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Municipal Law--Special Assessments for Street Improvements-- the Standard of Review

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exemption for women from a district which has a "gross disproportion" would be more likely to succeed than one from a "reasonably representative" district.⁸⁴

Whether the *Taylor* decision will live up to the denomination "landmark" is as yet an unanswered question. The Supreme Court, however, did its best to render a decision in *Taylor* that would have vitality long after the "women's exemption" is a thing of the past. Indeed, considering that only two states still retain such an exemption, the importance of *Taylor* lies in its explication of a defendant's rights under the sixth amendment. The right to a jury venire drawn from a fair cross section of the community necessarily requires a fair amount of community participation in the administration of justice. The Supreme Court has indicated that both aspects of the "fair cross section requirement" are of great importance. Whether automatic exemptions of any class of persons, without an individual showing of hardship or incapacity, is consistent with the protection of the defendant's sixth amendment rights is still unanswered. *Taylor v. Louisiana* helped resolve some of the difficulties inhering in the jury selection decisions and the state jury selection systems. Unresolved issues must await further elucidation from the Supreme Court.

KATHRYN MARIE KRAUSE

MUNICIPAL LAW—SPECIAL ASSESSMENTS FOR STREET IMPROVEMENTS—THE STANDARD OF REVIEW

*DeFraties v. Kansas City*¹

*Lakewood Park Cemetery Ass'n v. Metropolitan St. Louis
Sewer District*²

Plaintiffs in *DeFraties* sought a declaratory judgment to determine the validity of a Kansas City ordinance levying a special assessment on their property for the cost of improvements to their abutting street. The admitted purpose of the project was to convert plaintiffs' dead-end residential street into a trafficway³ connecting two other heavily travelled

84. If the district were "reasonably representative," the challenging defendant would have no credible allegation of injury, and thus probably would lack standing.

1. 521 S.W.2d 385 (Mo. 1975).

2. 530 S.W.2d 240 (Mo. En Banc 1975).

3. KANSAS CITY, MISSOURI, CHARTER, art. X, § 353 (1967), defines "trafficways" as being:

arteries of general traffic through the city, adapted to the safe, convenient and facile transportation of vehicles other than those for passengers only, in larger volume and heavier service than may be required in serving the average traffic needs of the property abutting thereon.

trafficways. The trial court declared the special assessment void.⁴ In affirming the judgment, the Missouri Supreme Court found that the improvement did not confer a special benefit, but was in fact a detriment to plaintiffs' property. It held that making the owners pay the special assessment in these circumstances amounted to a taking of their property without due process of law.⁵

Special assessments are a common form of public financing for local improvements.⁶ This peculiar form of taxation⁷ is levied upon property⁸ (usually abutting property) which is so situated in relation to the improvement that it derives a special benefit from it. Thus, only owners of benefited property, as opposed to the general public, must pay for part or

4. 521 S.W.2d at 386. The circuit court found for the plaintiffs on the basis that article X, section 355 of the Kansas City, Missouri charter, which denied property owners the right of remonstrance against trafficways, was in conflict with state statutes and a violation of due process under both the state and federal constitutions. The supreme court did not rule on the validity of the charter provision, choosing instead to invalidate the ordinance on the grounds stated in the text.

5. 521 S.W.2d at 388.

6. Special assessments were first authorized by the colonial New York legislature in 1691. V. ROSEWATER, SPECIAL ASSESSMENTS 22-23 (1893). They became of major importance in the late nineteenth and early twentieth centuries as a device for financing the extension of services to rapidly expanding urban areas. For example, 20 percent of Kansas City's revenues in 1913 was derived from special assessments. Between 1913 and 1931 the amount of this type of debt increased five-fold. The Great Depression, however, caused huge defaults on payments of special assessments bonds. Since that time, they have not regained their former relative importance in municipal financing, although the dollar amount of special assessments has continued to grow. TAX FOUNDATION, INC., SPECIAL ASSESSMENTS AND SERVICE CHARGES IN MUNICIPAL FINANCE 7-10 (1970). In 1972, there were \$712,000,000 in special assessments levied; 97 percent was raised on the local level and the remainder by state governments. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1974, 248, Table No. 405.

The use of special assessments has declined substantially in cities of over 500,000 population. New York City, for example, ceased levying them in 1962. TAX FOUNDATION, INC., *supra*, at 19. However, they remain an important source of funds for local improvements in smaller, still expanding cities (particularly those under 100,000). *Id.* at 10. In a representative year, 81 percent of cities of over 10,000 population used special assessments to pay for street improvements. They were also used extensively for the construction of sanitary sewers, sidewalks, storm sewers, water lines, and, to a lesser extent, for street lighting and off-street parking. INTERNATIONAL CITY MANAGER'S ASSOCIATION, MUNICIPAL FINANCE ADMINISTRATION 115 (6th ed. 1962).

