COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2463 **Cir. Ct. No. 2006CV1565**

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

ALLEN HAASE AND PATRICIA HAASE,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF MENASHA UTILITY DISTRICT AND TOWN OF MENASHA,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Allen and Patricia Haase, pro se, appeal from a judgment dismissing their challenge to a special assessment the Town of Menasha and its Utility District imposed for a sanitary sewer extension. The circuit court

granted the Town's motion for summary judgment on grounds that the assessment levied pursuant to the Town's police power was for a local improvement providing a special benefit to the Haases' property and was reasonable. We affirm.

¶2 In the exercise of its police power, the Town extended sewer services to an approximately 970-acre area by installing a large sewer main called an interceptor. As a cost-saving measure, the interceptor was run diagonally through a Town-owned park, "CB Park," already served by two existing sewer mains. The Town installed a twenty-four-inch main but assessed the property owners only for the cost of an eight-inch one and paid the difference out of impact fees imposed in 1995. The special assessment imposed was $934.39 per acre.

¶3 The Haases own six parcels of land in the assessed area. Four of the six are farmland. The farmland assessments are deferred as long as agricultural use continues. *See* WIS. STAT. § 66.0721 (2005-06).[1] The Haases' land is serviced by a well and septic tank. The Haases objected to the special assessment and filed a Notice of Appeal under WIS. STAT. § 66.0703(12) on grounds that the improvement actually was general in nature and should be funded by general taxes, and that the interceptor would not substantially benefit all subject property owners within a reasonable amount of time.[2]

¶4 The Town moved for summary judgment. After a hearing, the circuit court concluded from the filings that: the Town met all procedural requirements and made the assessment pursuant to its police powers; the

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

[2] Other area residents initially joined the Haases but were dismissed for a procedural irregularity in filing their notice of appeal.

interceptor was required to service all of the properties; the property owners have the option to hook up to the sewer service now or in the future, to defer payment on their agricultural parcels and to pass on the cost to a buyer or developer; the interceptor will dramatically increase property value; there was both a special and a local benefit; and the assessment was reasonable. The court granted the Town's motion and summarily denied the Haases' later motion for reconsideration. The Haases appeal.[3]

¶5 A town may collect special assessments upon property in a limited and determinable area for special benefits conferred upon the property by any municipal work or improvement. WIS. STAT. § 66.0703(1)(a). If the assessment represents an exercise of the police power, it "shall be upon a reasonable basis." Sec. 66.0703(1)(b). Special assessments can be levied only for local improvements. ***Genrich v. City of Rice Lake***, 2003 WI App 255, ¶9, 268 Wis. 2d 233, 673 N.W.2d 361. The Haases contend that, under ***Genrich***, the threshold question—whether an improvement is local or general—always is a question of fact thus rendering summary judgment inappropriate. We disagree.

¶6 We review a summary judgment independently but follow the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We must affirm if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). The Haases suggest that their mere disagreement

[3] The Haases' notice of appeal does not state that they also appeal from the order denying their motion for reconsideration. The defect is only technical because the notice purpose of the WIS. STAT. RULE 809.10 was satisfied. *See* ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 209-10, 562 N.W.2d 401 (1997).

with the Town over the nature of the improvement makes resolution of this matter inappropriate for summary judgment. Disputed facts must be more than germane, they must be "material" and the issue must be "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See* ***Park Ave. Plaza v. City of Mequon***, 2008 WI App 39, ¶24, ___ Wis. 2d ___, 747 N.W.2d 703.

