 22-27.

Third, the only case cited by the City for support of its position is *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 85 P.3d 346 (2004). BR at

---

[6] The City's attempts to distinguish other Washington precedents are unpersuasive. In *Hayes v. City of Seattle*, 120 Wash. 372, 373-75, 207 P. 607 (1922), the court found that when a city passed a law calling for the creation of 24 extensions to a street car system, the modification of one extension was improper—even though the ordinance allowed for modification—because, "as far as this extension is concerned," the change "does not deal with the details of the original plan; it is an entire departure from that plan[.]" While citing this case, the City tellingly makes no attempt to distinguish it. BR at 25. That is not surprising, as just like in *Hayes*, the City staff here departed from the original vacuum plan not by modifying the details of the plan, but by entirely departing from the plan and choosing a new system. This violates the rule in *Hayes*.

The City's analysis of *O'Byrne v. City of Spokane*, 67 Wn.2d 132, 135-36, 406 P.2d 595 (1965), is also off target. The City distinguishes *O'Byrne*—which held that a city may make "minor changes" to a plan but may not alter them "so as to construct an entirely new system"—by arguing that the City here "only changed one detail of the plan" by changing the vacuum system to a gravity system. BR at 26. One does not need to be an engineer to conclude that changing from an $11 million system to a $19 million system is more than a "minor change." The City's own Public Works Director even rejected the City's current argument: comparing the two systems, he said, is like comparing "apples and oranges." Hearing Transcript, page 338, lines 1-4.

24-25. Sane Transit reaffirms the general principle that a major deviation from a publicly approved project is unlawful. *Sane Transit,* 151 Wn.2d at 68. The City, however, claims that *Sane Transit* supports the City's position because the *Sane Transit* court refused to strike down the Sound Transit Board's decision to scale back a publically approved light rail line from 21 miles to 14 miles. But in that case, the resolution approved by the voters specifically allowed the Sound Transit Board to "scale back" the project, and it was the Board—not Sound Transit staff—that decided to make the change. 151 Wn.2d at 69-74. *Sane Transit* might support the City's position if in that case: (a) Sound Transit had scaled *up* the plan—building, for example, a 30-mile light rail line instead of a voter approved 21-mile line; (b) at a larger cost; (c) the publically approved resolution only allowed "modification" of the plan, not specifically allowing the plan to be "scale[d] back"; and (d) it was Sound Transit's staff, not the Sound Transit Board, that made the decision to increase the size and cost of the project. Of course, none of those things are true of the *Sane Transit* case. The citizens of North Bend who petitioned for—and later decided not to object to—the creation of ULID No. 6 did not agree to bestow upon City staff the discretion to change the type, details, structure, and cost of the vacuum sewer system.

Fourth, the City posits that the Owners did have "ample notice" of the change of the sewer system and its new cost. BR at 22. This is false. There is nothing in the record that supports the City's contention. No new public meetings were held, no new ULID was created, no

amendment to Ordinance 1293 (which formed ULID No. 6) was proposed, no new notice was provided to owners that they were going to be held responsible for an additional $8 million in costs.[7] Furthermore, even if the Owners were informed about the change to, and increased cost of, the gravity sewer project, they were not informed at a time or as part of a process *that would allow them to do anything about it.* Based on the City's logic, as long as the project remained a sewer of some kind, the City staff had discretionary legislative authority to change the project at its whim without concern about the scope of the change or the cost impact to the Owners. The City's failure to offer the Owners a fair process to challenge the wholesale abandonment of the original project violated their rights under RCW 35.43.100 and renders the assessments fundamentally flawed. The remedy for such failure is to annul the Owners' assessment under RCW 35.44.250.

The City's reliance on *Esping v. Pesicka*, 19 Wn. App. 646, 577 P.2d 152 (1978), highlights the City's error. In its brief, the City claims *Esping* stands for the proposition that judicial review can only overturn ULID formation upon mistake, fraud, or arbitrary action. BR at 19. In *Esping*, the plaintiffs sought to enjoin formation of an improvement district, and it was in this context the court explained the heightened deference given to municipalities when forming ULIDs. *Id.* at 152. But

[7] The City writes that after the change to a gravity system was made, "another public meeting was held with the owners concerning the project." BR at 22 (citing Hearing Transcript, page 16). The public meeting the City refers to *is the hearing on the assessment protests themselves.* Hearing Transcript, page 16, lines 12-18. There was *never* a public meeting discussing the change to a gravity system.

in the case of ULID No. 6, the Owners *were never given the chance* to challenge the gravity system they are currently being charged for because the gravity system was not the subject of ULID No. 6.

2. Any modification of ULID No. 6 required Council approval.

The City's position on Council approval is inconsistent. In its brief, the City employs the heading "The Change from a Vacuum Sewer System to a Gravity System *Did Not Require Further Council Action.*" BR at 17 (emphasis added). No less than three paragraphs later, the City incorrectly[8] chides the Owners for failing to bring to the Court's attention the "key language", according to the City, of Ordinance 1293 allowing for *Council* modification of ULID No. 6. BR at 18. Finally, the City takes a third position, insisting—without citation to the record, which is telling, since the assertion is untrue—that the Council "properly delegated authority to City staff to . . . find the best technology to effectuate the ULID goal" of providing sewer service. BR at 26.

Putting the City's self-conflicting and unsupported positions aside, the facts here are undisputed. Ordinance 1293 expressly allows modification of the improvement if that modification is made by the Council. AB, Appendix A. Even if the Council had the authority to change the system from an $11 million vacuum system to an $19 million gravity system—which, as the cases above explain, it did not without first creating a new ULID—it is undisputed that the Council never adopted

[8] The Owners did quote Ordinance 1293's modification language and discussed it repeatedly. AB at 5-6, 23.

any ordinance changing the improvement to a gravity system or increasing actual costs under RCW 35.44.020(1). Hearing Transcript, page 51, line 16 through page 52, line 1.[9] Nor, contrary to the untrue assertion by the City on page 26 of its brief, is there any evidence anywhere in the record that the Council "properly delegated authority to City staff" to change the ULID as the staff saw fit, just as long as the underlying "purpose" of completing a sewer, of any type, was served. In fact, this directly contradicts Ordinance 1293. The assessments before this Court are for an improvement ordered by City staff and never properly authorized by the Council with public notice as required by the ULID statutes.