7. Special assessments are not "taxes" within the meaning of the uniformity requirements of the Missouri constitution. *Farrar v. City of St. Louis*, 80 Mo. 379 (1883); *Adams v. Lindell*, 5 Mo. App. 197 (1878), *aff'd*, 72 Mo. 198 (1880) (construing Mo. CONST. art. X, § 3 (1875) (now Mo. CONST. art. X, § 3)). Nevertheless, the levy of special assessments is attributable to the legislative exercise of the taxing power. *Haeussler Investment Co. v. Bates*, 306 Mo. 392, 267 S.W. 632 (En Banc 1924).

8. The special assessment creates a lien against the property itself and is not a personal liability of the owner. *Heman Const. Co. v. Wabash R. Co.*, 206 Mo. 172, 179-80, 104 S.W. 67; 69 (En Banc 1907); 14 E. McQUILLIN, MUNICIPAL COR.

all of the cost.⁹ "The justice of demanding special contributions," one author has written,

is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sums they are required to pay.¹⁰

The "justice" of special assessments is not so evident to many affected property owners. The justification for finding special benefits may be very slight,¹¹ the usual methods of apportionment often appear to laymen to be mechanical and arbitrary,¹² and the tax burden on a particular piece of property may be very large.¹³ Consequently, special assessments are a fruitful source of litigation.

9. *Village of Norwood v. Baker*, 172 U.S. 269 (1898); *McConmack v. Patchin*, 53 Mo. 33 (1873). Even specially benefited property may not in theory be charged with that portion of the cost of a public improvement which is allocable to the general benefit of the public. *Goodell v. City of Clinton*, 193 N.W.2d 91 (Iowa 1971); *City of St. Louis v. Pope*, 344 Mo. 479, 126 S.W.2d 1201 (En Banc 1939). Cities commonly share the cost of projects otherwise financed by special assessments. INTERNATIONAL CITY MANAGER'S ASSOCIATION, *supra* note 6, at 124. One method is to charge the property owners only with the cost of widening a street to residential standards. The expense of any extra width is borne by the general tax revenues on the theory that it is a general benefit. *See, e.g., Goodell v. City of Clinton, supra.*

10. T. COOLEY, LAW OF TAXATION 606-07 (2d ed. 1886).

11. *See, e.g., Louisville & N.R. Co. v. Barber Asphalt Paving Co.*, 197 U.S. 430 (1905) (railroad right-of-way assessed for street improvement); *City of Webster Groves v. Taylor*, 321 Mo. 955, 13 S.W.2d 646 (1929) (water runoff from owner's property could not drain into storm sewer for which assessed); *Powers v. City of Grand Rapids*, 98 Mich. 393, 57 N.W. 250 (1894) (riverbed assessed for street improvement).

12. The difficulty in making an individual determination of benefits accruing to each piece of property has induced most cities to apportion the total cost of a project according to some standard rule. This practice has been condemned by some courts. *See, e.g., McNally v. Township of Teaneck*, 132 N.J. Super. 442, 334 A.2d 67 (Law Div. 1975). The three most common methods of allocating the benefits are the front-foot rule, the area rule, and the valuation rule. Under the front-foot rule, each piece of property is assessed according to the proportion that its frontage abutting the improvement bears to the total frontage of all property abutting the improvement. The area and valuation rules use similar formulas. Benefit districts may be used to assess non-abutting as well as abutting property. INTERNATIONAL CITY MANAGER'S ASSOCIATION, *supra* note 6, at 120-22.

Village of Norwood v. Baker, 172 U.S. 269 (1898), seemed at first to cast doubt on the validity of such arbitrary rules. However, in a series of eight cases decided on the same day, the Supreme Court upheld the use of these rules against constitutional attack. The leading case is *French v. Barber Asphalt Paving Co.*, 181 U.S. 324 (1901), *aff'g Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 58 S.W. 934 (En Banc 1900). *See also Tonawanda v. Lyon*, 181 U.S. 389 (1901) (front-foot rule approved); *Webster v. Fargo*, 181 U.S. 394 (1901) (area and valuation rules approved). *Accord, Nichols v. Kansas City*, 291 Mo. 690, 237 S.W. 107 (En Banc 1922) (valuation rule); *Heman v. Gilliam*, 171 Mo. 258, 71 S.W. 163 (1902) (front-foot rule); *Johnson v. Duer*, 115 Mo. 366, 21 S.W. 800 (1893) (area rule).

13. This is particularly true where the property is a corner lot subject to multiple assessments or an irregularly shaped lot with a long frontage but little depth.

