August 16, 2019

Detroit City Council
1340 Coleman A. Young Municipal Center
Detroit, Michigan 48226

RE: Supplemental Opinion on Special Assessments

Your Honorable Body, through the Budget, Finance, and Audit Standing Committee, has forwarded a memorandum from the Legislative Policy Division (LPD) dated June 5, 2019, regarding the above-referenced topic with a proposed ordinance attached for Corporation Counsel’s review and approval as to form. The Law Department filed an opinion dated June 14, 2019, setting forth the reasons for which the proposed ordinance is impermissible.\(^1\) Subsequently, LPD filed a supplemental memo dated June 19, 2019, maintaining its arguments that: I) local and state law are silent on the issue of extending hardship exemptions to parcels in a special assessment district; II) an exemption from a special assessment based on economic hardship should be available as a matter of public policy; III) special assessments should be treated similar to the solid waste fee; and IV) an ordinance establishing that the treatment of one class of special assessments different from all other special assessments is a valid exercise of City Council’s legislative authority. We are now responding to the supplemental memo.

**SHORT ANSWER**

There is no legal support for an ordinance that would extract individual parcels located within a special assessment district that receive the benefit of the service or improvement that is the premise of that special assessment district from that particular levy. The foundation of a special assessment district is that all of the parcels within that district receive a benefit from the special assessment levy that is distinguishable from general property taxes or a municipality-wide special assessment so that those parcels within the district are responsible for the levy while property outside of that district are not. The cost of the benefit is apportioned to every property in the district based on the value of the improvement (or service) to that property. In fact, most properties exempt from ad valorem or general property taxes are specifically not exempt from a special assessment levy, this includes certain government property.

Absent an express statutory exemption, all parcels within a designated special assessment district are responsible for their portion of the levy. The basis for a challenge to the establishment or implementation of a special assessment district are: 1) the property does not receive the benefit of the special service or 2) the assessment is unreasonable or out of proportion to the benefits conferred by the special service.

City Council, as the legislative body, has the authority to approve the boundaries of the special assessment district and the mode of apportionment within the district for the cost of the special service.

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\(^1\) Law Department opinion titled *Economic Hardship in Special Assessment Districts*, dated June 14, 2019.
services provided to benefitted properties within that district. The apportionment of the cost of the
benefit within a special assessment district cannot require a parcel to pay a greater share of the
benefit received to that parcel, nor is there any authority that would permit a benefitted parcel to
be exempt from the assessment based on the financial status of the property owner.

Therefore, the Law Department’s opinion remains unchanged. The proposed ordinance
amendment to exempt individuals from a special assessment if those individuals qualify for a
hardship exemption from general property taxes is impermissible.

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**LAW & ANALYSIS**

This opinion will individually address the four arguments reframed in the LPD
supplemental memo dated June 19, 2019, provide the law applicable to special assessments in
general, then shift to an analysis of the proposed ordinance amendment regarding special
assessments levied pursuant to MCL 117.5i. This will enable the reader to appreciate the full
context of this body of law and how an attempt by the City to contravene it via the proposed
ordinance amendment to extract individuals who qualify for a hardship exemption from payment
of a special assessment would likely be viewed by a court.
I. Local and state law are not silent on the issue of extending hardship exemptions to parcels in a special assessment district and case law does not support this position.

The Distinction between Taxes and Special Assessments

While special assessments are collected and enforced in the same manner as property taxes they are distinct under the law. Although it resembles a tax, a special assessment is not a tax. *Knott v. City of Flint*, 363 Mich. 483, 497 (1961). A special assessment refers to “a levy upon property within a specified district,” the purpose of which is “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, 500 (1993).

In *Niles Twp. v. Berrien Co. Bd. of Comm’rs*, 261 Mich.App. 308 (2004), the appellate court elaborated on the distinction between a tax and a special assessment. It reiterated the common themes throughout these cases that: 1) the purpose of a tax is to raise revenue for a general governmental purpose while the purpose of a special assessment is to defray the costs of specific local improvements; and 2) the amount of a special assessment generally bears “a reasonably proportionate relationship to the benefit that accrues to the property assessed.”2 The court noted that “[t]he 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 of 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.”3

In *Wikman v. City of Novi*, 413 Mich. 617 (1982), the Michigan Supreme Court distinguished between special assessment made under the state’s general authority to tax (such as property taxes and under the jurisdiction of the Michigan Tax Tribunal) versus special assessments levied under the state’s police powers (health and welfare and regulatory programs which are not under the jurisdiction of the Tax Tribunal). It held that “special assessment levied against property owners for public improvements to realty which especially benefit their property are special assessments under the property tax laws for the purposes of the Tax Tribunal Act.” This is important as the structure of the proposed ordinance amendment would exempt individuals that met a poverty threshold from a special assessment prior to the special assessment being added to the assessment roll. Based on the court’s analysis in *Wikman*, an attempt to do so would result in the application of property tax statutes and relevant case law which has consistently held that an exemption from property taxation does not relieve a property owner from a special assessment levy. As special assessments are directly tied to property based on location in a district and benefit to the property, not individuals, jurisdiction in the Tax Tribunal would be proper. (MCL 205.731(a)).