C. There is No Logical Explanation for Hearing Exhibits 72 and 73 Other Than An Arbitrary, Capricious, and Flawed Analysis by Ms. Foreman.

The City's 48-page brief contains no mention of—let alone an attempt to explain—two of the most important documents in this case. Hearing Exhibits 72 and 73 show that in 2007 the City's appraiser reached her conclusions of land values and corresponding special benefits and, despite the subsequent real estate downturn, declined to update her opinions to reflect the 2011 market. While Ms. Foreman testified[10] in

---

[9] The City claims the Council approved the contract for the construction of the "gravity system" in October 2009. There is nothing in the resolution (not an ordinance) referred to by the City, however, that even mentions a change to a gravity system. CP 91. Furthermore, any change to such a system would have to be made by ordinance, not a mere resolution. *See* RCW 35.67.030.

[10] The sum of Ms. Foreman's testimony was that she "considered" the relevant data and reached a blanket conclusion that all vacant land increased in value by 25% because of the sewer, but she was never able to explain *how* she reached that arbitrary number.

generalities that she "considered" post-2007 data, that simply cannot be true *when Ms. Foreman's numbers of values in 2007 are, to the penny, the same for values in 2011 for each and every type of zoning*. The City's silence on these two exhibits speaks volumes, for the only reasonable explanation is that, despite her testimony, she in fact did *not* update her numbers to reflect new data, for any new information would have changed at least one of the data points within Hearing Exhibits 72 and 73.

Unless the City is claiming that the historic market downturn never happened—which, oddly, the City seems to imply [11] — Ms. Foreman failed to incorporate any new data into her 2007 analysis. To conclude otherwise would mean to accept that by some mechanism, unknown to the principles of logic or mathematics, Ms. Foreman arrived, despite the real estate decline, at average before *and* after values in 2011 that were *exactly* equal to the average before and after values she reached

---

Hearing Transcript, page 147, line 16 through page 148, line 14; page 315, line 20 through page 316, line 16; page 321 line 6 through page 322, line 7; page 486 lines 12-19. The City points to Hearing Exhibit 5 as proof that Ms. Foreman did examine post-2007 sales. BR at 30. That document—which Ms. Foreman never explained in any detail—contains a list of 46 allegedly comparable sales. Five of those are merely listings, with no actual sales data to analyze. Of the few remaining listings post-market-downturn, neither Ms. Foreman in her report nor in person could explain how she analyzed them to reach her conclusion that all vacant land within ULID No. 6 increased in value by 25% because of the sewer. Instead, whether she said she used the data or not, the record shows without reasonable debate that the new data was *not* incorporated in her analysis, for if it was, somewhere among her many data points in her charts, the resulting valuations would have changed by at least one penny. It is infeasible to think that after a new analysis with hundreds of new data points, her conclusions of land values would have been exactly the same.

[11] BR at 31, 36. The City doubles down on questioning whether the market downturn occurred, stating that there was an "absence of expert testimony quantifying the impacts of the economic downturn on the real estate market." BR at 31. The City's statement is simply false. *See, e.g.*, Hearing Transcript, page 120, lines 12-15; Hearing Exhibit 29, pages 4-22 of the PDF.

in 2007. If an appraiser never changing her opinions of land value in the four years during a market crash is not sufficient to show an arbitrary, capricious, and flawed appraisal, it is difficult to surmise what would be.[12]

To that point, the City makes a telling admission in its brief. The City concedes, as it must, that it is a "fact" that Ms. Foreman's numbers "were not modified" between 2007 and 2011. BR at 33. The City then concludes that this fact, according to the Owners, "demonstrates that [the assessments] were incorrectly made." *Id.* While the Owners certainly do believe that Ms. Foreman's numbers are incorrect,[13] the City misses a more fundamental point. This is not a case where the Owners are merely claiming Ms. Foreman's numbers off by a degree and are offering a different opinion of special benefits, if any, provided by the gravity sewer. Instead, the Owners' argument is that Ms. Foreman *ignored facts*—chiefly, the market downturn and actual sales data—when she came to her erroneous conclusions. It is this failure and others that renders her opinions arbitrary and capricious under the standard set forth in *Abbenhaus v City of Yakima.* 89 Wn.2d 855, 858, 576 P.2d 888 (1978)

---

[12] The City contends "[o]ne whose property has been legally assessed is not entitled to have a revaluation made because of the subsequent events causing depreciation in the value of the property." BR at 32. That is of course true, but that is a completely separate issue. If, *after* a city assesses properties the value of land decreases, owners within a district cannot come back to complain about the amount of the assessments. That is not the issue here. The current issue before this Court is whether the assessment in 2011 takes into account the market decline between 2007 and 2011, which occurred *prior* to the assessment. As described above, the assessment does not reflect the market downturn.

[13] *See, e.g.*, AB at 9-10, and the citations therein, which the City never rebuts.

(explaining that arbitrary and capricious actions are ones "taken without regard to or consideration of the facts and circumstances surrounding the action").

1. The City offered no evidence concerning the feasibility of future development.

As explained in the Owners' brief, in order to determine a property's value, an appraiser can only employ assumptions concerning future use if the future use is reasonably certain to occur. *Bellevue Plaza Inc. v. City of Bellevue*, 121 Wn.2d 397, 411, 851 P.2d 662 (1993). As the City admits, Ms. Foreman "appraised the land as if it were likely to be developed into residential or retail lots." BR at 39. The City then contends that she "made a reasonable assessment of future commercial and/or residential development for these properties." BR at 39. No citation is provided by the City supporting this last statement.

The absence of a reference by the City to any authority speaks volumes. There was nothing provided by Ms. Foreman or the City during the administrative process that supported her assertions concerning future development. Instead, as explained in the Owners' brief, and in violation of the rule in *Bellevue Plaza*, she did not analyze what was actually feasible. AB at 36 (citing her testimony). Furthermore, other experts testified that the type of development envisioned by Mr. Foreman was simply not feasible. AB at 36 and citations therein. This evidence and argument was never rebutted below, and has not been rebutted before this Court. The assessments, which assume each and every vacant piece of

land within ULID No. 6 can be developed, are fundamentally flawed. *See Bellevue Plaza*, 121 Wn.2d at 411 ("Fair market value cannot include a speculative value.").