The courts rarely grant relief to property owners faced with special assessments because the determination of every issue connected with the question—including the existence, amount, and allocation of special benefits—is normally a legislative rather than a judicial function.¹⁴ A legislative finding of special benefits is presumptively correct,¹⁵ and the courts have traditionally had very little power to overturn it. There is a point, however, beyond which the legislature may not go.¹⁶ Missouri has followed the general rule in defining that point—*i.e.*, when the assessing authority's action is manifestly arbitrary, fraudulent, unreasonable, oppressive, or wholly unwarranted.¹⁷ This is, in effect, a rational basis test. In order for a property owner to invalidate a special assessment he must carry the burden of proving to a reviewing court that under no reasonable theory whatsoever can it be said that the improvement confers a special benefit on his property.¹⁸ It is a difficult, but not impossible,¹⁹ standard to meet.

DeFraties, in holding for the property owners, relied on a line of Michigan cases which have effectively raised the standard of review for special assessment cases. This higher standard permits the courts to decide for themselves, as a question of fact, the existence of special benefits. In the leading Michigan case, *Fluckey v. City of Plymouth*,²⁰ the city attempted to levy special assessments for "the conversion of a sleepy country road into a 4-lane thoroughfare for heavy traffic."²¹ Plaintiffs' evidence established a decline in the quality of life enjoyed by the residents abutting the widened street because of increased safety hazards, noise, and pollution.²² The city's case was rather weak, relying initially on the assumption that "any road improvement automatically carries with it special benefit."²³ The court said that the city's practice of routinely equating costs with benefits may not have been irrational during the early days of the automobile age, but that it was no longer appropriate.²⁴ The special assessment was

In many instances special rules granting relief in these situations have been devised. INTERNATIONAL CITY MANAGER'S ASSOCIATION, *supra* note 6, at 122-23.

14. 70 AM. JUR. 2d, *Special or Local Assessments* § 158 (1973).

15. *Collins v. A. Jaicks Co.*, 279 Mo. 404, 214 S.W. 391 (En Banc 1919); 14 E. McQUILLIN, MUNICIPAL CORPORATIONS § 38.183 (3d ed. 1970 rev. vol).

16. *Village of Norwood v. Baker*, 172 U.S. 269, 278-79 (1898).

17. *Mudd v. Wehmeyer*, 323 Mo. 704, 19 S.W.2d 891 (1929); *City of Webster Groves v. Taylor*, 321 Mo. 955, 13 S.W.2d 646 (1929); *Heman v. Schulte*, 166 Mo. 409, 66 S.W. 163 (1902).

18. Comment, *Special Assessments for Road Improvement Projects in Michigan—What Standard of Trial Court Review?*, 20 WAYNE L. REV. 1073, 1073-79 (1974).

19. See, e.g., *City of St. Louis v. Pope*, 344 Mo. 479, 126 S.W.2d 1201 (1939); *Hesse-Rix Co. v. Krug*, 319 Mo. 880, 6 S.W.2d 570 (1928).

20. 358 Mich. 447, 100 N.W.2d 486 (1960).

21. *Id.* at 450-51, 100 N.W.2d at 487.

22. *Id.* at 451-52, 100 N.W.2d at 488.

23. *Id.* at 452, 100 N.W.2d at 488. The city's arguments that elimination of dust and filling in potholes would be a benefit were dismissed as "afterthoughts." *Id.* at 454, 100 N.W.2d at 489.

24. *Id.* at 452, 100 N.W.2d at 488. Cf. *Carmichael v. Village of Beverly Hills*, 30 Mich. App. 176, 186 N.W.2d 29 (1971) (initial paving of street almost conclusively confers special benefits).

held void because "no reasonable person or body could conclude that . . . [this improvement] would result in a net benefit to the residential properties abutting it."²⁵

The *Fluckey* court did apply the traditional rational basis standard of review. However, a flurry of subsequent Michigan cases "relied too heavily upon *Fluckey's* factual situation and applied the result reached there mechanically and without regard for the *Fluckey* court's statements concerning the limitations" on judicial review of special assessments.²⁶ The *DeFraties* court appears to have succumbed to the same temptation. It relied primarily on the factually analogous case of *Brill v. City of Grand Rapids*²⁷ for the proposition that a four-lane street constructed through a residential area completely changing the character of the neighborhood confers no benefit on the abutting property. The court's failure to mention the appropriate standard of review, a singular omission in Missouri special assessment cases, indicates that it too applied the *result* from a factual situation it believed to be "on all fours." Using this approach probably achieved a correct decision in *DeFraties*, but it also created the possibility that Missouri courts would confuse or ignore the proper judicial role in reviewing special assessments, as happened in Michigan.