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2 *Niles Twp.* at 324.
3 *Id.* at 323-324.
In 1894, it was considered a "well-established" rule that: 1) special assessments are made based on benefit conferred to a property and 2) exemption from taxation does not relieve a property owner from a special assessment levy. It is unlikely a proposed departure from the body of case law spanning the mid-1800s to the present would successfully be abandoned by the courts in 2019.

The distinction between general property taxes and special assessments, as well as treatment of each, was discussed at length in the Law Department’s prior opinions (2015 and 2019). The Income Tax Act of 1967, Public Act 281 of 1967; MCL 206.512a, further supports the distinction between general property taxes assessed on an ad valorem basis and special assessments that are not calculated on an ad valorem basis. It states property taxes levied in 2003 onward do not include special assessments unless the special assessment is levied using a uniform millage rate on all real property not exempt by state law from the levy of the special assessment.

**Exemption from General Taxation Does Not Extend to Special Assessments**

Michigan courts and the Michigan Tax Tribunal have consistently held that exemption from ad valorem or general property taxation does not relieve a property owner from special assessment levies.

In addition to the Michigan Supreme Court’s ruling in the case of *In re Petition of Auditor General*, 226 Mich. 170 (1924), which is discussed in the preceding section, the Michigan Court of Appeals in *Acacia Park Cemetery Ass’n v. Southfield Tp. of Oakland County*, 83 Mich.App. 274 (1978), held that the cemetery, exempt from taxation, was responsible for a special assessment. The court noted "[g]enerally, a constitutional or statutory exemption is considered an exemption for ordinary taxes only and not from special assessment liability for local improvements. 70 Am.Jur.2d, Special or Local Assessments, Sec. 45; 84 C.J.S. Taxation, Sec. 229." (Emphasis added). In support of this general policy, the court also relies and reiterates the holding on a case from 1894:

Other property is also exempt from taxation, such as churches, hospitals, cemeteries, etc., but as to these is no implied exemption. * * * It has therefore been repeatedly held that, when these are mentioned as exempt in general tax law, the exemption applies only to the taxes mentioned in the general law, and not to those which are of a private and local character, such as assessments for sewers, sidewalk and the like, which are made according to the benefit conferred. This is the well-established rule, to which it is unnecessary to cite authorities. *Big Rapids v. The Board of Supervisors of Mecosta County*, 99 Mich. 351 (1894).

Emphasis added.

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4 *Big Rapids v. The Board of Supervisors of Mecosta County*, 99 Mich. 351 (1894).
5 Ad valorem special assessments levied after December 31, 1998, must be based on taxable value. (MCL 211.44c).
6 Unpaid special assessments returned to the County Treasurer are a valid tax (MCL 211.55) and may be collected under the procedures set forth under the General Property Tax Act.
See also, *Loomis v. Rogers*, 197 Mich. 265 (1917) which held:

As a proposition of general application the constitutional requirement of just and uniform taxation is met when the assessment is within the limit of benefits received, is just, and uniform throughout the created assessment district.

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The element of special benefits is a distinguishing feature between taxes and assessments for benefits. It is well settled in this state that a general exemption from realty from taxation does not extend to such assessments based on special benefits resulting from proximity – sometimes call taxes for special improvements.

Emphasis added.

In *Doane v. Pere Marquette Ry. Co.*, 247 Mich. 542 (1929), a railroad, which paid a specific tax rather than general taxes, was nevertheless subject to a special assessment levy. The court noted:

“It is axiomatic that all property, unless specially exempted, shall bear its fair share of taxation. Under the general tax law a specific tax is collected from railroads. This takes the place of the general taxes spread upon other property to pay governmental expenses. Special assessments for local improvements in cities and villages are not general taxes within the meaning of the term as used in our tax laws, and no special provision therefor in a statute is necessary to support the levy of such a tax. Blake v. Metropolitan Chain Stores (Mich. handed down June 3, 1929) 225 N.W. 587, and cases cited.”

Emphasis added.

The court found that the railroad property, which was exempt from general taxation, was benefited by the improvement in the amount charged and “[t]o relieve the defendant therefrom is to exempt its property from payment of its fair share of the cost of this improvement and thereby to increase the cost to other property benefited.” The court rejected this noting that:

Exemptions from taxation are not favored. As was said by the trial court: *While, of course, it lies within the power of the legislature to create an exemption from such special assessment any such grant must be thoroughly and definitely expressed.* The general rule is that any exemption from any form of taxation will be strictly construed. In 37 Cyc. 892, it is said: “Such a privilege or immunity cannot be made out by inference or implication, but must be conferred in terms too clear and plain to be mistaken, and in fact admitting of no reasonable doubt, and where it exists it should be carefully scrutinized and not permitted to extend either in scope or duration beyond what the terms of the concession clearly require.”

Emphasis added.
Cooley also notes that although a property may be tax-exempt “this does not preclude the property being assessed for benefits.” The Michigan Supreme Court also cites to Cooley on the topic of cancelling or exempting a property from an otherwise valid special assessment. Applying the rules of statutory construction regarding tax exemptions in Detroit v. Detroit Commercial College, 322 Mich. 142 (1948), the Court quoted the following from Cooley on Taxation:

*An intention on the part of the legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction....Exemptions are never presumed,* the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, *since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it.*

Emphasis added.

