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Municipal Corporations—Special Assessments—Local Improvement Districts.—Heavens v. King County Rural Library Dist.

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those of mortgagees. The mortgagee will normally accept a mortgage as security for a loan only after a thorough credit check of the applicant, an inspection of the record title of the property and a physical inspection of the land. The mechanic is not in a bargaining position to demand such things as waivers nor can he afford to make thorough investigations of those who request his services. The mortgagee should not be allowed to have the swollen value of his secured asset accrue to him at the expense of the mechanics and materialmen whose time, money, labor and material have made the increased value a reality. The mechanics and materialmen, having fully performed, should have a higher priority in foreclosure than the mortgagee who has suffered only a defeat of his expectations by the failure of the mortgagor to repay the personal obligation for which the mortgage served as security.

If the court maintains a rigid adherence to the time-priority rule, a more equitable solution than the rule of the present case would be to measure the reasonable value of the services rendered by the mechanics and, as to that amount, allow the mechanic first recovery from the proceeds of the foreclosure sale. After the pool has been depleted to this extent, the full amount of the mortgage claim would be disbursed and the mechanic would take the remainder, if any, to make up any difference between the reasonable value of his services and the contract price. This method would allow the interests and equities to remain undisturbed; the mortgagee's anticipated enhancement of the property's value would be subordinated to the reasonable value of services rendered by the mechanic, while the mechanic's anticipated profit would be inferior to the bargained-for benefit of the mortgagee.

The *Fleharty, Industrial Tile* and *American-First* decisions are demonstrative of the judicial inconsistency which can be caused by legislative ambiguity. The Oklahoma Legislature, which has not removed the ambiguous language from its statute, must bear the major portion of the responsibility for the confusion surrounding the question of which class of claimants is to be favored. It remains to be seen whether the seven years of legislative silence following the decision in *Industrial Tile* was an affirmation of that interpretation of the statute or was the implied delegation of law-making power to the court, for these diametrically opposite results on priority cannot both reflect the intent of the legislature. The need for legislative action in this area is clear and the type of legislation needed should reflect a balancing of bargaining positions between mortgagees and mechanics and materialmen.

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Municipal Corporations—Special Assessments—Local Improvement Districts.—***Heavens v. King County Rural Library Dist.***[1]—This case involves the constitutionality of a special or betterment assessment for the construction of a library. A 1961 Washington statute[2] empowers rural library districts[3] to form local improvement districts[4] and to finance new libraries by

[1] 404 P.2d 453 (Wash. 1965).

[2] Wash. Rev. Code § 27.14.020 (Supp. 1963).

[3] A rural county library district is a library serving all the area of a county not

levying special assessments where the newly constructed buliding "are of special benefit to part or all of the lands in the district."[5] Defendant King County Rural Library District sought to finance a new library by creating such an improvement district and levying a special assessment. The plaintiffs, property owners subject to assessment, contended that libraries confer an intangible benefit and that their construction therefore cannot constitutionally be financed by specially assessing local landowners.[6] The trial court dismissed plaintiff's complaint. The Supreme Court of Washington HELD: that the special assessment was invalid, indicating that public libraries do not bring a special benefit to neighboring land.

The court correctly focused on the issue of special benefit in determining the validity of the special assessment.[7] The requirement of a special benefit is primarily constitutional:[8] the courts have frequently indicated that a special assessment without a special benefit would be a deprivation of property without due process.[9] The constitutions of some of the states impose similar requirements.[10] Article 7, Section 9 of the Washington Constitution specifically limits special assessments to the property benefited. Also, legislatures frequently require a special benefit in statutes authorizing special assessments.[11] For example, the Washington Code prescribes that the assessment should be levied "on all property specially benefited by any local improvement."[12] Legislatures sometimes require such a benefit by implication by describing the property that shall be subject to the assessment, an example of which would be a sidewalk improvement where the statute provides that the assessment be levied against abutting property.[13]

Generally, the special benefit that is required is a benefit that is more intense to the assessed property than it is to all property within the municipality.[14] Where the primary purpose and effect of an improvement is to

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included within the area of incorporated cities and towns. Wash. Rev. Code Ann. § 27.12.010(5) (1963).

