COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1002 **Cir. Ct. No. 2011CV30**

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

PELLER INVESTMENTS, LLC,

PLAINTIFF-RESPONDENT,

V.

CITY OF LAKE GENEVA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Reversed and modified in part, affirmed as modified, and cause remanded with directions*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. This case arises out of a special assessment levied by the City of Lake Geneva against Peller Investments, LLC for a road-improvement project pursuant to the City's police power. Peller challenged the

special assessment, arguing it was unreasonable as a matter of law. The circuit court granted summary judgment in favor of Peller and denied the City's motion for summary judgment. We conclude that the City's disparate treatment of similarly-situated properties was unreasonable. We also conclude, however, that the City reasonably allocated excess funds received from a property owner pursuant to a development agreement. As to that matter, we reverse the circuit court and modify the judgment accordingly. Therefore, we reverse and modify in part, affirm the judgment as modified, and remand to the circuit court to enter judgment consistent with our modification.

BACKGROUND

¶2 The special assessment at issue involves a project on Edwards Boulevard, which runs north and south in the City of Lake Geneva, with its northern-most point intersecting Sheridan Springs Road and its southern-most point intersecting State Highway 50 (Main Street). Prior to 2010, Edwards Boulevard was not a through street to Sheridan Springs Road. Rather, it ended at the northern edge of a property on which a Target store is located. In 2010, the City undertook a road-improvement project to extend Edwards Boulevard to Sheridan Springs Road. The project also included the construction of a bridge, storm sewers, water mains, sewer mains, stormwater detention ponds, a sidewalk, and a bike path.

¶3 The Peller property is located to the north of the Target property and has frontage on Edwards Boulevard as extended. The Peller property was originally 16.63 acres in size. On May 3, 2010, Peller executed a quit-claim deed to the City for a 3.61-acre portion of the Peller property. The City had planned to place a detention pond via a stormwater easement on the 3.61-acre parcel, as a

necessary component to the project. Peller deeded the parcel to the City in lieu of condemnation. The parties refer to the 3.61-acre parcel as the "trapezoid parcel" and Peller's remaining 13.02 acres as "the Peller property." We will refer to the properties in the same manner.

¶4 On September 27, 2010, pursuant to WIS. STAT. § 66.0703 (2011-12),[1] the City's Common Council adopted Resolution No. 10-R56, a preliminary resolution directing the City's engineer to prepare a report consisting of plans, specifications and costs for the improvements, a schedule of the proposed assessments, and the properties to be benefited (and therefore assessed). The engineering firm Crispell-Snyder, Inc., served as the City's engineer.

¶5 Kurt Davidsen, an engineer for Crispell-Snyder, drafted a preliminary assessment report, in which he calculated the proposed assessments using the straight-line method. Under the straight-line method, Davidsen calculated assessments based on the length of each property running parallel to Edwards Boulevard. The preliminary assessment report listed the Peller property as a benefited, assessable property, and assessed the Peller property for 916.52 lineal feet running parallel to Edwards Boulevard, at a rate of $377.36 per foot. Had the preliminary assessment report become final, the Peller property assessment would have been $345,857.99. The preliminary assessment report estimated the total cost of the project to be $2,629,981.50.

¶6 After receiving the preliminary assessment report, the City's Public Works Director, Dan Winkler, and the City Administrator, Dennis Jordan,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

reviewed the report and consulted with Sue Barker, another engineer with Crispell-Snyder, regarding the method used and the costs included. Winkler and Jordan believed that the straight-line method inadequately reflected the relative benefits received by the properties. Specifically, Winkler and Jordan believed that the Peller property received a "unique special benefit" because it was the only property that became developable as a result of the project.[2]

¶7 Pursuant to these discussions, the City asked Crispell-Snyder to draft a second report applying an alternative assessment method referred to as the right-of-way method (also known as front-foot method or lineal-footage method). Unlike the straight-line method, which calculated assessable frontage based on the actual curb frontage of a property, the right-of-way method calculated the assessment based on the length of the road right-of-way abutting each property. The City's personnel knew that the right-of-way method would result in a greater amount of the project cost being assessed to the Peller property.

