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Inside this Issue

A Sleeping Giant: The Local Improvement District and its Practical Uses

Fire districts should use the law to their advantage. Rarely do fire districts consider forming local improvement districts (LID) within their boundaries.[1] But the LID is another funding mechanism—which does not require an election, as does the levy of property taxes and collection of benefit charges. And LIDs have existed in Washington for some time...much longer than the benefit charge. Under Washington law, a fire district may form a local improvement district (LID), "for fire protection or emergency medical purposes", to provide for the "acquisition, maintenance, and operation of real property, buildings, apparatus, and instrumentalities needed to provide such services." RCW 52.20.010.[2] To accomplish this, a fire district may impose "special assessments"—similar to a benefit charge, minus the requirement of an election under

[1] If a fire district is a participating fire protection jurisdiction in an RFA, the RFA may exercise the same powers as the participating fire district, or those powers that are set forth in the RFA plan, if there is no participating fire district. *See* RCW 52.26.090 (g)

[2] In other words, in the context of the fire service, an LID may not be formed to defray the labor costs of providing the necessary services, but instead must be formed to defray all other incidental capital costs.

RCW 52.18.050—upon those properties that are "specially benefitted" by the provided services. RCW 52.20.010. These special assessments would be levied annually, over 20 years, which makes it quite different from a fire benefit charge.

There are generally three questions that must be asked prior to the formation of an LID by a fire district: (1) Will the services performed be for fire protection and emergency medical purposes; (2) what properties would be "specially benefitted" by formation of the LID, and what shall the estimated assessments be for those special benefits; and (3) will this method of financing be greeted with consternation by those property owners who are "specially benefitted"? To discuss the second and third questions requires consideration of various statutory schemes and laws, so we shall address those questions first.

How an LID is Formed

Under RCW 52.20.025, various statutes applicable to cities and towns govern the formation of LIDs by fire districts.[3] We will call these governing statutes the "satellites." Chapter 52 RCW specifically states that an LID may be formed by resolution. RCW 52.20.010.[4] Such a resolution must specify a time and date for a public hearing to discuss formation of an LID, in addition to setting forth the factual basis for forming the LID, and the costs of any improvements to be financed by the LID. Those persons whose properties lie within the proposed LID must be given notice of the hearing. RCW 52.20.020. The notice shall state that annual assessments may increase from those estimated, "so long as they do not exceed a figure equal to the increased true and fair value the improvement adds to the property." RCW 52.20.022. **This statute encapsulates the golden rule of LIDs: the special assessment may never substantially exceed the value of the improvement.** This is the law of special benefits. We shall discuss this further below.

The notice shall also state the boundaries of the proposed LID and may also refer to the resolution passed by the board, which states the nature of the LID proposed. RCW 52.20.020. Finally, the notice shall state the estimated cost to be borne by the particular property. *Id.* Of great importance is that the notice must fairly apprise the property owners of their right to be heard. Otherwise, the formation of the LID is subject to challenge under the Due Process Clause of the Fourteenth Amendment. *See Hasit, LLC v. City of Edgewood*, 179 Wn.App. 917, 953 (2014) (finding that the city failed to provide adequate notice to property owners subject to LID assessments of their right to testify).

There is a two-hearing process, with the first hearing held for purposes of formation and the second for purposes of review and approval of all assessments, sometimes referred to as the

[3] These statutes are RCW 35.43-45, 35.49, 35.50 and 35.53.

[4] An LID may also be formed by a petition of a majority of those persons that would be within the LID boundaries, but we will not discuss that here. *See* RCW 52.20.010.

assessment roll hearing. Under one of the satellite statutes, the governing board may designate an officer to conduct a public hearing on the assessment roll, at which each property owner can protest their individual assessment. The Hearing Officer then reports the results of the hearing to the board. RCW 35.43.140. The ultimate decision confirming the assessment roll, after hearing, may be appealed to superior court. *See* RCW 35.44.200. But if there is no timely appeal the LID is conclusively presumed to be properly formed and no further appeals may be made.

How Special Assessments are Made

The local government may issue and sell warrants, to be repaid over three years, to finance the LID. RCW 52.20.060 (1). Those warrants may be repaid via the collection of "special assessments" (SA), and subsequent repayment from the fire district's LID fund. *Id.* Of course, the government may also issue warrants pursuant to RCW 39.46—the general statute pertaining to the issuance of bonds by municipal corporations, notwithstanding any of the provisions of the aforementioned section. RCW 52.20.060 (2).

