90027-2

Court of Appeals Case No. 69294-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DENIS FURY, et al.,
Appellants,

v.

THE CITY OF NORTH BEND,
Respondent

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Denis and Gail Fury, Tanner Way, LLC, Thomas Weber, Thomas and Nancy Thornton, and Dahlgren Family LLC #7 (collectively, the "Owners") ask the Supreme Court to accept review of the Court of Appeals decisions terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISIONS

The Owners seek review of the Court of Appeals October 21, 2013 Unpublished Opinion (the "Opinion"), attached in the Appendix as pages A-1 through A-16, as well the Court of Appeals January 8, 2014 Order Denying Motion for Reconsideration, attached in the Appendix as page A-17.

C. ISSUES PRESENTED FOR REVIEW

The Owners challenged assessments imposed against them by Respondent the City of North Bend (the "City") pursuant to a Utility Local Improvement District ("ULID"). The City's ULID—"ULID No. 6"—was created pursuant to the ULID statutes found in RCW 35.43 and RCW 35.44. In the 2007 ordinance enacting ULID No. 6, the City authorized the purchase of a vacuum sewer system at an approximate cost of $11.6 million. After passage, however, the City's staff—without modifying ULID No. 6 or obtaining public approval—decided to purchase a gravity sewer system instead of a vacuum sewer system,

increasing the cost by over $7 million. After the City imposed assessments against the Owners for the gravity system, the Owners challenged the assessments. The Court of Appeals invalidated the assessments levied by the City, holding that ULID No. 6 never encompassed a gravity sewer system. The Court of Appeals also held, however, that the City could "reassess" the Owners on remand. There is no provision in the ULID statutes that allows for assessment (or reassessment) based upon projects not originally encompassed by the improvement district. The issue presented, therefore, is whether a municipality may assess citizens for the cost of one public works project under the authority of a local improvement district when that local improvement district was expressly created for a *different* public works project.

D. STATEMENT OF THE CASE

1. The History of ULID No. 6.

In order to create a ULID, a municipality must obtain the written authorization of over 50% of the citizens within a proposed ULID boundary. Here, that occurred, and in 2007 notice was sent to the citizens of the City that a public hearing would be held concerning the creation of a vacuum sewer system ULID. CP 55 (Hearing Exhibit 1 at page 21 of

the PDF).[1] At the hearing, the City Council decided to create ULID No. 6 authorizing the vacuum system. The City effectuated its decision via ordinance, CP 80-84, and, as required by law—*see* RCW 35.43.080 & RCW 35.44.020—described in detail the improvement the City was authorizing:

> The City Council orders the following described improvements: Design and construction of a *vacuum* sewer system in the herein specified portion of the City [Comp Plan] . . . including but not limited to two (2) vacuum/pump stations, approximately 24,000 linear feet of 10-inch and 12-inch diameter force mains, approximately 40,600 linear feet of 4-inch, 6-inch, 8-inch, and 10-inch diameter collection pipes, one side sewer service and sump pit to each benefiting parcel, division valves, two (2) emergency generators, and appurtenances, all as approximately depicted in Exhibit A . . . .

CP 80-84 (emphasis added). The City estimated the total cost for the project as $11.6 Million. CP 81.

At some point after ULID No. 6 was created, City employees and consultants decided to change the vacuum sewer system, approved by the

[1] Pursuant to a stipulation and order signed by the Superior Court, see CP 46-47, the administrative record—developed before a Hearing Examiner hired by the City—is voluminous and accordingly on a CD. That CD was admitted as an exhibit by the Superior Court and has been transferred to the Court of Appeals. CP 55, 109-10. That CD is divided into three folders: (1) "Protest Letters" contains the original protest letters filed by property owners in response to the assessment roll issued by the City. This petition will cite them as "Hearing Protest Letters"; (2) "Exhibits" contains the exhibits introduced at the hearing before the Hearing Examiner. This petition will cite them as "Hearing Exhibits"; and (3) "Appeals to HE Decision" contains the documents filed after the Hearing Examiner's preliminary decision and on appeal to the City Council. This petition will cite them as "Council Appeal Documents." Finally, there are five PDFs not placed in folders, including a full copy of Ordinance 1452 and two PDFs of the hearing transcript. The hearing transcript will be cited as "Hearing Transcript," whereas the Superior Court oral argument transcript will be cited as the Record of Proceedings, or "RP".

Council and the landowners within ULID No. 6, to a gravity sewer system. Hearing Transcript, page 339, lines 2-9. The change was dramatic: it significantly altered the pipes and other items described in ULID No. 6 and increased the cost of the project by over $7 million. *See, e.g.*, Hearing Transcript, page 307, lines 6-14; page 335, lines 22-24. As the City's Public Works Director Ron Garrow put it to both the press, *see* Hearing Exhibit 75, and during the administrative hearing, *see* Hearing Transcript, page 338, lines 1-4, comparing the vacuum system to the gravity system is like comparing "apples and oranges." The price for constructing the gravity system, approximately $19 million, CP 86-89, was substantially higher than the original $11.6 million approved by the City Council and requested by petitioning owners for constructing the vacuum system.

There was never any ordinance or resolution from the City Council approving the City staff's decision to scrap the previously approved vacuum system or otherwise modifying ULID No. 6 to create a larger and more expensive gravity-based system. Hearing Transcript, page 51, line 16 through page 52, line 1.

2. The Owners Within ULID No. 6 Appeal the Assessments.

The Owners—and tens of other landowners within ULID No. 6—protested the assessments on a number of grounds. A two-day, 13-hour public hearing was held before a hearing examiner. The Hearing Examiner issued his decision largely approving the City's proposed assessment roll. Hearing Exhibit 88. Without discussion or oral argument, the City Council affirmed the roll. CP 86-89.

3. The Superior Court Orders a "Limited" Remand.

The Owners appealed the City Council's confirmation of the assessment roll to the King County Superior Court, which sat as an appellate court per RCW 35.44.250. The Superior Court remanded the case back to the City—on a "limited" basis—because of due process violations that occurred during the administrative hearing. RP 39-40. The Superior Court did not rule on the many other substantive issues raised by the Owners, and accordingly the Owners appealed. In their appeal briefs to the Court of Appeals, the Owners sought annulment of the assessments and, in the alternative, a full remand for a new administrative process, not a "limited" reassessment as proscribed by the Superior Court.

4. The Court of Appeals Annuls the Assessments, But Allows "Reassessment."

In the Opinion, the Court of Appeals adopted the Owners' position that it was improper for the City to charge the Owners for expenses incurred building a gravity system. The Opinion explains two separate reasons for invalidating the assessments on these grounds.

First, RCW 35.43.070 requires that cities employ ordinances for creating ULIDs. Once that ordinance is created, a property owner has 30 days to file a protest under RCW 35.43.100. The Court of Appeals relied on these statutes as well as the 1894 case of *Buckley v. City of Tacoma*, 9 Wash. 253, 37 P. 441 (1894), to hold that "once the City became aware of the substantially increased cost of the gravity sewer system, it should have passed a new ordinance giving the property owners a new opportunity to protest." A-14.

Second, RCW 35.44.020 requires every ordinance creating a ULID to include certain cost estimates. As the Court of Appeals explained: "If the City has latitude to materially increase the initial cost estimate without proper notice to the property owners, RCW 35.44.020 serves no purpose." A-14.

The Owners agree with these rationales. The Opinion concludes, however:

> [O]nce the City became aware of the substantially increased cost of the gravity sewer system, it should have passed a new ordinance, thus triggering a new notice and protest period for all property owners within the expanded ULID. As the appellants vigorously protest, the only validly created ULID was for a $11.7 million vacuum sewer system. *No ULID was ever created for a $19 million gravity sewer system. . . . The City does not have authority to impose assessments for an improvement not created under the ULID statutes.* . . . Consistent with *Abbenhaus* [*v. City of Yakima,* 89 Wn.2d 855, 576 P.2d 888 (1978)], we reverse the trial court and annul the assessments only of the appealing property owners, *allowing the City to pursue a reassessment.*

A-15–A-16 (emphasis added). The Opinion then contains a footnote, reading: "In both their opening brief and reply brief, appellants acknowledge that a city may proceed with a reassessment after an assessment is nullified. RCW 35.44.280. *See* Br. Of App. at 41, Reply Br. at 19." A-16.