The Michigan Court of Appeals has also held that the Michigan Legislature “intended, as a general rule, for property owners who benefit from an improvement paid for by a special assessment to incur the financial burden of that assessment.” *Howard v. Clinton Charter Twp.*, 230 Mich.App. 692 (1998). There is no express language in MCL 117.5i allowing for the exemption contemplated in the proposed ordinance amendment and, according to relevant case law, it cannot be inferred.

While accommodation for poverty, disability or other factors may be taken into account for general property taxes, no such accommodations can be found in regard to special assessments. Absent specific statutory exemptions, such as the use of the property for governmental purposes, property which receives the benefit associated with a special assessment district is properly assessed the cost of that benefit. *People v. Ingalls*, 238 Mich. 423 (1927). The following statutory exemptions from general property taxes explicitly state that the exemption does not include a special assessment levied by the local tax collecting unit in which the property is located: qualified start-up businesses and renaissance zone property. In addition to the statutory exemptions, foreclosure under the General Property Tax Act extinguishes all liens against the property, including any lien for unpaid taxes or unpaid special assessments at the time.

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8 *Id.* at 461.
9 MCL §§ 211.7b, 211.7d and 211.7u.
10 MCL 211.7h.
11 MCL 211.7ff.
12 MCL 211.78k(5)(c).
of foreclosure but does not extinguish future installments of special assessments that will be levied on the property. *OAG, Opinion No. 7110*, June 2, 2002.

II. An exemption from a special assessment based on economic hardship is not available as a matter of public policy as is it not supported by law.

Property owners are not subject to special assessments unless the improvement specifically benefits their land.13 The Michigan Court of Appeals cites two main policy considerations in justifying this rule: 1) property owners should pay a special amount for extra benefits brought to their land; and 2) the entire community should not pay the cost of an improvement that specifically benefits a particular property.14

**Basic Principles of Taxation**

The most appropriate place to begin our examination of the foundational issues of taxation is *A Treatise on the Law of Taxation* by Thomas M. Cooley.15 Taxes are defined as “the enforced proportional contribution of persons and property, levied by the authority of the state for the support of government, and for all public needs.”16 The Michigan Supreme Court noted in 1860 regarding the exercise of the power to tax, “the purpose always is, that a common burden shall be sustained by common contribution, regulated by some fixed general rule, and apportioned by the law according to some uniform ration of equality.” *Woodbridge v. Detroit*, 8 Mich. 274 (1860). This does not mean that all taxation must be equal, as general property taxation may take into account the status of the property owner, such as age, disability or poverty, in its formula.17

While these principles apply to taxation generally, Chapter XX, *Taxation by Special Assessment*, pp. 416-473, begins by noting that the system under which special assessments are levied have been adopted in the United States with the general features that have prevailed in England “for a long period of time.” It states that they are a “peculiar species of taxation” that are “governed by principles that do not apply generally” to taxation as they cannot be listed exhaustively:18

In addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it.

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No decision has ever undertaken to enumerate the cases in which special assessments are admissible. The reserve in this regard is wise, as it is

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16 *Id.* at p. 1.
17 “There is no imperative requirement that taxation shall be equal. *** Theoretically, tax laws should be framed with a view to apportioning the burdens of government so that each person enjoying government protection shall be required to contribute so much as is his reasonable proportion, and no more.” *Id.* at 410, Chapter VI, *Equality and Uniformity in Taxation*.
18 *Id.* at p. 416; pp. 418-419.
obviously impossible to anticipate all the cases in which it might be equitable and proper to levy them; and it is consequently better and safer that special cases, as they present themselves, be judged upon their special circumstances.

Emphasis added.


Uniformity of Taxation and the Michigan Constitution

Both the 1908 and 1963 Michigan Constitutions have required uniformity of assessments. The 1963 Constitution states in pertinent part “Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates.”¹⁹ The 1908 Constitution contained the same requirement at Article X, §4 which stated “The legislature may by law impose specific taxes, which shall be uniform upon the classes upon which they operate.”

This requirement ensures fairness among similarly situated classes within a special assessment district. The relevant analysis to determine “class or classes” is the property itself. The status of an individual property owner in the class is not relevant to the categorization as special assessments are tied to real property. Under the City’s ordinance, the eligible services of snow removal, mosquito abatement and security services under the special assessment at-issue would likely create one class as the properties within the district either received the service(s)/benefit or did not and if they did not they should not be included in the special assessment district. The mode of apportionment of the levy within the district will determine how the cost is allocated to benefitted properties. The character of the uniformity²⁰ and the basis on which it is established is unique in comparison to general property taxation. In re Willis Ave., 56 Mich. 244 (1885). Please note modes of apportionment are discussed in greater detail later in this opinion.

