

MAA SPECIAL ASSESSMENT COURSE

TEXT FOR 2006

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Assessment Administration Certificate R-1783***

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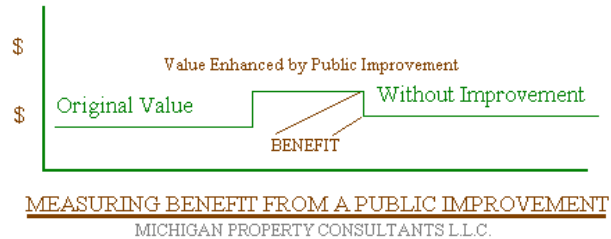
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2006 CLASSROOM TEXT
SPECIAL ASSESSMENT ADMINISTRATION IN
MICHIGAN

1.0 INTRODUCTION

Welcome to a discussion on the administration of special assessment levies. Special assessment administration is comprised of



sometimes complex and ever evolving legal issues. This text will explore several distinct, commonly used, special assessment processes. Where possible, it will address the refinements and sophistication of permitted activities resulting from judicial interpretations over time. We hope you'll find the challenges of the administration of special assessments, professionally stimulating.

A typical introductory statement from a Michigan Court of Appeals case follows this paragraph. In this course, we hope that each of the principles stated by the court will be embedded within your professional decisions. It is our intent to provide the most applicable supporting information we are aware of and to offer practical applications of special assessment theory.

2005 Judicial Analysis:

“A special assessment is not a tax. Rather, a special assessment ‘is a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area.’” Kadzban v City of Grandville, 442 Mich 495, 502; 502 NW2d 299 (1993). Special assessments are ‘sustained upon the theory that the value of property in the special assessment district is enhanced by the improvement for which the assessment is made.’” Knott v City of Flint, 363 Mich 483, 499; 109 NW2d 908 (1961). Municipal decisions regarding special assessments are generally presumed to be valid. In re Petition of Macomb Co Drain Comm’r, 369 Mich 641, 649; 120 NW2d 789 (1968). A ‘special assessment will be declared invalid only when a party challenging the assessment demonstrates that ‘there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements.’” Kadzban, supra at 502, quoting Crampton v Royal Oak, 362 Mich 503, 514-516; 108 NW2d 16 (1961). The party challenging the special assessment also has the burden of establishing the True Cash Value (‘TCV’) of the property being assessed. MCL 205.737 The TCV is equivalent to fair market value, CAF Investment Co v State Tax Comm, 392 Mich 442, 450; 221 NW2d 588 (1974), and is defined as ‘the usual selling price at the place where the property to which the term is applied is at the time of the assessment, being the price that could be obtained for the property at private sale ...’ MCL 211.27”¹

Assessor’s at every level of certification must deal with special assessments.

They are an important source of government revenue. Though creating special assessment districts and levying special assessments are a “legislative” function assigned to government bodies, the courts charge Assessor’s with the duty of properly determining the “benefit” to a property or properties arising from a public improvement. Michigan’s Supreme Court said it this way: “The assessor’s, not the court, weight the benefits, if, in truth, there are benefits to be weighed.”²

¹Rema Village Mobile Home Park v Ontwa Twp, Michigan Court of Appeals case No. 256395 unpublished.

² Fluckey v City of Plymouth, 358 Mich 447, 454; 100 NW2d 486 (1960)

Taxpayer's rely upon government officials to reasonably and fairly apportion any fiscal burden associated with "benefit" under various special assessment legislation.

Officials in local government must make the fundamental determination of the necessity for a public improvement which will be funded through a special assessment levy. Those officials must approve special assessment boundaries and they must approve the levying of a special assessment. The determination and apportionment of benefits for special assessments is a legislative function with which the courts should not interfere, at least in the absence of clear proof of fraud, bias, or discrimination.

Ad Valorem taxation and special assessments have been in use in Michigan since at least the 1800s. They are financial tools used throughout the United States.

In Michigan, two guiding principles have developed to address taxation in general and ad valorem taxation specifically: (1) "In general, tax laws are construed against the government."³ (2) tax exemption statutes are strictly construed in favor of the government.⁴

The rules for special assessments are much different than ad valorem

³ Great Lakes Sales, Inc v State Tax Comm, 194 Mich App 271, 276; 486 NW2d 367 (1992)

⁴ Elias Brothers Restaurants v Treasury Dept, 452 Mich 144, 150; 549 NW 2d 837 (1996)

taxation. A special assessment is presumed to be valid. The rules are less clear and far more unfamiliar to the ordinary citizen --- being obscure even to many members of the legal community. While special assessments are often confused with ad valorem taxes by a lay person, any professional in matters of property taxation must be able to discriminate between a property tax and a special assessment. Assessor's must be knowledgeable in the valuation principles support the special assessment process and at least conversant with overall procedures and guidelines.

The Supreme Court has pointedly stated that the benefits claimed must be real.

“The point here is more fundamental; where viewed in its entirety, no benefit upon abutting property owners has been conferred by the improvement, but rather a detriment suffered, a special assessment based upon the enhancement of the value of the property is a fraud in law upon such owners. There has been no enhancement. We are not unaware of such arguments as that the elimination of the formerly existing dirt shoulders would lessen the dust in the area, and that the depressions or ditches along the old road have been filled, but it was the conclusion of the trial chancellor that ‘the special benefits which are claimed by the city of Plymouth are pretty much afterthoughts.’ We need not go so far. The doctrine of *de minimus* is fully applicable to alleged benefits conferred by the elimination of problems so nebulous.”⁵

1.1 WHAT IS A SPECIAL ASSESSMENT?

*A special assessment is not a property tax. Rather a special assessment is a specific levy designed to recover the cost of improvements that confer local and peculiar benefits upon a property within a defined area.*⁶

⁵Ibid, Fluckey p 454

⁶Kadzban v City of Grandville, 442 Mich 495, 502; 502 N.W. 2d 299 (1993)

Let us contrast an ad valorem tax and a special assessment. An ad valorem property tax is based exclusively upon a property's value. Money collected from ad valorem taxes may be used for any of the many purposes of government. A determination of property value as used for taxation is mandated by the state's Constitution and the ad valorem tax burden created by it is strictly limited. Limits exist through a constitutional limit on millage rates and through a requirement that property values must be newly determined each calendar year. The actual tax burden is created by multiplying a property's taxable value by a millage rate. In the ad valorem tax process, the property value may be no more than 50 percent of True Cash Value; with certain exceptions, the millage rate may be no more than 50 mills and the term of a property tax may be no more than 20 years.

The economic and legal concepts related to a property's Fair Market Value are familiar and reasonably well understood by many taxpayers. Consequently, the property tax is regarded as one of the fairest of the taxes levied by government.

One reason for the belief property taxes are among the fairest of taxes is the ease with which an appeal from this tax burden can be made by ordinary citizens. Typical objections to a property tax (e.g. the value used) may be appealed each and every year without any (or at minimal) cost to the taxpayer. In addition to familiarity and ease of appeal, property tax burdens also represent a form of relief

from state and federal income tax burdens. Regulations permit the deduction of property taxes as part of the formula for calculating an income tax burden.

Special Assessments do not enjoy these characteristics and are distinguishable from property taxes in several ways.

“The differences between a special assessment and a tax are that (1) a special assessment can be levied only on land; (2) a special assessment cannot ... be made a personal liability or the person assessed; (3) a special assessment is based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality.”⁷

Special assessment levies may not be deducted in federal or state income tax formulas. They generally are not levied upon a property’s value. Most special assessments levies are calculated by dividing some fixed aggregate cost by the number of years over which the costs are to be spread. The exceptions to this procedure are certain special assessments in which a millage rate is levied across a unit wide Special Assessment District (S.A.D.). In this case, S.A.D. boundaries are established to be congruent with the levying entity’s political boundaries. This form of special assessment is becoming much more frequently used to fund public safety operations.

⁷ *Blake v Metropolitan Chain Stores*, 247 Mich 73, 77; 225 NW 587 (1929), quoting Cooley on Taxation (4th Ed), § 31

1.2 LEGISLATIVE FUNCTION

Creating a special assessment is a legislative function. In part, this means that the ordinances and decisions of governing bodies of local units of government are a form of extension of the state law(s) through which the local actions were enabled. The rules and decisions promulgated may be unique and confined to a specific political jurisdiction, but they have the weight of the law behind them. In part, that means the courts defer to the judgement of local government officials unless there is a very serious flaw in the process. This deference is known as a “presumption of validity.” Municipal decisions are presumed to be valid.⁸ This means that the special assessment and the process which created it are presumed to be valid unless clearly demonstrated otherwise.

