MEMORANDUM OF DECISION ON SCOPE OF REMAND

Sewers have run beneath Main Street in Hartford since at least 1849. The street has always been a center of commerce. That year a bank was assessed $215 to defray the cost of building this sewer system. But the bank was in a small building by modern standards and things changed over the years.

In 1966, one of Hartford's then great banking enterprises erected on the site a 26-story building. Apparently, the then reigning sewer authority didn't assess the building anything extra for growing so big. In any case, the bank is gone now, but the building remains. In 2015 the plaintiff in this case—777 Residential, LLC—converted it to 285 apartments.

The conversion caught the eye of today's sewer authority—the defendant Metropolitan District Commission. It chose the occasion of the conversion from office space to apartments to levy against the property a supplemental assessment of $473,330 for erecting new "structures"—calculated at $1,655 a unit. Apparently, the calculation was over by one unit. It charged for 286 units when there are only 285.

While that was a mistake, it was the least of 777 Residential's complaints about the assessment. It appealed the entire assessment to this court, claiming that during the conversion it had erected no new "structures" and that the MDC had no right to charge it by the unit rather than—as in 1849—by the front footage of the building on Main Street. The original trial court disagreed with the first claim but agreed with the second. On appeal, our Supreme Court disagreed with both of 777 Residential's claims and sent

the case back here saying, we "direct the trial court on remand to decide any remaining claims."[1]

So, are there any remaining claims to decide? Naturally, the MDC says there really aren't any remaining claims—at most the court might consider adjusting the assessment downward by one unit.

Unsurprisingly, 777 Residential disagrees. It says there are two big claims left: 1. whether the structures increased the benefit to the building of being connected to the sewer system so as to permit a supplemental assessment, and; 2. whether the per unit assessment method was permissible given that it was impermissible at the time of the original 1849 assessment.

As we will see, the MDC's view of the remand is right and 777 Residential's is wrong. Plaintiff 777 Residential misreads the statute and the Supreme Court's opinion.

The statute permits additional assessments when new structures are built so long as the total extra market value added to the building by virtue of the existence of the sewer system is more than the combination of all sewer assessment charges levied against it over time—a matter never disputed by 777 Residential.

Also, the statute does not require the MDC to use the 1849 method. Instead, the Supreme Court held that the MDC is free to change the method of assessment whenever the owner changes the use of its building.

[1] 2020 WL 5359748 at *13.

Starting with 777 Residential's first claim, we can see that the statute doesn't require a bigger benefit for a bigger assessment. The language of the statute on the subject is clear enough.

Sewer assessments are governed by General Statutes §7-249. The statute says: "No assessment shall be made against any property in excess of the special benefit to accrue to such property."

What is the benefit? Must it be direct? Must the service to the site somehow be improved to justify an assessment?

The statute says no. It says the "assessment may include a proportionate share of the cost of any part of the sewerage system." Indeed in an earlier part of the statute it allows assessments to the "especially benefited…whether they abut on such sewerage system or not."

This means the statute focuses on the particular benefit to the property accrued by virtue of the whole sewage system. It does not focus on benefits that are conferred uniquely on each property assessed. But is that all it means by "special benefit" and "especially benefited"?

The statute leaves that up to authority making the assessment. The statute says the authority may decide who is "especially benefited" "in its judgment." The later reference to "special benefit" has only this former reference to "especially benefited" to guide us about what "special benefit" means, so presumably that's also up to the authority to define. It most likely means the benefit "special" to the property by virtue of the whole system. That is the simplest and best explanation.

There are other possible explanations if needed. An authority might rationally believe that commercial districts accommodating thousands of people in apartments, office buildings, and hotels couldn't exist without sewer systems. A water pollution control authority might rationally conclude that the properties in the district gain a "special benefit" from being able to exist at all and, indeed, it might rationally consider that a community gaining a substantial tax base from the existence of that commercial district might also gain a special benefit from the sewer system that made it possible. Most important as far as the court's power is concerned, the statute leaves it up to the authority, and 777 Residential might at least see this explanation as illustrating why its circumstances make it particularly dependent on a reliable sewer system, not just at its door, but all around it.

So how do we measure the special benefit that accrues to a particular property from the system as a whole? We know 777 Residential's claim that we must focus on a new benefit to its particular building flies in the face of the reasoning just discussed. And given that the statute looks at the value of having a system as a whole, it makes sense for us to measure the benefit by considering the difference in the property's value with the sewer system and without the sewer system. And when we do it, we must remember that it's the "system's" value not only this particular parcel's connection to it.

