COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0055-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

WILLIAM O. CHAUDOIR AND CHERYL L. CHAUDOIR,

PLAINTIFFS-RESPONDENTS,

V.

CITY OF STURGEON BAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Reversed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. The City of Sturgeon Bay appeals a judgment precluding a special assessment against William and Cheryl Chaudoir under a 1985 connection agreement with their predecessors in title.[1] The City argues that

[1] This is an expedited appeal under RULE 809.17, STATS.

under § 66.60, STATS., it has the right to specially assess the Chaudoirs for the cost of extending sewer and water utilities to their property because: (1) the Chaudoirs' property was benefited by the extension of water and sewer utilities adjacent to their property; and (2) the connection agreement, of which the Chaudoirs are beneficiaries, bars their challenge to the special assessment. Even assuming that the connection agreement does not bar the Chaudoirs' challenge to the special assessment, we conclude that the sewer and water extension conferred special benefits on the Chaudoirs. Accordingly, we reverse the judgment and reinstate the special assessment levied to pay the cost of the improvements.[2]

I. BACKGROUND

The facts are not disputed. Webster and Emma Ransom, predecessors in title to the Chaudoirs' property, owned a corner lot on Third Avenue in the Town of Sevastopol, just outside the city limits of Sturgeon Bay; the land also had frontage on Alabama Street. The east side of Third Avenue is Sevastopol, and the west side is Sturgeon Bay. In 1960 or 1961, the City extended sewer and water utilities north on Third Avenue past the Ransoms' property. In 1985, the Ransoms wanted their land annexed to the City so they could connect to City sewer and water, but to do so, they needed the City's consent.

Under a "connection agreement" with the City, the Ransoms agreed to pay $150 to connect their residence to the City's water and sewer system. They further waived the right to object to "future installation" of sewer and water on

[2] The trial court further concluded that the City forfeited its right to specially assess the property. In its brief, the City contests that conclusion, but the Chaudoirs offer nothing in reply to the City's argument. Therefore, we will not address this issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp***., 90 Wis.2d 97, 108-09, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted deemed admitted).

Alabama Street easterly from Third Avenue. The connection agreement also provides for an additional fee if the property was subdivided. Finally, the agreement provides that its terms and conditions constitute a covenant running with the real estate and is binding on the Ransoms' successors and assigns.

In 1994, the portion of the contested property containing the residence was split from the remaining vacant land, and the Chaudoirs purchased it.[3] Later that year, William received notice of a preliminary resolution declaring the City's intent to exercise its special assessment power under § 66.60, STATS., to extend sewer and water utilities on Alabama Street adjacent to the Chaudoirs' property. William appeared at a public hearing to contest the proposed assessment. In May 1997, the City adopted a final resolution to extend water and sewer, and the Chaudoirs were assessed $26,323.55 for 317 front feet on Alabama Street. Following the final resolution, they appealed to the circuit court and challenged the special assessment. A bench trial followed.

The Chaudoirs opposed the special assessment against their property for two reasons. First, they indicated that while their home, when constructed, would face Alabama Street, they would be connecting to Third Street's existing water and sewer connections. Regarding their future plans for the property, William testified that although their property could be divided into four buildable lots (including the home they planned to build), they had no intention of subdividing the property.

[3] The trial transcript and a warranty deed reveal that the Ransoms sold the property to Reginald and Barbara Dart, who then sold it to the Chaudoirs.

Second, William testified that they relied on the following "incorrect information from the City" in proceeding with the closing.[4] William told the City engineer that based on the way they planned to build on the property, he would connect to the Third Avenue sewer and water. In response, the engineer told him that they would not be assessed for water and sewer on Alabama Street. In fact, the engineer acknowledged telling William that the property "probably would not be assessed for a future project," but when the engineer made that statement, he was unaware that the connection agreement existed. Likewise, William further testified that he was unaware of the 1985 connection agreement at the time of purchase because its existence was not communicated to them on purchase by either the seller or the title insurance company. William asked the City not to "penalize us for errors made by other persons."[5]

The engineer testified that without the connection agreement, the Chaudoirs would not have been allowed to annex and then connect to City sewer and water on Third Avenue in the first instance. According to the engineer, the

[4] In September 1994, a public hearing on the proposed assessments was held before the Sturgeon Bay City Council at which William contested the proposed assessment. At trial, the parties stipulated to the admission of the transcript of William's testimony at the public hearing. Thus, for purposes of clarity and cogency, we will discuss his public hearing testimony and his trial testimony together and refer to the testimony as his "trial testimony."