¹⁹ 1963 Michigan Constitution, Article IX, §3. The same section also requires uniformity in general ad valorem taxes of real and personal property.
²⁰ Assessors must make an assessment on all lands for the expense of an improvement in proportion to the benefit inured to the property.
In *Crampton v. City of Royal Oak*, 362 Mich. 503 (1961), the issue of uniformity was litigated. In upholding the uniformity of assessments based on benefit to the property, the Michigan Supreme Court cited to 63 CJS, Municipal Corporations, § 1424, pp. 1213-1214:

Assessments to defray the cost of local improvements may be apportioned according to the benefits conferred on the property assessed; and they must be so apportioned where apportionment according to this method is required by statute or charter; but, where a charter is adopted under a home-rule act, a section thereof relating to assessments is not unconstitutional and void because it does not provide that assessments must be made in proportion to benefits. Where this method of assessment is employed, assessments should be imposed equally on all property equally benefited by the improvement. On the other hand, a uniform assessment on lots may be set aside or its collection enjoined where the advantages to the lots or parcels of land vary; and the fact that lots are assessed in various percents does not show that they have not been assessed according to relative benefits. All of the factors and varying circumstances which relate to and may affect the proportionate benefits received should be taken into consideration; and the amount assessed on the various lots may properly differ according to their location. Where the lots on any street sewered are uniform in size and value and are similarly improved or unimproved, the unit plan may be a compliance with a statute requiring apportionment according to benefits; but where the properties affected vary greatly in value and area the unit plan should not be used.

Emphasis added.


Therefore, to be valid, the special assessment levy must not exceed the benefit inured to the property. To be just it must be equal and uniform throughout the assessment district or within the classes of property that are similarly situated within the district. An attempt to levy varying amounts within a class (i.e. charging less or more than the value of the benefit to that particular

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property) is legally untenable. The law is clear that a special assessment levy must be in proportion to the benefit to that specific property.

The proposed ordinance amendment would apportion the total cost of the services within the district differently based on the financial status of the property owner - those who qualify for a hardship exemption would pay nothing and the remaining property owners would pay more than their share of the total cost. Stated differently, the group of property owners that received a levy (which could fluctuate) would be charged more than the value of the benefit to their specific property. This opinion will demonstrate numerous reasons this is impermissible. While LPD is correct that the statute granting the City the authority to enact the special assessment district ordinance does not contain explicit language regarding exemptions, the case law, secondary sources and other materials contained in this opinion will demonstrate that the manner in which special assessments are handled by governmental units implementing special assessment districts and the correlating judicial interpretations have not significantly shifted since the mid-1800s and, under that framework, the proposed ordinance amendment would likely be determined to be improper by a court.

III. Treatment of solid waste fees and special assessments are not interchangeable.

The City’s solid waste fee is a fee for service, not a tax or special assessment so it is an improper comparison for the purpose of providing an example of an exemption to a levy. Rather than being an exercise of the municipal power to tax, the imposition of a fee constitutes an exercise of a municipalities’ police power to regulate public health, safety, and welfare. *Bolt v. City of Lansing*, 459 Mich. 152 (1998); *Merrelli v. St Clair Shores*, 355 Mich. 575, 583 (1959). A more appropriate comparison would be the special assessments levied by the City for sidewalk replacement. The amount is calculated by the number of concrete flags needing replacement on a specific tax parcel. City Council cannot exempt a property from a sidewalk assessment. As noted in this opinion special assessments “levied against property owners for public improvements to realty which especially benefit their property are special assessments under the property tax laws for the purposes of the Tax Tribunal Act.” Therefore, the solid waste fee and SAD levies are not similar exercises of power by a municipality and are handled differently.

IV. An ordinance establishing that the treatment of one class of special assessments differently is not a valid exercise of City Council’s legislative authority.

The grant of power to local units under the Home Rule City Act, MCL 117.1, *et seq.*, does not operate in a vacuum. The special assessments are levied against real property under the statutory authority granted to the City to enact the SAD ordinance. The Law Department maintains its position that properties within any special assessment district that receive the benefit of the

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23 The solid waste collection charge is a user fee. A user fee is a fee paid by those receiving specific services from the government. The revenue from such fees are dedicated to the services provided and the amount of the fee is based on the value of the service provided. *Bolt v. City of Lansing*, 459 Mich 152 (1998).
25 Some special assessments are an exercise of a local unit’s police power, but not the services or the SAD at-issue.
service cannot be excluded from a special assessment district levy absent specific statutory authority to exempt such parcels.

Similarly, the assertion that City Council may dictate that the City Assessor not levy special assessments on eligible parcels is unsupported. There is no legal authority to support an exemption of a special assessment absent an express statutory authority or; this proposition ignores a well-established body of statutory precedent and case law as set forth in this opinion.

**Creation of Special Assessment Districts**

The 1827 Charter of Detroit first granted the power to defray the costs of public improvements through the levy of a special assessment. A special assessment can be initiated by a governmental unit or by property owners signing a petition. In either circumstance, the creation of a special assessment district, its boundaries and apportionment of the costs of the improvement are ultimately approved by the local legislative body. This is not an unfettered power and the establishment of the special assessment district and its boundaries must be based on the area improved. It is improper to levy a special assessment on a property that does not receive the benefit or service of that designated district. The following discussion and supporting cases demonstrate it would be equally improper to not levy a special assessment on a property located within a district that does receive the benefit or service.

*City of Detroit v. Daly, 68 Mich. 503 (1888)*, supports the propositions in the preceding paragraph:

There may be a necessity of leaving consideration **discretion to the authorities who fix a taxing district**, if it can be made to differ from the ordinary municipal subdivisions; **but it cannot be such an uncontrolled discretion as to leave no public character whatever to the district**, and **make a purely private charge under pretense of setting off an assessment district**. While it is quite possible that a municipal subdivision would not be an appropriate territory to charge with the special improvement, yet, on the other hand, **if the matter could be left to the pure caprice of the city authorities, it is evident that there would be no equality in public burdens.**

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**It is elementary that no one can be lawfully made to bear more than his share of any public burden, and that share must be assessed by some tangible process of distribution.**

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If one person is charged for more benefit than another it must be because by the rule of apportionment his share is greater in the

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26 This opinion will not address this process or the related apportionment mechanisms as the special assessment district at issue is initiated by the community, not the City.