The decision of local government leaders that a project is needed (more, specifically that there is a “necessity”) is very rarely successfully opposed. It should be noted within this context, the legal standard of necessity is much more akin to one of reasonableness than a determination of conditions requiring absolute need.⁹ The term “necessity” has not been defined by the courts as this citation from a condemnation case states. And if the term is defined at some point, the term

⁸ *In re Petition of Macomb Co Drain Comm’r*, 369 Mich 641, 649; 120 NW2d 789 (1968)

⁹ *City of Novi v Adell Trusts*, 473 Mich 242, 254-255; 701 NW 2d 144 (2005)

“necessity” as used in special assessments may be differently determined than “necessity” as used in condemnation.

“While ‘necessity’ has not been defined, the courts have considered the facts of each case and what authority has been granted under the applicable condemnation statute in reviewing for ‘necessity.’ *Nelson Drainage Dist v Filippis*, 174 Mich App 400, 404; 436 NW2d 682 (1989), abrogated in part on other grounds *City of Novi*, supra p 249 n 4, citing *State Hwy Comm v Vanderkloot*, 392 Mich 159, 170; 220 NW2d 416 (1974)¹⁰

The existence of a “presumption of validity” requires taxpayers to overcome significant hurdles if they wish to oppose a special assessment boundary or special assessment levy. They must demonstrate clearly that the process was fatally flawed or that great disproportionality exists between the burden they’ve been assigned and the “benefit” their property will receive. Fatally flawed means that the process violates a statute, a constitutional right or judicial guidelines.

In fact, prior to the establishment of the Michigan Tax Tribunal (MTT), special assessment disputes were resolved in a court. Following the establishment of the MTT, many special assessment disputes are permitted to be resolved by the MTT. However, special assessments levied pursuant to the Michigan Drain Code and certain special assessment levies involving the public’s safety, health and welfare (e.g.maintenance of dams et cetera) must still be resolved in a court of

¹⁰ *Township of Gross Isle v Grosse Isle Bridge Company*, Case No. 255759, (2005)

law.¹¹

From the taxpayer's point of view, the result of court oversight is that an individual appeal usually requires a property owner to spend a large amount of money to hire legal counsel, engineers and other expensive consultants to properly demonstrate any errors that may make a levy improper or illegal. In any case, the appeal of a special assessment usually requires expertise of a broader scope than that of a simple real estate appeal to the MTT. "To effectively challenge a special assessment, a plaintiff must at a minimum present credible evidence to rebut the presumption that the assessments are valid."¹²

Another barrier to appealing a special assessment district (S.A.D.) boundary or levy is that the opportunities to appeal foundation issues are very limited in number and duration - usually varying (based upon authorizing statute) between 10 and 30 days after creation. These objections may be raised during the creation or modification of an S.A.D. The owner of property who may object to a special assessment boundary, must overcome the assumption that government did things correctly with regard to establishing or modifying the district. Government is bound by an obligation to consider all facts, known and ascertainable in the

¹¹ MTT Docket No. 312853, *Seebeck v Gladwin County Drain Commissioner* (2005)

¹² *Storm v Wyoming*, 208 Mich App 45, 46; 526 NW2d 605 (1994)

formation. From the government's point of view, a "presumption of validity" augments the means by which the jurisdiction may accomplish its goal and helps assure financing will not be delayed by "nitpicking" tactics. Delays arising from challenges will usually develop only when disputes are perceived by the parties involved to be significant enough to warrant the expenditure of considerable money and effort.

1.3 Incumbent Special Obligation

Because taxpayers rights are so limited and the burden of a special assessment can be so damaging, justice demands government administrators and officials involved in establishing special assessments have a special obligation to assure that special assessment districts and levies established subsequent to enabling ordinances are reasonable, lawful and fair. The concept was expressed this way by the Supreme Court: "One's home can be lost just as quickly and finally for non-payment of 'special' assessments as for non-payment of 'general' taxes."¹³

When donning their hats as real estate appraisers, assessment administrators understand that government imposed burdens such as taxes, are one of the considerations which informed buyers and sellers weigh in the execution of most

¹³ Lockwood v Nims, 357 Mich 517; 98 NW2d 753 (1959)

property sales. The financial burden created by a special assessment is often limited geographically to a relatively small area. This is important because in many market transactions, comparable properties exist outside the S.A.D. (maybe even in the exact neighborhood) that are close enough to be a good alternative; and they do not have special assessment burdens. Consequently, there is always a risk that a special assessment burden will lower a specific property's market value. Justice and the law require government officials to carefully evaluate market forces affected by the levying of any special assessment. Market economic forces such as contribution and substitution must be carefully evaluated.

2.0 FOUNDATION ISSUES

2.1 Premise for levying a special assessment

The fundamental premise underlying any special assessment is simple. A unit of government has expended (or plans to expend) public funds which somehow make a public or private property more valuable. When that happens, on behalf of the public, the government unit is entitled to demand that it be reimbursed by each property owner for an amount reasonably proportional to the amount of enrichment a specific property was benefitted, by the public improvement. “The theory of the special assessment is that a special benefit has been conferred, over and above that conferred upon the community itself.¹⁴ In a foundation case, *Kuick v Grand Rapids*, 200 Mich 582, 588; 166 NW 979 (1918) the court held that special assessments are remunerative. Special assessments seek repayment of a measurable increase in market value from properties which became more valuable as a direct result of a public improvement.

2.2 NECESSITY AND BENEFIT

Here in Michigan, there are two fundamental conditions that make a special assessment lawful: 1) the government unit must make a “determination of

¹⁴ Ibid, Fluckey, p 453

necessity” and; 2) there must be some unique and specific benefit which enhances the Fair Market Value (statutorily defined as True Cash Value) of a property which must bear the burden of a special assessment.

Just as the entire process of special assessing enjoys a presumption of validity, the presumption of validity flows to the “determination of necessity.” As a general principle, Michigan’s courts are reluctant to interfere with a local jurisdiction’s determination of “necessity”. This author’s research to date has not uncovered any special assessment case in which any Michigan appellate court has defined the term “necessity.”

The courts have ruled findings of necessity are invalid if not based upon evidence. That is, a finding of necessity by an appropriate body can only be made if there is evidence on the record which is competent, material and substantial enough to warrant a final determination.

For example, in 2001, the Court of Appeals found there was insufficient evidence to support a decision that a special assessment levy for a drain was necessary. It said,

“...it appears from the record that the trial court may have relied on knowledge from related cases. The trial court’s role was to examine the record as it existed in the present case, and it erred in considering information outside the record. The record before us contains no evidence, other than conclusive statements, that the Taub Drain is necessary for the public health. Because the record before us is devoid of evidence of how the township concluded that there was a public health necessity for the proposed drain, we cannot agree with the trial court that

competent, material and substantial evidence supported the board's final order of determination with regard to public necessity."¹⁵

In what has now become a crucial reference, the Supreme Court said:

"we clarified the test for determining the validity of special assessments. An earlier Court of Appeals opinion suggested that there were three alternative bases that would support a finding of special benefits sufficient to justify a special assessment: 1) an increase in the land's value, 2) relief from some burden to the land, or 3) the creation of a special adaptability of the land. Rejecting this approach, this Court said that special assessments are permissible only when the improvements result in an increase in the value of the land specially assessed."¹⁶

The concept of "time" as related to the statutory term "benefit" and to special assessment levies is important. When the "benefit" is conferred, it may be in either the present, or at some future use of a property. It is clear in the 1986 Dixon Road Case, where the Supreme Court looked to a proposed zoning change to determine if there would be "benefit," that a consideration of future uses is a proper basis for "benefit." In Dixon Road, the court ruled the special assessment invalid, not because there would be no future increase (for an increase in value was projected to result from the zoning change), but because the ratio of the cost apportioned was not reasonable with regard to the future benefit.¹⁷ Both present

¹⁵ Barak v Oakland Co Drain Comm'r, 246 Mich App 591, 603-604;633 NW 2d 489 (2001)

¹⁶ Id. Kadzban, p 501

¹⁷ Dixon Road Group v City of Novi, 426 Mich 390, 393; 395 NW 2d 211(1986)

and future use may be considered in the same manner as they would in a highest and best use analysis. The presumed time of enhancement must be reasonable and not a some distant future date.