2. The City's "depressed prices" argument is new and meritless.

The City argues on page 34 of its brief that "the appraisal of the fair market value cannot be based on the depressed price during a recession." The City appears to be saying that Ms. Foreman should not have even considered post-2007 data points because those sales would have occurred in a depressed market.

This is the first time the City has ever made this contention. Neither during the administrative hearing, on appeal to the Council, nor or on appeal to the Superior Court has the City asserted that all recession-related information should be discarded. The City's new argument should be ignored under RAP 2.5(a).

Even if the Court considers the City's new theory, it is without merit. The quote the City relies on states that fair market value does not mean a value "fixed" by depressed pricing. *Bellevue Plaza*, 121 Wn.2d at 404 (citing *Donaldson v. Greenwood*, 40 Wn.2d 238, 252, 242 P.2d 1038 (1952)). Fair market value instead equals the "amount of money which a purchaser willing, but not obliged, to buy the property would pay an owner willing, but not obligated, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied." *Donaldson*, 40 Wn.2d at 252. In other words—as common sense

dictates—fair market value is the value the market will bear, and obviously what is happening in the market affects the value. The key word in the *Bellevue Plaza* quote is "fixed": prices that are artificially fixed as deflated or inflated from normal market prices should not be considered. There was nothing "fixed" about the real estate market decline between 2007 and 2011.

3. The City misstates the record.

There are a number of inaccuracies in the City's Brief concerning the administrative record:

First, the City claims that no appraisal evidence contrary to Ms. Foreman was provided during the administrative hearing. BR at 29. This is false.[14]

Second, the City argues that the Ms. Foreman offered to explain her conclusions, but undersigned counsel refused to hear her out. BR at 31. This is false.[15] Indeed, even the Hearing Examiner concluded that

---

[14] *See, e.g.*, Hearing Protest Letter 28, at pages 72-87 of the PDF (the opinion of an MAI appraiser that Ms. Foreman did not follow relevant standards because she did not explain in her final report how she reached her average values and did not provide a proper basis for determining special benefits); Hearing Protest Letter 30, at pages 10-14 (same); Hearing Protest Letter 32, at pages 5-15 of the PDF (stating that the market downturn has made development almost impossible); Hearing Protest Letter 33, at pages 15-6 of the PDF (same and explaining that "virtually all commercial lending for proposed commercial developments has ceased for the time being. . . . To the extent that construction financing would then typically be considered as a primary feasibility requirement, most projects lacking a firm commitment for such financing may well be considered *de facto* infeasible."); Hearing Exhibit 15 (the opinion of a MAI appraiser that Ms. Foreman's comparable sales were often inappropriate for use).

[15] The record shows that after the passage quoted by the City, counsel did not "change the subject", but instead kept pressing (in vain) for an explanation of how Ms. Foreman's numbers in 2007 could possibly match her 2011 numbers in light of the market downturn. Hearing Transcript, page 320, line 4 through page 324, line 10. It is true, as the City concedes, that Ms. Foreman "admitted nothing"—BR at 31—and

Ms. Foreman "could not fully explain" how it is possible that she reviewed new data, as she claimed when testifying, but her 2011 conclusions of market value matched, exactly, her 2007 conclusions as shown in Hearing Exhibits 72 and 73. Hearing Transcript, page 330, lines 1-4.[16]

Third, the City contended Ms. Foreman demonstrated "flexibility" when presented with new or different information. BR at 32. This, simply as a matter of fact, is false. Over 30 protests were considered at the first night of the administrative hearing, along with five hours of testimony—almost all of which challenged Ms. Foreman's conclusions with actual sales data, King County Assessor records, and other appraisal evidence. Ms. Foreman's conclusions of value were uniformly higher than the evidence provided by the landowners. After reviewing this

---

instead just offered meaningless truisms that the numbers were her opinions—so much so that even the Hearing Examiner was forced to conclude during the hearing that Ms. Foreman "cannot fully explain" why her 2007 values and 2011 values match. Hearing Transcript, page 330, lines 1-4. For other examples of undersigned counsel, and others, attempting, without success, to have Ms. Foreman explain her conclusions, see Hearing Transcript, page 147, line 16 through page 148, line 14; page 315, line 20 through page 316, line 16; page 321 line 6 through page 322, line 7; page 486 lines 12-19.

[16] The City appears to contend that it is possible for this Court to analyze "in detail," "the factors considered" by Ms. Foreman, as is required by *Bellevue Plaza,* because the record is "replete with explanations" of these factors. BR at 32. The problem with the citation provided by the City is not that Ms. Foreman fails to list the factors she considered, albeit in the most general terms; the problem is that Ms. Foreman—despite repeated requests—*could not tie those factors to her conclusions*. For example, she concluded that all vacant land within ULID No. 6—regardless of zoning type—increased in value by 25%, and she ignored significant actual sales data to the contrary. This Court will read the record in vain to discover how exactly she came up with those numbers. And these numbers are responsible for hundreds of thousands of dollars in assessments against the Owners. The appraiser's opinion of added benefits must rest on more than her credentials and unverifiable testimony that she "considered" data when her own records show she did not.

evidence, Ms. Foreman refused to make even one adjustment to her conclusions and instead before the second night of the hearing drafted "memos"[17] challenging every owner who had the temerity to question her opinions: "Q. Okay. In any of the 35 reports you submitted today, in any of those have you changed your opinion? A. I don't believe so, no. Q. So despite the fact the you're supposed to be an objective nonadvocate [*sic*] for the City and despite all the evidence you heard on November 10th, not one thing changed your mind; is that correct? A. That's correct." Hearing Transcript, page 311, lines 17-24.

