

Memo

To: Walt, Wrede, City Manager, City of Homer
From: Groh Eggers, LLC
Date: March 4, 2013
Re: Enforceability of gas line special assessment

BACKGROUND:

We have been provided with the following documents:

1. Memorandum to Mayor and City Council Members dated January 28, 2013 from Thomas F. Klinkner;
2. Letter to Honorable Beth Wythe, Mayor, Members of the Homer City Council dated February 8, 2013 from Ken Castner, Managing Director, KBT Condo Association; and
3. Legislative history materials pertaining to AS 34.08.720.

We have been asked to review these documents and perform research as necessary to render a second opinion as to the applicability of AS 34.08.720(b) to the levying of assessments on condominiums and the enforceability of the gas line assessments in light of the condominium owners' arguments as presented in their letter of February 8, 2013.

CONDOMINIUM OWNERS' ARGUMENTS:

The condominium owners assert that:

1. AS 34.08.720 is “not a directive to municipalities from the Alaska State Legislature;”
2. AS 34.08.730 (this section is referenced as section 770 of the Act in the letter) prohibits imposing a requirement upon a condominium which would not be imposed upon a physically identical development under a different form of ownership; and
3. Case law states that there is no reasonable basis to assess according to tax parcel number.

DISCUSSION:

1. AS 34.08.720(b), by its express wording, states that in a condominium, each unit that has been created, together with its interest in the common elements, constitutes a separate parcel of real estate and requires, if there is a unit owner other than a declarant, that each unit in a condominium “shall be separately taxed and assessed” (emphasis supplied). Accordingly each condominium is required to be treated as a separate parcel for the purpose of levying assessments. Whether or not this is a “directive to municipalities,” it is the law in Alaska and must be followed. This, however, in and of itself, does not necessarily mean that the assessment is not subject to possible attack on other grounds. See discussion in paragraph 3 below.

2. AS 34.08.730 (b) provides as follows: “A zoning, subdivision, or other real estate use law, ordinance or regulation may not prohibit the condominium or cooperative form of ownership or impose a requirement upon a condominium or cooperative that it would not impose upon a physically identical development under a difference form of ownership” (emphasis added). It appears that the

condominium owners are arguing that pursuant to this section, a special assessment may not be levied on individual condominium units within a building because they would be treated differently than an apartment complex. This argument lacks merit. The section refers to zoning, subdivision and real estate use laws and regulations and not taxes or assessments. Further, AS 34.08.720(b) specifically provides that condominium units are to be taxed and assessed as separate parcels of real estate.

3. The condominium owners next assert that case law provides that “there is no reasonable basis to assess according to tax parcel number”. This is essentially an argument that the assessment is unreasonable because it does not treat similar properties alike or because the benefit received is not in proportion to the assessment. Accordingly, we examined the assessment methodology and the case law addressing the standards for determining whether assessments are reasonable.

Alaska Statutes 29.46.010 and .020 respectively permit municipalities to assess private property benefited by improvements and to adopt procedures for creating local special assessment districts. Alaska Statute 29.46.020(c) requires municipalities such as the City of Homer to comply with the special assessment procedures set out in AS 29.46.030-29.46.100 if the municipality does not prescribe a procedure for special assessments as permitted by section .020. *See Miller v. Matanuska-Susitna Borough*, 54 P.3d 285, 289-90 (Alaska 2002). The City of Homer has prescribed its own procedures for special assessments by enacting HCC 17.04.040.¹ Pursuant to HCC 17.04.040(a)(1), the City of Homer adopted Resolution 12-069² and enacted Ordinance 13-02, thereby substituting its

¹ HCC 17.04.040(a)(1) provides that a special assessment district may be initiated by a Resolution approved by a vote of not less than three-fourths of the council.

² Resolution 12-069 provides that, “[t]he Council finds that the natural gas distribution system will benefit equally all parcels of real property in the City that will receive access to natural gas service through the construction of the natural gas distribution system, and

own “per-lot”³ method of assessing gas line improvement costs benefiting residential lots, instead of the “proportional benefit” method that was generally adopted by the legislature in AS 29.46.060(a).

AS 34.08.720(b) states that a condominium unit is a separate parcel of real estate “for all purposes” and that each unit “shall be separately taxed and assessed”⁴ Under Homer’s Ordinance 13-02, a condominium unit is assessed as a separate lot. Although there are other possible ways to assess landowners in a local improvement district, the per-lot method the City of Homer chose for gas line improvements benefiting residential lots is **presumptively valid**. See *Miller*, 54 P.3d at 290.

In *Miller*, 54 P.3d at 288-89, the Alaska Supreme Court held:

We employ the rational basis standard when reviewing questions of law that involve the borough’s expertise, and when reviewing the borough’s application of law to facts when that application implicates administrative expertise or involves fundamental policy determinations. Under the rational basis standard, we defer to the borough’s determination as long as it is supported by the facts and has a **reasonable basis in law**.

The borough’s assessment determinations are presumed to be correct, and are **reversed only upon a showing “of fraud or conduct so arbitrary as to be the equivalent of fraud, or so manifestly arbitrary and unreasonable as to be palpably unjust and oppressive.”**

Id. at 289-90 (internal citations omitted) (emphasis added).

In *Miller*, the Matanuska-Susitna Borough Assembly enacted an ordinance which assessed the cost of road improvements equally to each lot within a newly created improvement district. *Id.* at 287-88. The Millers owned nine undeveloped lots within the improvement district and argued that the borough acted “arbitrarily and unreasonably” by

that all parcels so benefited should be assessed equally for the cost of the natural gas distribution system” The Council also determined that it would credit a grant it received against the total cost of the gas line “in determining the amount to be assessed against each lot that will have access to natural gas service”

³ Or “per-parcel” of real property.