¶7 Local improvements are made primarily for the "accommodation and convenience" of inhabitants of a particular area in the community whose property receives special benefits, either in the form of enhanced services or increased property value, although they incidentally may benefit the public at large. ***Duncan Dev. Corp. v. Crestview Sanitary Dist.***, 22 Wis. 2d 258, 264, 125 N.W.2d 617 (1964). General improvements confer substantially equal benefits and advantages on the public at large and are financed by general taxes. ***Id.***

¶8 We disagree that ***Genrich*** precludes summary judgment. There, in providing utilities and vehicular access to a "landlocked" public park, the City levied a special assessment against the property of the Genrichs and five others for street paving and installing sidewalks, curbs, gutters and water and storm sewers. ***Id.***, ¶¶1-3. The trial court granted summary judgment in the City's favor on grounds the Genrichs were benefited and the assessment method was reasonable. ***Id.***, ¶5. The court of appeals reversed because the record created opposing inferences about whether the City's primary purpose for the improvements was for accommodation and convenience for the surrounding properties or to provide access to the park, and whether the Genrichs' property realized a special benefit. ***Id.***, ¶¶16, 17. These opposing inferences created genuine issues of material fact and made summary judgment inappropriate. *See* ***id.***, ¶16.

¶9 Here the Town's motion for summary judgment is supported by affidavits averring that: (1) the assessment was undertaken pursuant to its WIS. STAT. § 66.0703 police powers and was made upon a reasonable basis; (2) only property owners of approximately 970 acres of the entire Town receive the benefit of the sewer main installation; (3) only those properties directly benefiting from the improvement were assessed; (4) no other Utility District areas will use the sewer main; (5) the interceptor was strategically run through CB Park for cost and distance savings and does not benefit the park; (6) the Haases' property was not serviced by municipal sewer and water before this; and (7) land values in the assessed area have risen dramatically with the laying of the interceptor.

¶10 The Haases either do not counter these points or do so insufficiently. Their affidavit avers that they are content with their private septic system and will have to sell some of their land to pay for the assessments. They also offer the affidavit of a citizen who states she obtained tapes of a Utility Board meeting at which the sewer installation project was discussed. She does not claim to have attended the meeting. The affidavit summarizes the Board's discussion and member comments. This hearsay does not constitute a proper affidavit for summary judgment purposes. *See* ***Hopper v. City of Madison***, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977) ("Affidavits in support of a motion for summary judgment must contain evidentiary facts, of which the affiant has personal knowledge."). The party challenging summary judgment must prove with specific facts that an issue is genuine; conclusory remarks, speculation or testimony not based on personal knowledge are not enough. ***Park Ave. Plaza***, 2008 WI App 39, ¶24. The Haases' submissions do not create a genuine issue of material fact in regard to the Town's averments that the improvement is local.

¶11 We turn, then, to the propriety of the special assessment under the Town's police power. *See* ***Genrich***, 268 Wis. 2d 233, ¶19. The circuit court concluded that the Haases have realized a special benefit in the form of municipal water and sewer service and increased property value. A special benefit furnishes an "uncommon advantage" in addition to that benefit enjoyed by other property owners in the municipality. ***Goodger v. City of Delavan***, 134 Wis. 2d 348, 352, 396 N.W.2d 778 (Ct. App. 1986). It either increases the services provided to the property or enhances its value and differs in kind, not simply degree, from the benefits the general public enjoys. ***Id.***

¶12 An assessment that represents a proper exercise of the police power must be levied in a limited and determinable area, only for special benefits, and have a reasonable basis as determined by the Town's governing body. WIS. STAT. § 66.0703(1)(a), (b). *See* ***Genrich***, 268 Wis. 2d 233, ¶9. The benefits must be substantial, certain and capable of being realized within a reasonable time. ***Estate of Wolff v. Town Bd. of the Town of Weston***, 156 Wis. 2d 588, 598, 457 N.W.2d 510 (Ct. App. 1990). "The fact that property will receive no present benefit in the sense of actual use of the improvement will not defeat the assessment if benefits are sure to be realized in a reasonable time in the future." ***Id.*** (citation omitted).