D. The Superior Court's Limited Remand Order is Improper.

The applicable statute is clear: if the Superior Court could not affirm the assessments, the Superior Court's options were to "correct, change, modify, or annul the assessment." RCW 35.44.250. If the legislature wanted to provide superior courts with plenary authority over ULID appeals, including the power to craft selective and equitable relief, the legislature would have said so and not proscribed limited options under RCW 35.44.250. It did not, and reading such power into RCW 35.44.250 renders the statute's remedy clause superfluous.

The City argues that the Superior Court "was not in a position" to "correct, change or modify" the assessments. BR at 13. Read literally, this is true: under the record before the Superior Court the assessments could not be corrected, changed, or modified. Instead, since the

[17] Hearing Exhibits 41-65.

assessments were arbitrary and fundamentally flawed, and since due process had been violated—a conclusion the City does not now contest—the Superior Court should have *annulled* the assessments, which is the fourth option under RCW 35.44.250. The failure to follow due process renders the assessments fundamentally flawed. *See, e.g., Abbenhaus*, 89 Wn.2d at 859.

The absurdity of the current status quo is worth emphasis: the Owners (and other property owners within ULID No. 6) are currently responsible for assessments that *every side of this dispute agrees were enacted via an unconstitutional process*. This cannot be a correct result. The Superior Court erred by failing to annul the assessments and ordering a completely new process under RCW 35.44.280.

The City also asserts that the Superior Court acted properly because the Superior Court did "not mention that the assessments were incorrectly made" and accordingly "[n]o final judgment was entered." This, according to the City, allows the Superior Court to remand and retain jurisdiction over this matter so that after the Owners "complete their case," the Superior Court can then issue "a final ruling on the assessments[.]" BR at 14. Put differently:

> The Superior Court's ruling concerning the validity of the assessments is, essentially, "pending;" i.e., awaiting the results of the remand hearing and the Owners' determination, following the hearing, on whether further appeal is warranted.

BR at 16.

The City's position is without merit. First, there is nothing in RCW 35.44.250 that allows a superior court to remand a case back to a city on selective issues, but retain jurisdiction, all the while "pending" further resolution.

Second, *this Court has already ruled against the City on these issues.* Prior to these briefs being filed, both the Owners and the City submitted memoranda to this Court concerning whether the Superior Court's order was a final order that allowed direct review, or whether, as the City is arguing again, the order was not final—was "pending" "essentially"—and no direct review is allowed. This Court ruled in favor of the Owners and found the Superior Court's order was final under RAP 2.2(a)(1). *See* December 14, 2012 Order Determining Appealability and Granting Stay.

Finally, the City attempts to distinguish *Bellevue Plaza* and *Triangle Traders v. City of Bremerton*, 89 Wash. 214, 225, 154 P. 193 (1916), both of which stand for the proposition that when assessments are annulled, the administrative process begins anew. AB at 41; 89 Wash. at 225 (remanding for a "new" assessment). The City contends these cases do not apply because "in the case at bar, the [Superior] Court did not make a decision on whether or not the Owners' assessments should be annulled or approved." BR at 16. That, of course, is the problem. The Superior Court's failure to follow the limited options available to it under RCW 35.44.250 is the error this Court should correct.

E. Dahlgren's Assessment Should Be Modified.

Despite the Owners' reliance on RCW 35.44.010, RCW 35.44.020, and *Vine Street Commercial v. City of Marysville*, 98 Wn. App. 541, 548-49, 989 P.2d 1238 (1999)—holding that assessments cannot exceed special benefits—the City claims that "[n]o law" supports Dahlgren's position. BR at 40. This is false.

Numerous experts (Craig Sears and Anthony Gibbons, MAI and later rebuttal witnesses Bill Dunlap, PE and David Hill, PLS) all testified or presented written evidence,[18] which the City did not rebut, proving that: (1) the City altered its original vacuum design that extended across Dahlgren's entire frontage on North Bend Way SE to a new gravity system that extended only 185 feet into the Dahlgren parcel;[19] (2) only 25% of the Dahlgren property would be served and receive any project benefit; (3) the City refused to adjust its assessment of $573,021 that was based a *full* special benefit to the entire property; (4) Dahlgren's engineers confirm that Dahlgren will be forced at his own cost of at least $465,000 to construct the 75% remainder of sewer extension improvements to fully serve his property absent a full special benefit;[20] and (5) the only MAI expert to testify, Anthony Gibbons, stated that Dahlgren's assessment should be proportionally corrected to $319,900 ($784,900 less the cost to

---

[18] Hearing Exhibits 20, 21, 34, 35, 36, 37, 60, 77, 78, 79, and 85; RP at 15-16; Ordinance No. 1452, Exhibit A at 8-9

[19] Hearing Exhibit 85 at sub-exhibits A and B to David Hill, PLS Declaration.

[20] Hearing Exhibit 85 at Bill Dunlap, PE, Declaration.

cure of $465,000) to reflect the inability to serve 75% of the Dahlgren property.

The City has cited no legal authority or law to explain why the complete absence of the ability to serve 75% of Dahlgren's property constitutes a special benefit worthy of a full assessment. In other words, the City's assessment assumes a "benefit" for 100% of the property but willfully ignores the undisputed fact that to achieve this purported "benefit" Dahlgren will have to pay, out of his own funds, to complete the sewer extension. This violates *Vine Street*: the assessment (which assumes a full benefit) exceeds the *actual* specific benefit, which is only for 25% of the Dahlgren property.

The City argues that but for the City's extension, Dahlgren's property would have "no potential for future development." BR at 45. This new argument—which asserts the amount of a full assessment is proper based upon future development, BR 45-46—concerns the City's assessment method and is raised for the first time on appeal in violation of RAP 2.5(a). Furthermore, the City's argument is not supported by any citations to the record, scientific data, testimony, or exhibits in the record.

Moreover, the City makes no attempt to connect its "potential for future development" to any traditional "zone and termini" method outlined in RCW 35.44.030—or any other logical assessment method allowed under RCW 35.44.047. Ordinance 1293 creating ULID No. 6 is silent to its method of determining special benefit and its final assessment roll. In *Bellevue Plaza* the court reviewed a city's unique "trip generation"

method of assessments under RCW 35.44.047 where a city asumed that every downtown property would be developed into office buildings. The court cautioned that any concept of future and highest best use that the city attempted to apply in its "potential for future development" argument must be reasonably related to specific parcel evaluations. It cannot be based on speculation, and must be based upon expert evidence.

