**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 18, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP474** **Cir. Ct. No. 2015CV70**

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

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**CED PROPERTIES, LLC,**

**PLAINTIFF-APPELLANT,**

**V.**

**CITY OF OSHKOSH,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 REILLY, P.J. The City of Oshkosh levied special assessments against CED Properties, LLC (CED) for installation of a roundabout intersection and related improvements pursuant to the City's police power. CED challenged

the special assessments on the grounds that (1) the City was foreclosed from assessing "special benefits" to its property where it failed to allege special benefits in an earlier condemnation action and (2) a genuine issue of material fact remains as to whether its property incurred any special benefits. We affirm the circuit court's grant of summary judgment to the City.

## BACKGROUND

*Jackson-Murdock Project*

¶2 CED is the owner of property located at the corner of Jackson Street and Murdock Avenue in Oshkosh, Wisconsin, on which a Taco Bell restaurant franchise operates. On July 27, 2010, the City passed a resolution to "reconstruct" the intersection of Jackson Street and Murdock Avenue, which would include "the construction of a roundabout to replace traffic signals; concrete paving; asphalt paving; sanitary sewer laterals (new and relaid); storm sewer main and laterals; sidewalk replacement and repair; concrete driveway approaches; and streetscaping/landscaping improvements." The total cost of the project was $4,060,000, with the City's share[1] being $1,449,250, of which $307,118.72 was special assessed to property owners adjacent to Jackson Street and Murdock Avenue.

*The Eminent Domain Action*

¶3 The City utilized its power of eminent domain to acquire approximately six percent of CED's property for the project. CED and the City

[1] The Wisconsin Department of Transportation paid the balance.

litigated the amount of just compensation owed to CED for the taking. The parties reached a settlement in April 2012 that the City would pay $180,000 in just compensation for the taking, and the City was released from claims arising out of the condemnation action.

*The Special Assessments*

¶4 This is the second time we have reviewed the City's special assessment of the CED property. *See* ***CED Props. LLC v. City of Oshkosh***, 2013 WI App 75, 348 Wis. 2d 305, 836 N.W.2d 654, *rev'd*, 2014 WI 10, 352 Wis. 2d 613, 843 N.W.2d 382. CED challenged the initial assessments under WIS. STAT. § 66.0703(12) (2013-14).[2] The circuit court granted the City's motion for summary judgment, finding that CED's appeal was ineffective and untimely. We affirmed. ***CED Props. LLC***, 348 Wis. 2d 305, ¶1. The Wisconsin Supreme Court reversed with directions to the circuit court to enter summary judgment in favor of CED on remand due to the City's failure to comply with statutory assessment requirements. ***CED Props. LLC***, 352 Wis. 2d 613, ¶35.

¶5 The City thereafter reopened and assessed CED the special assessments under WIS. STAT. § 66.0703(10). CED again contested the special assessments, and the circuit court again granted summary judgment in favor of the City. CED appeals.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

## DISCUSSION

*Standard of Review*

¶6 We review a grant of summary judgment under a de novo standard. ***Everson v. Lorenz***, 2005 WI 51, ¶9, 280 Wis. 2d 1, 695 N.W.2d 298. We apply the same methodology as the circuit court and will affirm summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2); ***Lorenz***, 280 Wis. 2d 1, ¶9. Whether a special benefit under the special assessment law is conferred is a question of fact. ***Park Ave. Plaza v. City of Mequon***, 2008 WI App 39, ¶20, 308 Wis. 2d 439, 747 N.W.2d 703.

