69294-1

69294-1

No. 69294-1

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

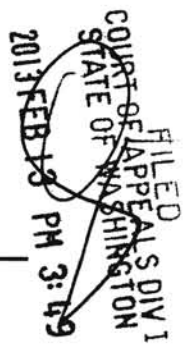
DENIS FURY, et al.,

Appellants,

vs.

THE CITY OF NORTH BEND,

Respondent.



BRIEF OF RESPONDENT

Bruce L. Disend
WSBA No. 10627
John P. Long, Jr.
WSBA No. 44677
Kenyon Disend, PLLC
11 Front Street South
Issaquah, Washington 98027-3820
(425) 392-7090
Attorneys for Respondent

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

Cases

REGULATIONS AND RULES

Statutes

Other Authorities

I. INTRODUCTION

This case involves the construction of a sewer line within a portion of the City of North Bend (hereafter "City" or "North Bend"). In 2005, a property owner petitioned the City Council to construct the sewer and to fund the construction costs using a mechanism known as a "utility local improvement district (ULID)." The ULID process concludes with the sale of bonds to investors and the retirement of those bonds via annual assessments on the property owners who benefit from construction of the improvement.[1]

The filing of the petition by the North Bend property owner triggered a statutorily mandated public process that led to a further petition, signed by more property owners. In turn, the second petition led to the formation of a utility local improvement district by the North Bend City Council, designated as ULID No. 6, and the construction of a multi-

[1] Local and Road Improvement Districts Manual for Washington State, Sixth Edition, 2009, published by Municipal Research and Services Center and the Washington State Chapter American Public Works Association, at 3.

million dollar sewer line designed to service over 400 parcels of property.[2]

Following construction of the sewer, the City sent individual notices of the proposed assessments to the benefitted property owners. A hearing was subsequently scheduled in accordance with the statutory requirements for the purpose of hearing any protests on the final assessment roll for the ULID. Out of the 400 plus parcels, only 35 property owners filed protests of their assessments.

The City Council appointed an experienced attorney as the Hearing Examiner to conduct the hearing and then file his recommendations with the City Council.[3] The hearing was conducted over a two-day period (November 10, 2011 and December 20, 2011). Thereafter, the Hearing Examiner filed his recommendations with the City Council.[4] Ten of the property owners, including the five appellants ("the Owners"), appealed

---

[2] RCW 35.43.120:

> Petition — Requirements. Any local improvement may be initiated upon a petition signed by the owners of property aggregating a majority of the area within the proposed district. The petition must briefly describe: (1) The nature of the proposed improvement, (2) the territorial extent of the proposed improvement, (3) what proportion of the area within the proposed district is owned by the petitioners as shown by the records in the office of the county auditor, and (4) the fact that actual assessments may vary from assessment estimates so long as they do not exceed a figure equal to the increased true and fair value the improvement, or street lighting, adds to the property.

The extensive public process that was used to implement the ULID is set forth in the testimony and PowerPoint presentation of the City Public Works Director, Ron Garrow. Tr. Hearing Exhibit (hereinafter Exhibit) at 10 et seq. and Exhibit 1. The Final Special Benefits Study, Exhibit 2, identifies 406 separate parcels of property in the Addenda at 1-18.

[3] Tr. Vol. I, at 5. RCW 35.44.

[4] Tr. Vol. I, Exhibit 88.

the Hearing Examiner's recommendation to the City Council.

On March 20, 2012, Council considered the appeals and the Examiner's recommendations. Council accepted most of the Examiner's recommendations. The Council's decision was then formalized by passage of Ordinance No. 1452 which confirmed the assessment roll.[5]

Five of the ten remaining protestors appealed the City Council's decision to Superior Court. They are the owners of 16 of the 400 plus parcels within the ULID boundary.[6] Upon reviewing the record and hearing argument from counsel for both parties, the Superior Court ruled that "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 . . . this matter is remanded to the North Bend Hearing Examiner for further hearing." (Certified Appeal Board Record, ["CABR"] at 151-52). The judge remanded the matter back to the Hearing Examiner for a limited hearing on (1) review of the written materials presented during the City's rebuttal and (2) examination of City Planning Department employees who provided information to the

[5] The ordinance is attached to Appellants' Brief as Appendix C.
[6] Parsons owns 1 parcel; Fury/Tanner Way own 5 parcels; Dahlgren owns 1 parcel; Weber owns 7 parcels; Thorntons own 2 parcels. See Tr. Vol. I, Exhibit 88.

City's witnesses. (CABR 151-52). The Owners appealed the order of remand to this Court. (CABR 153-54).

II. RESPONSE TO APPELLANTS' ASSIGNMENTS OF ERROR

The City asked the Superior Court to dismiss the Owners' appeal. The Court observed that it was not sure whether the result will be any different but remanded the matter back to the Hearing Officer to give the Owners an additional opportunity to question City staff. The City accepts the Court's decision to remand the matter in order to allow the Owners additional time to review the City's evidence. The Owners, however, take issue with the Superior Court's ruling. In their "Assignments of Error," the Owners not only disagree with the Court's decision, but do so in direct contradiction to the relief they sought from the Court.[7]

The Owners argued to the Superior Court that they needed additional time to review documents and conduct further questioning of City staff. The Superior Court gave the Owners what they asked for. Their appeal amounts to "buyer's remorse."

In the alternative, if this Court finds the Superior Court did not have the authority to remand the matter back to the Hearing Examiner, the City contends that (1) the assessments issued by the City were not

[7] Appellants' Assignments of Error are as follows: (1) the assessments were arbitrary and capricious; (2) the assessments were fundamentally flawed; (3) the Superior Court's decision not to order a full, new administrative hearing; and (4) the Superior Court's decision not to adjust the assessment for Appellant Dahlgren Family LLC #7.

arbitrary and capricious; (2) the assessments were not fundamentally flawed; (3) the Superior Court's decision not to order a full, new administrative hearing was valid; and (4) the Superior's Court's failure to adjust the assessment for Owner Dahlgren Family LLC #7 was valid. Finally, to the extent this Court rules in favor of the Owners on any of their "Assignments of Errors," the City contends that the decision is limited to the Owners' assessments only.

III. STATEMENT OF THE CASE

A. Pertinent Facts Related to Each of the Appellants.

Parsons – The Parsons submitted a protest letter, but did not appear at the hearing.[8] The Hearing Examiner's findings in regard to their property are not contested. The findings reveal that the Parsons did not provide any appraisal evidence. Instead, they simply inquired as to why their assessment increased by 33% from the preliminary assessment.[9]

Fury/Tanner Way – The Fury protest encompassed properties owned by Mr. Fury as an individual as well as property owned as Tanner Way, LLC. Mr. Fury did not testify at the hearing conducted by the Hearing Examiner. Instead, he relied upon his legal counsel, Mr. Wyatt, to make a presentation.[10] As part of that presentation, an appraiser, Steven

[8] Tr. Vol. I, at 32.
[9] Tr. Vol. I, Ex. 88, at 3.
[10] Tr. Vol. I, at 39-40.