The City here can point to no expert testimony, scientific data, appraisal textbook, or specific parcel analysis to support its "potential for future development" standard that it now argues as a substitute for actual benefit analysis required under *Bellevue Plaza* for any of the Owners' parcels. Its only reference is to the Hearing Transcript at pages 237 through 245. BR at 46. A review of this testimony shows that it relates to the *value* of the Dahlgren property. The remainder of the cited hearing text deals with the cost to extend the sewer system to serve the 75% of the remainder of the Dahlgren property. These cited references have nothing to do with adopting "potential for future development" as a supportable and reasonable special benefit method allowed under RCW 35.44.047.

Unable to support any "before or after" value assessment, the City has resorted to an unpermitted speculative benefits assessment when it knew its modified project could only serve 25% of the Dahlgren property.

As noted in *In Re: Westlake Avenue v. Seattle*, 40 Wash. 144, 150-51, 82 P. 279 (1905):[21]

> All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value. Of course, circumstances and *conditions tending to depreciate the property* are as competent as those which are favorable. (Emphasis added).

Similarly, in *In Re West Wheeler Street*, 77 Wash. 3, 6, 137 P. 303 (1913), the court required a proportional assessment where portions of the assessed property would receive no project benefit. Finally, in *Wilson v. Upper Moreland-Hatboro Joint Sewer Authority*, 132 A.2d 909, 912 (Pa. Super. 1957) (attached as Appendix C), the court held that when a sewer pipe was only brought to one corner of a property—like with Dahlgren—the owner could not be charged for a full assessment.

Even if the City had provided any evidence supporting its "potential for future development" method (which it did not), the City has failed to demonstrate to this court why the proportional benefits test of RCW 35.44.010, RCW 35.44.020, RCW 35.44.047, and *Vine Street* do not apply where: (1) its special benefits study[22] lacked sufficient information for Dahlgren to analyze "before and after value" assignments with no comparative sales analysis;[23] (2) it knowingly altered its former pressurized project design that doubled project costs but could only serve 25% of Dahlgren's parcel; and (3) refused to change its assessment that

---

[21] *See also* Trautman, ASSESSMENTS IN WASHINGTON, 40 Wash.L.Rev. 100, 118-19 (1965).
[22] Hearing Exhibit 2.
[23] Hearing Exhibit 20 &21 (appraiser Gibbons, MAI letter of August 11, 2011).

was predicated on the receipt of full service and benefit under the speculative "potential for future development" method when Dahlgren demonstated in expert testimony and written evidence that any special benefit was limited to only 25% of his parcel.

If this Court declines to annul the assessments, relief for Dahlgren is warranted given that the City failed to rebut Dahlgren's expert evidence showing a proportional 25% special benefit only. In its remand the Court should direct that Dahlgren's assessment be proportionally reduced in an amount of no less than $465,000 where the City has agreed that its system can serve only 25% of his property.

II. CONCLUSION

For the foregoing reasons, this Court should reverse the order of the trial court and hold that the assessments against the Owners are annulled.

RESPECTFULLY SUMITTED this 13th day of March, 2013.

CARSON & NOEL, PLLC

Todd W. Wyatt, WSBA #31608
Stuart Carson, WSBA #26427
Attorneys for Appellants

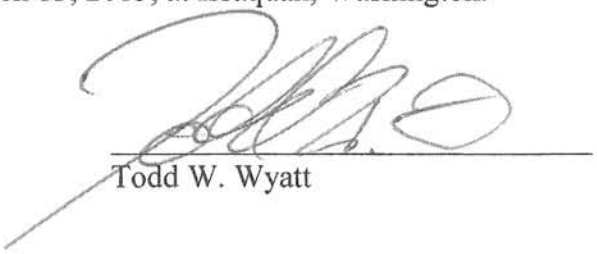
PROOF OF SERVICE

The undersigned hereby declare that on this 13th day of March, 2013, I caused the foregoing APPELLANTS' REPLY BRIEF to be served via the method listed below on the following party:

Via Hand Delivery to:

Bruce Laurence Disend
Kenyon Disend Law Firm
11 Front St S
Issaquah, WA 98027-3820
Attorney for Respondent