It is interesting to contemplate the impact of time with regard to the special assessment process. Some special assessments exist for only one year. Others may be levied for five, ten or twenty years. Arguments have been advanced that a special assessment district may last in perpetuity.

The market conditions change with the passage of time. In the 1970s there was an oil embargo and oil prices spiked quickly and dramatically. In the central area of Michigan real estate market purchasers had options to purchase homes with natural gas heat, propane heat, coal heat and fuel oil. Within just a few months of this spike in prices, they quickly began shying away from homes with systems heated by oil or oil derivatives. Those who owned oil fired furnaces began switching to natural gas.

Today, this is being played out in a new way. Arguments about global warming have swirled about for some time. It is a fact that the growing season in Michigan is longer than in past decades. There have been significant changes in the efficiency of furnaces and heat pumps. In the past, most Michigianians heated with furnaces and cooled with separate central air units. However, the combination of

lower energy costs for electricity when compared to natural gas and an increased number of days where the average temperature is 35 degrees F or higher and the higher efficiency of the most modern heat pumps has created a new trend where homeowners are now installing heat pump/air conditioner units. With these units, they now heat and cool their homes for most of the year using electricity only. When colder temperatures arrive and stay, their furnaces kick in using natural or some other fuel as the heat producing agent.

The point is, market conditions always change over time. Over time, land uses change. Views are modified by new plant growth, new construction or demolition and new skylines. Demand for water and sewer services change. The need for sidewalks change. Commuting routes change. Property use changes. Neighborhoods change. The administration of special assessments does not concern itself with normal inflation or deflation of value over time.

Proper administration means paying strict attention to the contributory value of one component of a property's value, benefit. That benefit may change. If there is not a fixed cost spread over a specific period of time, but instead some form of levy which varies periodically; then fairness requires that if a special assessment is established for a long term and the geographic distribution of value is not discrete but is instead amorphous, a periodic evaluation of the boundaries should be

undertaken. This technique is not required by law and it is more involved, but it assures a more reasonable and fairer levy.

2.3 VALUE OF IMPROVEMENT

Within the last decade, the court has also clarified how this change in market value is to be measured. It held,

“Common sense dictates that in order to determine whether the market value of an assessed property has been increased as a result of an improvement, the relevant comparison is not between the market value of the assessed property after the improvement and the market value of the assessed property before the improvement, but rather it is between the market value of the assessed property with the improvement and the market value of the assessed property without the improvement. The former comparison measures the effect of time, while the latter measures the effect of the improvement.”¹⁸

Of course, one must determine exactly what the improvement is. While it may be a brand new public improvement such as a sidewalk or street, may it also be limited to repair of the side walk and street? After doing independent research, consulting with experts, and after reviewing court and Michigan Tax Tribunal documents, to the best of this author’s knowledge, there has been no judicial interpretation by state courts of the term “improvement” as it applies to a special assessment. Various public owned structures have been listed in court cases as “improvements,” but no formal definition has been articulated. Similarly, there has not been a definition of

¹⁸ Ahearn v Bloomfield Charter Twp, 235 Mich App 486,863; 597 NW2d 858 (1999)

the term “project.”

Michigan’s courts have provided guidance when there is no statutory or judicial definition of a word. A general rule is that when construing a term not defined in a statute, a court can consider dictionary definitions. However, recourse to dictionary definitions is not necessary if the Legislature's intent can be determined from reading the statute itself. “When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate.”¹⁹ Two reference dictionaries were cited in one recent case: Black’s Law Dictionary and The American Heritage Dictionary of the English Language.²⁰

In this text, we have referred to Black’s Law Dictionary whenever possible and a well known dictionary relating to real estate terminology. You will find a limited number of definitions along with source citations have been provided.

There have been cases which suggest Michigan courts contemplated various forms of the term “improvement.” The 1960 Fluckey Supreme Court decision clearly differentiates between an original road as an improvement, and a later resurfacing and widening as an improvement. The consideration in Fluckey centered around a pre-existing condition — the existence of a viable roadway.

¹⁹ Title Office, Inc v Van Buren Co Treasurer, 469 Mich 516, 522; 676 NW2d 207 (2004)

²⁰ ¹³Craig Manske v Department of Treasury, Case No. 250565 (2005)

In an unpublished opinion, the Court of Appeals in calendar year 2005, addressed at some length the merits of an existing septic field and a local government's demand that a mobile home park be required to connect its units to a new sewer system. This 2005 Court of Appeals decision hinged on the fact that the burden of a new sewer actually reduced the mobile home park's value by over \$200,000, but a major component of the decision revolved around the court's determination that the existing septic field was sufficient for the park and the new sewer did not contribute new market value. ... it merely enhanced the community's overall public health needs. The court ruled that in light of the 1986 Dixon Road Group decision, a special assessment "*could only be justified on the basis of an increase in property value and not be justified on the basis of public health needs which inure to the public at large.*"²¹

Given the just mentioned decisions, the 1999 case of Ahearn et al v Charter Township of Bloomfield contains arguments which are quite interesting. The case revolved around a federal mandate that a water retention basin be built. While ordered by the federal government, construction of the basin was not funded with federal money. Portions of the Ahearn case were argued before both state and

²¹ Rema Village Mobile Park v Ontwa Twp, Case No. 256295, (2005)

federal courts. In the end, an assessment for an overflow basin was sustained.

In part, the Michigan Court of Appeals decided that even though the public improvement (a retention basin) did not increase a property's value now or in the future, the lack of its construction would cause a termination of the use of the existing public improvement (a combined sewer/storm sewer) and that would decrease the property's value.

Stated another way, the test for enhanced value was not a measured by an increase in value after the new retention basin was installed, but by the fact that property values would decrease if there were no retention basin. This is because without the federally mandated improvement, the local unit of government would not have been able to continue to provide sewer services.

It is interesting that when the court was presented with the argument that the township had an affirmative duty to provide sewer service, Michigan's Court of Appeals stated it had found nothing to support that proposition. It cited authority for the conclusion storm sewers were not mandated in *Kuriakuz v West Bloomfield Twp*²² and for sanitary sewers in *McSwain v Redford Twp*.²³

In *Ahearn*, the special assessment district was unit-wide. That is, the

²² *Kuriakuz v West Bloomfield Twp*, 196 Mich App 175, 177; 492 NW2d 757 (1992)

²³ *McSwain v Redford Twp*, 173 Mich App 492, 499-500; 434 NW 2d 171 (1988)

boundaries were congruent with the townships political boundaries. While this is a complex case, the final Michigan Appellate Court decision revolved around whether or not the “defendent township was entitled to a summary judgement.” That focus addressed only a single legal issue and did not address alternative issues of fact related to the special assessment process.

The court cited several issues of importance to it; in one instance stating that plaintiffs had expressed their contention that the township had an affirmative duty to continue providing sewer service, but offered no authority directly in support of the proposition.²⁴ There were other arguments that might not have been advanced or preserved:

1. a taxpayer’s vested rights to sewer service after having paid for the service
2. the justice of a political jurisdiction choosing or electing to levy a special assessment instead of alternatives such as a unit wide ad valorem debt levy for bond issues
3. the justice or injustice of the unit of government choosing to shift the financial burden to only real estate parcels and intentionally and significantly exempting benefitting business and industrial operations (This shift in burden occurs because special assessments may not be levied on personal property - thereby a significant part of the tax base is eliminated - even though those businesses and their employees may contribute to the need for this public improvement.)

²⁴ Ahearn v Bloomfield Twp, 235 Mich App 486, 494; 597 NW2d 858 (1999)

4. factual arguments regarding alternatives that existed to the public sewer system which would have negated the argument of a cessation of service
5. factual arguments regarding the magnitude or amount of any potential value losses

Special assessment law has evolved since this decision. You may want to consult with legal counsel regarding its contemporary application and instructions.

2.4 DATE OF CHANGE IN MARKET VALUE

The exact date of the measurement of Fair Market Value or True Cash Value, is critical in matters of property taxation and in special assessment administration. In ad valorem taxation, December 31st is the critical date. All taxing authority under ad valorem regulations flow from this “tax day.” In a number of economic development projects where there is a capturing of taxes for some specific purpose, the Fourth Monday in May is a critical date. This is so because the date of finalization of State Equalized Value determines a “base value” from which no taxes may be captured. However, as property values within the project increase over time valuations above the base value can be used to generate taxes that may be captured and used for “eligible” purposes on eligible properties.