[5] It is unclear whether the Chaudoirs or their title company have accepted responsibility for paying the special assessment. William testified that he had recently received a bill which he submitted to the "title company or sent it to the title company and they paid it." Further, he explained that he "[b]asically … responded to the City's requests of what payment plan I wanted. The title company said they were going to challenge the assessment …." Indeed, the record reveals that the Chaudoirs received a letter from the City requesting them to select a payment schedule for the special assessment. The Chaudoirs did not, however. Rather, William wrote the following note at the bottom of the letter: "Kathy [the City Treasurer] … I have submitted this to ticor title insurance comp. They inform me that they may be retaining legal council [sic] to challenge this assessment. Bill." Thus, while this appeal may be moot, the parties did not argue mootness, so we will not address it either. *See* ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992).

extension of water and sewer lines on Alabama Street would provide the following benefits to the Chaudoirs' property: (1) availability of sewer and water to the property; (2) additional sewer and water hookups to service additional lots in the event the property was subdivided; (3) increased fire protection from a new fire hydrant located directly across from the property; (4) better water flow; and (5) enhanced development opportunities.

Following a bench trial, the circuit court determined that the 1985 connection agreement precluded the City from imposing a special assessment and that even if it were not precluded, no special assessment was warranted under § 66.60, STATS., because no benefit was conferred on the Chaudoirs' property. In finding no special benefit, the trial court emphasized William's stated intent not to subdivide the property:

> I cannot find the property benefitted. I acknowledge that the cases cited by the city find a benefit conferred based upon potential future use (creating a separate lot) and irrespective of the appellants' declared intentions. But I agree with appellants that the alleged benefits of better fire protection and increased flowage or pressure do not constitute special benefits to this property distinct from those shared with nearby property owners outside the special assessment area. The only remaining benefit would be if appellants did create an additional lot, which based upon their house siting and present laterals is, I find, too speculative to justify a special assessment.

The City then filed this appeal.

II. ANALYSIS

While this case presents two issues, we need only decide one. The parties disagree regarding whether, under the 1985 connection agreement, the Chaudoirs, as successors in title, are barred from challenging the City's special

assessment. The City claims that waiving the right to object to "future installation" of sewer and water is the same as waiving the right to object to a "future assessment." By contrast, the Chaudoirs claim that "installation" and "assessment" are "two different things" and that if the agreement is ambiguous in that regard, it must be construed against the drafter, the City. *See* ***Goebel v. First Fed'l S&L Ass'n***, 83 Wis.2d 668, 675, 266 N.W.2d 352, 356 (1978). The trial court agreed with the Chaudoirs that installation and assessment are not synonymous and therefore held that the agreement did not bar a challenge.

We need not engage in contract interpretation to resolve this dispute, however, because even if the connection agreement does not bar the Chaudoirs' right to challenge the special assessment, the sewer and water extension conferred special benefits on the Chaudoirs. Because special benefits were conferred, we conclude that the City properly exercised its police power in levying the $26,323 special assessment.

The parties agree that when the City levied the contested assessment, it was acting pursuant to its police power under §§ 66.60(1)(a) and (b), STATS.[6] A

[6] Sections 66.60(1)(a) and (b), STATS., provide:

> **Special assessments and charges. (1)** (a) … as a complete alternative to all other methods provided by law, any city … may, by resolution of its governing body, levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon such property by any municipal work or improvement; and may provide for the payment of all or any part of the cost of the work or improvement out of the proceeds of such special assessments.
>
> (b) The amount assessed against any property for any work or improvement which does not represent an exercise of the police power shall not exceed the value of the benefits accruing to the property therefrom, and for those representing an exercise of the

(continued)

municipality may levy special assessments under its broad police power, s*ee* ***Gelhaus & Brost, Inc. v. Medford***, 144 Wis.2d 48, 51, 423 N.W.2d 180, 181 (Ct. App. 1988), and in general, the courts may intercede only when the exercise of that power is clearly unreasonable. *See* ***Peterson v. New Berlin***, 154 Wis.2d 365, 370, 453 N.W.2d 177, 180 (Ct. App. 1990).