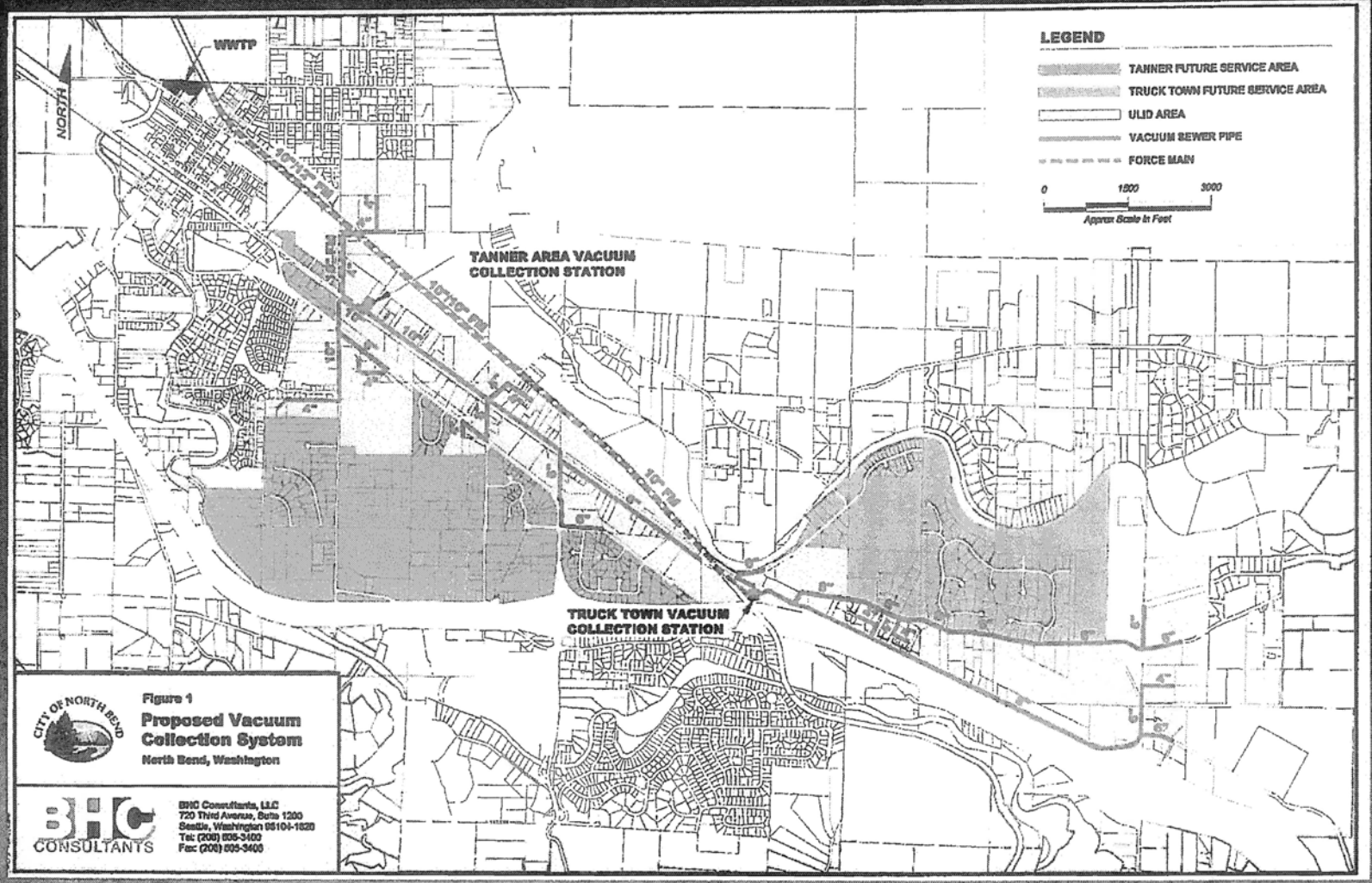
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on March 13, 2013, at Issaquah, Washington.



Todd W. Wyatt

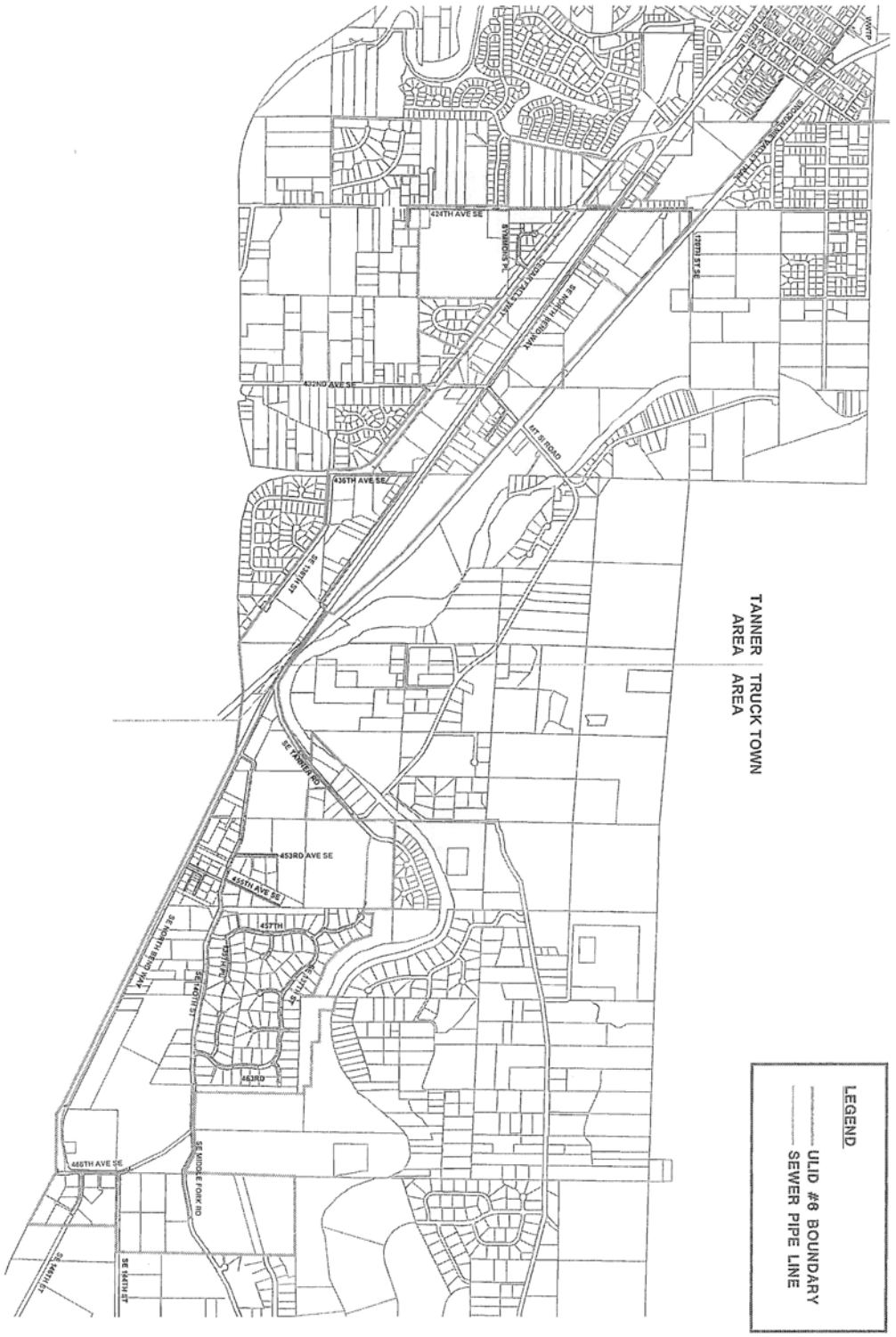
APPENDIX A

Service Area



APPENDIX B

M:\NBend\08462\Planset\GENERAL\Pipes Only KEY.dwg, SHEET KEY, 12/7/2010 10:21:09 AM