⁴ There are exceptions where the unit owner is the declarant.

assessing the cost of improvement equally on a per-lot basis. *Id.* at 288. The court noted that AS 29.46.060(a) provided a default method of assessing improvement costs “against property in proportion to the benefit received.” *Id.* at 289. However, it recognized that AS 29.46.020(a) also authorized municipalities to prescribe special assessment procedures if they so choose. *Id.* at 289. The court stated that the per-lot method of assessing improvement costs prescribed by the borough was presumptively valid and that to overcome the presumption, the Millers would have to show that the benefit to their property was grossly disproportionate to the benefit conferred upon the other assessed properties. *Id.* at 289-90. The Millers claimed that, unless the properties within the district are valued equally, they do not benefit equally, that there is a great disparity between the benefit received based on the differences in value of the properties, and that the assessments on a pro-rata basis were disproportionate to the value of the properties. *Id.* at 291. However, the court held that the evidence did “not rebut the presumption of correctness that attaches to the borough’s decision or the record evidence that paving substantially benefited the Miller’s parcels.” The court found that the per-lot method was not irrational and was therefore valid. *Id.* at 292.

Similar to *Miller*, the City of Homer enacted an ordinance which assessed the cost of gas line improvements equally to each lot within a newly created improvement district. *Id.* at 287-88. Condominium unit owners now argue that the city acted arbitrarily or unreasonably by assessing the cost of the gas line improvement equally on a per-lot basis. However, similar to the borough in *Miller*, the City of Homer prescribed special assessment procedures as allowed by AS 29.46.020(a) and its per-lot method of assessing improvement costs is presumptively valid. To overcome the presumption, the condominium unit owners would have to show that the benefit to their property was grossly disproportionate to the benefit conferred upon the other assessed properties. A mere claim that there are disparate benefits between properties within the district is not enough to rebut the “presumption of correctness” that attaches to the City’s decision. Here, the City found that the gas line will benefit all parcels of real property equally, including the condominium owner’s parcels.

In *Weber v. Kenai Peninsula Borough*, 990 P.2d 611 (Alaska 1999), the Kenai Peninsula Borough financed a privately owned gas-line extension by creating a utility special assessment district. *Id.* at 612. The gas-line was funded by an equal assessment to be paid by each property owner within the district. *Id.* Weber, a property owner in the district, argued that his property did not receive any special benefits and that he personally did not want to access the gas, so he would receive no benefit at all. *Id.* at 615-16. He argued that because he would receive no benefit, the assessment was a taking without just compensation in violation of the United States and Alaska constitutions. *Id.* at 615. The court held that Weber failed to show that his land was not benefited by the gas line, where the borough found that the gas line would benefit the public. *Id.* The court noted that the question of benefit applies only to the property itself, stating that “it is enough that he is able to access the gas line and enjoy its benefits if he so wishes.” *Id.* at 616. Accordingly, the court held that Weber failed to overcome the presumption that the assessment was valid. *Id.*

Similar to *Weber*, the City of Homer is financing a gas line extension through a special assessment district, funded by equal assessments to be paid by each property owner within the district. The gas line in this case would benefit the public, including condominium units, and a mere claim of disparate benefits is not enough to overcome the presumption that the City’s assessment is valid. Similar to *Weber*, “it is enough that the condominium units are able to access the gas line and enjoy its benefits if they so wish.” *Id.* at 616; *see also Kissane v. City of Anchorage*, 159 F.Supp. 733, (Alaska 1958) (holding that a special assessment on all property within a business district, regardless of whether the property was characterized as business or residential, was not “arbitrary or unjust” where the property involved would receive “some benefit”).

At least one jurisdiction outside of Alaska has come to a different conclusion under facts similar to this case. In the case of *Steinbach v. Green Lake Sanitary District*, 715 N.W.2d 195 (Wis. 2006), the Wisconsin Supreme Court analyzed a challenge by eighteen condominium owners against a special assessment financing a sanitary sewer system and held that the “assessment was unreasonable because the assessment charge

required the Petitioners to bear a disproportionate amount of the costs . . . as compared to the benefit they received.” *Id.* at 206.

In *Steinbach*, the sanitary district had levied charges against each tax parcel of record receiving sewer service in the assessment district. The assessment costs included the installation of one four-inch pipe stub to the sewer main of each property lot. 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. 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.* at 205. Thus, the 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. 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.* 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.* See also *Peller Investments, LLC v. City of Lake Geneva*, No. 2012AP1002, 2013 WL 361811, (Wis. Ct. App. Jan. 31, 2013) (citing *Steinbach* and finding that a special assessment was not reasonable where it did not treat comparable properties uniformly).

There are no Alaska cases with facts identical to those raised by the City of Homer’s gas line assessment. The condominium owners could ask the Alaska courts to adopt the reasoning of the Wisconsin Supreme Court and find that the City of Homer’s gas line assessment is unreasonable because condominiums are not treated the same as

comparable property with multiple habitable units, such as apartment buildings, or that there is disparate treatment that is not fair and equitable. However, under Alaska law, the City of Homer's per-lot methodology for levying assessments for the gas line improvements benefitting residential lots in the special assessment district is presumptively valid and the burden would be on the condominium owners to show that the assessment determinations are so arbitrary as to be the equivalent of fraud, or so manifestly arbitrary and unreasonable to be palpably unjust and oppressive. The Alaska courts have previously upheld levies of special assessments which resulted in disparate benefits to different properties within the district.