Based upon the 1999 Ahearn decision, it appears the date used to measure a change of value resulting from a public improvement can vary when computing the

“benefit,” as long as the date chosen is reasonable with regard to the levying of the special assessment. Said in another way, instead of measuring the benefit (increased market value) by determining the value of a property on some date prior to the public improvement and measuring the property’s value on a date after construction of the improvement, the proper procedure is to appraise the property’s value with and without, the public improvement, on one specific and reasonable date. Courts are not interested in a benefit determination clouded by the passage of time; rather their interest is in isolating and clearly identifying value attributable only to the public improvement. This is the “contribution” of the component to the overall property value.

2.5 Ad valorem Levies

The passage of Public Act 33 in 1951 marked a significant change in preferred financing for public safety activities. The enabled the levying of a special assessment for fire protection. The use of millage rates instead of a fixed cost in the special assessment process was assured in a 1958 case. In this case, the court opined that a law prohibiting the use of ad valorem millage rates in levying special assessments was improper. It also ruled that a special assessment levy based upon a property’s value was proper. The rationale employed was that in some situations (such as police and fire protection) it was entirely appropriate to

use a property's value as the foundation for a levy based upon benefit received.²⁵ AG Opinion 6896 provided instructions to levy the millage rate against a property's SEV. A later ruling modified these circumstances and now the Taxable Value is appropriate.

The list of ad valorem special assessments levied within the state of Michigan includes more than 120 units of government today. In 1993, passage of what is commonly known as "Proposal A" created a new value for for taxation purposes, the Taxable Value. Today, Taxable Value is used in the computation ad valorem special assessments. Most of these special assessments involve funding public safety agencies such as police and fire departments. However, the list of uses for ad valorem special assessments includes street lighting, trash removal and a number of other "public improvements." Challenges have been mounted against this form of special assessment, but as of today it is growing in popularity with government agencies. There are unresolved questions regarding the benefit to vacant land and other issues.

2.6 Duration of Special Assessment District and Levy

Whereas the ad valorem tax must be redetermined every year and in no case can an ad valorem millage rate exceed 20 years, special assessments follow much

²⁵ St. Joseph Twp v Municipal Finance Comm, 351 Mich 524; 88 NW 2d 543 (1958)

different rules.

Most special assessment districts and levies expire by the terms of their creation. This means they often have a fixed dollar amount to be collected and a specific purpose to fulfill. When that is finished, the special assessment is complete.

However, in at least one unpublished case, the Court of Appeals has ruled that a special assessment district for a Lake Level Special Assessment runs in perpetuity. It reiterated that the levy expire upon the terms of its creation. In this case, the levy was authorized by the circuit court for 20 years.

3.0 BASIC DEFINITIONS

Benefit: “In order for an improvement to be considered to have conferred a ‘special benefit,’ it must cause an increase in the market value of the land. *Ahearn v Bloomfield Twp*, 235 Mich App 486, 493; 597 NW2d 858 (1999)

Contribution: “A valuation principle which states that the value of an agent of production or of a component part of a whole property depends upon how much it contributes to the value of the whole; or how much its absence detracts from the value of the whole. The principle of contribution is sometimes known as the Principle of Marginal Productivity.” *Real Estate Appraisal Terminology*, Byrl N. Boyce,

- De minimis:** “De minimis non curat lex. The law does not care for, or take notice of, very small and trifling matters. The law does not concern itself about trifles.” Blacks Law Dictionary, Sixth Edition (1990), Page 431
- Highest and Best Use:** “*That reasonable and probable use that will support the highest present value, as defined, as of the effective date of the appraisal.*” Used for improved properties “*Alternatively, that use, from among the reasonably probable and legal alternative uses, found to be physically possible, appropriately supported, financially feasible, and which results in the highest land value.*” Used for vacant land Ibid, Real Estate Appraisal Terminology, p 107
- Improvement:** “A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally has reference to buildings, but may also include any permanent structure or development, such as a street, sidewalks, sewers, utilities, etc. An expenditure to extend the useful life of an asset or to improve performance over that of the original asset. Such expenditures are capitalized as part of the asset’s cost. Contrast with Maintenance and Repair.” Blacks Law Dictionary, Sixth Edition (1990), Page 757
- Maintenance:** “The upkeep or preservation of condition of property, including the cost or ordinary repairs necessary and proper from time to time for that purpose. Bogan v Postlewait, 265 N.E. 2d 195, 197” Id. Black’s Law Dictionary, p 953
- Market Value** “The highest price in terms of money which a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus.” Ibid.” Real Estate Appraisal Terminology, p 137
- Neighborhood:** “A portion of a larger community, or an entire community, in which there is a homogenous grouping of inhabitants, buildings, or business enterprises. Inhabitants of a neighborhood usually have a more than casual community of interest and a similarity of economic level or cultural background. Neighborhood boundaries consist may consist of well-defined natural or man-made barriers or they may be more or less well defined by a distinct change in land use or in the character of the inhabitants.” Id. Real Estate Appraisal Terminology, p 147
- Necessity:** There is no legislative or judicial definition of the term “necessity” as it applies to special assessments.
- Project:** There is no legislative or judicial definition of the term “project” as it applies to special assessments.

- Property Tax:** “Burdens imposed generally upon property owners for governmental purposes without regard to any special benefit which will inure to the taxpayer.” Knott v City of Flint at 499 citing In Re Petition of Auditor General 266 Mich 170, 173; 197 NW 552 (1924)
- Repair:** “To mend, remedy, restore, renovate. To restore to a sound or good state after after decay, injury, dilapidation or partial destruction. Congress Bar and Restaurant Inc v Transamerica Insurance Co., 42 Wis 2d 56, 165 N.W. 2d 409, 412. The word “repair” contemplates an existing structure or thing which has become imperfect, and means to supply in the original existing structure that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be. Childers v Speer, 63 Ga. App 848, 12 S.E. 2d 439, 440.” Id. Blacks, p 1298
- Special Assessment:** “A special assessment is a levy upon property within a specified district. Although it resembles a tax, a special assessment is not a tax.” Knott v City of Flint, 363 Mich 483, 497; 109 NW2d 908 (1961)
- “A special assessment is not a tax. Rather, a special assessment ‘is a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area.’” Kadzban v City of Grandville, 442 Mich 495, 502; 502 NW2d 299 (1993).*
- Substitution:** “A valuation principle that states that a prudent purchaser would pay no more for real property than the cost of acquiring an equally desirable substitute on the open market. The principle of substitution presumes that the purchaser will consider the alternatives available to him, that he will act rationally or prudently on the basis of his information about those alternatives available to him, and that time is not a significant factor.”Ibid.” Real Estate Appraisal Terminology, p 201
- True Cash Value:** “As used in this act, ‘cash value’ means the usual selling price at the place where the property to which the term is applied is at the time of the assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale” M.C.L. 211.27 True Cash Value is equivalent to Fair Market Value CAF Investment Co v State Tax Comm, 392 Mich 442, 450; 221 NW2d 588 (1974)

4.0 VALUATION CONCEPTS

4.1 Economic Principles

The change in value required for a special assessment relates only to real estate value because special assessment levies may be made only on real property. They do not apply to personalty or personal property. So we will begin examining real estate valuation principles.

Real estate is a term which refers to the physical, tangible land and all things permanently affixed to it. Real Property refers to the benefits and rights associated with ownership of property.

Real estate textbooks usually refer to certain basic valuation principles. These are factors at work in the marketplace that effect Fair Market Value. These principles should reflect the actual decision making process of buyers and sellers. According to the International Association of Assessing Officers (IAAO), the basic valuation principles of most importance are:

1. Highest and best use	4. Increasing and decreasing returns	7. Contribution
2. Substitution	5. Change	8. Supply and demand
3. Conformity	6. Competition	9. Anticipation

These concepts are critical in a benefit analysis of the market influence of a

public improvement on a specific parcel or parcels of real property. Any analysis of the influence of the public improvement should include a careful examination of each of these principles, but the principle central to a special assessment is “contribution.”