¶8 On October 25, 2010, the City's Common Council held a public hearing on the proposed special assessment during its regular meeting. After holding the hearing, the City adopted Resolution No. 10-R60, the final resolution declaring the City's intent to exercise its special assessment powers. The final resolution adopted and approved of the engineer's second report employing the right-of-way method.

[2] Peller disputes this fact, arguing that the Wight River Crossings, LLC property also benefited because it did not have any direct access to Edwards Boulevard before the extension project, and thus the project enhanced its developability. Given our conclusion that the assessment was unreasonable due to its disparate treatment of similarly-situated properties, any factual disputes regarding Wight River's developability are not material.

¶9 In addition to the change in assessment method, the second report increased the cost of the project by $116,378.10, resulting in a total cost of $2,746,359.60. The second report contained a schedule of eight properties benefited and therefore subject to assessment. The schedule noted whether a property's assessment amount was assessable, deferred, or exempt. A *deferred* assessment meant that payment of the assessment was deferred while no use of the improvement was made in connection with the property. *See* WIS. STAT. § 66.0715(2)(a). Kurt Davidsen opined at his deposition that the City would typically defer payment until the property was "either improved or sold." If a benefited property was *exempt* from a special assessment, the share of the assessment was not distributed among the remaining properties, but rather had to be computed and paid by the City. *See* WIS. STAT. § 66.0703(1)(c).

¶10 In the second report, the City issued a deferred assessment on the Peller property for 1,142.01 feet of right-of-way frontage, an increase of 225.49 feet from the first report's straight-line method. When calculating the total assessable lineal feet of the Peller property (1,142.01 feet), the City measured Peller's curb frontage on Edwards Boulevard (657.03 feet) plus the boundary line between the Peller property and the trapezoid parcel (484.98 feet). The City treated its trapezoid parcel as part of the road right-of-way. Thus, while the trapezoid parcel abuts Edwards Boulevard for a distance of 379.36 feet, the City considered the boundary between the Peller property and the trapezoid parcel to be the road right-of-way for purposes of calculating the Peller property's lineal footage under the right-of-way method. The Peller property is labeled as parcel 2 on the map appended to this opinion. The trapezoid parcel abuts Peller's property at its northeast corner.

¶11 The following presents a summary of the remaining seven assessed properties listed in the second report and the label assigned to each property on the appended map:

- Parcel 1: Ryan Companies US, Inc., owns the parcel on which the Target store was already located. The City assessed this parcel for $20,509.50 (44.91 feet) and exempted $7,306.88 (16 feet). Pursuant to a 2006 development agreement between Ryan Companies and the City, Ryan Companies paid the City $600,000.00 for the extension of Edwards Boulevard, which was Ryan Companies' sole obligation with respect to "the design, and the construction of the Edwards Extension, including, without limitation, any special assessment ...." The City used part of the $600,000.00 to cover the Ryan Companies' total assessment of $27,816.38 (the total of both its assessable and exempt amounts).

- Parcel 3: Wight River Crossings, LLC owns this parcel, which borders the Peller property to the north and west. The City assessed the parcel for $248,598.32 (544.36 feet). The City used part of the $600,000 paid by Ryan Companies to cover Wight River's entire assessable amount. Dennis Jordan testified in his affidavit dated December 12, 2011, that the City and Ryan Companies had an understanding at the time of their 2006 development agreement that "the $600,000 would also be used to offset any special assessment of the Wight River property because Wight River had provided property for storm water management."

- Parcels 4 and 7: The City owns these two parcels. The City acquired the two parcels as a single parcel from We Energies in order to construct the Edwards Boulevard extension. The extension of Edwards Boulevard to Sheridan Springs Road bisected the parcel, resulting in two separate properties now owned by the City. The City placed a second stormwater detention pond on parcel 4, in addition to the stormwater detention pond located on the trapezoid parcel. In the second report, the City assessed parcels 4 and 7 based on the amount of curb frontage each had abutting Edwards Boulevard.