0 1" 2"
TWO INCHES AT FULL SCALE
IF NOT, SCALE ACCORDINGLY

SHEET: G-3	CITY OF NORTH BEND KING COUNTY WASHINGTON		⚠1 PLAN SHEET REVISIONS 1 3-9-2010	DATE: JUL 2009	Gray & Osborne, Inc. CONSULTING ENGINEERS 701 DEXTER AVENUE NORTH SUITE 200 SEATTLE, WASHINGTON 98109 - (206) 284-0860
OF: 155	ULID NO. 6 SHEET KEY	THOMAS M. KEARNS STATE OF WASHINGTON 15210 REGISTERED PROFESSIONAL ENGINEER MICHAEL J. JAUNDOA STATE OF WASHINGTON 19404 REGISTERED PROFESSIONAL ENGINEER		SCALE: NOTED	
JOB NO.: 08462				DRAWN: C.J.K.	
DWG: SHEET KEY				CHECKED: T.M.K.	
			No. REVISION DATE APPD	APPROVED: M.J.J.	

APPENDIX C

183 Pa.Super. 588
Superior Court of Pennsylvania.

Norman M. WILSON and Amelia S. Wilson, his wife, Appellants,
v.
UPPER MORELAND-HATBORO JOINT SEWER AUTHORITY.

June 11, 1957.

Action by landowners for a declaratory judgment determining that a sewer assessment was invalid and unenforceable against their property. The Court of Common Pleas, Montgomery County, April Term, 1956, No. 151, E. Arnold Forrest, J., entered judgment adverse to landowners and they appealed. The Superior Court, No. 46, October Term, 1957, Ervin, J., held that a sewer authority could not assess property owners for their whole lot frontage under the foot front rule where the sewer pipe was brought only to one corner of the lot, and was not constructed in front of the same.

Judgment reversed.

West Headnotes (4)

[1] **Municipal Corporations**
Frontage of Lots in General

Sewer authority could not assess property owners for their whole lot frontage under the foot front rule where the sewer pipe was brought only to one corner of the lot, and was not constructed in front of the same. 53 P.S. § 301 et seq.

10 Cases that cite this headnote

[2] **Municipal Corporations**
Frontage of Lots in General

The "foot front" rule actually assesses cost, but such cost might not exceed the benefits which the property has received from the improvement.

6 Cases that cite this headnote

[3] **Municipal Corporations**
Frontage of Lots in General

Municipal Authorities Act authorizing creation of authorities for sewer and other improvements, and providing for assessments of the costs thereof, did not intend to change the foot front rule whereby property cannot be assessed for greater portion of the cost of an improvement than its frontage upon the improvement bears to the total frontage of lots thereon. 53 P.S. § 301 et seq.

7 Cases that cite this headnote

[4] **Municipal Corporations**
Sewer Service Fees

Where property owners were benefited by a sewer installed by a municipal authority, in that they were able to connect to such sewer although it did not run in front of their property, they could have been compelled to pay fair portion of the costs of insulation of the sewer, measured by the benefits to their property, by use of the jury of view method of assessing the benefits, although their property could not be assessed by the foot front method. 53 P.S. § 306(r, s).

Attorneys and Law Firms

***589** ****909** Conrad G. Moffett, Jenkintown, for appellants.

Samuel H. High, Jr., Norristown, Edward B. Duffy, Hatboro, for appellee.

Before RHODES, P. J., and HIRT, GUNTHER, WRIGHT, WOODSIDE, ERVIN and WATKINS, JJ.

Opinion

ERVIN, Judge.

[1] In this appeal the sole question is whether a sewer authority may assess a property owner for his whole lot frontage under the foot front rule where the sewer pipe is brought only to one corner of the ****910** lot and is not constructed in front of the same. Appellee was incorporated on December 15, 1953, upon the application of the Board of Commissioners of Upper Moreland Township and the

Borough Council of the Borough *590 of Hatboro under and pursuant to the Act of May 2, 1945, P.L. 382, as amended, 53 P.S. § 301 et seq. [1] Appellants, husband and wife, are the owners of a piece of ground with a frontage of 242.63 feet facing on Old York Road in the Borough of Hatboro, upon which they have their residence. In constructing the sewer in the bed of Old York Road, appellee constructed the sewer main to a point several feet south of appellants' lot and from that point constructed a lateral to the corner of appellants' property. The appellants constructed a further lateral from that point diagonally across their land to their residence at a cost of $341.50, which sum was in excess of the amount they would have had to pay had the sewer been laid in Old York Road in front of their property. Appellants have actually used this sewer since its construction. The cost of the sewer per front foot was determined by dividing the sum of $3,033,048.12 (the actual cost having been higher than that) by the total number of feet of frontage of properties benefited, improved or accommodated by the sewers, thus establishing the sum of $9.8058 per foot. Plaintiffs' full frontage of 242.63 feet was included in the total frontage and their property was assessed for the total sum of $2,379.18.

The lower court in a declaratory judgment held that the assessment was valid and enforceable against appellants' property. With this conclusion we are constrained to differ.