Thus, when the statute says assessment amounts may not be, "in excess of the special benefit to accrue to such property", we must measure the benefit to the property—the property value with and without the sewer system. We then compare it to the sewer assessments levied against the property. If the assessment amounts exceed the benefit calculated, the excess assessments may not be imposed.

This is clear to this court, and it was clear to our Supreme Court too. It said three times that this was the way to value the benefit:

- The benefit to a property owner is measured solely according to the amount by which the improvement causes the property to increase in market value. … Under § 7-249, [t]he monetary value of the special benefit conferred upon a piece of property by the presence of a sewerage system must be calculated by the difference between the market value of the realty with and without the sewerage system ….[2]

- As explained previously, § 7-249 prohibits the total amount of the assessments—including both the initial and any supplemental assessments—from exceeding the value of the benefit to the property from accessing the sewerage system.[3]

- The plaintiff offered no evidence regarding the market value of the property, originally or as altered, from any time period. Nor did the plaintiff offer any evidence, expert or otherwise, showing that the amount of the supplemental assessment exceeded the benefit to the property from accessing the sewerage system.[4]

This language settles the question. It shows that the Supreme Court rejected 777 Residential's view that the benefit must be new and particular to the property.

Still, 777 Residential points for support to another passage describing the required approach:

> Thus, the new or expanded building or structures must increase the benefit to the property before the defendant can levy a supplemental assessment. If the altered property receives the same benefit from accessing the sewerage system as did the initial property, then § 7-249 prohibits a supplemental assessment because the benefit already has been paid for through the initial assessment, and any additional assessment would cause the total amount of the assessments to exceed the benefit accruing to the property. Not all interior improvements and renovations will increase the "benefit" the property receives from the sewerage system. As a result, not all interior improvements made to a property will justify a supplemental assessment, and, thus, our definition of the term "structure" does not impermissibly expand the scope of § 7-249.[5]

[2] Id., *3.
[3] Id., *7.
[4] Id., *8.
[5] Id., *7.

The language is different, but it is merely another way of saying the same thing the court said elsewhere. If the sewer system were no more valuable to the property today than it was when the first assessment was made then a second assessment couldn't be levied to cover the value of something already paid for. In this case the sewer system may be more beneficial today than in 1849 because the building expanded over the years into a 26-story building, including the new structures added recently. Remember, there was no supplemental assessment when the big, new building was built, so a lot of benefit was likely never measured, considered, or levied against.

The market value of the building with the sewer system and without must be measured any time an assessment is made. The sum derived must be at least greater than the old assessment plus the new assessment. If it isn't, the second assessment isn't allowed because the building owner already paid for the benefit received from the sewer system. The trick is to understand that the benefit to the building is the benefit to the property as it stands at the time of a given assessment, including the fair market value of all of the improvements since the property was first assessed—not merely the latest improvement.

For example, if, at the time of a second assessment, a building is worth $1 million with the sewer system and $900,000 without the sewer system, the difference is $100,000. If an authority levied $50,000 against the property when the system was built and $25,000 when new structures were added to it, the second assessment is permissible. If by contrast the authority levied $100,000 against the property when the system was built and $25,000 when new structures were added to it, the second

assessment is impermissible because the total of the assessments exceeds the benefit to the property.

We can now turn to a piece of language that caused trouble below and on appeal. The statute says later construction of structures may be assessed "as if the new or expanded building or structures had existed at the time of the initial assessment." The Supreme Court rejected 777 Residential's claim—accepted by the original trial court—that this meant the assessment must be done using the same method as was used in the initial assessment—here the street frontage calculation used in 1849.[6]

In reality—read in context—these words say something far more modest. The statute opens by describing an authority that "acquired or constructed a sewerage system" having the right to "levy benefit assessments" against those properties "especially benefited." With emphasis added, it then allows the authority to assess "buildings or structures constructed or expanded *after the initial assessment*" to help pay the cost of the already constructed system once they come to benefit from it. So, when the statute says "as if the new or expanded building or structures had existed at the time of the initial assessment" it merely says that even though they didn't exist when the system was built, the authority may treat them as if they did exist, and may charge them part of the cost of the original system as well as later additions—assuming these costs haven't already been paid for. After all, they may not have been on the scene when the system was built, but they are getting a benefit from it.

The Supreme Court expressed this idea in a slightly different way:

[6] Id., *7.