27 *Bolema v. City of Norton Shores*, MTT Docket No. 220781, April 2, 1998. Petitioners challenged a special assessment levy arguing they were already connected to the sewer and therefore received no benefit from a remote sewer expansion. The Tribunal agreed finding that the special assessment was invalid and canceled the special assessment levy on that property.
assessment; but he can only be obliged to pay his share, and must have the means furnished him by the proceedings of knowing exactly what his share is. Otherwise the charge may be arbitrary.

Emphasis added.

A special assessment district is a geographic area within a service district. Properties within a special assessment district are eligible for the special assessment levy because they receive a direct, unique and measureable enhancement in their market value as a result of a public improvement. Special assessment districts must be determined using competent, material and substantial evidence based upon fact. "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 on facts." Lawrence v. City of Grand Rapids, 166 Mich. 134 (1911).

Judge Campbell noted that the court in 1860 was “affirming only what had many years before been fully decided” that “there is no restriction upon the legislature in defining the size of districts. Our road districts are instances of this. And if a charge is made on a uniform rule within any prescribed district, there can be no very good reason for objecting to it because the district is large or small, if the rest of the city is made to bear its own local burdens on a substantially similar basis.”

Valid Modes of Apportionment of a Special Assessment

Apportionment is the process of allocating costs that are eligible to be specially assessed, to the individual properties to be assessed based on benefit or other statutory requirement. For example, municipality-wide ad valorem special assessments must be based on the value of the property. For an apportionment to be made, there must be an improvement or project creating a benefit which is geographically disbursed. “To be valid, a tax or special assessment shall be levied in accordance with some definite plan designed to bring about a just distribution of the burden.” Thomas v. Gain, 35 Mich. 155 (1876); Panfil v. City of Detroit, 246 Mich. 149 (1929); Wood v. Village of Rockwood, 328 Mich. 507 (1950). Only properties receiving a measurable (more than de minimus) direct benefit can be specially assessed. “An assessment cannot be sustained where the benefit from the improvement is merely speculative or conjectural; it must be

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28 A service district includes all potential properties benefitted and is where the economic analysis begins to demonstrate a change in market value to support the levy of a special assessment. The service district analysis will identify which properties receive direct, unique and measureable increases making them eligible for inclusion in the special assessment district. The boundary between properties in the service district that receive some form of benefit to the improvement and those with none delineates between the service district and the special assessment district. This analysis would not be performed for a SAD under MCL 117.5i as it is petition driven to establish the boundaries.

29 Woodbridge v. City of Detroit, 8 Mich. 274 (1860).


31 Levy to be placed within the special assessment district on benefitted property: Home Rule City Act for public improvements & boulevard lighting systems at MCL 117.4d and Board of Public Works for a project special assessment district at MCL 123.743.
actual, physical and material.” 70 Am. Jur. 2d §21, p. 862. Cooley\textsuperscript{32} noted the following modes of apportionment that may be selected under different circumstances:

1. major part of the cost of a local work is sometimes collected by a general tax, while a smaller portion is levied upon the estates especially benefitted.
2. major part is sometimes assessees on estates benefitted, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.
3. the whole cost in other cases is levied on lands in the immediate vicinity of the work.

It is important to note, much like case law from the mid-1800s and early 1900s on this topic, the modes of apportionment in Cooley’s Treatise are still in use. Modern modes have been added and formulas on valuation clarified, but the foundational premise of a levy being based on benefit remain intact. Case law is consistent that an assessment must be levied in proportion to benefits. \textit{Hoyt v. City of East Saginaw}, 19 Mich. 39 (1869); \textit{Grand Rapids School Furniture Co. v. City of Grand Rapids}, 92 Mich. 564 (1892).

Section 3 – Theory and Method of the Michigan Assessor’s Training Manual, page 13-7,\textsuperscript{33} provides that the method to calculate the benefit in a special assessment district must be “uniformly and consistently applied to every property in the special assessment district.” Some common methods to measure the benefit/enhancement are:

1. \textit{Front foot method} (noted as the most common method). Used where there are varying lot widths but same or similar depths. Takes into account the potential for future lot splits or divisions.
2. \textit{Area basis}. Based on the physical area of a given parcel (square footage, acreage, or other common measurement).
3. \textit{Unit benefit}. Based on the criteria that every lot in the special assessment district is a single home site and equally assessed.
4. \textit{Frontage area combination}. Districts with major variances in frontage or lot depths. Size range from 1 acre to 40 acre. Objective is to reflect benefit based on current property use and benefit to the undeveloped acreage while maintaining uniform application.
5. \textit{Scientific approaches}. Method of apportionment based on some scientific fact or engineering data.