- Parcels 5 and 6: These parcels are located on the north side of Sheridan Springs Road and are owned by Lake Geneva Investors, LLC. The City exempted the parcels' assessments of $211,351.50 (462.80 feet) and $84,942.48 (186.00 feet), because, according to Sue Barker, "there was already an existing road in front of them."

- Parcel 8: U.S. Highway 12 comprises the entirety of this parcel and is owned by the Wisconsin Department of Transportation. The City exempted the parcel's assessment of $689,751.20 (1,510.36 feet) because, according to Kurt Davidsen, "State Highway 12 is not developable." After first applying a portion of the $600,000 contribution to Ryan Companies and Wight River, the City used the remaining balance of $323,585.30 to offset the DOT's exempt assessment.

¶12 Following adoption of the final resolution, the City sent Peller a letter on October 28, 2010, notifying Peller that the City adopted the final

resolution and providing Peller with an assessment installment notice. The letter included the eight-property schedule, which reflected a proposed special assessment levy of $521,533.13 against the Peller property, based on a frontage of 1,142.01 feet on Edwards Boulevard.

¶13 Peller filed a complaint against the City pursuant to WIS. STAT. § 66.0703(12)(a), which authorizes property owners to challenge special assessments in circuit court. Both parties moved for summary judgment. In its motion, Peller argued that the City's special assessment method was unreasonable because: (1) the City did not treat uniformly its parcel 4 and the trapezoid parcel, the two properties on which it placed detention ponds, because, unlike parcel 4, the City did not assess the road frontage of the trapezoid parcel, but rather treated it as part of the road right-of-way; and (2) the City's use of the right-of-way method resulted in Peller paying a disproportionate share of the cost of the project. Peller also argued that the City unreasonably allocated a portion of the Ryan Companies' $600,000 payment to cover part of the assessments for which the City was responsible, rather than using the funds to offset the total cost of the project.

¶14 In contrast, the City in its summary judgment motion argued that the Peller property was the only property that became developable as a result of the Edwards Boulevard extension and because of "the enormity of the unique benefit," it imposed an assessment against Peller in proportion to the benefit accrued. The City asserted that as a matter of law, the assessment was reasonable.

¶15 On January 11, 2012, the circuit court held a hearing and orally granted Peller's motion and denied the City's. Specifically, the court found unreasonable the City's disparate treatment of similarly-situated properties: the City categorized the City-owned, former We Energies parcels (parcels 4 and 7) as

lots, but categorized the City-owned trapezoid parcel (unnumbered parcel) as right-of-way, thereby "artificially and unreasonably [increasing] the Peller Property's assessable frontage …." The court further found that the City unreasonably applied the balance of the $600,000 payment to the DOT's exempt assessment amount. The parties subsequently submitted an agreed-upon assessment calculation for Peller's property and incorporated this assessment into a proposed Findings of Fact, Conclusions of Law and Order for Judgment, which the circuit court signed on March 28, 2012. The City now appeals.

DISCUSSION

¶16 We review a circuit court's grant of summary judgment de novo. ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶8, 319 Wis. 2d 622, 769 N.W.2d 1. In other words, we review the grant of summary judgment independently, employing the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate in cases in which there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶17 Pursuant to statute, 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 ...." WIS. STAT. § 66.0703(1)(a). When a municipality imposes assessments by an exercise of its police power, the statute mandates the existence of two requirements: "that the property be benefited and that the assessment be made upon a reasonable basis." ***Peterson v. City of New Berlin***, 154 Wis. 2d 365, 371, 453 N.W.2d 177 (Ct. App. 1990); *see* WIS. STAT. § 66.0703(1)(b).

¶18 The parties do not dispute that the Edwards Boulevard extension project benefited all eight properties in the assessment district. Thus, our focus is on the reasonableness of the assessment. The police power of a municipality is broad and, in general, the courts may intercede only when the exercise of that power is clearly unreasonable. ***CIT Group/Equip. Fin., Inc. v. Village of Germantown***, 163 Wis. 2d 426, 433, 471 N.W.2d 610 (Ct. App. 1991). Whether an assessment fulfills the legal standard of reasonableness is a question of law. ***Id.*** at 434.