*"Special Benefits" Under WIS. STAT. ch. 32 and Special Assessment Under WIS. STAT. ch. 66 are Distinct Considerations*

¶7 The crux of CED's argument is that it was error for the circuit court to interpret WIS. STAT. § 66.0703 to allow the City to exercise its police power and levy a special assessment where the City failed to allege special benefits in the eminent domain action under WIS. STAT. § 32.09(3).[3] CED provides no case law or direct statutory support for its argument, claiming only that the term "'special benefits,' as used in WIS. STAT. ch. 66 is indistinguishable from its use in WIS. STAT. ch. 32 cases." *See, e.g.*, ***Molbreak v. Village of Shorewood Hills***, 66 Wis. 2d 687, 703-04, 225 N.W.2d 894 (1975); ***Goodger v. City of Delavan***, 134 Wis. 2d 348, 352, 396 N.W.2d 778 (Ct. App. 1986). The City argues that special

[3] Under WIS. STAT. § 32.09(3), "[s]pecial benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of property taken or damages under sub. (6)."

benefits under eminent domain law and special benefits under special assessment law are two different beasts.[4]

¶8 We reject CED's contention that the concept of special benefits is the same for both condemnation and special assessment. We agree with the City that "special benefits" under WIS. STAT. § 32.09(3) need not be present in an eminent domain action in order for a city to allege special benefits under a WIS. STAT. ch. 66 special assessment. As explained in McQuillin,

> [A] town may exercise its police power to levy special assessments to pay for public improvements. However, the public improvement must be local, meaning that while it may incidentally benefit the public at large, it is primarily made for the accommodation and convenience of inhabitants of a particular locality and confers 'special benefits' to their properties. The assessment also must be fair and equitable and in proportion to the benefits accruing. A town wishing to exercise its power to levy special assessments must follow the procedures outlined by statute. But they have no relation to the exercise of the power of eminent domain ….

14 MCQUILLIN, MUN. CORPORATIONS § 38:1, Westlaw (database updated July 2016) (citations omitted).

¶9 Condemnation and special assessments are distinct proceedings with different legal analyses. While we acknowledge that the law of eminent domain and special assessments have developed together and contain similar definitions of

[4] The City also argues that the settlement agreement and release preclude a challenge based on WIS. STAT. § 32.09(3). The settlement agreement required CED to "execute a written release … releasing [the City] from any and all claims of any nature whatsoever arising out of [the Jackson-Murdock project], except for the special assessment issues pending between the parties." However, the parties explicitly reserved the ability to challenge the special assessment, which is what is at issue here.

the phrase "special benefits,"[5] there are important legal differences. In an eminent domain proceeding resulting from a public improvement for which part of the condemnee's land is taken, special benefits accruing to the remaining property and affecting its market value are deductible in ascertaining the amount of damages to be awarded. WIS. STAT. § 32.09(3). Under § 32.09(3), the taking *must* affect the market value of the remaining property. The suggested jury instruction on special benefits in an eminent domain proceeding, *see* WIS JI—CIVIL 8115, which we have cited with approval, *see* ***Red Top Farms v. DOT***, 177 Wis. 2d 822, 831, 503 N.W.2d 354 (Ct. App. 1993), informs the jury that special benefits "increase the fair market value of the remaining property," that "[s]pecial benefits arise because of the unique relationship between the remaining property and the completed public project," and that "the benefit is peculiar to the remaining property and provides it with an uncommon advantage." WIS JI—CIVIL 8115.

¶10 In an eminent domain proceeding, special benefits include the increased market value arising from physical improvement of the remaining land, or from a more advantageous adaptability for a different or more profitable use because of the public project's proximity to the land—such as from agricultural to commercial where there is new access to a highway. ***Red Top Farms***, 177 Wis. 2d at 823, 832-34; ***Hietpas v. State***, 24 Wis. 2d 650, 656, 130 N.W.2d 248 (1964). The benefit "must accrue to the property itself as distinguished from the

[5] *Compare* ***Petkus v. State Highway Comm'n***, 24 Wis. 2d 643, 648, 130 N.W.2d 253 (1964) ("Special benefits are distinguished from general benefits in that they differ in kind rather than in degree from those which accrue to the public generally.") *with* ***Goodger v. City of Delavan***, 134 Wis. 2d 348, 352, 396 N.W.2d 778 (Ct. App. 1986) (defining "special benefits" as an "uncommon advantage which accrues to a property owner under a special assessment … in addition to that benefit enjoyed by other property owners in the municipality").

owner or his business." ***Petkus v. State Highway Comm'n***, 24 Wis. 2d 643, 648, 130 N.W.2d 253 (1964).