The value of the improvement or benefit to a property must bear a reasonable relationship to the assessment. McQuillin’s, the definitive treatise for municipal law matters which has been published since 1904, states in regard to special taxation and local assessments:\textsuperscript{34}

\textit{The rule that a method of assessment cannot be arbitrary, and must have some relation to the benefits appears reasonable. It would

\textsuperscript{32} \textit{A Treatise on the Law of Taxation}, Thomas M. Cooley, 1876, p. 447.
\textsuperscript{33} \textit{The Michigan Assessor}, Volume 54, No. 8, August 2013, p. 25-33.
\textsuperscript{34} McQuillin, Municipal Corporations (3d ed.), Volume 14, § 38.02.
seem that the legislature is competent to judge of benefits. This is assumed by the current of authority. A public improvement having been made, the question of determining the area benefited by such improvement is generally held to be a legislative function, and such legislative determination, unless palpably unjust, is usually conclusive, and not subject to judicial interference unless arbitrariness, abuse or unreasonableness be shown. The prohibition is that special taxes or local assessments shall not be levied in excess of the benefits conferred, whether by the valuation, front foot, area, or any other method.

Emphasis added.

In *Cummings v. Garner*, 213 Mich. 408 (1921), the Michigan Supreme Court was concerned with the interpretation and validity of provisions regarding the improvement of highways under an assessment district plan. In discussing the authority granted by the statute to establish the boundaries of the district to be affected, and the levy being proportional to the benefits received by each parcel of land assessed, it was said that “[i]t is a fundamental rule that an assessment for a local improvement should be apportioned among and imposed upon all equally standing in like relation.” This requirement is in line with the Michigan Constitution as previously discussed in this opinion.

**Invalid Apportionment of a Special Assessment**

Case law also supports the converse, or the general proposition that a special assessment levy not made in line with benefits cannot be sustained. *Wood v. Village of Rockwood*, 328 Mich. 507 (1950), citing *Panfil v. City of Detroit*, 246 Mich. 149 (1929), and *I. H. Gingrich & Sons v. City of Grand Rapids*, 256 Mich. 661 (1932). Generally, courts will not interfere in the amount of assessments levied because it is a legislative act. The Michigan Supreme Court noted in *Marks v. Detroit*, 246 Mich. 517 (1929) that “[i]n the absence of fraud or bad faith or the following of a plan incapable of producing reasonable equality, their judgment must be held to be conclusive.”

In the *I.H. Gingrich* case, the Michigan Supreme Court struck down the levy for street grading and paving, mandating that the cost of the assessment be recalculated for the entire district. In support of its position, the Court noted the disparity of amounts assessed between similarly situated properties was untenable:

A piece of land with 100 feet frontage on the opening, owned by one D. Moses, pays for the opening, $30.80, while the 100 feet opposite, owned by the plaintiffs, pays $1,919, over 62 times as much.

* ***

Almost every special improvement tax results in some injustice, but the scheme of assessment used in this case is so lacking in uniformity and equality, so far removed from any plan of a levy according to benefits, that it cannot be sustained. That does not mean that plaintiffs should be relieved from paying their just share of this assessment; it does mean that the present assessment requires them
to pay more than their just share and has not been levied according to benefits. The cost of the entire improvement should be reassessed.

Emphasis added.

In an eloquent holding from 1876 regarding the propriety of apportionment of special assessments the court stated:35

If it is a tax in the ordinary sense, it must be assessed by value; if it is not a tax in that sense, it must be apportioned on some other basis. But it does not follow that it may be apportioned on any basis whatsoever which the legislature may see fit to prescribe.

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But it is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses.

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It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed; if it is not conceivable that the rule prescribed is one which will apportion the burden justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle. The only discretion which the act in question allows to the common council as an assessing board is in determining what lots and lands are benefited by the improvement. When that determination is made, the rule of apportionment is fixed, and it must be made according to the area.

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Nor does it confine the assessment to lands upon the street in which the sewer is laid; and in the assessment before us lots on a parallel street are assessed...This might not be unjust if each assessment was laid upon an estimate of actual benefits; but when it is levied by an arbitrary standard which requires the burden to be laid upon lands far from the sewer and only slightly benefited, equally with those fronting upon it and greatly benefited, it is manifest that it must not only work injustice, but that in some cases it may amount to actual confiscation. It is not, therefore, legally possible that such an apportionment of the cost of sewers can be just or equal, or in proportion to benefits, and when injustice must result from its adoption, we have no alternative but to reject the assessment as an unlawful exaction. It is an assessment made in entire disregard of the principle upon which

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special assessments can alone be sustained; the principle, namely,
that “those who enjoy the benefits shall equally bear the burden.”
Washington Avenue, 69 Penn. St., 360; Patterson v. Society, etc., 24 N.
J., 385.

Emphasis added.

This 1876 holding was distinguished by a Michigan Tax Tribunal decision in 1998 due to
more advanced modes of apportionment, but it did not invalidate the mode or reasoning used in
Thomas. In Bolema, the Tribunal canceled the special assessment levy finding that the property
did not accrue any special benefit, which is a factual determination.

In re: Willis Ave., 56 Mich. 244 (1885), the Michigan Supreme Court outlined again how
unjustly apportioned special assessments (or taxes in general) are improper.