The Owners then filed a motion for reconsideration and to publish. In that motion, the Owners explained that: (1) there was no legally permissible way under the statutes or case law to "reassess" in this context when the improvement was already constructed and the Court of Appeals had ruled the existing ULID did not substantively encompass the improvement the "reassessment" would cover, and (2) the Owners' request for a remand was sought in the alternative for procedural relief only and was located exclusively in the sections of their brief concerning

the Superior Court's "limited" remand order. *See* Motion to Reconsider, attached to the Appendix at A-18 through A-33. The City filed a response, and without explanation the Court of Appeals denied the Motion to Reconsider and Publish. A-17.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

This case meets the requirements of RAP 13.4(b). The Opinion's reassessment instruction conflicts with previous published decisions of the Supreme Court and Court of Appeals concerning public works, conflicts with the plain language of the ULID statutes, involves significant questions of public policy, and addresses issues of substantial public interest. If allowed to stand, the Opinion's holding concerning reassessment opens a new, wide, and problematic door for governmental agencies to excuse any lack of compliance with statutorily mandated local improvement processes and instead retroactively pigeonhole completed projects into improvement districts that were intended to fund completely different projects. The statutory requirements of notice and cost estimates will be subject to abuse, as cities could dramatically alter ULID projects and risk only the penalty of a new reassessment hearing. The statutes were never intended to allow such a result.

1. Allowing Reassessment Conflicts with Decisions of the Supreme Court, Court of Appeals, and Washington Statutes.

The best way to illustrate the error in the Opinion concerning reassessment is to imagine how reassessment could occur on remand. There are three possible ways the City could attempt a reassessment. One, the City could reassess under the current state of ULID No. 6. Two, the City could pass an ordinance attempting to "modify" ULID No. 6 to include the already-built gravity sewer system. Three, the City could form a new ULID for the completed gravity system. All of these options conflict with precedent and statutes.

a. Reassessment under ULID No. 6 as is.

Any reassessment under the current ULID No. 6 suffers from the same defect already found in the Opinion: ULID No. 6 did not include a larger, more expensive gravity system and no assessment can lawfully be made for that system. Whether it is labeled an assessment or reassessment, the flaw is the same, rendering the assessments against the Owners invalid as a matter of law.

b. "Modifying" ULID No. 6 via ordinance.

The second option possibly allowed by the Opinion is for the City Council to pass an ordinance—more than two years after construction of the gravity system is complete—"modifying" ULID No. 6 to include a

gravity system instead of a vacuum system. RCW Chapters 35.43 and 35.44 do not contemplate such a process. The City could claim that a "modified" ULID would trigger the opportunity to protest under RCW 35.43.100. If one assumes that protest is rejected, the City would assert that it could then proceed to reassess. This option raises numerous conflicts with Washington law.

First, as recognized in the Opinion, allowing an after-the-fact modification ordinance to materially increase costs and adopt a new improvement would render RCW 35.44.020 meaningless. A-14. The citizens petitioned for a vacuum system and it was approved following the requirements of RCW 35.44.020; allowing a City to throw those standards aside reads all force out of the statute. The City could materially and unilaterally alter the project and double the costs without the knowledge or consent of the original petitioning owners.

Second, although Washington courts allow curative procedural reassessments, cases do not allow municipalities to substantively and materially modify an already enacted and publically approved ULID, especially when such a modification drastically alters the system design or materially increases the cost to property owners within a ULID.[2]

[2] *See, e.g., Sane Transit v. Sound Transit*, 151 Wn.2d 60, 68, 85 P.3d 346 (2004) ("While minor details in a public project may be changed by the governing agency, taxpayer funds may not be used to construct a substantially different project than the one

Third, and more broadly, even if a modification of ULID No. 6 were allowed *before* the gravity sewer system was built—which it was not—modification *now* of ULID No. 6 runs directly afoul of the ULID statutes. The ULID statutes speak plainly on this: the ordinances describing and approving a ULID are to be vetted through the ULID process *before the improvement is constructed*, not after. There is no basis in the statutes (or anywhere else in law) for incorporating an improvement into a ULID after the improvement is built.[3]

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approved by the voters."); *O'Byrne v. City of Spokane*, 67 Wn.2d 132, 135-36, 406 P.2d 595 (1965) (holding that a city exceeded its power when, after it ordered a street improvement via ordinance and public vote that referenced specific items, the city then changed one of the items concerning a route of part of a street, and relying on the principle that "[i]t is probably true that the city may make minor changes in the plans but may *not* radically alter them *so as to construct an entirely different system* from that voted upon by the people" (citation omitted and emphasis added)); *George v. City of Anacortes*, 147 Wash. 242, 265 P. 477 (1928) (holding that when a change was made that accounted for over 10% of the total cost of the improvement project and was in contravention of the original ordinance, the change was invalid); *Hayes v. City of Seattle*, 120 Wash. 372, 374-75, 207 P. 607 (1922) (holding that even though the enacting ordinance for an improvement authorized a city to make changes to the improvement as long as the purpose of the improvement was not affected, the city did not have the right to make anything other than "minor" changes and the "radical" change to one part of the improvement plan was impermissible); *La Franchi v. City of Seattle*, 78 Wash. 158, 164, 138 P. 659 (1914) (rejecting an assessment roll passed by the City of Seattle when the city included items in the assessed expenses not included in the original petition calling for the improvement, and quoting a treatise for the proposition that "the ordinance being the sole authority for the construction of a public improvement to be paid for by special assessment, the municipal authorities *have no right to change the nature, locality, character or description* of the improvement as prescribed in the ordinance" (citation omitted and emphasis added)).

[3] *See, e.g., Douglass v. Spokane County*, 115 Wn. App. 900, 910, 64 P.3d 71 (2003) (holding that the phrase "to be" in the special assessment context is prospective only, and that "Washington cases addressing ULID improvements just discuss improvements made *after* the creation of the ULID." (emphasis in original)); *see also* RCW 35.43.040 (discussing the improvement "*to be* constructed" in a ULID and that a city may order the work "*to be* done" to complete the improvement (emphasis added)); 35.43.050

Fourth, allowing a retroactive modification now would not cure the Owners' lost protest rights under RCW 35.43.100, which the Opinion correctly identifies as one of the key reasons the assessments must be annulled. RCW 35.43.100 places a limit on any lawsuit "challenging the jurisdiction or authority of the [city] council *to proceed* with the improvement *and creating* the local improvement district . . . unless that lawsuit is served or filed no later than thirty days after the date of passage of the ordinance *ordering* the improvement *and creating* the district[.]" Emphasis added.

The statute presumes that there is an ordinance "ordering the improvement" and "creating" the district. Here, even if the City passed a new ordinance modifying ULID No. 6 to include the gravity system, that is not an ordinance "ordering" anything—the system has already been purchased and built. Moreover, a modifying ordinance is not an ordinance "creating" the district. The district has already been created. The time period for challenging ULID No. 6 has expired. Indeed, what possible beneficial effect could a protest have now? A new ordinance

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(explaining the procedure when a city finds that property "*will be* benefited" by the improvement (emphasis added)); 35.43.070 (mandating that a improvement "*may be ordered*" only via ordinance (emphasis added)); 35.43.080 (providing requirements for every ordinance "*ordering*" an improvement (emphasis added)); 35.43.120 (discussing the requirements needed for "*the proposed* improvement" (emphasis added)); 35.43.130 (same and requiring "preliminary estimates" for the improvements); 35.43.140 (explaining the process for resolutions of a city "declaring its intention to order the improvement"); 35.44.020 (requiring estimates of costs).

modifying the improvement could not be read to restart a protest period unless the phrases "ordering the improvement and creating the district" are read out of the statute. The Opinion allowance of a reassessment under these facts cannot be squared with the statutory language.

The phrase "to proceed with the improvement" cements this conclusion even further. There is nothing for the City "to proceed with" in this case; the language does not apply to any post-construction ULID modification. RCW 35.43.100 would not apply after a modification of ULID No. 6.[4]

Buckley v. City of Tacoma is on point. In that case, after the improvement was complete, the City of Tacoma passed an ordinance "ratifying" the work. 9 Wash. 253, 259-60, 37 P. 441 (1894). The court rejected this post-construction ratification as directly contrary to the sequence demanded by law. *Id.* at 268-69 (citing the applicable ordinances, which, like the ULID statutes, speak in terms of ordering and

[4] RCW 35.44.300 does not change this result. That statute states that reassessments are not invalid merely because the improvement is complete. That is, of course, true: if an assessment is found to be invalid in some technical sense—for example, if an appraiser's opinions were found to be arbitrary and capricious—*but the underlying costs within the ULID are valid*, the reassessment can and should be allowed even though the construction is complete. But that is not the issue here. A plain reassessment as envisioned by RCW 35.44.300 is not possible. The only other possibilities, therefore, are to modify ULID No. 6 or enact a new ULID. Both those scenarios fail because *the acts of modifying the ordinance or enacting a new ULID* are themselves invalid as a matter of law under the ULID process. Put differently, the "reassessment" is not on its face invalid because the improvement is complete, but the revised/new ordinances *themselves* are invalid under the ULID statutes, and that impermissibility imputes to the reassessments since these revised/new ordinances would be the only bases for any reassessment.

approving the project before construction). The court also noted that any "protest" right was meaningless: "The work has been done beyond recall, and no remonstrance of property owners could have any possible effect." *Id.* at 268. Like in *Buckley*, any post-construction modification (or, as discussed below, new ULID) cannot impose costs for the gravity system.

