STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

MOUNTAINVIEW ASSOCIATES, L.P.,

Petitioner,

-against-

VILLAGE OF HUNTER, WILLIAM MALEY, as Mayor and trustee of the Village of Hunter, MICHAEL TANCREDI, as trustee of the Village of Hunter, and ALAN HIGGINS, as trustee of the Village of Hunter,

Respondents.

DECISION and ORDER
INDEX NO. 08-0841
RJI NO. 19-08-3655

Supreme Court Greene County All Purpose Term, July 14, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Nixon Peabody, LLP
Jena Rotheim, Esq.
Attorneys for Petitioners
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Albany, New York 12207

Murphy, Burns, Barber & Murphy, LLP
James J. Burns, Esq.
Attorneys for Respondents
226 Great Oaks Boulevard
Albany, New York 12203

TERESI, J.:

Mountainview Associates, LP (hereinafter "Mountainview") operates a 32 unit "affordable housing" apartment complex in the Village of Hunter, New York (hereinafter "the Village"). Mountainview commenced this Article 78 special proceeding seeking to

exclude its apartment complex from the Village's newly created sewer special improvement district, claiming it derives no benefit therefrom. Alternatively, petitioner seeks to annul the Village's assessment imposed pursuant thereto, claiming it was done in an arbitrary and capricious manner. Because Mountainview proved that it receives no benefit from the Village's proposed new sewers, Mountainview's petition seeking to be excluded from the special improvement district is granted.

"There is a presumption of validity [for] assessments requiring petitioners to show by affirmative proof that they have not benefitted from the improvement or that it is nonassessable in the first instance." (Nolan v. Bureau of Assessors of New York City Finance Administration, 31 N.Y.2d 90, 93 [1972]). "In evaluating whether a particular parcel is benefitted by a public improvement, the test to be applied is not how the land is presently being used, but whether the improvement generally enhances the value of the property; the burden of disproving that the value of the property has been enhanced... is a heavy one". (Palmer v. Town of Kirkwood, 288 AD2d 540 [3 Dept.,2001][quoting Calm Lake Development, Inc. v. Town Bd. of Town of Farmington, 213 A.D.2d 979 [4 Dept.,1995][internal quotations omitted]). "[U]nless it may be said, as a matter of law, that the improvement may not by any possibility increase the value of [the subject] property, the Town Board's findings in this regard are conclusive." (Palmer, supra quoting Brewster Mill Park Realty, Inc. v. Town Bd. of Town of North Elba, 17 A.D.2d 467 [3d Dept. 1962][internal quotations omitted]).

Prior to 2006 Mountainview disposed of its sewage by first collecting it in onsite septic tanks, followed by its removal, through sewer pipes, north to Colonel's Chair Waste Water Treatment Plant (hereinafter "CCWWTP"). The CCWWTP was privately owned and operated

and also received sewage, through sewer pipes, from additional residential dwellings located south of Moutainview in the Colonel's Chair Subdivision. The sewage received by the CCWWTP generally flowed from south to north. Thus, Colonel's Chair Subdivision's sewage would flow through the subdivision north to Mountainview's property, and then past it, onto the CCWWTP. Mountianview's sewage would flow directly from its laterals, into the shared mains, and onto the CCWWTP.

In 2006, Mountainview abandoned its prior means of sewage disposal as part of an overall reconfiguration of the Village's waste water disposal system. With governmental funding, Mountainview's septic tanks were decommissioned and new sewer laterals were installed to connect directly to the Village's sewer system. Mountainview's sewage now flows from its apartments, through its laterals, to the Village's sewer system. Once in the municipal system it flows, by gravity feed, north to a pump station and then is pumped to the municipal waste water treatment plant. The Colonel's Chair Subdivision underwent a similar change, whereby its sewage still flows from its southerly location north, past Mountainview, to the new pump station. The pump station is located in approximately the same area as the prior CCWWTP was.