¶11 In contrast, WIS. STAT. § 66.0703(1) details the process whereby a municipality

> may … levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon the property by any municipal work or improvement; and may provide for the payment of all or any part of the cost of the work or improvement out of the proceeds of the special assessments.

A special assessment is a "complete alternative to all other methods provided by law." ***Id.***[6]

¶12 ***Genrich v. City of Rice Lake***, 2003 WI App 255, 268 Wis. 2d 233, 673 N.W.2d 361, sets forth the test to determine whether an improvement is "local" so as to permit a municipality to make a special assessment against a property "for the accommodation and convenience of inhabitants in a particular locality." ***Id.***, ¶¶8-9 ("Because special assessments can only be levied for local improvements … the circuit court must initially examine whether the improvement is local."). The ***Genrich*** test requires a court to look at (1) the purpose behind the improvement, (2) the type of benefits conferred, and (3) the extent of the benefits. ***Id.***, ¶12. As relevant to this discussion, the "type of benefits" that will constitute a local improvement are those that have "the effect of furnishing an 'uncommon advantage' that *either increases the services provided to*

[6] The special assessment statute recognizes that eminent domain proceedings may be involved with the public improvement project and provides the basis to arrive at a net amount awarded after a taking (damages or compensation) and an assessment for special benefits. WIS. STAT. § 66.0703(5)(c)(2), (8)(b).

*the property or enhances its value*." ***Id.***, ¶13 (emphasis added; citation omitted). "An uncommon advantage is a benefit that differs in kind rather than in degree from those benefits enjoyed by the general public." ***Id.***, ¶14.

¶13 In the assessment context, improved services, as for example, new lanes resulting in special benefits of improved traffic flow and reduced traffic congestion, may benefit commercial property, and these increased services may also result in increased property value. ***Park Ave. Plaza***, 308 Wis. 2d 439, ¶¶25-26. "If the uncommon advantage stems from an enhancement in the property's value, the court must view the benefits and their effect in light of the highest and best possible use of the property." ***Genrich***, 268 Wis. 2d 233, ¶14.

¶14 Thus, while market value may be considered in the context of special assessments, and there may even be some overlap, the context, process, purpose, and analysis is not the same. CED fails to address these differences, or to even acknowledge that the legal analysis applicable to the damages-offset analysis in a takings case is different from that applied to determine if a special assessment is legally appropriate. There is simply no support for CED's contention that the City could not pursue a special assessment for local public improvements apart from the eminent domain proceeding.[7]

¶15 The City admits that it never claimed that special benefits accrued to CED's remaining property as a result of its WIS. STAT. ch. 32 partial taking. The

[7] While nothing precludes the City from seeking a special assessment after the eminent domain proceeding is resolved, the value of the special benefit cannot be recovered twice. Philip Nichols, NICHOLS ON EMINENT DOMAIN § 8A.02(7) (Matthew Bender, 3d ed. 2016) ("[T]here can be no setoff of the benefits that will result from the public improvement for which a portion of the condemnee's land has been taken when the government has levied a special assessment for the same improvement.").

City's expert, Patrick Wagner, appraised the CED property in the condemnation case and testified that there were no special benefits *arising from the condemnation* as the condemnation did not result in an increase in the fair market value of CED's remaining property. CED's appraiser also indicated that the partial taking caused a loss in fair market value to the remaining property. The City's failure to claim special benefits in the eminent domain action, however, did not foreclose the City from levying special assessments for local improvements against CED under its police power.

¶16 The testimony established that the special benefits arose from an increase in services and not market value. The City's expert opined that there were no special benefits accruing to the property after condemnation, meaning that the remaining property did not increase in market value as a result of the condemnation. CED does not challenge this conclusion.