Fifth, in situations like this where the flaw is so fundamental that reassessment could not cure the defect, courts have not condoned or discussed reassessment. They have instead simply annulled the assessments, which is and always has been the primary remedy sought by the Owners. *See, e.g., Douglass*, 115 Wn. App. At 914 (affirming the annulment of the assessment without any reference to a reassessment); *Kusky v. City of Goldendale*, 85 Wn. App. 493, 501, 933 P.2d 430 (1997) (same); *In re Indian Trail Trunk Sewer*, 35 Wn. App. 840, 844, 670 P.2d 675 (1983) (same).

c. Enacting a new ULID.

The City's third potential option is to create a new ULID ordering a gravity system, and after enactment proceed to assess the Owners. Technically, this would not be a "reassessment" at all, but instead a new assessment under a new ULID. But for the exact same reasons discussed above, this scheme would also fail. Under the language of the statutes found in RCW 35.43 and 35.44, a ULID cannot be modified or created

for an already-built and purchased improvement. Nor could an owner protest a new ULID under RCW 35.43.100 because the City would not have "ordered" a new, "to be" created improvement. There is no jurisdictional authority or legislative policy supporting this sort of ULID-in-reverse scheme, and there are a multitude of policy reasons, discussed below, why such a plan should not be allowed. The ULID must be lawfully created before, not after, completion of the project. *Douglass*, 115 Wn. App. at 910.

In summary, the Opinion allows a reassessment in circumstances that run afoul of Washington precedents and statutes. Obviously this has a tremendous impact on the Owners and the City—and the other citizens of North Bend. But, as discussed below, the implications of allowing reassessment reach much farther than just the current parties.

2. This Case Presents Significant Questions of Law With Substantial Public Interests at Stake.

The Opinion is an important decision, for it applies common law rules limiting governmental expansion of publically approved improvements within the rubric of the modern local improvement district statutes. *No published case has addressed these questions within the context of RCW 35.43 and .44*, both of which affect every municipality in

the state seeking to construct improvements and pass the cost of those improvements onto landowners.

To be clear, although there have been a good number of published opinions in the LID and ULID realm, none squarely address all the issues considered by the Opinion, and no modern cases have applied the clear common law mandates against municipalities enacting material changes to an approved improvement in the context of RCW 35.43 and 35.44. The Supreme Court should take this matter to provide guidance to both municipalities and citizens about the proper scope of municipal power after a municipality has obtained approval for a ULID, the importance of a meaningful, timely right to protest under RCW 35.43.100, and to ensure the statutory processes under the ULID scheme—including the statutes concerning design and projected costs—can actually be enforced.

Moreover, if the Opinion stands, it creates extremely poor public policy; policy which has never been approved by the Legislature. If allowed, cities would be free to look back in time, find completed improvements that provided special benefits to landowners, and shove those improvements into an already created improvement district. This is not how the carefully crafted ULID system is intended to operate.

Indeed, imagine the incentives involved. If a city were free to later modify a ULID after construction, a city would have every incentive

to chose the most politically acceptable—that is, cheaper—plan available to present to the public. After approval, a city could, like here, chose a different, more expensive plan, and after completion—and after weeding out protests by forcing them to go through an administrative hearing and numerous appeals—"modify" the original ULID (or create a "new" ULID) to include the more grandiose project.[5] Put differently, if reassessment were allowed as the Opinion states, cities could drastically alter projects without consequences knowing that their only penalty would be to reassess landowners for materially increased costs or changed designs never envisioned by the original owners. This is not the public policy or process dictated by the ULID statutes.

3. The Owners' Request for Full Reassessments Concerned the Due Process Issue and the Superior Court's "Limited" Remand Order.

The Owners have consistently argued the assessments were invalid because the City was imposing assessments for an improvement (the gravity system) based upon ULID No. 6 even though the gravity

[5] Another issue: if cities were allowed to retroactively modify ULIDs or create ULIDs to correct errors in the original ULIDs, and then cities could then reassess based on the corrected or new district, what owner in his or her right mind would ever appeal an assessment? In other words, if cities were always allowed a "do over" to correct fundamental problems found by a court, there is no reason for an owner to appeal at all, since the net effect is the city can do whatever it chooses without consequence. Although the ULID statutes are intended to assist in creation of public improvements, they do not go that far: the checks and balances of RCW 35.44.250 are there for a reason. The appeal procedures become superfluous if cities can never be truly held to what the law requires.

system was never lawfully incorporated into ULID No. 6. The Opinion agreed. The relief the Owners sought was always full and permanent annulment. Reassessment, as discussed above, was never the proper remedy for this fundamental problem because under the logic of the Owners' arguments, no assessments or reassessments could include payments for the unlawful gravity system.

Contrary to the implication in the Opinion, the Owners only discussed reassessment as the proper procedural remedy *if* the Court of Appeals ruled on due process grounds.[6] That is, *if* the assessments were annulled because due process was denied during the administrative hearing, a full new reassessment was the proper remedy. *See* Appellants' Brief ("AB") at 40-41 (asking for reassessment in the due process portion of the brief and in contrast to the trial court's order of a "limited" new hearing); Reply Brief ("RB") at 18 (same). The Owners' request for reassessment was always in the alternative of the primary substantive relief sought by the Owners: permanent, not temporary, annulment. *See, e.g.*, AB at 2 ("[t]his Court should reverse the Superior Court order and

[6] The Opinion suggests that it was the Owners' contention that the assessments be annulled but that the City be "allow[ed] . . . to pursue a reassessment" of the Owners' parcels. Opinion at 1. The Opinion later cites the Owners' brief, stating that the Owners "acknowledge that a city may proceed with a reassessment after an assessment is nullified. See Br. Of App. at 41; Reply Br. at 19." Opinion at 16, n. 33. But these sections of the briefs were where the Owners discussed their due process arguments.

instead order that the assessments are annulled. *If this Court decides to limit its decision on the due process issues*, this Court should order a full new administrative hearing under RCW 35.44.280" (emphasis added)); *id.* at 2-3 ("The Superior Court erred . . . because the Order: . . . (3) *in the alternative*, failed to order a full, new administrative hearing" (emphasis added)); *id.* at 3-4 (raising the reassessment only in the context of issues related to due process); *id.* at 21 ("the City *cannot* [whether via assessment or reassessment] impose assessments for an improvement that was not created under the ULID statues." (emphasis added)); *id.* at 27-28 (explaining that post-construction changes to an ULID were improper and affected the validity of the ULID itself); *id.* at 29 (seeking annulment without requesting reassessment for the gravity sewer issue); RB at 8 (same);

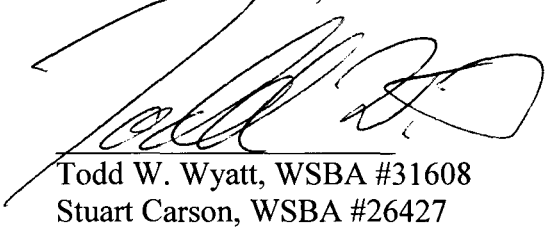
The Owners' arguments on the gravity-versus-vacuum system were that the assessments were flawed and invalid because the original ULID sought by the petitioning landowners and enacted by the City did not include the gravity system. The Opinion correctly confirmed this conclusion. Reassessment was never sought nor, as discussed above, could it be sought, as relief for the City's violations.

F. CONCLUSION

For the foregoing reasons, the Supreme Court should grant the Owners' Petition for Review, affirm the Court of Appeals' reasoning that the assessments are annulled, but make clear that a reassessment cannot occur under these facts.

RESPECTFULLY SUMITTED this 6th day of February, 2014.

CARSON & NOEL, PLLC



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Stuart Carson, WSBA #26427
Attorneys for Appellants

PROOF OF SERVICE

The undersigned hereby declare that on this 6th day of February, 2014, I caused the foregoing PETITION FOR REVIEW 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 February 6, 2014, at Issaquah, Washington.