Shapiro, was called to testify. Mr. Shapiro was asked to provide his opinion as to whether the City's appraiser conducted the City appraisal in accordance with relevant standards.[11] Mr. Shapiro did not perform an appraisal of any of the properties, nor did he offer any opinion regarding the before and after values of the property pre and post the ULID.

Weber – Mr. Weber offered personal testimony. He stated that he had three issues to discuss, but only commented upon two issues: (1) that he had received two purchase offers for his property in the amounts of $1.6 and $1.7 million, respectively, but they "went away because of uncertainty about the LID." He stated that the after value for his property, as determined by the City's appraiser, was "only half that but yet I'm slapped with this huge assessment. It's kind of backwards. Maybe the City ought to be paying me. . ."[12] and (2) that the Mountain to Sound Greenway had resulted in a taking of his property due to setback and landscape requirements. He added: "I don't know if this was considered in your appraisal."[13] Mr. Weber did not provide appraisal evidence.

Dahlgren – The Dahlgrens were represented prior to this appeal by attorney, Bill Williamson.[14] They presented two witnesses at the hearing:

---

[11] Tr. Vol. I, at 52.
[12] Tr. Vol. I, at 70.
[13] *Id.*
[14] Tr. Vol. I, at 113.

a land use consultant, Craig Sears, and an appraiser, Anthony Gibbons.[15] However, other than in a very generalized manner, neither witness testified regarding the specific special benefit conferred upon the Dahlgren property as a result of the ULID. Although Mr. Gibbons also testified about the difficulty of appraising property in a declining real estate market, he did not conduct an appraisal of the Dahlgren property.

Both witnesses focused upon the difficulty of developing the property due to its size and shape, and they complained that the sewer line did not extend across the entire frontage of the Dahlgren property. In their view, this circumstance will unfairly require the Dahlgrens to expend additional money in order to develop their property.

Thornton - The Thorntons submitted a protest letter, but did not appear at the hearing. They suggested that the value of their property should be reduced due to the existence of a setback on their property and the fact that stormwater was discharged upon their property. The Hearing Examiner's findings in regards to their property are not contested. The Thorntons did not provide any appraisal evidence.[16]

B. <u>On Appeal From the Superior Court, the Appellate Court's Review is Limited to the Record Before the City Council</u>.

The Owners argue that the Appellate Court's review of the

---

[15] See Sears' testimony, Tr. Vol. I, at 116:24 – 118:1-5. See Gibbons' testimony, Tr. Vol. I, at 120-123.
[16] Tr. Vol. I, Ex. 88, at 6.

Superior Court's decision under RCW 35.44.250 is de novo. The Owners cite no legal authority for this argument except RCW 35.44.250. However, this code section deals only with appeals to superior court of assessments approved by the city council. Appellate review of the judgment of the superior court may be obtained as in other cases if sought within fifteen days after the date of the entry of the judgment in the superior court. RCW 35.44.260.

The decisional law is contrary to the Owners' position. "On appeal, this court limits its review to the record before the council, looks only at the propriety of the assessment process and does not undertake an independent evaluation of the merits. *Kusky v. City of Goldendale*, 85 Wn. App. 493, 498, 933 P.2d 430, 433 (1997) citing *Doolittle v. City of Everett,* 114 Wn.2d 88, 93, 786 P.2d 253 (1990). An assessment against property located within a local improvement district is presumed proper and will be upheld unless it is founded on a fundamentally wrong basis or the city reached its decision arbitrarily or capriciously. *Kusky* at 498; citing *Abbenhaus v. City of Yakima,* 89 Wn.2d 855, 860-61, 576 P.2d 888 (1978). Further, an appellate court "presume[s] that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair." *Abbenhaus* at 861.

This presumption is not evidence and may be rebutted. *Id.* If the challenging party presents expert appraisal evidence showing that the property is not benefited by the improvement, the burden shifts to the city to prove that the property is benefited. *Id.*

C. Arbitrary and Capricious.

The term "arbitrary and capricious" has a well-established meaning in Washington State.

> It refers to willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.

Abbenhaus, 89 Wn.2d at 858-59.

Whether property assessed for special improvements is specially benefitted by those improvements is a question of fact. Thus, under the arbitrary and capricious standard, a conflict in the facts presented to the council relating to special benefits should result in the confirmation of the final assessment if the assessment is appealed.[17] The basis for this rule is explained in *In re City of Seattle*, 54 Wash. 297, 298, 103 P. 20 (1909):

> The first assignment of error in this case is based upon the facts, and depends upon whether the assessments were too high or

[17] *Id.*

> not. This is largely a matter of opinion. In this class of cases we said, in *In re Seattle*, 50 Wash. 402, 97 P. 444, 'opinions will differ widely ¼ as to the benefits to accrue to the different properties within the districts; but this court cannot substitute its judgment for the judgment of those whom the law has charged with a duty of establishing the district and apportioning the cost, whenever such difference of opinion may arise.'

In Re City of Seattle at 298.

D. Fundamentally Wrong Basis.

The term "fundamentally wrong basis" has a less well established meaning:

> [It] refers to 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 assessment as to particular property.

Abbenhaus, 89 Wn.2d at 859.

If a fundamental error is found to exist, however, the judge is limited to nullification or modification only of those assessments which have actually been appealed.[18]

E. Presumptions in Favor of Validity.

The presumption indicates a clear public policy favoring the

[18] *Abbenhaus,* 89 Wn.2d at 859.

construction and financing of local improvements via LIDs and ULIDs.[19] The Supreme Court, in the *Abbenhaus* decision, set forth five specific presumptions applicable in Washington on an appeal from a special assessment:

> We begin with a presumption of the correctness of the action; the burden is upon one challenging the assessment to prove its incorrectness as it is presumed the City has acted legally and properly. Further, "(i)t is presumed that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair." [Citations omitted]

Abbenhaus v. City of Yakima, 89 Wn.2d at 860-861.

The scope and standard of review places a strict and heavy burden upon property owners who wish to object to an assessment. If a property owner fails to support his or her objections to an assessment by placing relevant evidence before the city, the assessment should be confirmed by the judge on appeal.[20]

---

[19] Local and Road Improvement Districts Manual for Washington State at 64.
[20] *Id.* at 863.

IV. ARGUMENT

A. The Superior Court's Decision to Remand the Appellants' Assessment Roll Back to the Hearing Examiner for Further Testimony Was Proper Under RCW 35.44.250.

The Owners contend that the Superior Court's Order remanding the matter back to the hearing examiner is improper under RCW 35.44.250. This code section provides:

> [t]he 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**. *Id.* [emphasis added.]