[4] A local improvement district is a subdivision within a library district in which a library is deemed desirable. It can be established by either the governing board of the library district or by a petition of the residents within the district. Wash. Rev. Code § 27.14.020 (Supp. 1963). In the instant case, the local improvement district was established by the library district. The court here took judicial notice of the fact that the district was extensive in area. Supra note 1, at 455.

[5] Wash. Rev. Code § 27.14.020 (Supp. 1963).

[6] Brief for Plaintiff Heavens, p. 50, supra note 1.

[7] Lloyd v. City of Redondo Beach, 124 Cal. App. 541, 546, 12 P.2d 1087, 1090 (1932). Certain exceptions to this requirement, such as exercise of police power, are not relevant here.

[8] Norwood v. Baker, 172 U.S. 269, 278-79 (1898); Garcia v. Falkenholm, 198 A.2d 660 (R.I. 1964).

[9] See, e.g., Seidlitz v. County of Faribault, 237 Minn. 358, 361, 55 N.W.2d 308, 311 (1952); In re Shilshole Ave., 85 Wash. 522, 537, 148 Pac. 781, 787 (1915).

[10] See, e.g., Minn. Const. art. IX, § 1.

[11] See, e.g., Conn. Gen. Stat. Ann. § 13-29 (1960); Idaho Code Ann. § 50-2905 (1957).

[12] Wash. Rev. Code § 27.14.020 (Supp. 1963).

[13] Ore. Rev. Stat. § 371.642 (1963).

[14] Fisher v. City of Astoria, 126 Ore. 268, 277, 269 Pac. 853, 856 (1928).

benefit the general public, there is no special benefit.[15] The courts do not, however, hold invalid special assessments where there is mere incidental benefit to the unassessed landowners.[16] Nor does an additional benefit to certain property constitute a special benefit when it is merely incidental.[17] Future or potential benefit may be considered,[18] but it should not be so speculative as to render it uncertain.[19]

The ever-increasing revenue demands on municipalities dictate that some of the legal principles regarding special assessments be re-examined. Generally, cities and towns are forced to rely on a general real estate tax, charges for services rendered, and special assessments to meet their revenue needs. Since many improvements do not lend themselves to special charges,[20] and since political considerations can often prevent increases in the general real estate tax, special assessments might be the only means of financing needed additional services.

Certain types of improvements have been categorized as suitable or unsuitable for special assessments, and courts sometimes automatically approve or disapprove special assessments for them,[21] perhaps because certain improvements bring far greater benefit to adjoining land than to less proximate areas. Examples of suitable types of improvements are streets,[22] curbing,[23] paving,[24] sewers,[25] and parks.[26] In the instant case, the court attempted to analogize between improvements, relying heavily on a case in which a special assessment for a public auditorium was held inappropriate.[27]

Some courts have already suggested that the type of improvement should not be determinative.[28] Rather, inquiry should be made in each case into whether the specific property is actually benefited. Thus, the type of neighborhood should play an increasingly important role—an improvement would

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[15] Williams v. Arkansas County Courthouse Improvement Dist., 153 Ark. 469, 475, 240 S.W. 725, 728 (1922).

[16] Mullins v. City of Little Rock, 131 Ark. 59, 67, 198 S.W. 262, 266 (1917); City of Waukegan v. Dewolf, 258 Ill. 374, 381, 101 N.E. 532, 535 (1913); Village of Edina v. Joseph, 264 Minn. 84, 92, 119 N.W.2d 809, 815 (1962).

[17] Williams v. Arkansas County Courthouse Improvement Dist., supra note 15.

[18] Crampton v. City of Royal Oak, 362 Mich. 503, 517, 108 N.W.2d 16, 22 (1961); In re Arch Hurley Conservancy Dist., 52 N.M. 34, 50, 191 P.2d 338, 348 (1948).

[19] Ibid.; D'Antuono v. City of Springfield, 114 Ohio App. 102, 106, 180 N.E.2d 607, 610 (1960).

[20] Special charges are usually flat rates employed where an attempt to pay off the cost of the improvement or service would result in prohibitive rates. For example, municipalities supply water to residents and charge a set amount per faucet. If such an approach were employed with regard to a library, its cost would never be paid off unless prohibitive rates were charged for its use.