Todd W. Wyatt

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DENIS FURY and GAIL FURY, individuals, and the marital community composed thereof; TANNER WAY LLC, a Washington limited liability company; TOM WEBER, an individual; KEN PARSONS and NANCY PARSONS, individuals, and the marital community Composed thereof; TOM THORNTON and NANCY THORNTON, individuals, and the marital community composed thereof; DAHLGREN FAMILY LLC #7, a Washington limited liability company,	)	No. 69294-1-I
Appellants,	)	
v.	)	
THE CITY OF NORTH BEND,	)	UNPUBLISHED OPINION
Respondent.	)	FILED: October 21, 2013

VERELLEN, J. — The owners of five parcels within a utility local improvement district (ULID) appeal the trial court's grant of summary judgment to the City of North Bend (City). The owners contend that instead of remanding the matter for a limited hearing on the propriety of the assessments imposed on the owners, the superior court should have annulled their assessments all together, allowing the City to pursue a reassessment of those five parcels. RCW 35.44.250 states that a court shall annul an assessment if it is founded on a "fundamentally wrong basis." A "fundamentally wrong basis" involves errors in the procedures used by the municipality.

After receiving a petition for a sewer system improvement from property owners, the City passed an ordinance for construction of a vacuum system, specifying the cost would be approximately $11.7 million. When the City then expanded the ULID to accommodate more parcels, the City determined the increased size of the ULID required construction of a gravity sewer system, which would cost approximately $19 million. The City did not pass a new ordinance specifying the material change in design and cost of the improvement; rather, it proceeded with construction and approved construction contracts by resolution.

Under RCW 35.43.100, the passage of the ordinance creating an improvement district triggers a 30-day window in which the affected property owners may file suit to challenge the improvement district. Because the City did not pass a new ordinance after determining it would build a gravity system, the property owners did not have the opportunity to protest the substantially increased cost of the improvement under RCW 35.43.100. Rather, the appealing property owners had the opportunity to challenge the construction of the gravity system only after the assessments were imposed. We reverse the trial court and annul the assessments of the five parcels at issue, allowing the City to pursue a reassessment.

FACTS

a. Establishment of ULID No. 6

In November 2007, after receiving a petition for sewer service from some property owners, the City created ULID No. 6, which authorized the City to purchase and install a vacuum sewer system. The ULID was enacted through Ordinance 1293 and provided in part: "The City Council orders the following described improvements:

Design and construction of a *vacuum sewer system* in the herein specified portions of the City of North Bend Final Comprehensive Sewer Plan."[1]

Ordinance 1293 estimated the cost of the sewer improvement to be approximately $11.7 million, and, pursuant to RCW 35.44.020, set forth the various components of the total estimated cost:

> The total estimated cost and expense of the improvements is declared to be $11,685,032. The entire cost and expense of the improvements including all labor and materials required to make a complete improvement, all engineering, surveying, inspection, ascertaining ownership of the lots or parcels of land included in the assessment district, and all advertising, mailing and publication of notices, accounting, administrative printing, legal interest and other expenses incidental thereto, shall be borne by and assessed against the property specially benefited by such improvement included in the [ULID] embracing as nearly as practicable all property specially benefited by such improvement.[2]

After the passage of Ordinance 1293, other property owners requested inclusion in the ULID.[3] The City determined the authorized vacuum system would not provide sufficient capacity to the expanded ULID and installed a gravity sewer system instead. The cost of the gravity sewer system was approximately $19 million.

b. Notice and Opportunity to Protest Assessments

After construction of the gravity sewer system was complete, the City sent notices of the proposed assessments, giving those property owners who wished to

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[1] Clerk's Papers at 81 (emphasis added).

[2] Clerk's Paper at 81.

[3] See Clerk's Papers at 86 (Ordinance 1452). Ordinance 1452 references Ordinance 1312, but the parties did not include Ordinance 1312 in the record. However, we take judicial notice of the public record, which states there was a public hearing on May 20, 2008 and June 3, 2008 on the proposed expansion of the ULID, and it was determined to be in the best interests of the City and the property owners to include the previously omitted properties.

protest the assessments an opportunity for a hearing. Thirty-four property owners filed written protests of the assessments. The City appointed a hearing examiner to conduct a hearing and file his recommendations with the city council.

The hearing took place on November 10, 2011 and December 20, 2011. The hearing examiner stated at the beginning of the hearing that the property owners "will have a chance to ask questions of any city rebuttal witnesses or evidence."[4] The City presented testimony from Ron Garrow, the City's public works director, from the city engineer, and from Deborah Foreman, the appraiser.

c. Testimony on Change from Vacuum to Gravity Sewer System

On the issue of the change from the vacuum system to the gravity system, Garrow testified that the city council approved the gravity system when it approved the construction contracts for the project.[5] Garrow testified:

> Q. Who made the decision to switch to a gravity system?
>
> A. That was a technical decision through not only the consultants but also the City.
>
> Q. Did the City Council ever pass a resolution approving of a gravity system?
>
> A. They approved the construction of the gravity system through the acceptance of the bids for that project.
>
> Q. Did they—but did they ever pass an ordinance or resolution expressly saying the project is dually [sic] changed due to a gravity system?

[4] Transcript (Tr.) (Nov. 10, 2011) at 7.

[5] Resolution 1390, passed on October 6, 2009, accepted the construction bid for piping construction, but did not specify the type of sewer that would be installed. By Resolution 1435, the city council awarded the pump station contract.

A. Not as a separate ordinance, no.[6]

Garrow further testified that the City consulted with its own staff, its consultants, and the city attorney and determined that

> the value of the project was still less than the special benefits that were determined at the time [of the proposal for the vacuum sewer system] and therefore because we were still underneath the special benefit, the project was still viable and we didn't have to go out for district property owners' approval [for the gravity sewer system] to go any further.[7]

d. Testimony on the City's Special Benefits Analysis

To support the amount of the assessments, the City presented testimony showing the amount of the special benefit afforded to each property owner. Foreman conducted a preliminary special benefits study in 2007. Foreman assessed the average value per square foot of each property within the ULID, and then determined the special benefit the new sewer system would add to each property. For vacant land, Foreman determined that the addition of a City sewer system would add 25 percent in value.

In 2011, Foreman made her final special benefits study, concluding that the addition of a City sewer system to vacant land would add approximately 25 percent in value (the same calculation as in 2007). The final special benefits study concluded the "after" value of all of the property within the ULID was $256,229,300 and the "before" value of the property within the ULID was $230,415,600, rendering $25,813,700 in ULID special benefits. With the total cost of the sewer project at $19,270,000, the City was able to assess 100 percent of the ULID project costs to ULID property owners.

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[6] Tr. (Nov. 10, 2011) at 51-52.

[7] Tr. (Dec. 20, 2011) at 338.

Many of the owners contested Foreman's appraisal of the property and corresponding special benefits. For instance, appellant Fury presented evidence that he purchased his parcels for $475,000 in 2010 with knowledge of the ULID; Foreman's appraisal of the "after" fair market value of those parcels was $1,122,400. Others highlighted that Foreman's square foot values were the same in 2007 as they were in 2011, reflecting Foreman's failure to take into account the market downturn.[8]

e. Continuation of Hearing

At the conclusion of the first hearing day, the hearing examiner continued the hearing to December 20 to allow the City to submit rebuttal testimony. On December 20, the City distributed materials to the owners rebutting the owners' protests to the assessments. The hearing examiner noted the objections of the property owners to the new material, but did not grant additional time for surrebuttal. The City also introduced some exhibits which were never provided to appellants before or during the first day of hearing.

After the City presented its rebuttal testimony, some of the property owners raised challenges to the fairness of the hearing. They argued the City did not provide the owners with the rebuttal information until the night of the December 20 hearing, and

[8] They specifically argued Foreman neglected to consider the post-2008 decrease in development, rendering Foreman's appraised values for "highest and best use" impossible to obtain. Protest Letter 32 at 5-15; see also Protest Letter 33 at 25-26 (explaining the dearth of lending for proposed commercial developments renders most projects de facto infeasible). Other owners presented the opinion of an accredited appraiser, who stated Foreman did not provide a basis for determining average values and did not utilize market data to determine special benefits. See Protest Letter 28 at 72-87; Protest Letter 30 at 10-14.

all voiced concern that the hearing examiner did not allow them to present additional witnesses after the City's rebuttal testimony.[9]

The property owners presented expert evidence to rebut Foreman's appraisals, arguing there was a significant downturn between 2007 and 2011, resulting in up to 40 percent loss in total value. On cross-examination,[10] Foreman testified she did not make any significant downward adjustment to pre-crash sale and valuation data. She did not offer a full explanation, but suggested that her report did not incorporate market decline from 2008 to 2011, in part because the market began to recover in 2011.