But such local burdens cannot be imposed in a manner which
disregards the fundamental principles of taxation. The assessment
must be for a public purpose and affect some well-defined
community, and some proper and reasonable rule of apportionment
must be observed in all local as well as general taxation; that is to
say, the apportionment should be such that the amount paid by one
person or piece of property shall bear some reasonable relation to
the amount paid by another in the assessment district or community
where the burden is to be borne. These principles are so elementary
as to need no citation of authorities. In this state the law allows an
assessment district to be created for the purpose of making therein local
improvements, and the property therein to be assessed in proportion to
the extent of the benefit received by each party required to discharge the
burden.

Emphasis added.

opined that property subject to a special assessment levied based on its ‘distance from the end of
the road’ places an unequal burden on some property owners and misjudges ‘benefits conferred’
on the properties, as it would have owners paying for paving in front of not only their own but
other properties as well. The Court struck down this method of apportionment on uniformity
grounds citing Auditor General v. Konwinski, 244 Mich. 384 (1928) that every valid assessment
must be based on some legally ordained basis of apportionment (such as frontage-footage basis),

36 Bolema v. City of Norton Shores, MTT Docket No. 220781, April 2, 1998. Petitioners were already connected to
the sewer and therefore received no benefit from a remote sewer expansion.
37 The standard of review is whether the taxpayer proved by a preponderance of the evidence that there is a substantial
or unreasonable disproportionality between the amount specially assessed and the value accrued to the land as a result
of the improvement.
38 This case dealt with not only an assessment for street paving, but also condemnation of land for such purposes.
Those legal arguments are outside of the scope of this opinion.
and not arbitrarily set. *Carmichael* included the following 2-part test: 1) Was the method used to determine the perimeters of the special assessment district arbitrary, capricious and unreasonable? 2) Was the formula used to determine the amount of the special assessment arbitrary, capricious and unreasonable? 39

Another attempt to impose a creative formula to apportion a special assessment levy also failed at the appellate level. In *Axtell v. Portage*, 32 Mich.App. 491 (1971), the Court rejected an apportionment formula advanced by the plaintiffs that assessors should “employ a ‘balancing test’, i.e., weighing special benefits against special detriments, to compute the amount of the assessment.” The Court upheld Defendant Portage’s use of “one formula for all special assessment situations based upon the theory that any street is of about equal benefit to the frontage owner” which amounts to a legally sanctioned frontage-footage basis of apportionment.

Given the requirements regarding appropriation of a special assessment within a district based on benefit to the property coupled with the judicial rejection of alternative methods of apportionment it is likely that the proffered apportionment mechanism based on the financial status of the property owner will likely be viewed by the Michigan Tax Tribunal as arbitrary and lacking in uniformity between similarly situated properties.

**Legal Challenge of a Special Assessment**

A petitioner seeking to challenge a special assessment bears the burden of presenting credible evidence to rebut the presumption that the assessments are valid. *Kane v. Williamstown Twp.*, 301 Mich.App. 582 (2013). A special assessment will be deemed valid if it meets two requirements: (1) the improvement subject to the special assessment must confer a benefit on the assessed property and not just the community as a whole and (2) the amount of the special assessment must be reasonably proportionate to the benefit derived from the improvement. 40 When a special assessment is made, it “stands upon the presumption of good faith, lawful action, and considerate creation of the assessment district, although such presumption cannot withstand established facts to the contrary.” *Dix-Ferndale Taxpayers’ Ass’n v. City of Detroit*, 258 Mich. 390 (1932). Specifically, the petitioner must demonstrate “a substantial and unreasonable disproportionality between the amount assessed and the value that accrues to the land as a result of the improvements.” *Dixon Rd. Group v. City of Novi*, 426 Mich. 390 (1986); *Storm v. City of Wyoming*, 208 Mich.App. 45 (1994).

In *Davis v. City of Westland*, 45 Mich.App. 497 (1973), the Michigan Court of Appeals clarified that voiding the entire assessment was not the remedy in a situation where the assessment of one party was “clearly out of proportion and unjust” and the errors in the varying amounts of the assessment should be corrected before the tax roll is confirmed. Voiding the entire assessment roll is appropriate when “an assessment is so arbitrary or discriminatory as to be substantially unfair.”

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39 The burden is on the property owner to prove that the amount of the assessment is not proportionate to the benefit received. *Johnson v. Inkster*, 401 Mich. 263 (1977).

Additionally, to protect private property rights, Michigan law also requires that the total amount of the assessment must be no greater than what was reasonably necessary to cover the cost of the work. Oneida Twp. v. Eaton Co. Drain Comm'rs, 198 Mich.App. 523 (1993). Therefore, it is likely that a challenge to the proposed ordinance amendment to charge parcels that receive the benefit of the same service(s) differing amounts based on the financial status of the property owner, not on the value of the benefit to the property, would fail. Particularly if the court were to determine that the class or classes within the district were similarly situated as to benefit of the improvement(s) but different amounts were levied.

Therefore, a legal challenge to the Michigan Tax Tribunal or pursuit of a discontinuance petition under Sec. 18-12-14141 of the SAD Ordinance are the proper vehicles to impact a SAD levy once established. The City cannot forgive or exempt a special assessment. The Treasurer may withhold a delinquent special assessment from Wayne County but it remains a lien against the property and subject to collection action by the City.42

Analysis of MCL 117.5i

The statutory authority43 for the City’s enactment of the local ordinance creating the particularized Special Assessment District (SAD) at issue provides:

(1) Whether or not authorized by its charter, a city with a population of more than 600,000 may provide by ordinance a procedure to finance by special assessments the provision by private contractors of snow removal from streets, mosquito abatement, and security services. The ordinance shall authorize the use of petitions to initiate the establishment of a special assessment district. The record owners of not less than 51% of the land comprising the actual special assessment district must have signed the petitions.