[21] See, e.g., In re Improvement of Lake of the Isles Park, 152 Minn. 29, 35, 188 N.W. 54, 57 (1922).

[22] Butters v. City of Oakland, 263 U.S. 162 (1923).

[23] Kraushaar v. Zion, 196 Misc. 437, 94 N.Y.S.2d 449 (Sup. Ct. 1949).

[24] City of Moundsville v. Brown, 127 W. Va. 602, 34 S.E.2d 321 (1945).

[25] Fisher v. State, 69 Nev. 236, 246 P.2d 804 (1952).

[26] Wilson v. Lambert, 168 U.S. 611 (1898); In re Improvement of Lake of the Isles Park, supra note 21.

[27] Lipscomb v. Lenon, 169 Ark. 610, 276 S.W. 367 (1925).

[28] City of Edwardsville v. Jenkins, 376 Ill. 327, 330, 33 N.E.2d 598, 600 (1941).

have a different effect in a residential neighborhood from that in an industrial area; the particular characteristics of the improvement are still important—unsightly buildings would have a deleterious effect in a suburban neighborhood; and the adaptibility of the improvement to the neighborhood pattern should be given greater consideration—some "improvements" might actually be nuisances in a residential neighborhood. Since it requires a case-by-case analysis, use of this suggested approach might be difficult, but it is more consistent with the underlying theory of special assessments, namely, payment for benefit received.[29]

The courts have generally indicated that the *amount* of the special benefit is the difference between the fair market value before and after the improvement.[30] Fair market value can be reached: First, by ascertaining the value of the property by comparable sales, second, by determining the cost of the property and depreciating it to its present age, and third, by ascertaining the amount of money necessary to produce an income equal to that of the property.[31]

Perhaps the most readily apparent method of measuring the amount of an increase in fair market value is determining the increase in resale value after the improvement. It is difficult, however, to place a dollar value on the effect on resale value of a given improvement. For example, the addition of a public park near residential property will certainly boost the amount a buyer would be willing to pay, but it is impossible to say just what the dollar value is to the seller. The utility of this method pales when it is remembered that few property owners are interested primarily in owning real estate for resale purposes.

In certain cases, there are other and perhaps more accurate methods of measuring the amount of increase in fair market value. If an improvement saves a homeowner the cost of a comparable utility, this cost could reflect the amount of his benefit. For example, if the installation of a sewer line makes unnecessary the purchase of a septic tank, the owner has saved the price of the tank, and this saving is a tangible benefit. Or if the construction of a new fire station reduces local insurance rates, this saving is also a benefit.[32] The sum of the savings thus gained would represent a more tangible gain to the homeowner than would increase in resale value. Moreover, ascertainment of the amount of this type of gain would be quite simple. This approach, however, is applicable only in limited situations,[33] and it should not be used to force a homeowner to pay for improvements that government has traditionally been required to provide.

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[29] Norwood v. Baker, supra note 8.

[30] City of Philadelphia v. Conway, 257 Pa. 172, 178-79, 101 Atl. 472, 474 (1917); In re Schmitz, 44 Wash. 2d 429, 434, 268 P.2d 436, 439 (1954).

[31] American Inst. of Real Estate Appraisers, The Appraisal of Real Estate 66 (3d ed. 1962).

[32] The possibility of this type of benefit was treated in In re Jones, 52 Wash. 2d 143, 145, 324 P.2d 259, 260 (1958).

[33] It would be difficult to measure this saving in most situations. For example, how could the savings, if indeed there are any, from the proximity of a library or the construction of a street be measured?

Another method of ascertaining the extent of the special benefit would, in certain cases, be to determine the amount of increased income that the improvement brings to the landowner. If a municipal parking lot increases the amount of rent that can be charged in a retail district, this increase is a benefit to the landlord.[84] This method would also allow the landowner to be taxed on in-pocket benefits rather than paper profits. While it is possible that the increase in fair market value might be determined by increase in resale value, increased income, or savings from the provision of a needed improvement, it is suggested that the full impact of all these savings might not be reflected in an isolated determination of fair market value. Thus, where the homeowner has been spared a five hundred dollar expense, but his resale value has not increased, his benefit would still be five hundred dollars. The municipalities should therefore be able to assess the benefit by that of the three methods which yields the greatest gain.