¶19 There is no single formula or methodology for apportioning assessments. ***Park Ave. Plaza v. City of Mequon***, 2008 WI App 39, ¶27, 308 Wis. 2d 439, 747 N.W.2d 703. Generally speaking, an assessment is made upon a reasonable basis if it is "'fair and equitable'" and "'in proportion to the benefits accruing.'" ***Gelhaus & Brost, Inc. v. City of Medford***, 144 Wis. 2d 48, 52, 423 N.W.2d 180 (Ct. App. 1988) (quoting ***Berkvam v. City of Glendale***, 79 Wis. 2d 279, 287, 255 N.W.2d 521 (1977)).

¶20 The law presumes that the municipality proceeded reasonably in making the assessment. ***Lac La Belle Golf Club v. Village of Lac La Belle***, 187 Wis. 2d 274, 281, 522 N.W.2d 277 (Ct. App. 1994) (citing ***Peterson***, 154 Wis. 2d at 371). The challenger to the assessment bears the burden to establish prima facie evidence that the assessment was not reasonable. ***Steinbach v. Green Lake Sanitary Dist.***, 2006 WI 63, ¶11, 291 Wis. 2d 11, 715 N.W.2d 195. Once a challenger establishes such, the burden shifts to the municipality "'to show that the chosen assessment method comported with the statutory requirement that it' produce a reasonable assessment." ***Id.*** (quoting ***Lac La Belle***, 187 Wis. 2d at 281).

¶21 The term "reasonable basis" as used in WIS. STAT. § 66.0703 is not statutorily defined. Rather, "[t]he facts of the particular situation must govern the determination of whether the assessment is made 'upon a reasonable basis.'" ***Peterson***, 154 Wis. 2d at 374. The Wisconsin Supreme Court has observed that "[t]he analysis for whether a special assessment is 'reasonable' has been articulated in a number of ways, depending on the facts of the particular case." ***Steinbach***, 291 Wis. 2d 11, ¶20.

¶22 For example, the facts in ***Peterson*** prompted articulation of the following rule: "[A]n assessment is unfair when property owners in comparable positions face a marked disparity in cost for the receipt of equal benefits when an alternate, more equitable, method of assessment is feasible." 154 Wis. 2d at 373. In ***Peterson***, a property owner challenged an assessment for water and sewer improvements calculated using the "front foot" method. ***Id.*** at 369. The assessment amounts varied in that some of the properties were "pie-shaped," meaning that some properties had substantially more front-footage than others. ***Id.*** at 368. While the assessment utilized a uniform method and all properties in the assessment district were approximately the same size, properties with more front footage incurred a disproportionate share of the assessment compared to those properties with less front footage. ***Id.*** at 368-69. Concluding the assessment was unreasonable, the ***Peterson*** court explained that "not only must the *exercise* of the police power be reasonable; its *result* must be reasonable as well." ***Id.*** at 371 (emphasis in original).

¶23 More recently, Wisconsin appellate courts have addressed the question of reasonableness in terms of a two-part test: first, the assessment must be uniform, in that it is fairly and equitably apportioned among property owners in comparable situations; and second, the assessment must not affect a unique

property in a manner disproportionate to the benefit conferred. *See* ***Park Ave. Plaza***, 308 Wis. 2d 439, ¶¶29-31; ***Steinbach***, 291 Wis. 2d 11, ¶23; ***Genrich v. City of Rice Lake***, 2003 WI App 255, ¶¶20-22, 268 Wis. 2d 233, 673 N.W.2d 361; ***Lac La Belle***, 187 Wis. 2d at 285-86.