Although a city may exercise its police power and impose a special assessment on a landowner to recover the cost of a public improvement, this power is not unfettered. *See* ***Lac La Belle Golf Club v. Village of Lac La Belle***, 187 Wis.2d 274, 281, 522 N.W.2d 277, 280 (Ct. App. 1994). Two additionally legislatively mandated requirements apply: (1) the landowner's property must be specially benefited; and (2) the assessment must be made on a reasonable basis. Section 66.60(1)(b), STATS.; ***Gelhaus & Brost***, 144 Wis.2d at 50-51, 423 N.W.2d at 181-82. "Thus, not only must the *exercise* of the police power be reasonable; its *result* must be reasonable as well." ***Peterson***, 154 Wis.2d at 371, 453 N.W.2d at 180.

The parties here do not dispute the second requirement, the reasonableness of the assessment, but instead, concentrate on whether the Chaudoirs received a special benefit from the sewer and water extension. Thus, as do the parties, we will address only the special benefit requirement.

With this focus in mind, we address the applicable standard of review regarding whether the sewer and water extensions conferred special benefits on the Chaudoirs. Without citation to authority, the Chaudoirs assert that our review is "two-tiered … with the legal issues being reviewed de novo, and the

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police power, the assessment shall be upon a reasonable basis as determined by the governing body of the city, town or village.

trial court's ultimate determination that this real estate was not specially benefited is reviewed using the abuse of discretion standard." The City disagrees and asserts that under ***Goodger v. Delavan***, 134 Wis.2d 348, 353, 396 N.W.2d 778, 780 (Ct. App. 1986), whether special benefits were conferred requires the application of a statute to a set of undisputed facts, a question of law we review de novo.

We agree with the City. The parties do not dispute the underlying facts, so all that remains is the application of these facts to the statutory definition of "special benefit" under § 66.60(1)(a), STATS. Application of an undisputed set of facts to a statute is a question of law we review de novo; thus, our review is de novo. *See* ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989). Applying this standard of review, we conclude that the sewer and water extension conferred benefits to the Chaudoirs' property.

The Chaudoirs argue that pursuant to ***Goodger***, benefits resulting from water main construction, such as receiving sewer and water service for homes, increased fire protection, and increased flows do not constitute "special benefits" because a different water main, the one on Third Avenue, was already serving the Chaudoirs' property before the City extended sewer and water on Alabama Street. The City maintains that unlike ***Goodger***, the benefits of increased fire protection, lateral hook-ups to service additional lots if the property were subdivided, and increased potential for development from the additional laterals were not available to those outside the special assessment district.

A special benefit means an "uncommon advantage" beyond that enjoyed by non-assessed property owners in the municipality. ***Goodger***, 134 Wis.2d at 352, 396 N.W.2d at 780. All that is required is that the property be benefited to some extent. *See* ***Village of Egg Harbor v. Mariner Group, Inc.***, 156

Wis.2d 568, 572, 457 N.W.2d 519, 521 (Ct. App. 1990). That the general public may also derive a benefit from an improvement does not preclude a special benefit to an abutting landowner. *See* ***Molbreak v. Village of Shorewood Hills***, 66 Wis.2d 687, 699, 225 N.W.2d 894, 901 (1975).

We conclude that present and future benefits exist to support the City's special assessment. First, the installation of a fire hydrant directly across from the Chaudoirs' property confers a present benefit, increased fire protection, and this benefit is an uncommon advantage particular to the Chaudoirs. Second, the lateral hook-ups on Alabama Street for water and sewer confer special benefits because they increase the land's development potential. The Chaudoirs' declarations that they do not plan to subdivide or develop the property are irrelevant to determine if a special benefit has been conferred; the reason for this is that the landowner's long-term commitment to present use notwithstanding, we may look to the land's adaptability for other future uses and assess benefits accordingly. *See* ***Soo Line R.R. v. Neenah***, 64 Wis.2d 665, 670, 221 N.W.2d 907, 910 (1974). "A benefit may accrue even when it is established that the land will not be developed in the foreseeable future or when there is no present use of the improvement." *See* ***Dittberner v. Windsor Sanitary Dist. No. 1***, 209 Wis.2d 478, 498, 564 N.W.2d 341, 350 (Ct. App. 1997) (citing ***Soo Line R.R.***, 64 Wis.2d at 671-72, 221 N.W.2d at 910-11); *see also* 14 EUGENE MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 38.32 at 152 (rev. 3d ed. 1998).

Thus, a special benefit may accrue to a landowner even though there is no actual use of the improvement, and a municipality may consider the adaptability for future uses in determining the benefits received. Ramon A. Klitzke & Jerry A. Edgar, *Wisconsin Special Assessments*, 62 MARQ. L. REV. 171, 173, 175 (1978). The sewer and water mains and additional laterals to which the

potential developed property may connect confer an uncommon advantage on the abutting property.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.