Turning to the instant case, the court found that libraries cannot produce a special benefit. The court relied heavily on a Arkansas case that had set aside a special assessment for a public auditorium.[85] This approach should be discouraged since there are obvious factual differences between auditoria and libraries,[86] and very probably there were differences between the neighborhoods involved. The determination of a special benefit should be made to turn on the individual facts and not upon prior judicial determinations involving dissimilar facts.

It is a well-recognized principle of appraisal that the existence of libraries and similiar facilities are relevant factors in setting the value of real estate, especially in residential neighborhoods. One authority[87] states that: "Cultural institutions such as libraries, colleges, and universities all tend to serve as beneficial factors in the neighborhood pattern."[88] In the *Encyclopedia of Real Estate Appraising*, some of the factors for determining value are: (1) Character of neighborhood buildings; (2) neighborhood planning and design; and (3) schools, churches, shopping centers and recreational areas.[89] It is submitted, therefore, that libraries do have an effect on value. Whether this effect is present in a degree sufficient to produce a special benefit should not be the subject of a universal rule. Rather it should be determined by evidence relating to the particular improvement, especially the testimony of real estate appraisers. While it may be that the library in the instant case did not create a special benefit, the court should have made it clear that this was a factual determination. It is at least possible that under different circumstances a library, especially a branch library, could create a special benefit.

[84] See City of Whittier v. Dixon, 24 Cal. 2d 664, 668, 151 P.2d 5, 7 (1944) for the advantageous effect that a parking lot might have on the surrounding property.

[85] Lipscomb v. Lenon, supra note 27.

[86] An auditorium would be more likely to attract people from a greater distance and would tend to interfere with a residential neighborhood pattern because of the large crowds it would serve.

[87] Amer. Inst. of Real Estate Appraisers, supra note 31.

[88] Id. at 95.

[89] Anderson, Appraisal of Residential Property, Encyclopedia of Real Estate Appraising 156 (Friedman ed. 1962).

In selecting the method to be employed in determining the extent of any special benefit, it appears unrealistic to attempt to determine the cost of a comparable service. Actually the benefit measured by this test would be the expense and inconvenience involved in travel to the next nearest library, hardly a significant benefit. Nor does it appear that the erection of a library in a neighborhood would be an income producing improvement. While it might be a limited factor in determining the fair rental value of an apartment building, this would apply only in certain situations. It thus appears that if indeed a library does confer any special benefit, it will best be reflected in property resale value. The determination of amount under this standard will be properly left to the appraisers.

JAMES P. DOHONEY

Products Liability—Strict Tort Liability—Liability of a Manufacturer for "Economic Loss."—*Seely v. White Motor Co.*[1]—The plaintiff purchased a truck from a dealer under a conditional sales contract. The truck had been manufactured by the defendant who made the following express warranty:

> The White Motor Company hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good at its factory any part or parts thereof. . . .[2]

Upon taking possession of the truck, the plaintiff found it to be unsatisfactory because of a violent bouncing effect known as "galloping." For nearly a year thereafter, the dealer, acting under the guidance and direction of the manufacturer, attempted unsuccessfully to remedy this defect. Subsequently, the brakes failed and the truck was extensively damaged when it overturned in a non-collision accident. After the plaintiff had repaired this damage, he notified the dealer that he would make no more payments on the contract. The dealer consequently repossessed the truck and resold it for an amount greater than the deficiency.

The plaintiff commenced this action against the manufacturer[3] both for the damages "related to the accident," namely the cost of the repairs,[4] and for the damages "unrelated to the accident," the amount paid toward the purchase price and the profits which had been lost because the truck had been unfit for normal use.[5] The trial court entered judgment for the plaintiff for these "unrelated damages" which had arisen independently of the accident as a result of the defendant's breach of its express warranty.[6] Re-

[1] 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

[2] Id. at 20, 403 P.2d at 148.

[3] The trial court granted plaintiff's motion to dismiss without prejudice to his action against the dealer. Id. at 20, 403 P.2d at 148.

[4] Id. at 19-20, 403 P.2d at 147-48.

[5] Id. at 20, 403 P.2d at 148.

[6] Ibid.