The Owners contend that the Superior Court found that due process had been violated during the hearing and that the assessments against the landowners are founded upon a "fundamentally wrong basis" under RCW 35.44.250. (Appellants' Brief at 39) Next, they contend that the Court had only four options under RCW 35.44.250: to either "correct, change, modify, or annul the assessment." The Owners contend that the Superior Court did none of these things and chose to craft selective relief to cure assessments founded on a fundamentally wrong basis or as the

result of arbitrary and capricious action. (Appellants' Brief at 40). The Owners contend that the Superior Court had only one choice because of the "due process" violations, which was to annul the assessments and direct a new hearing. The Owners contend that all of the assessments should be thrown out and a new hearing should be conducted for all property owners. The Owners' contentions are wrong. The Superior Court's ruling was proper. As noted above, the Superior Court's order is limited to the Owners' property only. Under RCW 35.44.250, **the Court may correct, modify or change the assessments made against the appellants**. Here, the Court was not in a position to correct, change or modify the assessments against the Owners since the Court found that the Owners should be given the opportunity to go back before the Hearing Examiner to review the written materials and question City staff. In other words, the Owners were granted the opportunity to supplement the record to cure any due process defects that may have occurred. The order makes it clear that the remand is limited to the Owners only and to the issues raised in the order — which is consistent with RCW 35.44.250. The assessments of other property owners who were not parties in the appeal were not before the Court. Had those owners wished to file an appeal, they could have done so. They chose not to file an appeal.

It is also noteworthy that the Superior Court did not rule that the assessments were founded on a fundamentally wrong basis, or that the decision of the Council was arbitrary and capricious. Nowhere in the ruling does it mention that the assessments were incorrectly made. The Court remanded the matter back to the Hearing Examiner for a limited hearing on (1) review of the written materials presented during the City's rebuttal, and (2) examination of City Planning Department employees who provided information to the City's witnesses. (CABR 151-52). In other words, the Court found that the Owners should be given the opportunity to review written materials presented during the City's rebuttal and conduct additional cross-examination if needed. The Court clearly did not feel that it was in a position to make a decision to invalidate or approve the assessments and, therefore, ruled accordingly. No final judgment was entered. Instead, the Owners were given additional time to complete their case. Following further proceedings before the Hearing Examiner, the Owners will still have the opportunity to return to the Superior Court for a final ruling on the assessments if necessary.

The Owners do not cite any credible authority for their argument that the Superior Court could not remand the case back to the Hearing Examiner. The Owners cite *Bellevue Plaza* for the contention that, when assessments are annulled, they are remanded back for a new hearing.

(Appellants' Brief at 40). In *Bellevue Plaza v. City of Bellevue* , 121 Wn.2d 397, 851 P.2d 662 (1993), the Supreme Court, held that: (1) landowners had satisfied their initial burden of overcoming the presumption that assessment was valid, and (2) the municipality had failed to support the assessments, as based upon benefits conferred on the units of property. In *Bellevue Plaza*, the court found serious flaws in the City's assessments and remanded the matter. *Id.* at 406-11.

The facts in *Bellevue Plaza* are distinguishable from the case at bar because the Court, in this case, did not find any flaws in the City's assessments. The Court simply found that the Owners should be entitled to additional review of the City's evidence and questioning of City employees. *Bellevue Plaza* has no applicability to the current case.

The Owners also reference *Triangle Traders v. City of Bremerton*, 89 Wn. 214, 220-21, 154 P. 193, 196 (1916), where the court held that when an assessment has been declared void and its enforcement refused by the court then the council of any such town shall make a new assessment. *Triangle Traders* is distinguishable from the case at bar because it did not involve a petition for an improvement. *Id.* at 215. Instead, the city took steps to build a trunk sewer without providing notice to the affected landowners that they would be assessed the cost of the improvement. *Id.* at 215-16. In both *Bellevue Plaza* and *Triangle*

Traders, the Supreme Court held that the assessments were annulled and sent back to the respective cities for reassessment. Whereas, in the case at bar, the Court did not make a decision on whether or not the the Owners' assessments should be annulled or approved. 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.

The Owners also cite *Abbenhaus*, and contend that, where the court found widespread violations of due process that denied a fair hearing to all owners, the court must annul the assessments altogether and direct a new hearing. (Appellants' Brief at 40). In interpreting RCW 35.44.250 and the Superior Court's review of an assessment, *Abbenhaus* states explicitly:

> Before a superior court alters or nullifies any portion of an assessment under the "fundamentally wrong basis" standard, the assessment must meet this definition, although we emphasize that the statute provides that where such fundamental error exists the court is **limited to nullification or modification only of those parcel assessments before it**. [emphasis added.] *Id.*, at 859.

Both the language of RCW 35.44.250 and *Abbenhaus* make it clear that, if a superior court alters, modifies or nullifies any portion of an assessment, it will only apply to the parcel assessments before it on

appeal. The record is clear that the Superior Court did not alter or nullify the Owners' assessments. The Court's order is also consistent with RCW 35.44.250 in that it does not address the other property owners who are not part of the appeal.

Based on the foregoing, the Superior Court's decision to remand the matter back to the hearing examiner — to give the Owners an additional opportunity to review the written materials and question City staff — is proper.

B. The Change From a Vacuum Sewer System to a Gravity Sewer System Did Not Require Further City Council Action.

A petition was filed by landowners requesting that a sewer system and related improvements be extended to provide service to their properties. In response, the North Bend City Council passed Ordinance 1293 establishing a ULID to provide for the extension of the City's sewer system.

The City's Public Works Director, Mr. Ron Garrow, testified regarding the decision to switch from a vacuum system to gravity system. (Tr. Vol. II, at 239-45). He testified that once the total service area was identified, it was determined that the vacuum system could not accommodate the expected flows. (Tr. Vol. I, at 13-15). According to Mr. Garrow, "the 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." (Tr. Vol. I, at 13-15).

The Owners make no reference to why the vacuum system was changed. Instead, they contend that cities cannot lawfully impose assessments for a vacuum sewer system and later change the design to a gravity sewer system without seeking Council approval. Their argument makes no sense in light of the express language of the ordinance authorizing the establishment of the ULID and the construction of the sewer improvement.[21] While a portion of Section 1 of the ordinance does, indeed, describe a vacuum sewer system, the Owners fail to bring to the Court's attention the key language in Section 1 that allowed for the gravity system to be built without further action by the City Council:

> All of the foregoing shall be in accordance with the plans and specifications therefore prepared by the City Engineer, **and may be modified by the City Council as long as such modification does not affect the purpose of the improvement**. [Emphasis added.] (Appellants' Brief, Appendix A).