*CED Incurred Special Benefits as a Result of the City's Special Assessments*

¶17 CED claims that summary judgment was improper as CED presented evidence supporting a genuine issue of material fact regarding the presence of special benefits in the special assessments. According to CED, the court may not grant summary judgment where the property owner puts forth facts that there was no special benefit. The City counters that CED's claims do not overcome the presumption of correctness of the City's determination. We agree.

¶18 Under WIS. STAT. § 66.0703(1)(a), a municipality may, by resolution of its governing body, "levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon the property by any municipal work or improvement." A city's power to levy a special assessment, while broad, is limited by § 66.0703 in that it must satisfy three

requirements: (1) the assessment must be levied on property within a limited and determinable area, (2) the assessment must be "for special benefits conferred upon the property," and (3) the assessment must be made on a reasonable basis. Sec. 66.0703(1)(a)-(b); ***Genrich***, 268 Wis. 2d 233, ¶19. "When a property owner challenges a special assessment, a presumption exists that the city officers proceeded regularly unless the contrary is shown by competent evidence." ***Genrich***, 268 Wis. 2d 233, ¶19 n.8.

¶19 We find the facts present in this appeal to be analogous to ***Park Ave. Plaza***. In ***Park Ave. Plaza***, property owners along Port Washington Road appealed special assessments levied by the City of Mequon. ***Park Ave. Plaza***, 308 Wis. 2d 439, ¶1. This court upheld the circuit court's grant of summary judgment to the city, finding no evidence in the record to rebut the presumption that the commercial properties received a special benefit. ***Id.***, ¶26. We identified record facts demonstrating special benefits, such as "improved traffic flow" and "an increase in customer trips to retail centers, shorter travel times for employees, higher occupancy levels and possibly higher rental rates for offices and retail, and more timely deliveries and lower transportation costs to light industrial centers." ***Id.*** We found these benefits to be "different in kind than those enjoyed by the public at large." ***Id.***

¶20 In this case, the project report provided similar local benefits as those found in ***Park Ave. Plaza***. The improvements to the Jackson-Murdock intersection specially benefited CED by providing better traffic flow; a substantial increase in accessibility; and safer, lower cost, and shorter travel times for customers, deliveries, and employees.

¶21 To rebut the presumption, CED disputes the Jackson-Murdock project's benefits, claiming that the traffic improvements are a detriment to its tenant, Taco Bell. CED's expert claimed that roundabout intersections are disfavored by the public and actually impair fast food sites as fast food sites are "impulse stop[s]" which benefit from longer intersection delays, the roundabout is under-engineered making it difficult for large trucks to navigate, and the landscaping provides no benefit for Taco Bell.

¶22 We conclude that CED has failed to overcome the presumption of correctness of the City's actions as well as establish a genuine issue of material fact to overcome summary judgment. As this court explained in ***Park Ave. Plaza***, "[t]he simple existence of a factual dispute between the parties will not defeat summary judgment if the factual issue is not genuine." ***Park Ave. Plaza***, 308 Wis. 2d 439, ¶24. CED must demonstrate "specific facts showing that a genuine issue exists for trial; '[i]t is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge.'" ***Id.*** (citation omitted; alteration in original). In response to the dissent's concern that a question of fact remains as to whether CED received a special benefit from the project, Dissent, ¶¶30-31, we submit that the phrase "special benefit" sets a low bar, requiring only that CED's property be "benefited to some extent." ***Village of Egg Harbor v. Mariner Grp., Inc.***, 156 Wis. 2d 568, 572, 457 N.W.2d 519 (Ct. App. 1990).

¶23 The majority of CED's claims focus on the detriment to the specific business currently located on the subject property—Taco Bell. Special assessment law is concerned with the fairness of the allocation of costs between similar properties for a local public improvement. As our supreme court explained, "[I]t is proper … to look to adaptability for other uses in the future and assess benefits

accordingly," suggesting that courts may consider uses for the property not specific to the type of business located presently on the property. ***Soo Line R.R. Co. v. City of Neenah***, 64 Wis. 2d 665, 670, 221 N.W.2d 907 (1974). Assessments are levied as a measure to allocate the costs of local municipal improvements; improvements that are important to the infrastructure of our municipalities. It would be unreasonable to expect a municipality to begin allocating the local costs of a roadway or sidewalk improvement based on peculiar commercial differences between the adjacent properties.