The hearing examiner issued findings and conclusions and recommended adopting the assessments proposed by the City, with the exception of protests 4, 26 and 33. The hearing examiner declined to rule on the procedural due process issues raised by the property owners.

f. Appeal to City Council and Superior Court

The owners of ten of the parcels, including the five parcels at issue in this appeal, appealed the hearing examiner's recommendation to the city council. The city council, via Ordinance 1452, accepted and adopted the hearing examiner's findings,

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[9] Specifically, the property owners objected because Foreman's complete files were not available to them until after the first hearing, and because the City did not disclose certain rebuttal evidence until the second day of hearing. See Exs. 26, 37 (requesting disclosure of rebuttal evidence five days before the continued hearing date and reserving the right to respond to rebuttal evidence); Ex. 30 (requesting all reports on which the City relied to support the assessments); Ex. 31 (requesting another opportunity to examine Foreman because the City did not disclose her files until after the first hearing day); Ex. 77 (handwritten letter from Dahlgren).

[10] While the owners did have the chance to cross-examine both Foreman and Garrow, it became apparent that other City employees in the planning department had the personal knowledge underlying Foreman and Garrow's testimony. See Tr. (Dec. 20, 2011) at 221, 315, 358-59.

conclusions and recommendations, confirming the assessment. The city council also concluded "the ULID property owners and or their legal counsel . . . were afforded the opportunity to question City witnesses; all persons appearing at said hearing were heard."[11]

Of the ten who appealed to the city council, five appealed the city council's decision to superior court. These property owners are Dennis and Gail Fury and Tanner Way LLC, Tom Weber, Ken and Nancy Parsons, Tom and Nancy Thornton, and the Dahlgren Family LLC. Upon review of the record and oral argument, the superior court concluded:

> Appellants did not have a meaningful opportunity to review written materials presented during the City's rebuttal before the Hearing Examiner, and Appellants having requested the opportunity to examine employees of the City Planning Department who provided information to the two City witnesses who testified at the hearing.[12]

The superior court then issued an order remanding the case to the hearing examiner for a limited hearing to allow for "[r]eview of the written materials presented during the City's rebuttal" and "examination of City Planning Department employees who provided information to the City's witnesses."[13]

The owners of the five parcels appeal the superior court's order of remand,[14] contending the court should have annulled the assessments because (1) RCW 35.44.250

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[11] Clerk's Papers at 87.

[12] Clerk's Papers at 151-52.

[13] Clerk's Papers at 152. Appellants did argue to the court that the remedies available to them were limited by RCW 35.44.250, and that crafting a "limited" remand was outside the scope of the statute. See Clerk's Papers at 148-50.

[14] This court previously determined the order of remand was appealable as a matter of right.

does not authorize the superior court to remand, and the court determined procedural irregularities had deprived the owners of a fair process; (2) the City materially changed the sewer improvement from a vacuum system to a gravity system, substantially increasing the cost and thereby unlawfully increasing the assessments; and (3) the City's appraiser estimated the assessments upon a fundamentally wrong basis because she did not take into consideration decreased property values.[15]

DISCUSSION

a. Standards of Review

RCW 35.44.250 sets forth the procedure by which to appeal assessments to superior court. The statute provides relief to property owners if a ULID assessment is founded upon a "fundamentally wrong basis and/or the decision of the council . . . was arbitrary or capricious":

> [T]he superior court shall hear and determine the appeal without a jury . . . . The judgment of the court shall confirm, unless the court shall find from the evidence that such assessment is founded upon a fundamentally wrong basis and/or the decision of the council or other legislative body thereon was arbitrary or capricious; in which event the judgment of the court shall correct, change, modify, or annul the assessment insofar as it affects the property of the appellant.[16]

"Arbitrary and capricious" refers to "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action."[17] An action

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[15] In the alternative, appellant Dahlgren requests a modification of his assessment on the grounds that his assessment is greater than the special benefit the sewer system provides to his property.

[16] RCW 35.44.250.

[17] Abbenhaus v. City of Yakima, 89 Wn.2d 855, 858, 576 P.2d 888 (1978).

taken after due consideration is not arbitrary and capricious even though a reviewing court may believe the action to be erroneous.[18]

In Abbenhaus v. City of Yakima, our Supreme Court adopted the lower court's definition of "fundamentally wrong basis," which was "'some error in the method of assessment or in the procedures used by the municipality, the nature of which is so fundamental as to necessitate a nullification of the entire LID, as opposed to a modification of the assessment as to particular property.'"[19] The Abbenhaus court then noted the lower court's definition was inconsistent with the legislative mandate of RCW 35.44.250 that relief be awarded "insofar as it affects the property of the appellant."[20] Accordingly, a "fundamentally wrong basis" involves error in the method of assessment or in the procedures used by the municipality, but relief is available only to those property owners who challenge their assessments.

Appellate review of the superior court's determination under RCW 35.44.250 "should not be an independent consideration of the merits of the issue but rather a consideration and evaluation of the decision-making process."[21] On appeal, we

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[18] Id. at 858-59.

[19] 89 Wn.2d 855, 859, 576 P.2d 888 (1978) (quoting Cammack v. Port Angeles, 15 Wn. App. 188, 196, 548 P.2d 571 (1976)).

[20] Id. ("[W]e emphasize that the statute [RCW 35.44.250] provides that where such fundamental error exists the court is limited to nullification or modification only of those parcel assessments before it.").

[21] Id. at 859-60.

consider the record before the hearing examiner.[22] To the extent the appellants raise issues of statutory interpretation, we review de novo the meaning of a statute.[23]

b. Fundamentally Wrong Basis

The appellants contend their assessments are founded on a fundamentally wrong basis and must be annulled because they did not receive adequate notice of the cost of the gravity sewer system. To support their argument, appellants rely predominately on RCW 35.43.070, which provides that an improvement may be ordered only by ordinance; on RCW 35.43.100, which provides a 30-day period, triggered by the ordinance forming the ULID, in which to protest the formation of a ULID; and on RCW 35.44.020, which requires the City to provide a cost estimate for the authorized improvement.

1. RCW 35.43.070 & RCW 35.43.100

RCW 35.43.070 mandates that whether by petition or resolution, all improvement districts must be created through ordinance: "A local improvement may be ordered only by an ordinance of the city or town council, pursuant to either a resolution or petition therefor. The ordinance must receive the affirmative vote of at least a majority of the members of the council."

Appellants argue the change to the gravity system was unlawful because the city council did not approve the change from a vacuum system to a gravity system through enactment of a separate ordinance. Ordinance 1293, which authorized the City's initial

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[22] Id. at 860.

[23] Pasco v. Pub. Emp't Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

proposal for construction of the vacuum sewer system, specified the improvement as a "vacuum sewer system" and estimated a cost of $11,685,032.

The City responds that nothing in the plain language of RCW 35.43.070 prevents a municipality from approving increased cost of an improvement. The City highlights that the same section of Ordinance 1293 that specified construction of the vacuum system also stated that "[a]ll of the foregoing . . . may be modified by the City Council as long as such modification does not affect the purpose of the improvement."[24] Further, the City highlights that the city council approved the change from a vacuum system to a gravity system by resolutions that awarded the construction contracts for the gravity system. Appellants also point out that RCW 35.43.100 gives property owners 30 days to contest a ULID after passage of the ordinance. The statute reads:

> The council may continue the hearing upon any petition or resolution provided for in this chapter and shall retain jurisdiction thereof until it is finally disposed of. The action and decision of the council as to all matters passed upon by it in relation to any petition or resolution shall be final and conclusive. No lawsuit whatsoever may be maintained challenging the jurisdiction or authority of the council to proceed with the improvement and creating the local improvement district or in any way challenging the validity thereof or any proceedings relating thereto unless that lawsuit is served and filed no later than thirty days after the date of passage of the ordinance ordering the improvement and creating the district or, when applicable, no later than thirty days after the expiration of the thirty-day protest period provided in RCW 35.43.180.[25]

Appellants rely on Buckley v. City of Tacoma[26] to refute the City's position that it could make material changes to the cost of the improvement without regard to the

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[24] Clerk's Papers at 81.

[25] RCW 35.43.100. RCW 35.43.180 applies only to improvement districts initiated by resolution, rather than petition. ULID No. 6 was initiated by petition.