The purpose of the improvement was to construct a sewer as requested by the citizens of North Bend. That purpose never changed. The fact that the type of sewer system changed from a vacuum system to a gravity system had no impact, whatsoever, upon the purpose for which it

[21] The ordinance is attached to Appellants' Brief as Appendix A.

was built.

1. The property owners were informed of the details of the improvement and when changes were made.

The Owners further contend that under RCW 35.43.080 and 35.43.130, North Bend is required to describe the improvement. The Owners also reference RCW 35.44.020 and contend that it requires the City to include within its cost estimates a number of other items including engineering costs, property costs etc. The Owners conclude that all details of the improvement must be incorporated into the Ordinance. Their conclusion is incorrect.

The Washington Code does not require an ordinance establishing a ULID to give as much detail as the Owners claim. Even if it did, the improvement that is subject of the ULID – extension of sewer system – did not change. A municipal corporation has broad discretion in creating and fixing ULIDs and its determinations in this regard will be overturned on judicial review only upon a showing of mistake, fraud, or arbitrary action which amounts to an abuse of its statutory discretion. *Esping v. Pesicka* (1978) 19 Wn. App. 646, 577 P.2d 152, on rehearing 21 Wn. App. 96, 583 P.2d 671, review granted, reversed 92 Wn.2d 515, 598 P.2d 1363. RCW 35.43.130 spells out that the city shall create a preliminary estimate of the cost and expense of the proposed improvement. RCW 35.44.020

states that the estimated cost of engineering, property acquisition, etc. must also be detailed. Neither code section requires that the costs be exact and final and the statute specifically spells out that **these costs may be estimates or preliminary**. Nothing in these code sections states that the costs cannot be changed, or the details of the improvement changed, so long as the intended purpose does not change.

The Owners cite *Buckley v. City of Tacoma*, 9 Wash. 253, 37 P. 441, (1894), which has facts plainly distinguishable from the case at bar. In *Buckley*, the City of Tacoma passed a resolution which stated that ". . . city council hereby declares its intention to improve N street . . . at the expense of the abutting owners. . . " but did not provide any details about the construction, when it would take place or who was directly affected. *Id.* at 258. After passing the resolution the city went ahead and completed the construction work and subsequently passed a second resolution which stated in effect, retroactively, that the improvement of N Street was completed per the plans submitted by the City Engineer and assessments would be made against the property owners. *Id.*

In finding that the city did not give the property owners proper notice the court found that: (1) no resolution was passed ordering any improvement made on N Street; (2) the engineer did not file a diagram in the office of the board; (3) neither the board nor its clerk published a

notice containing a copy of the resolution that was passed; and (4) the notice contained no description of the property to be charged. *Id.* at 260. *Buckley* has no application to the case at bar because, in the present case, the property owners filed a petition requesting that the City create the ULID. The owners wanted sewer service for their respective properties and clearly said so. The property owners, under these circumstances, obviously had notice of the proposed sewer improvement and all of the proceedings that led to the formation of the ULID.

The record reflects that the property owners initially filed the petition requesting the City create a utility district for this improvement. Thereafter, the City's engineer had several public meetings with affected property owners during 2007-2008 in which the City discussed the process, and provided preliminary costs of the system and preliminary assessments. (Tr. Vol. I, at 13-15). Subsequently, an additional petition was received to add additional property owners to the ULID. *Id.* A fourth public meeting was held to discuss the addition of these properties. *Id.* Due to the capital expense and concerns about making sure the correct type of system was put in place to serve the needs of the property owners, the City conducted a value engineering study to look at the technical feasibility of using the vacuum system for this particular ULID in relation to the long-term operation and maintenance costs. (Tr. Vol. I, at 15, 17).

After conducting this study, the City determined that the vacuum system would not be able to handle the expected flows from the properties to be served and therefore, the design had to be changed to a gravity system. (Tr. Vol. I at 15). Thereafter, the contract for the gravity system was approved by City Council in October 2009 and the contract for the pump station was awarded in March 2010. (Tr. Vol. I, at 16). Later, the assessment rolls were subsequently mailed out to property owners and another public meeting was held with the owners concerning the project. (Tr. Vol. I, at 16).

Unlike *Buckley*, the Owners in this case were aware of the preliminary cost estimate from the construction work and which properties would be affected by the project. Unlike *Buckley*, the owners had ample notice of the project and its costs. In sum, the owners had proper notice of the improvement and the subsequent change in the details of the improvement.

2. The purpose of the property owners' Petition and City's Ordinance was to build a sewer system.

The City did not overstep its bounds in violation of the ordinance when it changed the sewer system from a vacuum system to a gravity system. The Owners rely on several cases to contend that the City has overstepped its bounds in violation of the ordinance in creating this ULID.

They refer to a number of cases in which an ordinance was passed and the cities subsequently changed the location of the proposed improvement. Cited is *George v. City of Anacortes*, 147 Wash. 242, 265 P. 477 (1928), a case distinguishable from the case at bar.

In *George*, the City of Anacortes passed an ordinance that authorized an improvement of a water system and water main on Twentieth Street. *Id.* at 242-43. After approval by voters, the city subsequently began work on the water main improvement on Seventeenth Street, rather than on Twentieth, as listed in the ordinance. *Id.* at 243-44. Suit was filed to restrain the city from using any funds derived from the sale of the bonds for the construction of a main on Seventeenth Street. *Id.* at 242. The Supreme Court ruled against the city finding that the ordinance specifically detailed that the water main improvement was to occur on Twentieth Street rather than Seventeenth Street. The change was made by the city, on its own, without any voter approval. *Id.* at 244-246.

George is distinguishable from the facts in the present case. Here, the City did not change the location of the improvement, whereas, in *George,* the change not only impacted the original property owners along Twentieth Street but also the property owners on Seventeenth Street who were not even identified in the original ordinance.

In this case, the City approved a sewer improvement. When it was

subsequently determined that the flows from the properties to be served were going to exceed the capacity of the proposed vacuum system, the design was changed to a gravity system that could handle the flow. The City did not act arbitrarily, it acted logically. If the City had not changed the type of system, the ULID would no longer have been feasible. The purpose for forming the ULID would have been defeated.

The Owners also cite *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 85 P.3d 346 (2004) for the proposition that minor details in a public project may be changed by a governing agency, but taxpayer funds may not be used to construct a substantially different project than the one approved by voters. In *Sane*, the Supreme Court affirmed a King County Superior Court ruling dismissing an action by Sane Transit to enjoin Sound Transit from expending funds collected from local taxes for construction of a 14–mile light rail line from downtown Seattle to Tukwila. *Id.* at 63.

Sane Transit argued that the planned light rail line was an unlawful "substantial deviation" from a planned 21–mile light rail line that had been approved by voters. *Id.* The court held, however, that when the voters approved the implementation of a regional transportation system they granted Sound Transit the discretion to scale back the light rail project in the event of unforeseen circumstances. *Id.* Likewise, in the case at bar,

due to unforeseen circumstances, the City had to change from a vacuum system to a gravity system because the flows were going to exceed the capacity that a vacuum system could handle. Therefore, in order to make the improvement viable, the City had to change to a gravity system.