## CONCLUSION

¶24 We affirm the order of the circuit court granting the City's motion for summary judgment. "Special benefits" in the eminent domain context and the special assessment context, while similar in definition, are distinct and different considerations under distinct and different governmental actions. Failure to claim special benefits in one situation does not foreclose a claim in the other. The City demonstrated the existence of special benefits sufficient to support the special assessment for its local public improvements, and CED failed to overcome the presumption of correctness of the City's assessments.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

¶25 NEUBAUER, C.J. (*concurring*). I agree with Judge Reilly's analysis concluding that "'[s]pecial benefits' in the eminent domain context and the special assessment context, while similar in definition, are distinct and different considerations under distinct and different governmental actions." Majority op., ¶24. I also agree that the circuit court did not err in determining that CED failed to overcome the presumption of correctness of the City's special assessments but concur for additional reasons.

¶26 CED, as does the dissent, points to its appraiser's report, which CED relied upon in the eminent domain proceeding. As discussed above, the "special benefits" analysis in an eminent domain proceeding is whether special benefits affect the *market value* of the remaining property and shall be considered and used to offset the value of the property taken or damages. The appraisal report, and the analysis of the market value of the remaining property, was not only prepared for the eminent domain proceeding, it was presumably considered and reflected in the settlement of the condemnation action.

¶27 Here, the "special benefits" addressed in the City's assessments of approximately $20,000 for each property are assessed to recoup the cost of the improvements—increased services—not changes to market value. Again, while there is some conceptual overlap when it comes to market valuations, the legal analyses are simply not the same. As noted in Judge Reilly's decision, we reject CED's contention that "special benefits" in the context of condemnation is an identical analysis to that in the special assessments. I similarly reject CED's attempt to again rely on (and again benefit from) a market-value analysis in the

subsequent special assessments, which are based on increased services, such as improvements to replace the damaged, deteriorating and unsafe sidewalks, concrete driveway approaches, and new curbs and gutters. None of these improvements are challenged by CED.

¶28 WISCONSIN STAT. § 66.0703(1)(b) states in part that "if an assessment represents an exercise of the police power, the assessment shall be made upon a reasonable basis as determined by the governing body of the city, town or village." The amount of the assessment can exceed the value of the special benefits. ***Gelhaus & Brost, Inc. v. City of Medford***, 144 Wis. 2d 48, 52, 423 N.W.2d 180 (Ct. App. 1988) (rejecting argument that "the assessment not exceed the value of benefits bestowed by the improvements"). The phrase "special benefits" in the context of special assessments requires only that CED's property be "benefited to some extent." ***Village of Egg Harbor v. Mariner Group, Inc.***, 156 Wis. 2d 568, 572, 457 N.W.2d 519 (Ct. App. 1990). A challenger must overcome the presumption of correctness, i.e., reasonableness, by "strong … clear and positive proof." ***Molbreak v. Village of Shorewood Hills***, 66 Wis. 2d 687, 696 n.3, 225 N.W.2d 894 (1975) (quoting 14 MCQUILLIN, MUN. CORPORATIONS § 38.184 (3d ed. 1965)).

¶29 Here, CED has not created a genuine issue of material fact to show that it has overcome the presumption of correctness by again relying on the market-value analysis of its appraiser submitted in the condemnation proceeding. More to the point, it has failed to show by "strong … clear and positive proof" that the $20,000 special assessments are not reasonable—given that it is undisputed that improvements to the sidewalks, curb and gutters, etc. have been made—and the reasonableness analysis requires only that CED's property be "benefited to

some extent" and that the amount of the assessment can exceed the value of the special benefits.