¶13 The numerous maps the parties submitted make plain that the special assessment is levied upon property in a limited and determinable area of the Town, approximately 970 acres. Further, the Town filed affidavits uncontradicted by the Haases averring that only certain properties in the Utility District, not the entire Town, would benefit from this installation. As discussed above, the connection of the Haases' property to municipal sewer and its concomitant escalation in value provides a special benefit, an uncommon advantage different from the benefits the general public enjoys. *See* ***Goodger***, 134 Wis. 2d at 352.

¶14 As to reasonableness, the law presumes the municipality proceeded reasonably in making the assessment, and the challenger bears the burden of going forward. ***Peterson v. City of New Berlin***, 154 Wis. 2d 365, 371, 453 N.W.2d 177 (Ct. App. 1990). Whether an assessment is reasonable is a question of law. ***Gelhaus & Brost, Inc. v. City of Medford***, 144 Wis. 2d 48, 52-53, 423 N.W.2d 180 (Ct. App. 1988). The Utility District passed resolutions making an area-wide assessment based upon acreage, rather than front footage, as the most fair and reasonable method to allocate costs in proportion to the benefit received. The Haases do not creditably dispute that the assessment was made upon a reasonable basis. Accordingly, they have not overcome the presumption that the Town proceeded regularly. *See* ***Peterson***, 154 Wis. 2d at 371.

¶15 The record also is clear that the benefits to the Haases' property are substantial, certain and capable of being realized within a reasonable time. *See* ***Estate of Wolff***, 156 Wis. 2d at 598. The affidavit of the Town administrator states that the Haases' property did not previously have municipal sewer and water, the Town already has approved rezoning the subject property and the official change from agricultural to residential will occur upon individual landowner request, and property serviced by municipal sewer and water is valued significantly higher than that with a private septic system. The Haases' affidavits do not dispute this. Instead, they contend that various Town officials believed installing the sewer main would benefit the Town. Even if the interceptor incidentally benefits the larger community, here the only reasonable inference is that it confers special benefits—both enhanced services and increased property value—on the particular property owners.

¶16 The Haases raise a few more points that they claim rise to the level of disputed material facts. We touch on them, but state at the outset that we

disagree. The Haases assert, for example, that it is disputed whether the assessed properties are the only ones which will use the improvements. They premise their argument on a letter, made an exhibit to Mrs. Haase's affidavit, from the executive director of the East Central Wisconsin Regional Planning Commission discussing a particular wastewater treatment plant's service to a development in another town. The letter offers various hypotheticals and ends by stating that any future service by the Town of Menasha sewer system to the other town would require formal agreement between the two towns. This is too vague to defeat summary judgment. *See* ***State v. Better Brite Plating, Inc.***, 160 Wis. 2d 809, 815, 466 N.W.2d 239 (Ct. App. 1991) ("An affidavit may be rejected if it is too vague."). They also argue that material facts are in dispute as to whether the Town must pay the assessment under WIS. STAT. § 66.0705, which states that town property is subject to special assessments. They assert that CB Park was exempted from the assessment because it was not benefited, but "it is obvious that the Town Electors at any Annual Town Meeting could vote to sell this land for Private Enterprise." It is not obvious to us. We miss the genuine issue of material fact on these points.

¶17 Finally, the Haases claim that disputed material facts exist regarding whether, given the impact fee imposed in 1995, this constitutes a double assessment. Again we are not persuaded. The record establishes that an impact fee was imposed in 1995. An affidavit of the Town administrator establishes that an eight-inch sewer main was sufficient for current service; a twenty-four-inch sewer main was installed to accommodate future development; the subject properties were assessed only for the cost of the eight-inch main; and the Town paid the excess amount from the 1995 impact fees. The Haases submitted nothing sufficient to create a genuine issue of material fact on this point.

¶18 Water and sewer mains typically are subject to special assessments to nearby properties. *See* ***Duncan Dev. Corp.***, 22 Wis. 2d at 265. The Haases have not shown that this is not a typical situation. We are constrained by the level of proof the summary judgment methodology and the presumption of reasonableness require. Nothing presented here establishes that genuine issues of material fact remain. We affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.