4.2 Contribution

Contribution is defined within this context by the IAAO as: “A principle which holds that the value of any component of a property consists of what its addition adds to the value of the whole, or what its absence detracts from the value of the whole. For example, the rental value of a particular piece of vacant land used for parking purposes may be greater than it would be if the land were improved with a building. Or the cost of remodeling an apartment building may be greater than justified by the rental increase that can be expected as a result of remodeling.”²⁶

The point is, the contribution value of anything which increases the fair market value of a property is controlled by market conditions. It is not controlled by the cost of the improvement. The contributory value of an enhancement is that portion of the cost of the enhancement (or that part of the cost of the enhancement) which is equal to the direct increase in market value caused directly by the

²⁶ An Introduction to the Cost Approach to Value, International Association of Assessing Officers, Chicago, Il (1973), Page8

enhancement.

4.3 Fictional Case Studies of contribution and substitution

Lets see how these valuation principles inter-relate. First, we'll examine a fictional real estate market. In this market, we'll first consider only residential properties. Then we'll look at parking improvements for business.

4.31 Residential Properties

We see that there is a sufficient supply of both both new construction and existing homes to satisfy the existing demand. There are no obvious distortions in market forces and conditions appear normal.

We've spoken with several active, experienced real estate appraisers and have determined there is also a nice variety of houses offered in the market based upon amenities demanded by buyers. That is, most buyers are able to acquire the style and functionality they are looking for in this market.

When we examine the motives of buyers, we find for example, that the majority prefer three bedroom houses, with attached garages, full basements and two and one-half baths. However, there are buyers looking for small starter homes with one or two bedrooms and there are a few buyers with large families looking for four and five bedroom homes.

In our consideration of the economic principle of "contribution"we'll first

look at the contribution of water and sewers connections. We notice that in new housing, there are special assessments for both. According to our real estate agents, it is unusual for a buyer in this market to object to paying these special assessments. They seem to accept them as part of the cost of buying a newly constructed home. Of course, there are a few buyers who attempt to get the sellers to pay for these special assessments as part of the closing, but this objection is relatively rare and it is not typical that the special assessment balances are paid in full at closing. When we check with local real estate appraisers, we find they do not typically adjust for water and sewer connection fees on new housing.

However, we have found several brokers who've been making sales in this community that have had existing houses where the sewer or water connections had fouled for one reason or another, and buyers in general expected those costs to be paid for in full by the sellers at or prior to closing.

From this investigation, we've concluded that sewer and water connections are considered to contribute value to a property at the initial installation. It seems typically, everyone agrees water and sewer connections are basic components of any newly built residential property.

However, we have also been told that repairs to these basic amenities are considered normal maintenance in this market. Buyers expect them and they do not

usually agree to accept costs to repair them. Once a house is occupied and considered existing housing, rather than newly built housing in this market, the burden of financing sewer and water connections is not accepted by buyers.

We've also discovered a similar pattern with paved street surfaces. When the home is new typical buyers seem willing to pay future special assessment levies for the roadway as part of the ordinary costs of new home ownership. However, where a special assessment for street paving exists in older neighborhoods with existing housing, buyers typically look for substitute comparable properties with similar amenities but not the financial burdens of a special assessment for paving. Sellers in this neighborhood typically must pay the balance of their paving specials at closing or reduce the price of their property to find willing buyers. Based upon this information, we've created a chart illustrating market forces related to the economic principles of contribution and substitution. In some instances, buyers consider these amenities to contribute to the value of the property and are willing to pay for them. In other cases, buyers look for substitute properties without the tax burden but with similar amenities.

Improvement	Contributes Value to New Housing	Contributes Value to Existing Housing
Water and Sewer Connections	Yes	No
Street Paving	Yes	No

When provided with this information, our community elected officials decide that the community policy will be to specially assess the cost of new streets and new sewer and water connections, but they will pay repairs out of the general fund budget. Their reasoning, in part, includes the idea that communities compete with each other for residents and high tax burdens, including special assessment burdens, will encourage citizens to look for substitute housing elsewhere.

4.32 Business Parking

In addition, we've surveyed our brokers and appraisers with regard to parking structures. Luckily, this community's business district has become quite popular. In part due to the urbanization of empty nesters, in part because entrepreneurs and economic developers have succeeded in creating a wonderful central business district with extensive rehabilitation of early 1900s store fronts and in part due to the great geographic location of this community. It sits amidst a high density population of working families that are economically advantaged.

Vacancy rates in this central business district have dropped to levels not seen in decades. As the stores fill up, vehicular traffic congestion has increased. It is clear that the planning department's call for more parking is justified. Several years ago a parking structure was built near the business district, but six blocks away. It is used extensively by employees of local businesses in an attempt to keep the limited off street and on street parking for customers.

Demand for housing and offices is such that even the upper floors of the old store fronts have become used for a variety of purposes. There has been some new commercial building going on. The consequence of this activity is that parking is once again at a critical state and a new parking structure is needed.

This one is to be build adjacent to the commercial district, in a large part to service customers who simply refuse to walk the six blocks or so from the existing parking to the business district. Everyone agrees there is a need for the facility.

Once again we survey our brokers and appraisers and find the following information. Business property buyers would not object to a special assessment for parking, because they project higher rents and lower vacancies and retail customer demand continues to build. This means a continuation of the recent trend towards larger and larger annual sales.

However, most business people believe that if congestion is not eliminated

soon momentum will be lost and customers will begin shopping at an adjacent community which has also done well in revitalizing its central business district. Business owners believe time is of the essence with regard to getting more parking.

Because of the way the original buildings were constructed, there are residential properties located within the business district. This are primarily single family homes built between 1915 and 1940. There are apartments located in some of the refurbished commercial structures and some of the newly built commercial structures.

Luckily for this tale, a well respected economic development firm has completed a scientific survey of residential property users. Some are renters, some are shopping for apartments in the housing which has been included within new multi-story commercial structures. Some are looking at the quaint homes from the last century.

Unfortunately, it is clear from this study that residential property owners believe there is sufficient parking for their vehicles and they don't see a need to support business parking structures with their hard earned money. Potential residential buyers, brokers and appraisers all agree that the many communities which surround this metropolitan site offer plenty of comparable substitute housing. Buyers either will not buy in a neighborhood specially assessed for

commercial parking or they only buy properties which are being sold with a discount equal to the financial burden of future special assessment fees.

Another study conducted by our traffic engineers and economic development team show that there will be a small amount of customer traffic from the new parking structure to nearby commercial strip centers. However, the projections are that this traffic is really incidental and nominal in its impact. From this information, we have decided that the *Service District* (the geographic area where influence from the new parking structure is detected) will extend outward from the structure for a radius of six blocks. The S.A.D. however, is smaller. It will only encompass the distance the scientific survey showed customers will walk to stores. That radius is four blocks.

Based upon this information, we've created another chart which illustrates the contributory value of a new parking structure in this neighborhood. Our conclusion is that the special assessment district boundaries must include some residential neighborhoods. Notwithstanding the boundary decision, market forces are such that there will be no special assessments apportioned against residential properties.

Improvement	Contributes Value to Housing	Contributes Value to Business Property
PARKING FACILITY	No	Yes

Within our community we now have identified components which will help us understand the geographic extent to which certain kinds of special assessments extend. Here is what we've compiled. With any luck, our GIS people will map this information some day.

Improvement	Sewer	Water	Parking
Benefit If adjacent to	Yes	Yes	Yes
Included in Service District	Yes	Yes	Yes
Benefit if within 4 Blocks	No	No	Yes
Include in Service District	No	No	Yes
Benefit if within 6 blocks	No	No	No
Include in Service District	No	No	Yes

From this chart we can see that the geographic influence of water and sewer connections are limited to adjacent properties. However, a public improvement such as parking may extend for several blocks. We also see that different classes of property are effected in different was.

5.0 FORMING AN S.A.D.

Following a determination of necessity and an analysis which results in the determination of the extent of the geographic distribution of all identifiable benefits from a public improvement (Service District), there are two basic value determinations which need to be made within a special assessment levy.

First, a determination must be made of the geographic distribution of market value influence arising from the public improvement. Then there must be the appraisal of individual properties with and without the influence of the public improvement.

5.1 Service District

In the first case, one can determine which properties would be eligible to place within a special assessment district. Individual property appraisals need not be completed, but some reasonable and fair method of determining where market influences extend to (from the public improvement) must be utilized. The assessor should fully consider the economic factors which can be identified — both those easily known and those can be ascertained or determined with proper due diligence. The outcome of this determination is the identification of exactly where

boundaries for a special assessment district should be placed.