¶30 GUNDRUM, J. (*dissenting*). I dissent because I agree with CED Properties, LLC (CED) that a jury issue exists as to whether the Jackson-Murdock Project conferred special benefits on the CED property so that the City could collect a special assessment from CED. "A special *benefit* has the effect of furnishing an uncommon *advantage* to a property." ***Park Ave. Plaza v. City of Mequon***, 2008 WI App 39, ¶17, 308 Wis. 2d 439, 747 N.W.2d 703 (emphasis added). This of course requires that the project actually be "beneficial" or "advantageous" to a property. As the majority notes, "Whether a special benefit under the special assessment law is conferred is a question of fact." Majority, ¶6 (citing ***Park Ave. Plaza***, 308 Wis. 2d 439, ¶20); ***First State Bank v. Town of Omro***, 2015 WI App 99, ¶20, 366 Wis. 2d 219, 873 N.W.2d 247.

¶31 Relying on ***Park Ave. Plaza***, 308 Wis. 2d 439, ¶20, the majority concludes that "CED has failed to overcome the presumption of correctness of the City's actions as well as establish a genuine issue of material fact to overcome summary judgment." Majority, ¶22. The majority finds that the project in this case "provided similar local benefits as those found in ***Park Ave. Plaza***," including "better traffic flow; a substantial increase in accessibility; and safer, lower cost, and shorter travel times for customers, deliveries, and employees." Majority, ¶20. In ***Park Ave. Plaza***, however, the complaining commercial property owners "present[ed] nothing to rebut the City's conclusion that commercial properties received special benefits." ***Park Ave. Plaza***, 308 Wis. 2d 439, ¶¶1, 26. By contrast, in the case now before us, CED presents significant evidence from which

a jury could find its property did not receive a special "benefit" or uncommon "advantage."

¶32 In opposition to the City's motion for summary judgment, CED submitted the affidavit of James C. Johnson, a "certified general appraiser," who avers he was previously employed by the Wisconsin Department of Transportation as an "access specialist." He served "on the committee that established the 'Special Benefits Criteria' which were implemented and used by the [department] for assessing whether benefits were general benefits or special benefits." Johnson worked at various times as an "access expert … on the issue of reasonable access," and cites various cases in which he served in this capacity. He wrote numerous "sale of access rights appraisals" for the department, appraisals which were used by the department "to decide how much to charge landowners who wished to buy access rights." Johnson also served as litigation coordinator for the department, during which time he trained consultant appraisers who worked for the department "on evaluating general vs. special benefits." In addition, while serving in this position, "all requests for changes in the amount of compensation due to landowners in the southwest region were reviewed by [Johnson] … includ[ing] consideration of any access issues, general benefits, and special benefits."

¶33 Having personally inspected CED's property and the changes to the intersection, Johnson avers CED received "no benefit ... let alone a special benefit," due to the changes. Johnson states the roundabout is not an improvement for CED but actually a detriment because fast food restaurants, like its tenant at the site, Taco Bell, receive business based upon driver impulse while waiting at traffic lights and the new roundabout will impede that business. "It is more desirable," Johnson avers, "for the subject to have slower moving traffic as opposed to faster moving traffic in front of it." Thus, according to Johnson, the

"improved traffic flow," referenced by the Majority, ¶13, is actually detrimental to this property. "Additionally," Johnson states, "the roundabout created a very inconvenient access situation because traffic moving south on STH 76 (Jackson Street) can no longer make a left hand turn into the driveway because of the splitter island." Utilizing "seven criteria to establish reasonable access," Johnson explains in his affidavit why the access to CED's property "gets worse, not better." In addition, Johnson's affidavit points out that CED's "landscaping on the southwest corner [which] was taken by the City ... left the drive thru lane completely exposed, and creates the impression for diners that traffic is immediately outside the window of the dining room." Johnson explains why CED ultimately has suffered a loss in value due to the "landscaping and screening of the drive thru lane taken for the roundabout project."

¶34 I conclude the evidence put forth by CED "*could* support a finding by a reasonable jury that a special benefit does not exist." *See* ***First State Bank***, 366 Wis. 2d 219, ¶20 (emphasis added). Because of this, I believe this matter should be returned to the circuit court for a jury trial on the issue.