As far as we can ascertain, the appellate courts of Pennsylvania have never interpreted the foot front rule in such manner as to permit the assessment of property frontage which does not actually abut on the line of the improvement In City of Scranton v. Beckett's Estate, 17 Pa.Super. 296, 300, we said: 'The property *591 of the defendant cannot be assessed for a greater portion of the cost of this sewer than its frontage upon the improvement bears to the total frontage of the lots of private owners, thereon, if the assessment is made according to the foot-front rule.' In Borough of Berwick v. Smethers, 105 Pa.Super. 40, 42, 160 A. 148, 149, we said, in defining the foot front rule: 'The assessment is confined to the actual frontage on the line of improvement.' In Nether Providence Twp. Sewer Dist. Assessment Case, 143 Pa.Super. 286, 290, 18 A.2d 128, 130, we said: 'It is a prerequisite to assessments of benefits that the property to be charged therefor must *abut* on the sewer.' In Spring Garden Twp. v. Logan, 149 Pa.Super. 580, 584, 585, 27 A.2d 419, 422, we said: 'Local assessments can only be made for improvements which confer peculiar local benefits upon property *which adjoin the improvement.* In justifying any assessment for benefits it must be confined to the particular properties which do in fact abut directly upon the line of the improvement. In re Morewood Ave. Chambers's Appeal, 159 Pa. 20, 28 A. 123 [132]; Cooper v. Bellevue Borough, 51 Pa.Super. 597. Unless the front-foot rule is so applied, reflecting an assessment according to the benefits conferred, it exceeds the legislative power of taxation. In re Washington Ave., 69 Pa. 352.' In Witman v. Reading City, 169 Pa. 375, 391, 32 A. 576, 577, it was said: 'It is held in Re Park Avenue Sewer (opinion filed herewith) * * * that no properties can be assessed for the cost of a sewer, except those that abut on the line of it.' See also In re Park Ave. Sewers, Appeal of Parker, 169 Pa. 433, 32 A. 574. In Grafius' Run, 31 Pa.Super. 638, 643, 644, we said: 'These cases, and many more that could be cited, seem to me to oblige us to hold that the legislature could not, acting within its constitutional powers, authorize the appellee to assess benefits against, or in **911 other *592 words, levy special taxes on, any properties, to pay the cost of a local improvement, except those abutting directly on the line of such improvement.'

The lower court felt that the foot-front rule had been changed by the legislature in the Municipality Authorities Act of 1945. The portions of the act with which we are concerned in this case are as follows:

'(r) To charge the cost of construction of any sewer constructed by the Authority against the properties benefited, improved or accommodated thereby to the extent of such benefits. Such benefits shall be assessed in the manner provided by section eleven of this act for the exercise of the right of eminent domain.

'(s) To charge the cost of construction of any sewer constructed by the Authority against the properties benefited, improved or accommodated thereby according to the foot front rule. Such charges shall be based upon the foot frontage of the properties so benefited, and shall be a lien against such properties. Such charges may be assessed and collected and such liens may be enforced in the manner provided by law for the assessment and collection of charges and the enforcement of liens of the municipality in which such Authority is located: Provided, That no such charge shall be assessed unless prior to construction of such sewer the Authority shall have submitted the plan of construction and estimated cost to the municipality in which such project is to be undertaken, and the municipality shall have approved such plan and estimated cost: And provided further, That there shall not be charged against the properties benefited, improved or accommodated thereby an aggregate amount in

excess of the estimated cost as approved by the municipality.' 53 P.S. § 306.[2]

*593 [2] [3] The lower court said: 'The Municipality Authorities Act, supra, specifically states that the charges shall be based upon the front-footage of the properties so *benefited*. Then the question is whether or not a particular property has been benefited, not whether it has any frontage upon the sewer. A property may have no frontage upon the sewer, as in this case, yet if it is provided with an opportunity to connect which makes for a benefit not previously enjoyed, the property may be assessed in accordance with the front-foot rule.' A comparison of (r) and (s) above reveals that the same language in both paragraphs is used down to the word 'thereby.' Then in (r) the language continues, 'to the extent of such benefits' and in (s) the language continues 'according to the foot front rule.' The lower court puts great reliance upon the next sentence, which reads: 'Such charges shall be based upon the foot frontage of the properties so benefited * * *.' If the foot front rule is only a measure of benefits, then there would have been no need to include (r) and the same would appear to be mere surplusage. The obvious legislative intent appears to be to the contrary and each provision should be given its full effect. The legislature undoubtedly knew that in rural sections it would be inequitable or impossible to assess the costs under a foot front rule. The foot front rule actually assesses costs but they may not, under the law, exceed the benefits which the property has received from the improvement. If appellants had 5,000 feet of frontage on Old York Road, under the lower court's interpretation they could be assessed therefor. Such a result would be most unfair. If we were to adopt the lower court's interpretation, where would we draw the line-at 100 feet, 500 feet, 1,000 feet or 5,000 feet? We feel certain that the legislature intended to provide the jury of view benefit method for a situation such as is presented *594 in this case. We think that the legislature **912 was merely giving to the authority the two long known and familiar methods of assessment, namely, benefits determined by a jury of view and cost of construction according to the foot front rule, limiting the charge to such cost. If the amount of benefits exceeded the cost, such excess could not be assessed against the property. If the costs exceeded the benefits, such excess could not be assessed against the property. When the legislature enacted the Act of 1945 and the subsequent amendments, it certainly must have known of the long line of decisions in Pennsylvania interpreting the foot front rule so that the property could not be assessed for a greater portion of the cost of the sewer than its frontage upon the improvement bears to the total frontage of lots thereon. We can see no good reason for the legislature to authorize an authority to use a method of assessment which the courts had declared to be unequal and unfair and which had been denied theretofore to municipalities. The authority was merely a creature brought into being by a borough and a township and normally would not be expected to possess a power which its parents did not possess. We definitely hold that the legislature did not intend to change the foot front rule by the Municipality Authorities Act.

This holding will make it unnecessary for us to consider the constitutional question of whether the legislature could make the change which the lower court found to have been made.

In addition, we might add that the authority must have construed its powers in accord with our conclusion. It promulgated and adopted Resolution No. 4, § 2 of which provides: 'Certain of the costs of the construction of the Sewer System are hereby charged and assessed against the assessable properties *abutting on* *595 *such sewer system*, and benefited, improved or accommodated thereby in accordance with the front foot rule.' (Emphasis added.) The assessment notice which was served upon appellants stated that the property was assessed *'where it abuts upon the line of the sanitary sewer.* * * *' (Emphasis added.) It would appear that the authority has restricted itself by its resolution and sewer assessment bill to the frontage upon the line of the sewer.

[4] We have no doubt that appellants' property has been benefited by this sewer. They have been actually using it and should pay a fair proportion of its cost, measured by benefits to their property. This could have been done by using the jury of view method of assessing the benefits. Whether it is too late for this to be done at this time, we do not have to decide.

Judgment reversed.

Parallel Citations

132 A.2d 909

Footnotes

1 Formerly 53 P.S. § 2900z-1 et seq.

2 Formerly 53 P.S. § 2900z-5.

End of Document