> Thus, in the present case, although the total amount of the initial and supplemental assessments could not exceed the value of the benefit that access to the sewerage system would have conferred on the altered property if it had existed in 1849, the defendant retained discretion to determine the method to apply in calculating the supplemental assessment.

This language isn't intended to change the meaning of the statute. It still means that authorities can assess "buildings or structures constructed or expanded" later for the establishment of a system that was constructed earlier—provided that the benefits they get from the system outweigh whatever assessments the authority levies on them through time—in this case stretching all the way back to 1849.

It doesn't mean the statute should be given the absurd meaning of requiring something wildly and perhaps impossibly speculative—the fair market value of a 26-story building on Main Street in Hartford in 1849. It only means that the building can be assessed for the benefit conferred on it by becoming a part of a system originally assessed for in 1849. To assess that benefit, we have to add the 1849 assessment to the 2014 assessment. So long as by virtue of the sewerage system the market value at the time of the second assessment is greater than if the system didn't exist by more than the sum of the two assessments, it is permissible.

Now that we know how the benefit must be calculated, what must be done about the fact that 777 Residential never calculated the benefit this way? The company has only said here that it has the right to show that the building didn't gain any extra benefit to itself from sewers by building the new structures. But under the standard, this particularized calculation is irrelevant, so regardless of the scope of the remand it may not make this claim.

More to the point, in its remand brief, 777 Residential hasn't proposed that it should get a chance to put on evidence of the correct benefit calculation. But even if it wanted to put on this evidence, the Supreme Court repeatedly said it had its chance:

- The plaintiff offered no evidence regarding the market value of the property, originally or as altered, from any time period. Nor did the plaintiff offer any evidence, expert or otherwise, showing that the amount of the supplemental assessment exceeded the benefit to the property from accessing the sewerage system.[7]

- The plaintiff, which bears the burden in this case, however, has not maintained any claims before this court or the trial court that…the assessment exceeded the benefit.[8]

- Whether the supplemental assessment exceeds the benefit to the property—an issue not raised by the plaintiff in its appeal to the Superior Court, not decided by the trial court, and not supported by any evidence presented by the plaintiff, which "did not present any evidence that the sum of the initial and supplemental assessments exceeded the special benefit accruing to the property."[9]

We cannot know whether the MDC trial expert was right. The MDC expert said that without the existence of the sewer system, 777 Residential's property would be worthless. This makes it less of a surprise that the company didn't offer testimony on this point. In fact, on page nine of its decision, the trial court noted that the company opted not to offer this evidence.

There might be other approaches to the correct benefit analysis to keep the MDC assessments from being bounded solely by the entire property value. But none were offered at trial. And while in its remand brief, 777 Residential didn't ask to put on this

[7] Id., *8.
[8] Id., *11.
[9] Id., *13 n.19.

kind of evidence, the message from the Supreme Court on this seems clear: it's too late now.

The second issue 777 Residential raises is easily resolved. The Supreme Court did not say the MDC had to use an assessment method authorized in 1849. When it discussed this concept it was merely repeating 777 Residential's claim, going so far to note that even if 777 Residential were right, it didn't offer any evidence about what was approved or not in 1849.[10]

More important, the Court went on to reject this view in no uncertain terms, saying, "to interpret § 7-249 as the plaintiff argues would be unworkable and absurd." Instead the Court believed, "the method used for calculating an initial assessment may not apply for calculating a supplemental assessment if the use of the property has changed." Far from requiring an 1849 method, the Supreme Court held that, [t]he statute imposes a limitation, not on the method used, but on the result of its calculation."[11]

At every point, 777 Residential has only sought to offer evidence to support impermissible claims, including its latest claim about the methods used in 1849. Despite the opportunity to do so at trial –even though the MDC did—777 Residential didn't offer evidence on the permissible claim of the properly-calculated-benefit value.

With 777 Residential showing no additional matters to be decided, the only matter left is the MDC's failure to assess the building for 285 rather 286 units. While the MDC may choose its assessment method it must at least be obliged to follow it. An assessment in excess of its own stated calculation could only be deemed here as

[10] Id., *12.
[11] Id., *13.

excessive as well. The court is ready to enter a judgment recognizing it as so. In any case, the MDC should within 14 days of this ruling move for a judgment in accordance with this ruling or move for a hearing on the question of the court's power to hold it to the calculation method it has chosen.

BY THE COURT

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Moukawsher, J.