¶24 In ***Steinbach***, the Wisconsin Supreme Court applied this two-part analysis to a challenge by eighteen condominium owners against an assessment financing a sanitary sewer system. 291 Wis. 2d 11, ¶2. The sanitary district had levied charges against each tax parcel of record receiving sewer service in the assessment district. ***Id.***, ¶5. The assessment costs included the installation of one four-inch pipe stub to the sewer main of each property lot. ***Id.*** Because each condominium unit in the challengers' building was a separate tax parcel, each unit owner was assessed a full "availability charge," even though the single lot on which all of the condominiums stood was provided with only one four-inch stub. ***Id.*** The Wisconsin Supreme Court observed that "other lots that [had] multiple habitable units and were provided access to the sewer main through one four-inch stub to the lot were charged only one availability charge. Yet the Petitioners' lot was assessed an availability charge 18 times higher for the same, single four-inch stub." ***Id.***, ¶26. Thus, the ***Steinbach*** court determined that the petitioners had provided prima facie evidence that the assessment was not levied uniformly, because the condominiums were not treated the same as comparable property with multiple habitable units. ***Id.*** With this evidence shifting the burden to the district to demonstrate reasonableness, the court found that the district failed to show that the disparate treatment was fair or equitable, "except to assert it applied the same method of assessment to everyone." ***Id.***, ¶27. The court noted that "as part of the District's method of assessment, it created a definition for the term, 'lot,' that

caused the method of assessment to have dissimilar effects on the properties within the District." ***Id.***

¶25 We now apply these legal principles to the present case, recognizing again that "[t]he facts of the particular situation must govern the determination of whether the assessment is made 'upon a reasonable basis.'" ***Peterson***, 154 Wis. 2d at 374. Because the law presumes that the City proceeded reasonably in making the assessment, our first task is to determine whether Peller has provided prima facie evidence that the assessment was not reasonable.

¶26 Peller's first reasonableness challenge concerns whether the right-of-way method treated comparable properties uniformly. Specifically, Peller asserts that the City treated parcel 4 (one of the parcels it acquired from We Energies and on which it constructed a stormwater detention pond) as an assessable lot, but did not treat the similarly-situated trapezoid parcel as an assessable lot. Rather, the City characterized the trapezoid parcel (which the City acquired from Peller and on which it constructed a stormwater detention pond) as part of the road right-of-way, thereby increasing the frontage assessable to the Peller property.

¶27 Uniformity is required among comparable properties. *See* ***Park Ave. Plaza***, 308 Wis. 2d 439, ¶30. It is true that the right-of-way method, in theory, is uniform because it calculates assessments based on length of the road right-of-way abutting each property. However, it is not the general method used but rather the particular application of that method here in which the City defined road right-of-way that resulted in disparate treatment of similarly-situated properties. Parcel 4 and the trapezoid parcel were characterized in different manners, yet both properties contained stormwater detention ponds and both abutted Edwards Boulevard. By characterizing the trapezoid parcel as right-of-way and parcel 4 as

an assessable lot, the City did not treat comparable properties uniformly and shifted the cost of the trapezoid parcel's curb frontage to Peller. This disparate treatment was unreasonable.

¶28 Because Peller has produced prima facie evidence that the assessment was not reasonable, the burden shifts to the City to show that the chosen method produced a reasonable assessment. *See* ***Steinbach***, 291 Wis. 2d 11, ¶11. The City argues that under the right-of-way method, all properties were treated the same: the assessments were all based on the amount of lineal feet abutting the Edwards Boulevard right-of-way. However, this does not explain the City's disparate treatment with regard to the characterization of the trapezoid parcel as right-of-way and parcel 4 as a lot. The City offers the distinction that the pond on the trapezoid parcel abutted private property and the pond on parcel 4 did not, and therefore, "[t]here was no reason to make the We Energies detention pond part of the right-of-way." This distinction is inaccurate, because the only difference was the amount of land separating the ponds from neighboring private property, and the City does not explain why this difference should matter. Moreover, the City fails to explain why it did not characterize the trapezoid parcel as an independent lot. Thus, we conclude that the City has not met its burden to show the chosen method produced a reasonable assessment.