(2) A service instituted under this section may be discontinued upon petition by the record owners of 51% of the land comprising the special assessment district.

Emphasis added.

Section 5i was first enacted by Public Act 431 of 1994 with a population threshold of one million. In 2001 and 2011 it was amended to lower the population threshold.44 The City of Detroit remains the only local unit that meets the population threshold to trigger the discretionary authority to enact such an ordinance. The statute requires a community–based petition drive to initiate the designation of a special assessment district. Given the previous discussion of relevant case law, the “procedure by which to finance” refers to the apportionment of costs (such as unit benefit, front foot method, or area basis) within a designated district. This does not grant the legislative body unfettered power relative to financing. It must conform to a “legally sanctioned” method of

41 This section codifies MCL 117.51(2).
42 If an individual were delinquent on their property taxes or water bill then it would still be referred to Wayne County for collection.
43 MCL 117.5i.
44 Public Act 173 of 2001 lowered the population threshold to 750,000 and Public Act 287 of 2011 further reduced it to the current level of 600,000.
apportionment as well as due diligence based on the cost of services, number of properties benefitted by the service and related information from the assessor.

City Council, as the legislative body of the City, holds the responsibility to approve the boundaries of a special assessment district to include those properties that will benefit from the special assessment. There is no legal authority that supports the exemption of select parcels within a special assessment district or that receive the value of the benefit of the service based on the financial status of the owner. This proposition would run afoul of the basic principles of taxation and encourage a re-interpretation of law so well-settled cases from the mid-1800s to date remain good law with precedential value. The current exemptions from a SAD levy mirror other exemptions in state law and are based on the use of property for public purposes. Entities, such as a municipal lighting authority, which are exempt from taxes and special assessments lose this status if they are leased to private persons.

The language regarding exemptions in the current ordinance comports with state law and the body of case law discussed in this opinion. Because the Michigan Tax Tribunal would hold jurisdiction over a challenge of a SAD it is prudent to anticipate the court would continue to hold that property exempt from general taxation is nevertheless subject to a special assessment. This opinion outlines the apportionment guidelines to establish a valid “procedure to finance” with the applicable principles of uniformity among classes incorporated.

The Glenn Steil State Revenue Sharing Act of 1971, Public Act 140 of 1971; MCL 141.904(5), which deals with the distribution of collection of state income tax to local units on a per capita basis, defines in subpart (a) that a special assessment is imposed by a city against property in the city for any public improvement, facility, or service authorized by charter, ordinance, or statute to be imposed on the basis of benefit to the property.

In its brevity, MCL 117.5i does not explicitly address the availability of exemptions from a SAD levy. In drafting the exceptions contained within the ordinance, the Law Department mirrored similar statutes as well as case law to establish a legally defensible list. The Law Department has been unable to find, and LPD has not cited to any legal support that would allow an exemption from a special assessment levy based on a characteristic of the property owner as opposed to a calculation based on benefit to the property itself. In the case of a SAD levy under

45 The Drain Code of 1956 at MCL 280.280 and Principal Shopping Districts and Business Improvement Districts at MCL 125.990h.
46 MCL 123.1287.
48 This definition exempts special assessments where an entire local unit is the special assessment district and included as part of local taxes on each parcel on an ad valorem basis, MCL 141.904(3) and (6). This type of special assessment is outside of the scope of this opinion as the proposed special assessment district under MCL 117.5i is not City-wide but a discrete area of the City to be benefitted by the services.
49 The notice requirements for special assessments is addressed in MCL 211.741, et seq.
the current ordinance it would be the cost to each parcel of the total cost of the services, using an apportionment method (such as area basis or unit benefit).

CONCLUSION

There is no legal authority to exclude a property within a special assessment district that received the benefit of the service provided from a special assessment levy or exclude it from the assessment roll prior to confirmation absent a specific statutory exemption. General principles of taxation and uniformity established in case law and the 1963 Michigan Constitution require that the levy be imposed on a parcel that receives the benefit. Constraints regarding the creation of a special assessment district and the requirement that “legally sanctioned” modes of apportionment be used to distribute the cost of the improvement throughout the district also do not support the proposed ordinance. It is well-established that exemptions from general taxation do not extend to special assessment levies as those costs are attached to the property, not the property owner.

As Detroit is the only municipality that meets the population threshold to enact an ordinance under MCL 117.5i, there is a lack of materials surrounding that particular special assessment. However, the full body of materials regarding special assessments (secondary sources, case law and related statutory comparisons) provide a complete and clear framework that remains virtually unchanged since the mid-1800s and does not support the enactment of the proposed ordinance amendment. Therefore, Corporation Counsel remains unable to approve the proposed ordinance amendment as to form as its enactment or enforcement is not supported by the Michigan Constitution, state or local law, or relevant case law.

Should you have any additional questions, please feel free to contact us.

Respectfully submitted,

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