In the second case, the determination of a change in market value on a specific parcel of real property is used to ascertain the amount of benefit received and therefore the amount of special assessment levy that may reasonably be levied or apportioned against a specific parcel.

5.2 The Special Assessment District

SAD boundaries can be contemplated in a manner similar to a determination of a “neighborhood” surrounding a subject property. While a neighborhood usually has homogeneity as a primary component of its identification, the neighborhood formed by Special Assessment District has only one defining characteristic, “benefit” from a specific public improvement.

All the properties within it receive a factual, measurable, direct and specific increase in fair market value from that particular public improvement. Remember, the S.A.D. boundaries may be congruent to the boundaries of the Service District, they may be smaller than the Service District, but they may never be larger than the Service District.

To identify the boundaries of the S.A..D., the assessor or appraiser must determine which group of properties have share the external economic influence.

In the case of the special assessment, the focus is strictly limited to the geographic distribution of value from a specific public improvement.

Here is a salient example. It is almost always the case that an enhancement of real estate from a water supply connection is limited specifically to the lot or lots to which the water connection is provided. Having a reliable water supply makes property marketable when that might not be the case without water. Examples of this economic factor may be found throughout Michigan, but lack of water is a very significant issue in the southwestern U.S. where demand for water has actually eliminated existing water supplies.

It is very clear to valuation experts that in most cases public improvements, such as initial sewer and water connections, enhance property values by an amount equivalent to the cost of installing them at the time the original public improvement is built. Thus, the land value is enhanced when sewer and water connections become available and the special assessment levy spreads the cost immediately. There need not be any buildings or other improvements affixed to the land for the enhancement to be conveyed. The land itself becomes more marketable because building becomes an option. Thus, the assessor can confidently and easily ascertain which properties belong within the S.A.D.

As a footnote, some jurisdictions may defer the financial burden to property

owners to some future date, but the levy is based upon costs new for the installation. The term discrete concerns geographic distribution of the increased market value. By discrete, we might that the enhanced value only spreads to specific lots or parcels. Usually, the term discrete in this context, includes a requirement that the affected property is somehow directly connected to the public improvement. The spread of value is limited to a specific parcel or parcels of real estate.

This is not always the case however. All of us intuitively know the value of a specific parcel of land can often be influenced by features not connected in any way to the property. They are external to the property.

For example, an outside influence effecting value can arise from a beautiful view of some sort. It may be a view of a mountain from a property lying in a valley or hollow. It may be a view of a lake or a forest from a property located on the side of a hill.. It may be a view of a city from high atop a building. Buyers pay more money for attractive views. These examples are interesting in their diversity and reflect value enhancement from both nature and man made features. They illustrate common market forces influencing buyers and sellers in a variety of markets.

Thus, a public improvement such as a dam creates a lake. The dam creates an enhancement downstream as property owners are protected from flooding. The

lake creates enhancements to adjacent and nearby properties and it may create an enhancement of property values some distance away.

In this case, let us assume the lake is not a private lake, but a lake large enough to have public access and a lake which is used by the public for recreational purposes. Under these conditions, there are other market influences which effect value. Not only is there the enhancement of recreational or residential property values which directly result from frontage on water, but commercial property values may be influenced.

As an illustration, it may be that an abandoned gas station on a road a mile from the lake becomes a bait shop servicing people who like to fish the lake. Perhaps a convenience store opens up along one of the other access roads to the lake. It may be that homes begin getting built on the lake and local businesses such as food stores and furniture stores and hardware stores benefit from increased annual sales as both residents living on lakefront land and visitors to the lake begin making trips to local businesses for needed items or simply to enjoy a meal.

What has happened is an economic development activity made possible by the waters stored behind the dam. The water enhances the value of property touching it and properties with easy access to it. The water stimulates tourism which creates new jobs and permits the expansion of existing businesses. People

employed in these new jobs spend their earnings and stimulate the local economy through their purchases from local businesses and their demand for housing.

Unlike the fresh water connection to a specific home, the creation of a natural feature such as a lake has a widespread influence on property values. There may be value enhancement of properties directly touching the water or those within close proximity to the lake. There are affected properties which might have a view of the lake and those commercial properties (perhaps some distance from the lake) which become more valuable to rent or market because of enhanced income streams from tourism and other commercial activity generated by people utilizing the lake.

Even when there is a paucity of sale data, these enhancements might be manifested through higher rents, reduced vacancy rates, or a sudden increase in new businesses arising from the public improvement. There may be other indicators of enhanced property value in the classes of business, recreational or residential property. Obviously, higher rents and reduced vacancies are reliable indicators of changing property values when an income stream to a property is commonly used by buyers and sellers in a market. Therefore, under those conditions these indicators are appropriate determinants of real property value.

6.0 APPLYING THE PRINCIPLES

The power to levy special assessments is derived from the power to tax. *Williams v Mayor of Detroit*, 2 Mich 560 (1853)

6.1 The Geography of Boundaries

Boundaries must be defined as the first step in the special assessment process. In *Lawrence et.al. V City of Grand Rapids* 166 Mich 134, 131 N.W. 581, (1911) the Supreme Court noted *“it is the duty”* of an entity *“when a special improvement is made, the benefits accruing from which are regarded as local, to determine the boundaries of the district within which the property is supposed to specially benefitted by the improvement.”*

Secondly, boundaries are arbitrary and unwarranted when known facts are ignored or facts may be determined but no one looks for them. Continuing with *Lawrence v Grand Rapids*, the court in its discussion of the second finding said, *“From this and other testimony we feel obliged to agree with the trial judge in the conclusion that the boundaries of the district were fixed by the common council without reference to either known or ascertainable facts; that the action was arbitrary and unwarranted.”*

Thirdly, there should be deference to the admonition that the boundary line for a Special Assessment District may not be based strictly upon the basis of its proximity to a public improvement. In *Johnson v Inkster*, 401 Mich 263; (1977); 258 NW 2d 24(1977) the Michigan Supreme Court held:

“Every public improvement is ‘local’ in the sense that it is located in a particular area; libraries, fire and police stations and street improvements are all located closer to a property owned by some persons than to property owned by others. The location of this widened highway closer to plaintiff’s homes than to other Inkster properties does not by itself justify requiring a special contribution to defray costs.”

6.2 Service District — Geographic Extent of all Benefits

A geographic distribution of benefits from a public improvement may be analyzed by first figuring out exactly which benefits exist. While these benefits

must contain economic components, it would be unusual if there were not other “benefits” besides economic. Other benefits might include: public safety components, public welfare components, a larger tax base or other benefits to specific political jurisdictions, benefits to the environment and other benefits.

The geographic extent of all benefits from the improvement defines the “**service district.**” That is, you should map out where the identified benefits spread to from the public improvement.

To determine properties that will be benefitted one must look to the authorizing statute’s definition of benefit and to cases interpreting or applying this definition. From those sources all benefits from the public improvement may be identified.

The first reference the assessor should turn to is the resolution by the governing body which finds that there is “necessity” for the public improvement. Why was it needed? What justification was used to make the finding and what facts were used by the deliberating body to conclude there was a need? Are there other documents which support the finding of necessity?

6.3 LES - Legal, Economic and Scientific Information

Once you've examined all documents related to the finding of necessity, you should seek out a possible pool of information that may be available for analysis. At a minimum, the source of facts used to define boundaries for a Service District should include considerations of **legal, economic and scientific (LES) information** that may be available. Some brief examples of the principle of LES follow.

6.3.1 LEGAL DOCUMENTS AND INFORMATION

The bundle of legal rights interwoven within real estate ownership can influence a special assessment process. For example, state owned land is often exempted from special assessment levies. However, there are statutes, such as the Natural Resources Environmental Protection Act (NREPA M.C.A. 324 et seq.), which require the state to pay a special assessment levied pursuant to the Act. Examine the authorizing statute carefully to substantiate the inclusion of properties that might be otherwise overlooked.

Another example might apply to **recorded deeds or other legal instruments**. There are situations where enhanced market value varies based upon closeness or proximity to a public improvement. In such situations, care must be

taken to assure that there are no unknown easements or right-of-ways which physically separate the land to be specially assessed from the public improvement. An example, would be a right-of-way owned in fee simple by a utility company, which exists solely to provide access for the company. Another would be long forgotten (or ignored) and never used public streets or right-of-ways. These circumstances more common than one might expect even though evidence is almost always recorded and available at in a county clerk's office.