¶29 We note that the City posits that Peller had "no right to challenge the fairness of [the assessment method with respect to parcel 4 and the trapezoid parcel] assessments on their behalf." However, regardless whether Peller could challenge the fairness of the assessments of other properties on behalf of the owners of those properties, that is not what Peller did here. Peller's argument is directed at the effect that this disparate treatment had on the Peller property assessment. While Peller's argument might affect the assessment of these other

properties, that is an unavoidable consequence of Peller's proper argument about the effect of the treatment of the other parcels on the Peller parcel assessment.

¶30 Because the assessment failed the uniformity prong of the analysis, we need not continue to the second uniqueness prong.[3] Furthermore, because we agree with Peller's argument on this topic, we need not address Peller's alternative argument that the method used was improper because it resulted in Peller paying a disproportionate share of the cost of the project.

¶31 Finally, we must address Peller's assertion that it was also unreasonable for the City to allocate the balance of the Ryan Companies' $600,000 payment to the exempt DOT parcel (parcel 8) rather than use the funds to offset the total cost of the project for all affected properties. So far as we can tell from the briefing before us, it is true that the City could have opted to reduce the total cost of the project with the remaining balance. At the same time, it is not apparent why the City could not do what it did do, that is, apply the remainder to assessment amounts for which the City was responsible. Nothing in the development agreement with Ryan Companies required the City to apply the remainder in any particular way. And, Peller does not cite any legal authority that would obligate the City to allocate the funds in a particular way. Therefore, Peller

[3] In apparent reference to this prong, the City asserts that the end result of the assessment method was more than fair to Peller because the Peller property was the primary beneficiary of the road extension and the City "could have assessed the Peller property for all of the cost of the Edwards Boulevard construction." We understand the City to be arguing that the Peller property was unique and that the assessment was more than proportionate to the benefit conferred. Some facts in the record and common sense suggest that this may be true, but as we have already concluded, the method that the City used to calculate the assessment of the Peller property failed the first prong of the test. Moreover, the City does not provide legal authority for its proposition that it could have assessed Peller the total cost of the project involving eight benefited parcels. Therefore, we discuss the matter no further.

did not meet its burden in establishing that the City's allocation of the Ryan Companies' $600,000 payment was unreasonable. *See* ***Steinbach***, 291 Wis. 2d 11, ¶11 ("the challenger [to the assessment] bears the burden of going forward to establish prima facie evidence that the assessment was not reasonable").