[26] 9 Wash. 253, 37 P. 44 (1894).

statutory procedures. There, our Supreme Court invalidated assessments levied by Tacoma where the city had passed a resolution to improve a street by grading and installing sidewalks but provided no details. Once the city completed the work, it passed another resolution taxing property owners for the improvement. The court reasoned that "the difference in cost [between the vague proposal and what was actually installed] may mean an easy payment by the owner in one case and substantial ruin in another."[27] The court further noted that 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."[28, 29]

Appellants did not have the opportunity to protest the change to a gravity sewer system and its resulting 63 percent cost increase because the City did not pass a new

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[27] Id. at 262.

[28] Id.

[29] Appellants rely on 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. Appellants' reliance on George is misplaced. In that case, the city changed the location of the water system improvement. George, 147 Wash. at 244-45. 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." Id. at 246. Here, while the change to a gravity system materially increased the cost, that change in cost was forced by feasibility concerns—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.

Appellants also rely on 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. 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.

ordinance under RCW 35.43.070 specifying this material change. Appellants' only opportunity to challenge ULID No. 6 was within 30 days of the passage of Ordinance 1293. But Ordinance 1293 described a materially different, and much less expensive, sewer system. Appellants were accordingly without recourse to invoke RCW 35.43.100 to challenge the substantially increased cost of the vacuum system.

Consistent with RCW 35.43.070, RCW 35.43.100, and Buckley, once the City became aware of the substantially increased cost of the gravity sewer system, it should have passed a new ordinance giving the property owners a new opportunity to protest.

2. RCW 35.44.020

Appellants also rely on RCW 35.44.020, which requires certain cost items to be included in every local improvement for assessment against the property in the district, and specifically requires "[t]he cost of all of the construction or improvement authorized for the district."[30]

At oral argument, the City contended that once a ULID is formed, the City has carte blanche to authorize cost increases for the improvement, as long as the total cost does not exceed the special benefit afforded to the property owners. We are not persuaded. RCW 35.44.020 requires the City to include a cost estimate. If the City has latitude to materially increase the initial cost estimate without proper notice to the property owners, RCW 35.44.020 serves no purpose.

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[30] "There shall be included in the cost and expense of every local improvement for assessment against the property in the district created to pay the same, or any part thereof: (1) The cost of all of the construction or improvement authorized for the district including, but not limited to, that portion of the improvement within the street intersections; (2) The estimated cost and expense of all engineering and surveying necessary for the improvement done under the supervision of the city or town engineer." RCW 34.44.020.

c. Remedy of Property Owners

Finally, the City emphasizes it was necessary to change the type of sewer system because the City expanded the ULID to serve additional property owners. Once the ULID expanded, the City conducted a value engineering study on the proposed vacuum system. The study revealed that the vacuum system would not work "because the expected 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."[31]

We recognize that to accommodate all of the property in the expanded ULID, the City had to construct a system with appropriate capacity. However, once the City became aware of the substantially increased cost of the gravity sewer system, it should have passed a new ordinance, thus triggering a new notice and protest period for all property owners within the expanded ULID. As the appellants vigorously protest, the only validly created ULID was for a $11.7 million vacuum sewer system. No ULID was ever created for a $19 million gravity sewer system.

Although the City passed resolutions adopting construction contracts for the gravity system, in proceedings open to the public, these procedures were in violation of the statutory requirements for creation of improvement districts. The City does not have authority to impose assessments for an improvement not created under the ULID statutes. The property owners should have had the chance to protest the substantial and material changes to the sewer system. Because we have determined the City's

[31] Tr. (Nov. 10, 2011) at 15.

material change to sewer improvement necessitated the passage of a new ordinance and a new 30-day protest period, we decline to address the remaining issues.[32]

Consistent with Abbenhaus, we reverse the trial court and annul the assessments only of the appealing property owners, allowing the City to pursue a reassessment.[33]

WE CONCUR:

Cox, J.

[32] With the annulment, the procedural issues raised in this appeal are moot.

[33] In both their opening brief and reply brief, appellants acknowledge that a city may proceed with a reassessment after an assessment is nullified. RCW 35.44.280. See Br. of App. at 41; Reply Br. at 19.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DENIS FURY and GAIL FURY, individuals, and the marital community composed thereof; TANNER WAY LLC, a Washington limited liability company; TOM WEBER, an individual; KEN PARSONS and NANCY PARSONS, individuals, and the marital community Composed thereof; TOM THORNTON and NANCY THORNTON, individuals, and the marital community composed thereof; DAHLGREN FAMILY LLC #7, a Washington limited liability company, Appellants, v. THE CITY OF NORTH BEND, Respondent.	)	No. 69294-1-I ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

Appellants filed a motion for reconsideration and also a motion to publish the court's opinion entered October 21, 2013. The panel has considered the motions and the respondent's answer thereto and determined they should be denied. Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied. It is further

ORDERED that appellant's motion to publish is denied.

Done this 8th day of January, 2014.

FOR THE PANEL:

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

MOTION FOR RECONSIDERATION AND TO PUBLISH OPINION

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I. INTRODUCTION AND RELIEF REQUESTED

Appellants/Owners ("Owners") move for reconsideration of a portion of the Court's October 21, 2013 Unpublished Opinion ("Opinion"). Specifically, the Owners ask the Court to remove the Court's pronouncement that the City of North Bend ("City") may reassess the Owners under RCW 35.44.280. The reasoning of the Opinion—that ULID No. 6 does not encompass the gravity sewer system purchased by the City—does not logically permit a reassessment. Now that the construction of the gravity sewer system is complete, the time under law for modifying ULID No. 6 or creating a new ULID has passed. There is, accordingly, no legally permissible way to implement a reassessment.

The Owners also seek publication of the Opinion. This is an important decision, both locally and state-wide, for it applies common law rules limiting governmental expansion of publically approved improvements within the rubric of the modern local improvement district statutes. No published case has addressed these questions within the context of RCW 35.43 and .44. Finally, publication is necessary to govern any other proceedings that may stem from ULID No. 6.

II. ARGUMENT

A. The Owners' Request for Full Reassessments Concerned the Due Process Issue and the Superior Court's "Limited" Remand Order.

Throughout this case, both below and on appeal, the Owners have consistently argued the assessments were invalid because the City was

imposing assessments for an improvement (the gravity system) based upon ULID No. 6 even though the gravity system was never incorporated into ULID No. 6. This Court has agreed. The relief the Owners sought was always full and permanent annulment. Reassessment—as discussed below—was never the proper remedy for this fundamental problem because under the logic of the Owners' arguments, no assessments or reassessments could include payments for the unlawful gravity system.

The Owners only discussed reassessment as the proper remedy *if* the Court ruled on due process grounds.[1] That is, *if* the assessments were annulled because due process was denied during the administrative hearing, a full new reassessment was the proper remedy. *See* Appellants' Brief ("AB") at 40-41 (asking for reassessment in the due process portion of the brief and in contrast to the trial court's order of a "limited" new hearing); Reply Brief ("RB") at 18 (same).

Put differently, the Owners' request for reassessment was always in the alternative of the primary relief sought by the Owners: permanent, not temporary, annulment. *See, e.g.*, AB at 2 ("[t]his Court should reverse the Superior Court order and instead order that the assessments are annulled. *If this Court decides to limit its decision on the due process*

[1] The Opinion suggests that it was the Owners' contention that the assessments be annulled but that the City be "allow[ed] . . . to pursue a reassessment" of the Owners' parcels. Opinion at 1. The Opinion later cites the Owners' brief, stating that the Owners "acknowledge that a city may proceed with a reassessment after an assessment is nullified. See Br. Of App. at 41; Reply Br. at 19." Opinion at 16, n. 33. But these sections of the briefs were where the Owners discussed their due process arguments.

issues, this Court should order a full new administrative hearing under RCW 35.44.280" (emphasis added)); *id.* at 2-3 ("The Superior Court erred . . . because the Order: . . . (3) *in the alternative*, failed to order a full, new administrative hearing" (emphasis added)); *id.* at 3-4 (raising the reassessment only in the context of issues related to due process); *id.* at 21 ("the City *cannot* [whether via assessment or reassessment] impose assessments for an improvement that was not created under the ULID statues." (emphasis added)); *id.* at 27-28 (explaining that post-construction changes to an ULID were improper and affected the validity of the ULID itself); *id.* at 29 (seeking annulment without requesting reassessment for the gravity sewer issue); RB at 8 (same);

The Owners' arguments on the gravity-versus-vacuum system were that the assessments were flawed and invalid because the original ULID sought by the petitioning landowners and enacted by the City did not include the gravity system. The Court has correctly confirmed this conclusion. Reassessment was never sought nor, as discussed below, could it be sought, as relief for the City's violations.