In addition, the Owners cite *Hayes v. City of Seattle*, 120 Wn. 372, 207 P. 607 (1922) which is distinguishable from the present case as well. In *Hayes*, the Supreme Court addressed whether Seattle, after passing an ordinance adopting an extension of its street car system, could modify the details of the plan, abandon the extension of improvements as provided in the original plan, and extend the line on a different street and in another direction.

The specific issue the court addressed was whether ". . . the change here proposed is one which merely modifies the 'details of the foregoing plan or system,' and 'one not substantially changing the purposes specified." *Id.* at 374. The Court found ["t]he **change** proposed **does not deal with the** details of the original plan; it is an entire departure from that plan in so far as this extension is concerned." *Id.* at 374-375.

The Owners also cite *O'Byrne v. City of Spokane* 67 Wn.2d 132, 406 P.2d 595 (1965). In *O'Byrne* the city council passed an ordinance providing for improvements of a street system, including a freeway which was to intersect a high school site. Voters approved the ordinance.

Thereafter, the city council adopted another ordinance moving the freeway to avoid the intersection with the high school. The Court ruled that the change of freeway was a major deviation from the ordinance approved by the voters and was not within discretion of city council.

Again, the present case is distinguishable. Here, the City only changed one detail of the plan, substituting a gravity system for a vacuum system. The service area did not change nor did the stated purpose of the ordinance – to create a sewer ULID for a clearly identified area.

Lastly, the Owners rely on *Barry & Barry v. State DMC*, 81 Wn.2d 155, 500 P.2d 540 (1972), a case in which the Supreme Court held that the DMV had the right to exercise such administrative authority as had been delegated by statute, and that delegation of such authority did not constitute an improper and unconstitutional delegation of legislative authority without appropriate standards. Neither the facts nor the law in *Barry* are relevant to the case at bar. Barry was not a ULID case. Moreover, in the case at bar, the City Council properly delegated authority to City staff to work on the ULID and find the best technology to effectuate the ULID goal of providing sewer service to a group of property owners who had petitioned for it.

None of the cases cited by the Owners are applicable here. If nothing else, though, the cases cited by the Owners make it clear that even

if the City deviated from the language in the ordinance, and changed the details of the improvement, the City still had the discretion to do so as long as the purpose of the improvement remained in place. See *Hayes* and *Sane Transit* referenced above. Based on the foregoing, the change from a vacuum system to a gravity sewer system did not require further City Council action.

C. North Bend's Appraiser's Opinions Concerning the ULID Are Not Arbitrary, Capricious Nor Founded Upon a Fundamentally Wrong Basis.

It is settled law that an assessment against property located within a local improvement district is presumed proper and will be upheld unless it is founded on a fundamentally wrong basis or the city reached its decision arbitrarily or capriciously. *Abbenhaus v. City of Yakima,* 89 Wn.2d 855, 860-61. Further, an appellate court "presume[s] that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair." *Id.* at 861. This presumption is not evidence and may be rebutted. *Id.* If the challenging party presents expert appraisal evidence showing that the property is not benefited by the improvement, the burden shifts to the city to prove that the property is benefited. *Id.* The method of assessment is not fixed in stone. RCW 35.44.047 provides:

> Notwithstanding the methods of assessment provided in RCW 35.44.030, 35.44.040 and 35.44.045, the city or town may use any other method or combination of methods to compute assessments which may be deemed to more fairly reflect the special benefits to the properties being assessed.

See, *Bellevue Associates v. City of Bellevue*, 108 Wn.2d 671, 678, 741 P.2d 993, 998 (1987), citing RCW 35.44.047.

Fair market value "means neither a panic price, auction value, speculative value, nor a value fixed by **depressed** or inflated prices." [Emphasis added.] *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 404, 851 P.2d 662, 665 (1993). "We affirm the statement in *Doolittle* that "future use to which property is reasonably adaptable within a reasonably foreseeable time is considered in determining the amount of special assessments." *Bellevue Plaza, Inc.*, 121 Wn.2d 397, 413; citing *Doolittle v. City of Everett*, 114 Wn.2d 88, 104, 786 P.2d 253, 261 (1990).

In *Bellevue Associates*, a property owner and member of a local improvement district appealed an assessment alleging that it was improperly calculated. *Bellevue Associates,* 108 Wn.2d 671. The Supreme Court held that: (1) assessment of two out of four improvements solely against one member of local improvement district was proper in light of evidence that other members of district did not benefit from such improvements; and (2) the proportionality requirement does not mandate

that all properties within a local improvement district be assessed the same percentage of special benefits received. *Id.* at 667-68. In other words, properties within a LID may be assessed different percentages of benefit received. *Id.*

1. The City's appraiser's assessments were valid.

The Owners contend that the City's appraiser's opinions are arbitrary, capricious and founded upon a fundamentally wrong basis. Ms. Deborah Foreman, of the firm Allen Brackett Shedd, was the appraiser for the City. Both Ms. Foreman and the firm have impeccable credentials that demonstrate the knowledge and experience necessary to conduct LID appraisals in an appropriate manner.[22] In contrast, the Owners provide no appraisal testimony from comparably experienced appraisers and, more importantly, provide no appraisal testimony relevant to the specific valuations that are being challenged.

The Owners contend Ms. Foreman ignored all post-2007 data when conducting her appraisal. Therefore, according to the Owners, her opinions "are without regard to or in consideration of the material facts."[23] Ms. Foreman testified that she reviewed property sales activity after 2007,

---

[22] Ms. Foreman's qualifications are set forth in the Final Special Benefit Study, Exhibit 2; and in her testimony at Tr. Vol. I, at 18-19. Ms. Foreman has prepared thousands of appraisals. Tr. Vol. II, at 292. See Exhibit 66 for qualifications of Allen Brackett Shedd.

[23] Appellants' Brief at 10.

including more than 100 after 2008.[24] The Final Benefits Study, dated 2011, references analyzing "current" information from the ULID neighborhood and proximate neighborhoods.[25] Exhibit 5, a document entitled "Comparable Sales," lists 11 different sales or listings dated post-2007. In light of the testimony, there is no basis for the Owners' assertions.

The Owners also argue that "[h]er numbers never changed, despite the obvious downturn in the economy and real estate market, which she even described as "drastic." (Tr. Vol. I, at 60). In fact, counsel for the Furys used a variation of the term "drastic" and Ms. Foreman simply repeated his usage:

> Q. . . . For actual sales data, as I know you're aware the commercial and residential real estate market has drastically changed since 2003; is that correct?
> A. It's drastically changed since roughly late 2008.[26]

Moreover, when Ms. Foreman offered to substantiate the basis for her conclusion that the 2007 sales did not require adjustment, counsel declined the invitation:

> Q. Okay. So what did you lack in judgment in 2007?