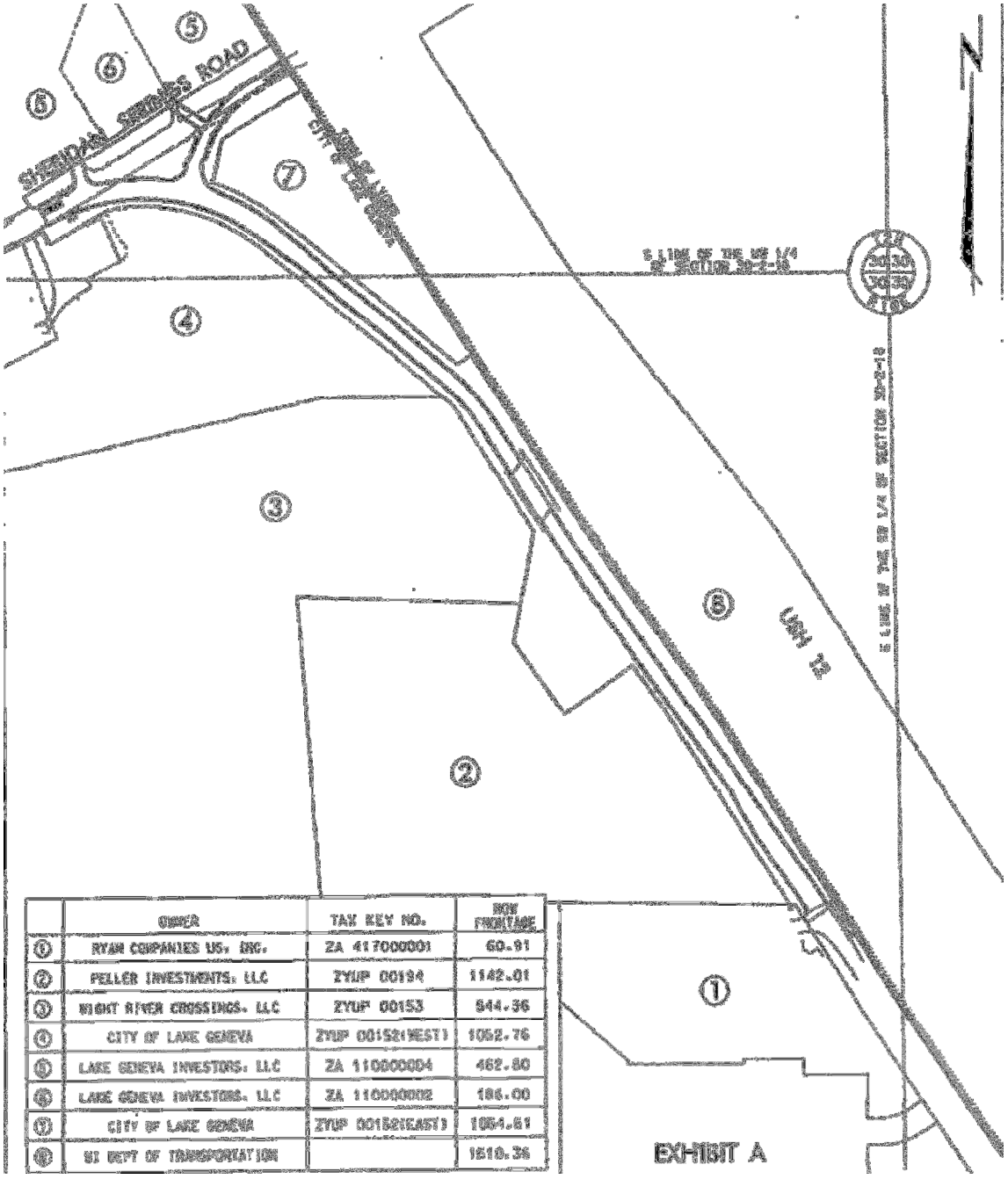
CONCLUSION

¶32 In sum, we affirm that part of the circuit court's grant of summary judgment to Peller Investments, LLC which finds that the City did not treat comparable properties uniformly and that the special assessment against Peller's property was unreasonable. We reverse that part of the circuit court's judgment which finds that the City unreasonably allocated the balance of the $600,000 contribution from Ryan Companies, and modify the judgment, after restoring the City's original allocation of the $600,000 payment, as follows (using uncontested numbers in the circuit court's judgment). The total cost of the project was $2,746,359.60. The project involved a total of 5,741.05 lineal feet in the special assessment district. Dividing the $2,746,359.60 project cost by 5,741.05 lineal feet provides an assessment rate of $478.37 per lineal foot. The Peller property had 657.03 lineal feet of assessable frontage. Multiplying Peller's 657.03 lineal feet of assessable frontage by the assessment rate of $478.37 per foot, the special assessment levy against the Peller property shall be $314,303.44.

¶33 Our directions on remand are that the circuit court enter judgment consistent with this modification.

By the Court.—Judgment reversed and modified in part, affirmed as modified, and cause remanded with directions.

Not recommended for publication in the official reports.



	OWNER	TAX KEY NO.	ROW FRONTAGE
①	RYAN COMPANIES US, INC.	ZA 417000001	60.91
②	PELLER INVESTMENTS, LLC	ZYUP 00194	1142.01
③	NIGHT RIVER CROSSINGS, LLC	ZYUP 00153	944.36
④	CITY OF LAKE GENEVA	ZYUP 00152(WEST)	1052.76
⑤	LAKE GENEVA INVESTORS, LLC	ZA 110000004	462.80
⑥	LAKE GENEVA INVESTORS, LLC	ZA 110000002	186.00
⑦	CITY OF LAKE GENEVA	ZYUP 00152(EAST)	1054.51
⑧	WI DEPT OF TRANSPORTATION		1510.36