So how does a fire district determine what "special assessments" may be made on particular property? This requires us to consider another rule of LIDs. One satellite states this rule: "Assessments in any such utility local improvement district may be made on the basis of special benefits up to but not in excess of the total cost of the local improvements...." RCW 35.43.042. Special assessments may be based on "special benefit of the improvements as a whole to the properties within the entire local improvement district." RCW 35.43.050. But SAs may also be based on the increased value attributable to the improvement to each individual unit of benefitted property, if the legislative body makes no finding as to "the benefit of the improvements as a whole to all of the property." *Id.*

Another statute governing how special assessments may be made is RCW 35.44. Under this statute, all property located within an LID shall be considered the property that is specially benefitted, and therefore subject to assessment. RCW 35.44.010. The cost and expense of the proposed improvements "shall be assessed upon all the property in accordance with the special benefits conferred thereon." *Id.* This mandate does not conflict with RCW 35.43.050, delineated above, which provides that SAs may be based on consideration of individual units of property. **Ultimately, the general rule is that any SA must be measured against the special benefit conferred.**[5] This is so whether the board has or has not made a finding of the special benefit of the improvements to all of the property within the LID as a whole.

A common method of spreading the costs of LID improvements is the "zone and termini" method, which is codified at RCW 35.44.030. Washington courts have held that "[T]he zone

[5] This is similar to the mandate of determining benefit charges: "A benefit charge imposed shall be reasonably proportioned to the measurable benefits to property resulting from the services afforded by the district." RCW 52.18.010.

and termini method is a method of apportioning these special benefits on the basis of area and proximity to the improvement." *Sterling Realty Co. v. City of Bellevue*, 68 Wn.2d 760, 762 (1966).[6] Under *Sterling*, "'[S]pecial benefits' refer to the special, as opposed to general benefits gained by property from the improvement which is constructed." *Sterling* at 766; *See Also Hasit* at 937, citing *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397 (1993) (finding, as a general rule, that "assessed property must be specially benefitted by the improvements, as distinguished from a general benefit to the entire district."). Consequently, RCW 35.44.030 sets forth a method that breaks the LID up into zones, based on their proximity to the proposed improvement, to support "special benefit."

Importantly, the failure of the board to state in its resolution establishing the LID that it will not use the zone and termini method, will not invalidate any other method used by the district to establish an SA. *See* RCW 35.44.047. The rule of proportionality shall always apply. However, "the requirement of proportionality does not mandate that all properties within an LID be assessed the same percentage of the special benefits received." *See Hasit* at 933. Ultimately, a fire district "may use any other method or *combination* of methods to compute assessments which may be deemed to more fairly reflect the special benefits to the properties being assessed." RCW 35.44.047 (emphasis added). The *Hasit* court, cited above, noted that this portion of RCW 35.44.047 permits cities—and therefore fire districts—to use other avenues, such as the "mass-appraisal" method, to determine special benefits, provided that these methods are not arbitrary. *See Hasit* at 928, 943 (noting that the "mass-appraisal" method was applied arbitrarily because the appraiser did not "provide actual appraisals of each parcel or the specific calculations used to arrive at the estimated values.").

The *Hasit* court states the fundamental truth of the laws governing special assessments:

> We recognize also that by their nature the legal standards governing special assessments are not applied with the precision of a jeweler's eye...The flexibility in [the legal principles applicable to special assessments] acknowledges that the calculation of special benefit is not an entirely exact undertaking and that local governments cannot be held to an unrealistic standard of precision in doing so

See Hasit at 940. Based on this fundamental truth, and the laws governing the calculation of special assessments, fire districts would have some flexibility in deciding how the amounts of assessment may be set, so long as that formulation is not arbitrary and is supported by evidence. Provided that a fire district can demonstrate, through cogent evidence, the existence of sufficient special benefits, the

[6] Square footage may also be considered in determining an SA. *See* RCW 35.44.040.

collection of special assessments will not only be fair, but shall also survive taxpayer scrutiny.