---

[24] See Tr. Vol. I, at 25:24 et seq.; Tr. Vol. I, at 43:10; Tr. Vol. I, at 61:19; Tr. Vol. I, at 434:19-20.
[25] For example, see Tr. Vol. I, Exhibit 2, at 8, 18, and 19.
[26] Tr. Vol. I, at 60:16-19.

> A. It wasn't a lack. It was my conclusion then, and as I've just testified in looking back, I – I looked at the values as being somewhat conservative. Would you like me to point to some of the sales to support that?[27]

Instead of encouraging Ms. Foreman to do so, counsel quickly changed the subject.

The Owners claim that "Ms. Foreman admitted that she did not make any adjustment for the market downturn when examining data from before the market crash and applying it to 2011." (Tr. Vol. II, at 431-432). In fact, Ms. Foreman admitted nothing, and the Owners ignore the explanation offered in the following exchange:

> Q. Right, OK. And you used the exact same numbers in 2007 that you used – down to the penny that you used in 2011?
> A. Right, but what I've already testified to is your transactions were all over the place. You had the issues of water.[28] You had the issues of moratorium. I was simply taking, you know, an approach of trying to measure all of those factors and after looking at the data this is my opinion. I'm the appraiser. This is my opinion.[29]

In the absence of expert testimony quantifying the impacts of the economic downturn on the real estate market, and how such impacts might

---

[27] Tr. Vol. II, at 322:25 – 323:7.
[28] A water moratorium was in place in North Bend for a significant period of time. See Final Special Benefits Study, Tr. Exhibit 2, at 4; and Foreman testimony, Tr. Vol. I, at 24:4-16.
[29] Tr. Vol. II, at 323:19; at 324:1.

affect an appraisal analysis, tthe Owners' focus is misplaced. As one municipal authority has commented, "One 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."[30] The Owners further argue that "it is impossible for this Court to analyze, 'in detail,' 'the factors considered' by Ms. Foreman as required by Washington precedent."[31] This argument lacks all credibility. The record is replete with explanations of the factors considered by Ms. Foreman.[32] Moreover, there is a wealth of evidence supporting the validity and credibility of her work: 1) her background and experience in the appraisal field, as previously noted;[33] 2) the thoroughness of the Final Special Benefits Study and supplementary analyses;[34] 3) the clarity of the appraisal approach as depicted in her PowerPoint presentation;[35] 4) the reasonableness and flexibility demonstrated when presented with new or different information;[36] and 5) the lack of credible appraisal testimony in

---

[30] McQuillan, The Law of Municipal Corporations, § 38:195 (data base updated October 2011). See, also, *Robinson v. City of South Euclid*, O.O. 94 (1944), affirmed 146 Ohio St. 627, 67 N.E.2d 327 (subsequent diminution in value of land could not affect the validity of special assessment original validity.).

[31] Appellants' Brief at 34.

[32] See Exhibit 2; Tr. Vol. I, at 21-28; Tr. Vol. I, at 17-18; Tr. Vol. I, at 24:17; at 26:8.

[33] See footnote 23. In his General Conclusions, Conclusion No. 4, the Hearing Examiner stated: "No evidence was presented to challenge her qualifications." Tr. Vol. I, at 12, Ex. 88.

[34] Tr. Vol. I, Ex. 2. See discussion of chart prepared by Ms. Foreman at Tr. Vol. II, at 343:25 – 345:19.

[35] Tr. Vol. I, at 19-30.

[36] Tr. Vol. II, at 246-247; and Tr. Vol. I, at 44:17-24.

opposition to her conclusions. In sum, the arguments set forth by the Owners are inaccurate at best and misrepresentative at worst. Under either characterization, they should be disregarded by the Court.

2. Appellants have not rebutted the presumption that the City's appraiser's assessments of their property values after the improvement are valid.

The Owners contend that the City's appraisal was arbitrary and capricious and/or founded on a fundamentally flawed basis. The Owners contend that the fact that the appraised prices of the improvements made back in 2007 were not modified after the recession and subsequent appraisal in 2011, demonstrates that they were incorrectly made. Again, it must be remembered that the improvement is presumed to be a benefit, and "[t]he burden of proof shifts to the City only after the challenging party presents expert appraisal evidence showing that the property would *not* be benefited by the improvement." *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 403, 851 P.2d 662, 665 (1993). [Emphasis in original.] That proof must rest upon competent evidence and must prove the difference between the fair market value of the property immediately before and after the improvement. *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 404, 851 P.2d 662, 665 (1993) citing *Bellevue Assocs. v. Bellevue,* 108 Wn.2d 671, 675, 741 P.2d 993 (1987).

The Owners focus their entire argument on the recession and how

it may or may not have affected property values. They do not address that, regardless of the current market price of their property, they still received the benefit of an improvement - sewer service to their properties. They contend the City did not consider the recession in making their appraisal and had they done so the appraisal in 2011 would have been lower than 2007. The issue however, as *Bellevue Plaza* makes clear, is that the fair market value "means neither a panic price, auction value, speculative value, nor a value fixed by **depressed** or inflated prices." In other words, the appraisal of the fair market value cannot be based on the depressed price during a recession.

Whether property is specially benefitted by an improvement and the extent of the benefit are questions of fact to be proved by expert testimony. *In re Indian Trunk Sewer System*, 35 Wn. App. 840, 842, 670 P.2d 675 (1983). Property owners who wish to dispute the city's determination of special benefits must provide appraisal testimony that there is no difference between the fair market value of the property before the improvements were installed and after the improvements were installed. As our courts have noted, expert testimony is clearly required to establish whether or not property is specially benefitted by an improvement and the extent of the improvement. *Cammack v. City of Port Angeles*, 15 Wn. App. 188, 197, 548 P.2d 571 (1976). Although

appraisers appeared on behalf of two of the the Owners, their testimony did not address the subject of special benefits. Their testimony primarily focused on the recession and its possible impact on property values. The Owners failed to meet their burden of proof.

3. Facts regarding the specific Appellants.

Steve Shapiro appeared on behalf of Owners Fury and Weber, and Anthony Gibbons appeared on behalf of Owners, the Dahlgrens. Mr. Shapiro testified that he was not asked to perform an appraisal of the properties. Instead, Mr. Shapiro was asked to provide an opinion as to whether the appraisal performed by Ms. Foreman was in accordance with relevant standards.[37] Similarly, Mr. Gibbons was not called upon to perform an appraisal. His testimony centered upon the subject of mass appraisal technique.[38] This testimony, likewise, must be disregarded.