Recently, in one case, islands in the middle of a lake were omitted from an assessment roll and two special assessment districts, even though they were available for sale and had been identified in an engineering study for the unit of government.

6.3.2 ECONOMIC FACTS AND INFORMATION

Economic benefits include such things as an elevated tax base, new or increased tourism, job generation, new recreational or residential growth and business incentives or features attractive to business. These may be widely spread economic influences. Sometimes they apply to one class of properties and not another.

We've already discussed the importance to market value of a view of water. It may possible that a public golf course or wetlands or some other environmental improvement enhances property in a wide geographic area and properties not physically adjacent to the improvement. Appraisers across the country have investigated these types of economic influences and assessors must be alert to them in the special assessment process.

Remember Economic benefits also include such things as an elevated tax base, new or increased tourism, job generation, business incentives or features attractive to business and new recreational or residential growth. Benefits to units of government in the form of higher property tax collections are easy to trace. One merely reviews the millage rates levied and the jurisdiction the taxes go to when collected. A map can quickly be prepared which illustrates the geographic distribution of an enhanced property tax base. Benefits from tourism, business incentives (such as infrastructure or enhanced economic development) might require the aid of professionals in those fields to ascertain.

6.3.3 SCIENTIFIC FACTS AND INFORMATION

A good example of the importance of **scientific and engineering studies** can be found in one unique situation in Troy, Michigan. In this example, sound

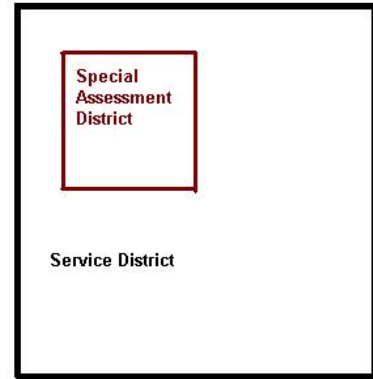
barriers were erected as a way to mute traffic noise flowing to a residential neighborhood from an expressway. The noise was so loud, constant and annoying that it adversely impacted property values.

After consulting with experts, the cost of building the barriers was apportioned based upon the propagation of sound waves. This resulted in an apportionment of costs plotted on a map in a wave-like geometric pattern --- that is, there was a cluster of properties at which sound was attenuated greatly. This cluster received costs apportioned higher than those apportioned against the next a series of properties - which traffic noise had effectively “skipped.” These properties were specially assessed at a lower rate. They were followed by another group of properties influenced by a crest of noise; and so on.

In this case properties located some distance from the barriers received a significant reduction in noise levels and properties located closer to the expressway were apportioned lower costs because their benefit had not been as great. In this case, it was not appropriate to use mere proximity to the barrier as a measure of sound. The proper determination resulted from scientific studies of the way in which the amplitude of sound from this particular noise generator varied over the local terrain.

Thus, a Service District associated with a particular public improvement can have many facets.

The assessment **Service District** is not comprised of properties having only one benefit. It is comprised of all properties identified as being directly or indirectly



benefitted by the public improvement. The geographic area comprised of these aggregated properties constitutes the service district.

A service district may be a large area; covering more than one county. For example, it may be an entire surface drainage area such as a watershed which contains hundreds of square miles of land. It may be a downstream flood plain. It may be a central business district serviced by parking facilities or a long commercial strip served by a street. In the case of an activity such as public safety, it may cover multiple jurisdictions which enjoy a mutual aid agreement.

Of those properties located within the Service District there may be some that receive a specific and unique benefit greater than that generally conferred. Those properties benefitting from the public improvement in some special and unique manner greater than that of other benefitting properties, should be included within a geographic sub-zone termed the “special assessment district” (SAD).

6.4 SPECIAL ASSESSMENT DISTRICT

“It is the duty” of an entity “when a special improvement is made, the benefits accruing from which are regarded as local, to determine the boundaries of the district within which the property is supposed to be specially benefitted by the improvement...The carving out of a special assessment district in a city is a practical matter, depending wholly upon facts.” Lawrence et al. V City of Grand Rapids, [166 Mich 134, 131 N.W. 581 (1911)]

The special assessment district (S.A.D.) is comprised of only real property located within the service district that receive an increased property value as a direct and unique result of the existence of the public improvement. If this is not the case, then a special assessment may not be levied because a “fraud” is committed when an assessment is levied where a property is not benefitted.²⁷

Care must be exercised in reviewing the distribution of benefits when one intends to isolate those creating increased market value. For example, it may be demonstrated that properties within a watershed receive a general benefit that goes to all properties in the community when a storm sewer is put in place; but they do not receive a measurable increase in property value which is unique from any benefit the rest of the community receives from the storm sewer. So, they are not placed within the S.A.D. However, it may be that certain downstream properties do in fact, have property values enhanced due to flood control resulting from the storm sewer project. Those properties would be in the S.A.D. Remember, when

²⁷Crampton v City of Royal Oak, 362 Mich 503, 515

defining the S.A.D. it is not critical that you know the exact increase in property value contributed by the public improvement to each specific property. That determination occurs in the apportionment of costs. Establishing district boundaries requires only that available facts and corroborating information are used to establish reasonable boundaries that are fair and appropriate.

The idea is to **include all properties** which should be specially assessed. There are three possible outcomes in creating a district boundary. The district may be perfect, it may be too small and exclude real estate which should be properly included or it may be too large and include properties which receive no benefit.

If a district is too small, then those properties remaining within the district will be forced to carry the financial burden of those properties wrongly excluded. However, if the district is too large (e.g. includes properties that do not receive a market value enhancement), then the error is easily negated. At apportionment, taxing officials simply do not levy a special against properties which have not received a benefit. One should always strive to create perfect boundaries, but from an equity perspective, it is better to error with too large a district rather than too little. Unfortunately, there is sometimes political pressure to irritate as few voters as possible when creating a district.

“It is settled law that special assessments may be sustained upon the theory that the property assessed receives some special benefit from the improvement

differing from the benefit that the general public enjoy.”Lansing v Jenison, 201 Mich. 491, 497; 167 N.W. 947 (1918)

In determining boundaries for a special assessment district, it is proper to remember, there is one, and only one, special and unique benefit that permits a property to suffer the burden of a special assessment tax levy. The special and unique benefit which permits the levy of a special assessment is “increased property value”.

“This court said that special assessments are permissible only when the improvements result in an increase in the value of the land specially assessed...municipalities are not free to levy special assessments without regard for the amount of benefit that inures to the assessed property. For a special assessment to be valid, ‘there must be some proportionality between the amount of the special assessment and the benefits derived therefrom.’ In the absence of such a relationship, the special assessment would be ‘akin to the taking of property without due process of law.’” Kadzban v Grandville, 442 Mich 495 (1993)

The demarcation between properties qualifying to be located within a specially assessment district and those that may have a benefit but are not eligible for inclusion is the boundary line of the special assessment district. It must be based upon a factual increase in an individual property’s value resulting directly from some public improvement. The assessor is the public official charged with this duty.

“The assessors, not the court, weight the benefits, if, in truth, there are benefits to be weighed.” Fluckey v Plymouth, 358 Mich. 447, 454; 100 N.W. 2d 486 (1960).

6.5 Summary: Steps for the Determination of Boundaries

The procedure to be followed is:

For the Service District ...

1. Review the finding of “necessity” authorizing a special assessment levy - Identify potential benefits conferred from the public improvement project.
2. LES - Review legal, economic and scientific studies, facts and other information
3. Determine and map the geographic extent over which all benefits are distributed.

For the Special Assessment District ...

4. Segregate all benefitting properties into two classes: those that have a direct, specific and unique increase in property value as a result of the public improvement from those that don't.
5. Use the demarcation between properties directly benefitting and those that are “indirectly” benefitted as the boundary line for the Special Assessment District.

7.0 APPORTIONING COSTS

7.1 Individual Properties

Great leeway exists in how costs can be apportioned. Costs are to be apportioned based upon the specific value enhancement each property receives. The apportionment of costs need not be exactly one dollar of costs for every dollar of enhanced value, but it must be reasonable. The courts have ruled that an amount 2.6 times the enhanced value is too great a disparity.²⁸

The foundation for apportioning costs rests upon the enhanced value. The measure of enhanced value is made by measuring the value of the property without the public improvement and then measuring it with the public improvement. At the present time, there is no specific date upon which a special assessment benefit must be estimated. The measurement may occur on any date reasonably related to the public improvement and its contribution to market value.