B. There Can Be No Valid Reassessment

The Court has properly held that the gravity sewer system purchased by the City was not part of ULID No. 6: "No ULID was ever created for a $19 million gravity system. . . . The City *does not have authority* to impose assessments for an improvement not created under the ULID statutes." Opinion at 15 (emphasis added). Nonetheless, the

Court appears to have left the door open for the City to attempt to reassess the Owners per RCW 35.44.280. Opinion at 2, 16.

There are three possible ways the City could attempt a reassessment. One, the City could reassess under the current state of ULID No. 6. Two, the City could pass an ordinance attempting to "modify" ULID No. 6 to include the already-built gravity sewer system. Three, the City could form a new ULID for the completed gravity system. All of these options are invalid under common law and the ULID statutes.

1. Reassessment under the current state of ULID No. 6.

The first option needs little discussion. Any reassessment under the current ULID No. 6 suffers from the same defect already found by the Court: ULID No. 6 did not include a gravity system and no assessment can be made for that system. Whether it is labeled an assessment or reassessment, the flaw is the same, rendering the assessments against the Owners invalid as a matter of law.[2]

2. "Modifying" ULID No. 6 via ordinance.

The second option is for the City to pass an ordinance—more than two years after construction of the gravity system is complete—"modifying" ULID No. 6 to include a gravity system instead of a vacuum

[2] To be precise, the City could attempt reassessment without changing ULID No. 6 and without enacting a new ULID. But it will lead to the exact same result. Since this Court has held the costs for the improvement constructed are not properly included within ULID No. 6, a hearing examiner (or court on appeal) would reject the reassessments for the same reason the Court is annulling them now. If the City were to force the Owners to go through such a process to reach the same result, it would be a waste of time and resources for everyone involved—to put it mildly. As discussed below, preventing this absurd result is also a reason publication is warranted.

system. The City may claim that this would trigger the opportunity to protest under RCW 35.43.100. If one assumes that protest is rejected, the City would assert that it could then proceed to reassess. This logic fails for a number of reasons.

First, as recognized by the Court in the Opinion, allowing a simple modification ordinance to materially increase costs and adopt a new system would render RCW 35.44.020 meaningless. Opinion at 14. The citizens petitioned for a vacuum system and it was approved following the requirements of RCW 35.44.020; allowing a City to throw those standards aside reads all force out of the statute.

Second, as briefed by the Owners, the City simply does not have the power to modify or revoke an already enacted and publically approved ULID, especially when such a modification materially increases the cost to property owners within a ULID. *See* AB at 21-28 and RB at 3-8 (both citing the requirements of the ULID statutes and numerous cases for the proposition that material changes may not be made to an already approved improvement ordinance).

Third, and more broadly, even if a modification of ULID No. 6 were allowed *before* the gravity sewer system was built—which it was not—modification *now* of ULID No. 6 runs directly afoul of the ULID statutes. The ULID statutes speak plainly on this: the ordinances describing and approving a ULID are to be vetted through the ULID process *before the improvement is constructed*, not after. There is no basis in the statutes (or anywhere else in law) for incorporating an

improvement into a ULID after the improvement is built. *See, e.g.*, *Douglass v. Spokane County*, 115 Wn. App. 900, 910, 64 P.3d 71 (2003) (holding that the phrase "to be" in the special assessment context is prospective only, and that "Washington cases addressing ULID improvements just discuss improvements made *after* the creation of the ULID." (emphasis in original)); *see also* RCW 35.43.040 (discussing the improvement "*to be* constructed" in a ULID and that a city may order the work "*to be* done" to complete the improvement (emphasis added)); 35.43.050 (explaining the procedure when a city finds that property "*will be* benefited" by the improvement (emphasis added)); 35.43.070 (mandating that a improvement "*may be ordered*" only via ordinance (emphasis added)); 35.43.080 (providing requirements for every ordinance "*ordering*" an improvement (emphasis added)); 35.43.120 (discussing the requirements needed for "*the proposed* improvement" (emphasis added)); 35.43.130 (same and requiring "preliminary estimates" for the improvements); 35.43.140 (explaining the process for resolutions of a city "declaring its intention to order the improvement"); 35.44.020 (requiring estimates of costs).

Not only does a post-construction ULID modification run afoul of the procedures in the ULID statutes, it also would create extremely poor public policy. Cities would be free to look back in time, find old improvements that provided special benefits to landowners, and shove those improvements into an already created improvement district. This is not how the carefully crafted ULID system is intended to operate. Indeed,

imagine the incentives involved. If a City were free to later modify a ULID after construction, the City would have every incentive to chose the most politically acceptable—that is, cheaper—plan available to present to the public. After approval, the City could, like here, chose a different, more expensive plan, and after completion—and after weeding out protests by forcing them to go through an administrative hearing and numerous appeals—"modify" the original ULID (or create a "new" ULID) to include the more grandiose project.[3] Put differently, if reassessment were allowed, cities could drastically alter projects without consequences knowing that their only penalty would be to reassess landowners for materially increased costs or changed designs never envisioned by the original owners. This is not the public policy or process dictated by the ULID statutes.

Fourth, allowing a retroactive modification now would not cure the Owners' lost protest rights under RCW 35.43.100, which the Opinion correctly identifies as one of the key problems with the City's approach in this case. RCW 35.43.100 places a limit on any lawsuit "challenging the jurisdiction or authority of the counsel *to proceed* with the

[3] Another issue: if cities were allowed to retroactively modify ULIDs or create ULIDs to correct errors in the original ULIDs, and then cities could then reassess based on the corrected or new district, what owner in his or her right mind would ever appeal an assessment? In other words, if cities were always allowed a "do over" to correct fundamental problems found by a court, there is no reason for an owner to appeal at all, since the net effect is the city can do whatever it chooses without consequence. Although the ULID statutes are intended to assist in creation of public improvements, they do not go that far: the checks and balances of RCW 35.44.250 are there for a reason. The appeal procedures become superfluous if cities can never be truly held to what the law requires.

improvement *and creating* the local improvement district . . . unless that lawsuit is served or filed no later than thirty days after the date of passage of the ordinance *ordering* the improvement *and creating* the district[.]" Emphasis added.

The statute presumes that there is an ordinance "ordering the improvement" and "creating" the district. Here, even if the City passed a new ordinance modifying ULID No. 6 to include the gravity system, that is not an ordinance "ordering" anything—the system has already been purchased and built. Moreover, a modifying ordinance is not an ordinance "creating" the district. The district has already been created. The time period for challenging ULID No. 6 has expired. Indeed, what possible beneficial effect could a protest have now? A new ordinance modifying the improvement could not be read to restart a protest period unless the Court were to read the phrases "ordering the improvement and creating the district" out of the statute, which the Court cannot do.

The phrase "to proceed with the improvement" cements this conclusion even further. There is nothing for the City "to proceed with" in this case; the language does not apply to any post-construction ULID modification. RCW 35.43.100 would not apply after a modification of ULID No. 6.[4]

[4] RCW 35.44.300 does not change this result. That statute states that reassessments are not invalid merely because the improvement is complete. That is, of course, true: if an assessment is found to be invalid in some technical sense—for example, if an appraiser's opinions were found to be arbitrary and capricious—but the underlying costs within the ULID are valid, the reassessment can and should be allowed even though the construction is complete. But that is not the issue here. A plain reassessment as envisioned by RCW 35.44.300 is not possible as discussed above in Section B.1. The

Buckley v. City of Tacoma is on point. In that case, after the improvement was complete, the City of Tacoma passed an ordinance "ratifying" the work. 9 Wash. 253, 259-60, 37 P. 441 (1894). The court rejected this post-construction ratification as directly contrary to the sequence demanded by law. *Id.* at 268-69 (citing the applicable ordinances, which, like the ULID statutes, speak in terms of ordering and approving the project before construction). The court also noted that any "protest" right was meaningless: "The work has been done beyond recall, and no remonstrance of property owners could have any possible effect." *Id.* at 268. Like in *Buckley*, any post-construction modification (or, as discussed below, new ULID) cannot impose costs for the gravity system.

Fifth, in situations like this where the flaw is so fundamental that reassessment could not cure the defect, courts have not condoned or discussed reassessment. They have instead simply annulled the assessments, which is and always has been the primary remedy sought by the Owners. *See, e.g., Douglass*, 115 Wn. App. At 914 (affirming the annulment of the assessment without any reference to a reassessment); *Kusky v. City of Goldendale*, 85 Wn. App. 493, 501, 933 P.2d 430 (1997) (same); *In re Indian Trail Trunk Sewer*, 35 Wn. App. 840, 844, 670 P.2d 675 (1983) (same).