The Hearing Examiner dismissed the Thornton protest because they "failed to overcome the presumptions in favor of the City by not electing to present relevant testimony to overcome the presumption of validity either at the hearing or in their protest documents or presenting any evidence that would counter the City's appraisal testimony and exhibits."[39] The City concurs. In addition, the City provided ample

[37] Tr. Vol. I, at 52.
[38] Tr. Vol. I, at 120.
[39] Tr. Ex. 88, at 12-13.

evidence to rebut the arguments made on behalf of the Thorntons.[40]

As in the case of the Thorntons, the Hearing Examiner dismissed the Parsons' protest because they "failed to overcome the presumptions in favor of the City by not electing to present relevant testimony to overcome the presumption of validity either at the hearing or in their protest documents or presenting any evidence that would counter the City's appraisal testimony and exhibits."[41] Further, the City provided more than sufficient evidence to rebut the arguments made on behalf of the Parsons.[42]

Surprisingly, Owners criticize Ms. Foreman's study for lacking the "detail" necessary to properly evaluate her conclusions.[43] This is strongly disputed by the record. Nonetheless, neither of the appraisers presented by Owners provided any relevant details in their comments. Instead, Mr. Gibbons offered such sweeping generalizations as "[t]his LID was begun in a very hot market in 2007" and "[t]oday we have a market that is 30, 40 percent down."[44] These are bold statements, but wholly lacking in facts or figures; i.e., wholly lacking in the level of detail that the Owners deem critical for a proper evaluation by the Court.

---

[40] Tr. Vol. II, at 212-217:15; Exhibit 51.
[41] Ex. 88, at 12.
[42] Tr. Vol. II, at 343:25 – 351:10; Exhibit 39.
[43] Appellants' Brief at 3, 30.
[44] Tr. Vol. I, at 120.

The following principle was announced by the court in *Doolittle v. City of Everett*, 114 Wn.2d 88, 104, 786 P.2d 253 (1990): An expert's opinion on the market value of real estate must be based upon those legal principles which define the factors the expert can or cannot consider in reaching his or her report. Examining Mr. Shapiro's testimony, apart from its lack of relevance, we note that it included testimony, presumably expert testimony, about the standards applicable to conducting mass appraisals. On cross-examination, however, he admitted that he had never conducted a mass appraisal.[45] It is difficult to give credibility to the testimony of Mr. Shapiro, or Mr. Gibbons, or to the Owners' critique of Ms. Forman's appraisal when there appears to be a lack of any understanding of the basic requirements of expert testimony. As noted earlier, in the discussion of applicable legal standards, if a property owner fails to support his or her objections to an assessment by placing relevant evidence before the city, the assessment should be confirmed on appeal.[46] Based on the foregoing, the Owners have not rebutted the presumption that the City's Appraiser's assessments are valid.

---

[45] Tr. Vol. I, at 58.
[46] Footnote 22.

4. The cases cited by Appellants do not support their argument that they have rebutted the City's assessments.

The Owners cite several cases in support of their argument that the City's assessments were arbitrary and capricious and/or founded on a fundamentally flawed basis. In *Bellevue Plaza v. City of Bellevue*, the Supreme Court held that: (1) landowners had satisfied initial burden of overcoming presumption that assessment was valid; and (2) the municipality had failed to support the assessments as based upon the benefits conferred on units of property. *Bellevue Plaza v. City of Bellevue,* 121 Wn.2d 397, 851 P.2d 662 (1993). Specifically, the court found:

> First, he ignored entirely existing improvements and existing uses and was unaware of any lease terms. Second, he assumed that parcels owned by different persons would be assembled into superblocks. He was vague about the timing of such assemblage. Third, he did not identify any seller or buyer, or any particular property where the existence of the LID improvements had an effect on the market price. Fourth, he attributed a benefit to the ability to comply with a traffic standards ordinance which had yet to be implemented. His claim that this was worth $1 million to Bellevue Plaza was without any substance. Fifth, he ignored existing uses on the Tochterman properties, assembled two zones into one and then relied largely on an option, the terms of which were undisclosed, to assemble all the existing uses into a

> convention center on part of the property. *Id.* at 410-11.

The Court acknowledged that future use may be considered when making an appraisal; however, those uses and predictors cannot be based on pure speculation, e.g. that landowners would sell and/or consolidate parcels together. *Id.* at 413.

In the present case, the City's appraiser based her assessments on possible future uses. The City appraised the land as if it were likely to be developed into residential or retail lots. Relying on *Bellevue Plaza*, the Owners contend that she did so unreasonably. *Bellevue Plaza* is distinguishable because the appraiser in that case ignored, entirely, the existing improvements and existing uses, was unaware of any lease terms, and assumed that parcels owned by different persons would be assembled into superblocks in the future. *Id.* at 410-11. In contrast, the City in our case made a reasonable assessment of future commercial and/or residential development for these properties.

The Owners also cite *Douglass v. Spokane County*. 115 Wn. App. 900, 913, 64 P.3d 71, 78 (2003). *Douglass* is also distinguishable. In that case the Court ruled the assessment was invalid because the Douglasses did not receive any special benefit from the sewer improvement. None of the flow from the Douglasses' properties entered into any portion of the

improvements constructed after the ULID was adopted. The improvements were backdated and levied without proper notice to the Douglasses. *Id.*

The Owners have not shown that the City's appraiser's assessments were arbitrary and capricious nor fundamentally flawed. They have not rebutted the presumption that the assessments were correct. Therefore, the assessments should be upheld.

D. Dahlgren's Assessment Should Not be Modified.

The Owner Dahlgren contends that their assessment should be modified because the sewer improvement did not extend to 75% of their property. (Appellants' Brief at 41). No law is cited in support of this contention.

The City's assessment for the improvement to the Dahlgren property was $573,021. (Tr. Exhibit 60). Owner Dahlgren contends that they are entitled to an offsetting proportional credit of $465,000.00 against the City's special benefit of $784,900 as Dahlgren's cost to extend the City's sewer line to serve the 75% of their property "not benefitted" from the project. (Appellants' Brief at 42). Dahlgren contends they are entitled to a corrected proportional assessment of $319,900: $784,900 less the cost to cure of $465,000.

The Owners presented two witnesses at the hearing: a land use

consultant, Craig Sears, and an appraiser, Anthony Gibbons.[47] Neither witness testified regarding the specific special benefit conferred upon the Dahlgren property as a result of the ULID. Although Mr. Gibbons testified about the difficulty of appraising property in a declining real estate market, he did not conduct an appraisal of the Dahlgren property.