Market value is to be estimated using good appraisal practices and valuation methods accepted by the courts as appropriate. The change in value of each property within the special assessment district which is a direct and unique result of the public improvement should be estimated and documented.

²⁸ Dixon Road Group v City of Novi, 422 Mich 858; 365 NW 2d 749 (1986)

Meticulous documentation of the special assessment process, proper notification within the process and a factual basis for any government action must be employed by the assessor and other government officials. For, once a taxpayer overcomes the presumption of validity afforded local government in the administration of a special assessment, the burden of proof shifts to the unit of government.

7.2 At Large Assessment

When a property lies within a jurisdiction empowered to levy special assessments for public improvements and an improvement is made for the public good, the cost of which cannot be levied against a specially benefitting property, the property is deemed to receive an indirect benefit and may not be specially assessed. The portion of the cost of the public improvement charged to indirectly benefitting properties is termed an “at-large” special assessment. An at-large assessment comes from the general fund of the local unit of government.

8.0 JUDICIAL DECISIONS OFFERING GUIDANCE

Just as the definition of “Benefit” has been modified over time and various decisions of Michigan’s superior courts, there have also been decisions which are instructive as to the proper resolution of legitimate conflicts that arise from practical administration of special assessments.

Benefit to Community at large

“The special assessment cannot be justified on the basis of public health needs and the tribunal erred to the extent it did so. ... Here, public health benefits from the implementation of a municipal sewer system are not unique to the assessed property. Such benefits inure to the community at large. Because the property did not increase in value as a result of the municipal sewer system that was the subject of the special assessment, the improvement did not confer a special benefit to the assessed property as a matter of law.” Rema Village Mobile Home Park v Ontwa Twp, No 256295 (2005)

Damage Caused by the Public

The cost of repairing damage caused by the public at large may not be specially assessed against property. In *Johson v Inkster*, the court said: *“The principle that persons who ‘are made to bear the cost of a public work , are at the same time to suffer no pecuniary loss thereby’ does not accommodate an assessment to defray the cost of rectifying conditions mainly brought about by the public at large and not ‘specially and peculiarly’ related to the use or needs of persons residing in the assessment district.” Johson v Inkster 401 Mich 263, 268; 258 NW 2d 24*

Existing condition

In some cases, a previously existing conditions eliminates specially assessing costs for a public improvement which involves an adequate pre-existing. *“But, the order changed. Original paving of a dirt road without any change in its width of, say 20 feet, may be clearly of special benefit to abutting property owners. One cannot say the same about the widening of a road in a residential district and its repavement when the pre-existing impervious hard surface was amply adequate for abutting owners. Fluckey v City of Plymouth, 358 Mich 447,452; 100 N.W. 2d 486 (1960)*

Facts both known and ascertainable Required

“From this and other testimony we feel obligated to agree with the trial judge in the conclusion that the boundaries of the district were fixed by the common council without reference either to known or ascertainable facts; that the action was arbitrary and unwarranted. We are of opinion, also, that the bill of complaint, fairly interpreted, charges the creation of a district invalid because not including lands benefitted by the improvement.” Lawrence v City of Grand Rapids, 166 Mich 134, 143; 131 NW 581 (1911)

Highest and Best Use

“The benefit by reason of which a special assessment is authorized to be imposed must be understood to be a pecuniary benefit resulting from the increased market value of the land, and if the use of the land imposed by law is such that it can have no market value, an assessment cannot be levied.” Dixon Road Group v Novi 426 Mich 390, 399 (1986) quoting 70 Am Jur 2d, Special or Local Assessments, §18, p 859.

Reasonable Proportionality

“While we certainly do not believe that we should require a rigid dollar-for-dollar balance between the amount of the special assessment and the amount of benefit, a failure by this court to require a reasonable relationship between the two would be akin to the taking of property without due process of law. Such a result would defy reason and justice.” Dixon Road Group v Novi, 426 Mich 390, 402-403; 395 NW 2d 211 (1986)

Proximity to a Public Improvement

Not justification for a special assessment levy. In Johnson v Inkster the Supreme Court held: *“Every public improvement is ‘local’ in the sense that it is located in a particular area; libraries, fire and police stations and street improvements are all located closer to property owned by some persons than to property owned by others. The location of this widened highway closer to plaintiff’s homes than to other Inkster properties does not in itself justify requiring a special contribution to defray the cost.”*

Presumption of Validity

“Invariably when a special assessment district is created, as in the instant case, opinions may differ as to its proper extent and its inclusion or non-inclusion, of specific property therein. The creating of the districts was within the legislative powers of the commission, and the presumption of validity attaches to the action taken. Crampton v City of Royal Oak, 362 Mich 503; 108 NW 2d 16 (1961)

Value determinations are to be made by Assessors

“It must be stressed that the facts before us do not involve a mere error in judgement on the part of assessing authorities. We do not trifle with such. Nor do they involve the substitution of the judgment of the court upon the worth of special benefits conferred. The assessors, not the court, weight the benefits, if, in truth, there are benefits to be weighted.” Fluckey v Plymouth, 358 Mich 447, 454; 100 NW 2d 486 (1960)

Vested Interests

Under some circumstances, it may be argued that a taxpayer has obtained vested rights in a public improvement through the payment of special assessment fees. The most likely examples would be situations where many years passed between the public improvement and a property’s need for it. For example, suppose a water or sewer connection were paid for through a special assessment and then, the local unit of government denied the property owner a right to connect because local growth had stressed the system. This actually happened in an Illinois case (*La Salle Nat’l Bank v Riverdale*, 16 Ill 2d 151 (1959)). The village denied a plat based upon the lack of an available sewer even though the property had previously been charged for a sewer connection. The court ruled the plaintiff could not be denied the benefits guaranteed by previous payments *“merely because of changed circumstances.”*

9.0 FORMS OF RELIEF FROM THE FINANCIAL BURDEN

9.1 Individual Statute

Limited relief from the financial burden of a special assessment is sometimes provided in the form of a hardship exemption. The exemption is granted locally pursuant to enabling statutes. This benefit varies considerably, so individual special assessment statutes need to be scrutinized for this component.

9.2 PA 225 of 1976

This act provides an exemption from special assessments for certain senior citizens and disabled persons. Pursuant to the act, the special assessment is paid by the state of Michigan and a lien is placed against the property. The lien is to be paid in full upon the death of the property owner or the sale of the property. The act creates income parameters for applicants. It requires the payment of annual interest on the lien. The amount of interest may become significant over time and this act is little used.

9.3 APPEALS

Most appeals of special assessments are made to the Michigan Tax Tribunal (MTT). Some, primarily involving the public health, safety and welfare, must be appealed to a court of law. All appeals must be initiated with a local appeal as directed by the authorizing statute. Details of how, when and where to appeal will be cited in the statute enabling the levying of the special assessment.

In some cases, such as the Natural Resources Environmental Protection Act (MCL 324 et seq), special assessment levies are made pursuant to the drain code. In cases such as that, the proper procedure to follow is that outlined in the Drain Code.²⁹

²⁹ Id. Seebeck v Gladwin County Drain Comm.

10.0 SIMPLE MODEL FOR COST vs BENEFIT

The overall relationship of total benefits, unique and special benefits and at-large benefits can be stated mathematically. The distribution of associated costs can be formulated in a similar manner. Consequently, a decision can be made based upon a mathematical model of costs verses benefit.

In any particular project, the amount of total benefit and relationships between components can be stated as follows:

Where: Total Benefit is represented as “ B_T ”
and Identifiable Unique and Special Benefits are identified as B_D
and Indirect Benefits are represented as B_I

Then $B_T = (B_D + B_I)$ and $B_I = (B_T - B_D)$

This benefit formula may be useful in determining the benefit to be assigned at large and the benefit expected to devolve to properties located within a special assessment district.

A similar formulation may be derived for costs from a public improvement.

Where: Total Project Costs are represented as “ C_T ”
and Specially Assessed costs are represented as “ C_S ”
and At-Large costs are represented as “ C_A ”

For planning purposes, the merit of the project is defined as

$$B_T = C_T \quad \text{or} \quad B_T > C_T$$

That is: Benefits must be equal to or greater than the cost of the project for a it to be funded via a special assessment levy. This formula may also be used to identify the amount of cost which may be spread as a special assessment and the portion which must be spread as an at large levy.