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only other possibilities, therefore, are to modify ULID No. 6 or enact a new ULID. Both those scenarios fail because *the acts of modifying via ordinance or enacting a new ULID* are themselves invalid as a matter of law under the ULID process. Put differently, the "reassessment" is not on its face invalid because the improvement is complete, but the revised/new ordinances *themselves* are invalid under the ULID statutes, and that impermissibility imputes to the reassessments since these revised/new ordinances would be the only bases for any reassessment.

3. Enacting a new ULID.

The City's third potential option is to create a new ULID ordering a gravity system, and after enactment proceed to assess the Owners. Technically, this would not be a reassessment at all, but instead a new assessment under a new ULID. But for the exact same reasons discussed above, this scheme would also fail. As noted above, under the language of the statutes found in RCW 35.43 and 35.44 a ULID cannot be modified or created for an already-built and purchased improvement. Nor could an owner protest a new ULID under RCW 35.43.100 because the City would not have "ordered" a new, "to be" created improvement. There is no policy reason for allowing this sort of ULID-in-reverse scheme, and there are a multitude of policy reasons, discussed above, why such a plan should not be allowed. "If you build it, he will come" works for *Field of Dreams*, but "build it, and [the ULID] will come" afterwards is the exact opposite order required by the statutes. The ULID must come first. *Douglass*, 115 Wn. App. at 910.

C. The City is to Blame for Its Predicament.

There may be a natural tendency for the Court to search for an alternative remedy to permanent and full annulment. After all, the City claims that because the Owners own property within ULID No. 6, they have received some benefit[5] because their properties are now near a

[5] To be clear, and to avoid a waiver of any kind, the Owners do not concede they've received any benefit at all. As ample evidence showed at the administrative hearing, ULID No. 6 was not a panacea for real estate prices in North Bend. Instead, the market's response to sewer system was a collective yawn.

public sewer system. A concern could arise that these Owners, therefore, are receiving a windfall of some kind if the assessments are annulled without reassessment available.

These concerns may be understandable to have, but they cannot change the outcome. The law here requires annulment and does not permit a reassessment under these circumstances. As shown in the briefs on the merits, and as adopted by the Court, the City exceeded its power by changing the project approved by the citizens. Once it realized it wanted a different system, the City could have held public meetings about its concerns. It did not. When the City realized it purportedly needed a gravity system, it could have explained those reasons to its citizens.[6] It did not. If the City wanted a ULID for a $19 million dollar gravity system, it could have attempted to create one via the ULID process mandated by law. It did not. The City instead chose to move forward without following the statutes, and now has left the Owners—and many others—holding the bill for never-approved improvement. The

[6] The City alleged, and it is noted in the Opinion, that the change to a gravity system was required by alleged feasibility concerns because a vacuum system could not meet the projected capacity of the expanded ULID. Opinion at 13, n. 29. The record is devoid of (and the City did not cite any) evidence of why these concerns were valid. The project the Owners and the other original petitioning citizens of ULID No. 6 approved *was fully capable* of serving their properties. Put differently, there was never a "feasibility" concern in the record about the original ULID No. 6. It was only when the City decided to include *new* areas within ULID No. 6 (and improperly consider other, future expansions of the sewer outside ULID No. 6), that the City allegedly realized it wanted to construct a gravity system. The City never bothered to inform the citizens, however, that these expansions of the geographic scope would include a new type of sewer system costing landowners $8 million more. Had the City been up front about these concerns and the increase in costs, it is very safe to say that the citizens of North Bend would have some questions about the advisability of expanding the geographic scope of the district.

City's own errors led the Owners down this road. There is no reason to circumvent what the well-reasoned logic of the Opinion dictates as the correct result.

And in a more general, equitable sense, permanent annulment is justified. As the record demonstrates without reasonable debate, the City has fought vigorously every step of the way in this case. Thirty five owners protested the assessments in a two-day, 13-hour hearing, but the City refused to give ground on any of their arguments. The practical (and likely intended) effect of the City's strategy was to weed out owners that could not afford to continue to appeal. It worked. What started as 35 owners became 10 on appeal to the City Council, 6 on appeal to Superior Court, and now 5 left to fight for their rights. "You can't fight city hall" is the cliché that unfortunately turned out all too true for many citizens. The Owners left standing before this Court have expended tremendous resources in this matter over the previous two-plus years and are entitled to the result the law requires.[7] The internal fallout for the City of North Bend is a political and financial matter that the City will have to deal with going forward. It is not something this Court can, should, or is equipped to mitigate by allowing or condoning some type of reassessment as the Opinion currently does.[8]

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[7] Repeating this process via reassessment proceedings would obviously cause the Owners to incur another round of extraordinary costs.

[8] For example, a limited remand restricting reassessment hearings to the approximate $11 million price authorized by the original petitioning landowners would not cure the statutory defects noted above.

D. The Opinion Should Be Published.

Regardless of whether or not the Court grants the motion to reconsider the reassessment issue, the Opinion should be published. Under RAP 12.3(e), there are six criteria the Court evaluates in a motion to publish:

> (1) if not a party, the applicant's interest and the person or group applicant represents; (2) applicant's reasons for believing that publication is necessary; (3) whether the decision determines an unsettled or new question of law or constitutional principle; (4) whether the decision modifies, clarifies or reverses an established principle of law; (5) whether the decision is of general public interest or importance; or (6) whether the decision is in conflict with a prior opinion of the Court of Appeals.

Here, factor (1) is not an issue. Likewise, factor (6) does not apply, as there is no conflicting authority. The remaining factors, however, favor publication.

First, this is an important decision for municipalities and citizens employing and analyzing local improvement districts. Although there have been a good number of published opinions in the LID realm, none address the issues considered by the Opinion, and no modern cases have applied the clear common law mandates against municipalities enacting material changes to an approved improvement in the context of RCW 35.43 and 35.44. Publication will provide guidance to both municipalities and citizens about the proper scope of municipal power after a municipality has obtained approval for a ULID and the importance of a meaningful, timely right to remonstrate under RCW 35.43.100.

Second, this is a significant decision not just for the Owners, but for the City and its citizens. This issue has been a center of controversy within the community for a number of years. In a city the size of North Bend—which has about 6,000 residents—the increase in cost from $11 million to over $19 million has had dramatic effects. Although it was not pertinent to the legal issues on appeal, the Court can read the administrative hearing transcript to see the testimony of numerous owners who would be—and, by now, may have been—forced out of their homes because of the large assessments imposed by the City. These citizens' larger interests in holding the City to account have been effectively prosecuted by the Owners. Although only the Owners' assessments are annulled, the other owners within ULID No. 6, and other citizens of North Bend, have strong and compelling interests in this case. In such a circumstance, the importance of the Opinion weighs in favor of publication.

Third, publication will help avoid future disputes and re-litigation of the same issues covered by the Opinion. If the Opinion is not modified, all parties—including the City—are left to wonder about how, exactly to proceed, or whether to proceed at all. Without further guidance from the Court about what is and is not allowed, the City may attempt reassessment and/or a new assessment through one or more of the avenues discussed above. As part of this process, the City might claim that since the reassessments are beginning the process anew, the Court's decisions concerning the current assessments are neither res judicata,

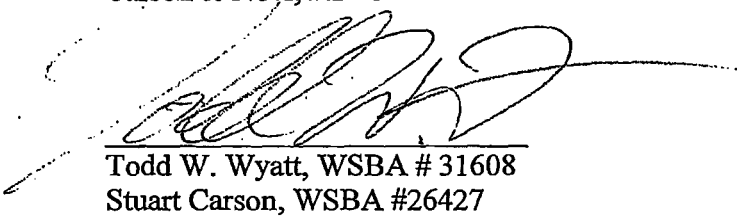
collateral estoppel, nor the "law of the case." Although there are some obvious counterarguments against such contentions, if the Opinion is unpublished a Superior Court (or Hearing Examiner) in a future reassessment contest may be reluctant to consider the Opinion controlling. It is possible, therefore, that without the benefit of a published opinion, the Owners and the City will be left fighting for *years* over these exact same issues as they relate to reassessments. The prospect of such a result is daunting. But considering the significant amounts at issue and the proceedings to date—13 hours of administrative hearings, an appeal to the City Council, an appeal to the Superior Court, and an appeal to this Court, all taking over two years—it is not unrealistic to predict. A published opinion can definitively put these issues to rest, saving the parties and future tribunals significant time and money.

III. CONCLUSION

For the foregoing reasons, the Court should reconsider and amend the Opinion to make clear that under these circumstances, no reassessment can occur. The Court should also publish the Opinion.

Dated this 8th day of November, 2013

Carson & Noel, PLLC



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