Both witnesses focused upon the difficulty of developing the property due to its size and shape, and they complained that the sewer line did not extend across the entire frontage of the Dahlgren property. In their view, this circumstance will unfairly require the Dahlgrens to expend additional money in order to develop their property. The gist of the Dahlgrens' arguments is that their property must be treated differently due to its size and shape, and that it is unfair for the sewer not to extend across the considerable frontage of their property. The Hearing Examiner rejected these arguments.[48]

The Examiner concluded that the City did consider the development constraints on the property and found that the City had presented credible and recent information regarding the cost of extending the sewer across the full frontage. He concluded that the property owner had not shown that the Foreman analysis was incorrect or based on flawed

[47] See Sears' testimony, Tr. Vol. I, at 116:24 – 118:5. See Gibbons' testimony, Tr. Vol. I, at 120-123.
[48] Ex. 88, at 18-19.

methodology.[49] There is more than ample evidence in the record to support the Hearing Examiner's conclusions.[50]

The Owners cite *Vine Street Commercial Partnership v. Marysville*, 98 Wn. App. 541, 548-49, 989 P.2d 1238 (1999) and contend that assessments cannot exceed a figure equal to the increased true and fair value the improvement adds "in direct proportion to the amount of the special benefit" to the property." (Appellants' Brief at 42-43.) The Owners argue that 75% of the property is not specifically benefitted by the sewer project and Dahlgren will be forced to extend the sewer system at its own cost to serve development of the remainder of its property. (Appellants' Brief at 42-43.) Apparently, the Owners are contending that because Dahlgren's property was not completely served by the extension of sewer service the City should be responsible for paying for the extension across the entire property. Interestingly, the Owners further contend that because the City provided sewer service to only a part of Dahlgren's property, but not all of it, the City's action constituted an unconstitutional taking of property. (Appellants' Brief at 42-43.) There is no legal basis for the Owners' contentions.

The facts in *Vine Street* are distinguishable from the case at bar. In *Vine Street*, property owners paid a special assessment for the formation of

---

[49] *Id.*

[50] Tr. at Vol. II, at 237:8 – 248:12; Exhibit 60.

a ULID but did not consent to annexation to the City. *Id.* at 542-46. Subsequently, the city denied water and sewer service to these property owners and the property owners appealed. *Id.* The court analogized the situation to a taking because the landowners gave the government money with the anticipation of receiving water and sewer services, but when the government refused to provide those services because the landowners would not agree to annexation, the government's withholding of those services was a taking. *Id.* at 547-50.

The facts of *Vine Street* are not applicable to our case. Here, the City agreed to provide services to Dahlgren's property and has provided those services. In *Vine Street*, however, the city refused to provide water and sewer service to the property owners even though they had already paid the assessment. *Id.* The cases are not comparable. The City never agreed to provide sewer service to the entire Dahlgren property.

No agreement to provide services to the entire Dahlgren property was ever entered into and the Owners cite no authority that required the City to do so. Instead, the Owners focus on the fact that the property is not going to be completely served by the sewer extension even though the property has in fact been improved by construction of the sewer system and can now be developed.

City Public Works Director, Ron Garrow, testified about the

difficulty and high cost of developing the Dahlgren site. (Tr. Vol. II, at 239-45). Mr. Garrow testified the Dahlgren property was treated in the same manner as the other ULID properties in that it received one connection point. (Tr. Vol. II, p. 243). He testified that there were other properties in the ULID like Dahlgren's property that had received one connection and that would need to do future development extensions in order to fully develop their sites. (Tr. Vol. II, at 243-44).

It is not the City's role to determine how individual properties will be developed. The City's role was to provide sewer access. This was accomplished.

When asked under what circumstances the City would extend sewer service the entire length of a parcel, Mr. Garrow testified that the only time they did so was when the entire length of the property was already developed and there was public access to the back of the property. (Tr. Vol. II, at 243-44).

Based on the foregoing facts, the City acted properly when it provided the Dahlgren property with access to sewer. The City was not required to provide service to the entire Dahlgren parcel. The Owners cite no authority to the contrary.

1. Dahlgren's entire property was benefitted by the sewer extension and connection.

The Owner does not address the fact that, but for the City's sewer extension, their property would have no potential for future development. The party challenging the assessment has the burden of proof. *Bellevue Associates v. City of Bellevue*, 108 Wn.2d 671, 674, citing *Abbenhaus,* at 860–61, 576 P.2d 888. As noted above, an appellate court "presume[s] that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair." *Id.*

In *Bellevue Associates*, the property owner argued that its assessment was incorrect because all properties within a LID must be assigned the same percentage of the special benefits they receive. *Id.* at 677. The court held the proportionality requirement did not mandate that all properties within an LID be assessed the same percentage of the special benefits received. *Id.* at 678. Instead, the court observed that a city or town may use any method or combination of methods to compute assessments that fairly reflect the special benefits to the properties being assessed citing RCW 35.44.047. *Id.*

Here, the assessment against the Dahlgreen property was made

based on the total benefit to the entire property and the potential for future development. (Tr. Vol. II, at 237-245). There was no requirement that the sewer extension extend to all of Dahlgren's property. The Dahlgren's property, like others in the ULID, was provided sewer access at one connection point. There is no basis to modify the Dahlgren assessment.

V. CONCLUSION

Based upon the foregoing, Respondent City of North Bend respectfully requests that the Superior Court's decision to remand this matter to the Hearing Examiner be upheld. In the alternative, if this Court finds the Superior Court did not have the authority to remand the matter back to the Hearing Examiner, Respondent City of North Bend maintains that: (1) the assessments issued by the City were not arbitrary and capricious; (2) the assessments were not fundamentally flawed; (3) the Superior Court's decision to not order a full, new administrative hearing was valid and in the interests of judicial economy; and (4) the Superior Court's failure to adjust the assessment for the Owner Dahlgren was appropriate.

Finally, to the extent that this Court rules in favor of the Owners on any of their "Assignments of Errors", the scope of the decision must be limited to the Owners only.

RESPECTFULLY SUBMITTED this 15th day of February, 2013.

KENYON DISEND, PLLC

By _____
Bruce L. Disend
WSBA No. 10627
John P. Long, Jr.
WSBA No. 44677
Attorneys for Respondent City of North Bend

DECLARATION OF SERVICE

I, Kathy Swoyer, declare and state:

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

2. On the 13th day of February, 2013, I served a true copy of the foregoing *Brief of Respondent, City of North Bend* on the following counsel of record using the method of service indicated below:

Stuart Carson Todd W. Wyatt Carson & Noel, PLLC 20 Sixth Avenue NE Issaquah, WA 98027	☐ First Class, U.S. Mail, Postage Prepaid ☒ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail

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

DATED this 13th day of February, 2013, at Issaquah, Washington.

Kathy Swoyer

DECLARATION OF SERVICE

I, Kathy Swoyer, declare and state:

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

2. On the 13th day of February, 2013, I served a true copy of the foregoing *Brief of Respondent, City of North Bend* on the following counsel of record using the method of service indicated below:

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

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

DATED this 13th day of February, 2013, at Issaquah, Washington.

Kathy Swoyer