The supreme court was not long in providing guidance. Another special assessments case, *Lakewood Park Cemetery Ass'n v. Metropolitan St. Louis Sewer District*,²⁸ was decided by division one on the same day that the court denied the city's motion for rehearing en banc in *DeFraties*. In upholding the assessment of a non-profit cemetery for the construction of a sewer, the divisional opinion said that the determination of benefits "was a matter of legislative discretion . . . and in the absence of fraud or unless a real and arbitrary abuse of discretion clearly appears [it] is conclusive on the courts."²⁹

Plaintiff successfully moved for a rehearing en banc to consider the effect of *DeFraties*. The full court affirmed the divisional opinion. It noted that the assessing authority's legislative determination of public necessity for the improvement created a presumption of special benefits to the property. The burden of establishing the contrary rests on the property owner, who must overcome the prima facie case "in the most satisfactory manner."³⁰ Although the court treated the case as a problem of plaintiff's failure of proof, the clear import of its decision was that *DeFraties* did not change the standard of review in Missouri and that the case will be limited to its facts.

25. 358 Mich. at 451, 100 N.W.2d at 488.

26. Comment, *Special Assessments for Road Improvement Projects in Michigan—What Standard of Trial Court Review?*, 20 WAYNE L. REV. 1073, 1079 (1974).

27. 383 Mich. 216, 174 N.W.2d 832 (1970).

28. 530 S.W.2d 240 (Mo. En Banc 1975). The divisional opinion, originally filed on April 14, 1975, was adopted by the full court without change on rehearing.

29. *Id.* at 246 (divisional opinion).

30. *Id.* at 248 (en banc per curiam opinion).

The theory of special assessments is deceptively simple. The real difficulties are encountered in making the factual determinations necessary to implement the theory. This type of factual issue is not well suited to resolution by the judicial system. As Justice Holmes wrote:

There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of special benefits attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. . . . The amount of benefit which an improvement will confer on particular land—indeed, whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the laws.³¹

Permitting the courts to determine as a question of fact the existence of special benefits is a subtle shift away from the rational basis standard. Nevertheless, the Michigan experience has shown that it can have an unsettling effect on a city's ability to plan and finance local street improvements.³² In the 16 years since *Fluckey*, many property owners have sought a reviewing court's judgment as to the correctness of a city's finding of fact that a special benefit existed. Their successes have increased significantly over the pre-*Fluckey* period.³³ As a result, some cities have gone to extreme lengths to avoid having a special assessment upset.³⁴

A broad interpretation of *DeFratis* would have allowed similar consequences in Missouri. *Lakewood Park* forestalled that possibility by stating that Missouri will continue to follow the traditional standard of review. Assuming the validity of the special assessments theory,³⁵ the ra-

31. *Louisville & N.R. Co. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 433 (1905).

32. Comment, *Special Assessments for Road Improvement Projects in Michigan—What Standard of Trial Court Review?*, 20 WAYNE L. REV. 1073, 1091-95 (1974).

33. *Id.* There is a tendency for trial courts in Michigan to be especially sympathetic to property owners. *Id.* at 1087-91. On the appellate level, property owners have won the following cases based on a finding of no benefit: *Brill v. City of Grand Rapids*, 383 Mich. 216, 174 N.W.2d 832 (1970); *Knott v. City of Flint*, 363 Mich. 483, 109 N.W.2d 908 (1961); *Mueller v. City of Roseville*, 38 Mich. App. 170, 195 N.W.2d 882 (1972); *Cusumano v. City of Detroit*, 30 Mich. App. 603, 186 N.W.2d 740 (1971); *Wood v. Village of Middleville*, 11 Mich. App. 104, 160 N.W.2d 585 (1968). Cities have won the following cases based on a finding that a special benefit existed: *Eilender v. City of Pontiac*, 371 Mich. 671, 124 N.W.2d 806 (1963); *Crampton v. City of Royal Oak*, 362 Mich. 503, 108 N.W.2d 16 (1961); *Johnson v. City of Inkster*, 56 Mich. App. 581, 244 N.W.2d 664 (1974) (see note 34 *infra*); *Wabeke v. City of Holland*, 54 Mich. App. 215, 220 N.W.2d 756 (1974); *Axtell v. City of Portage*, 32 Mich. App. 491, 189 N.W.2d 99 (1971); *Soncoff v. City of Inkster*, 22 Mich. App. 358, 177 N.W.2d 243 (1970). See also Annot., 46 A.L.R.3d 127 (1972).

34. For example, in *Johnson v. City of Inkster*, 56 Mich. App. 581, 224 N.W.2d 664 (1974), the city drew up a benefit district for a street widening project that included all nearby property *except* abutting property.

35. The theory of special assessments has been criticized as a legal fiction with no basis in reality. C. BASTABLE, *PUBLIC FINANCE* 166 (3d ed. 1903). Even a Missouri court of appeals has recognized that the presumption of the existence of