As a practical matter, what sometimes occurs in hearings on "special benefits" is that a property owner introduces expert testimony as to the fair market value of property both **before and after** the addition of the LID improvement. If the SA substantially exceeds this proven difference in value (assuming there is some increase) then the SA should be disallowed or reduced.

Taking into account the above considerations, let us consider the propriety of forming an LID under three factual scenarios.

The Boat. Pretend that within the boundaries of Hasitacre Fire District, there exists a hill. This hill rapidly descends toward a large cove. The scenic vistas from this hill are so wonderful that various affluent citizens flock to this neighborhood. One tradeoff: There is very little space for access roads to these homes in the event of a fire. Fire engines would not have adequate ingress and egress in order to extinguish fires at these homes. Consequently, a brilliant chief decides that a fireboat with long-range water disbursement capabilities is necessary to avoid any issues with response times.

The Development. Pretend that within the boundaries of Sterlingacre Fire District, a developer has proposed a massive development (BigPlat). BigPlat shall be comprised of 450 single-family residential homes. To the east of this development, a fire station exists, but is five miles away. For the district to get a fire engine to the westernmost point of the development would take much longer than 8 minutes, and would result in a failure to meet the response-time objectives set forth at RCW 52.33.030. A new fire station must be built in the middle of the development to meet those objectives, but clearly provides much more benefit to homeowners in BigPlat than Sterlingacre district property owners in general. So there is special benefit and general benefit.

These are both perfect scenarios for an LID, at least in theory. The district just spreads the total costs of the improvements among those specially benefitted, recognizing that perhaps 20% of the cost should be borne by the other taxpayers of the district who do get some general benefit. The district then pays off the money borrowed for the purchase (by selling bonds) over a 20- year period, backed by the assessment payments from those properties specially benefitted. Like a mortgage, the lien of these assessments follows the property if it is sold, so an assessment need not be paid off upon sale of the property. Query: May an LID be used to fund a CARES Program, formed pursuant to RCW 35.21.930? Stay tuned.

A Legal Giant Passes: The Ramifications of the Death of Antonin Scalia

The passing of Supreme Court Justice Antonin Scalia could very well cause a dramatic shift in the legal landscape of this country. Prior to his passing, the Supreme Court (SCOTUS) was composed of four conservative justices (Scalia, Thomas, Alito and Roberts), four liberal justices

(Ginsburg, Kagan, Sotomayor and Breyer), and one "moderate" justice, Anthony Kennedy. With President Obama in office, a liberal justice will probably be nominated to fill Scalia's place. But will the Senate confirm (majority vote) any Obama appointee? Or will they reject any nominee long enough to leave the appointment up to the next President? Will the Senate bottle up the procedure in the Judiciary Committee or refuse to hold hearings?

A decision of SCOTUS is binding only if made by a majority (five) of the nine justices. While only eight justices are seated, any 4-4 ties will leave the ruling below intact. This means, in our opinion, that SCOTUS will not be operating at full power until that seat is filled, as there may be many 4-4 "non-decisions."

As a member of the Supreme Court bar, Joseph Quinn has seen fit to become a member of the Supreme Court Historical Society, and otherwise remains in touch with the issues SCOTUS deals with each year. Those who suggest that the Senate need not hold hearings or that the Senate might simply delay any votes are mistaken in our opinion.

The Constitution provides that the President shall nominate and the Senate shall confirm...or not. There is no "lame duck" provision in the Constitution; the President has the duty to nominate as long as he is President. But the Senate has no obligation to confirm such nominee. Apparently, the political parties are in agreement that a filibuster is not appropriate for a Supreme Court nominee, although it may be used to delay other federal judge appointments. Let us realize this process for what it is at bottom: a political process shaped by the Constitution. If the President nominates someone in a timely manner, it will be difficult, but not impossible, for the Senate to delay the process for so many months. It might get much easier if one or more nominees are rejected by majority vote. Suffice it to say that it may well get very ugly, but politics seems rather ugly in these times of sequestration and other purely political obstructionism. Or so it seems to this editor anyway.

But can the Senate refuse to consider nominees at all or refuse to hold hearings? Can they refuse to "advise and consent"? We do not think this fulfills their Constitutional duty.

(Ed. note: Joseph F. Quinn argued *Brock v. Pierce County* for that entity in the October 1985 term of the Supreme Court. He is old.)

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