As part of the Village's overall sewer reconfiguration, and to reduce the infiltration and inflow of storm water into the municipal sewer system, the sewer pipes contained within the Colonel's Chair Subdivision need to be replaced. The replacement will cost the Village $1.4 million, and by resolution dated May 12, 2008, the Village apportioned such cost to the properties "benefitted" by the new sewer lines. To distinguish those properties it claims are benefitted by the new sewers the Village's resolution created a map depicting the Colonel's Chair

Sewer Service Area, and included Mountainview in the district.

Mountainview proved, however, that it will not benefit from the new sewers because its laterals were replaced in 2006, it is connected directly to the municipal sewer system that is not part of the proposed work, and the sewage it generates will not flow through the new sewers. The Colonel's Chair Sewer Service Area map depicts the most northerly portion of new sewers as crossing an existing sewer main line. It then crosses Mountainview's property at its far south easterly corner. Finally, connecting into another sewer main line located immediately adjacent to, and east of, Mountainview's property. The crossing of Mountainview's property, however, is proven false because the Village has no right to install a sewer in that location. Mountainview affirmatively denied that the Village has such right and submitted the Village's requests (last one being dated April 14, 2008) for an easement to install a new sewer line across Mountainview's south easterly corner. It appears that Mountainview has not granted the Village's requests. Moreover, even if the new sewer did cross Mountainview's property, Mountainview will not benefit from the crossing because their laterals were newly installed (as admitted by the Village) in 2006 and tied into the Village's sewer system that will not be undergoing any change, or worked on in any way, relative to this sewer improvement district.

The proposed new sewers, except as set forth above, are all located south of Mountianview and flow north. The sewage from Mountianview also flows north. As such, the sewage generated by Mountainview will not, in any circumstance, pass into the proposed new sewers. Other than Mountainview's being immediately adjacent to the new sewers, it has no connection with them. Accordingly, Mountainview derives no immediate benefit from the proposed new sewers, because they will not be handling its sewage. Nor will it possibly derive

any future benefit from the proposed new sewers because it is already connected to the municipal sewer system.

Although not set forth in the Village of Hunter Record of Proceedings, respondents now argue that Mountainview would derive a benefit from the new sewers because it would decrease the volume of water the pump station receives during wet wether events. This, in turn, would prevent the pump station from becoming overburdened during those times and would thus prevent one of its manholes from overflowing. Respondent alleges that the pump station's overflowing manhole is less than 100 feet from Mountainview's property, which along with "neighboring properties and the Schoharie Creek are at risk of environmental degradation". Conspicuously absent from respondent's allegations are any claims that the overflow actually affects Mountainview's property. They merely allege a potential "risk". Moreover, if in fact the benefit that Mountainview derived from preventing this "risk" were concrete, the "neighboring properties" also at "risk" would have been included in the Colonel's Chair Sewer Service Area. However, they were not. The speculative "risk" fails to substantiate any benefit Mountianview actually derives from the proposed new sewers, nor rebuts Mountainview's proof that it derives no benefit.

Mountianview affirmatively proved that it will not benefit from the proposed new sewers, either now or in the future. Because the new sewers are not going to serve Mountainview, which is already being served by the existing municipal sewer system, the Village's inclusion of Mountainview in the sewer improvement district was irrational, arbitrary and capricious. (Kane v. City of New York, 51 Misc.2d 587 [1966][cited, discussed and approved by the Court of Appeals in Nolan v. Bureau of Assessors of New York City Finance Administration, 31 NY2d 90

[1972]) (compare Matter of Brewster-Mill Park Realty, Inc. v. Town Bd. Of Town of North Elba, 17 AD2d 467 [3d Dept. 1962][holding that a property was benefitted by the installation of a new municipal sewer system, even though the property was serviced by a private sewer system and not connecting to it, because the property could connect to the municipal system in the future. Here, as in Kane, Mountianview is being served by a Municipal sewer system and will therefore derive no future benefit from this sewer improvement.])

Accordingly, Mountainview's petition is granted to the extent that it is excluded from the Colonel's Chair Sewer Service Area. The Court need not, and does not, reach the assessment issue.

All papers, including this Decision and Order, are being returned to the attorney for the petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 11, 2008
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated May 27, 2008; Verified Petition, verified May 22, 2008, with attached Exhibits A-C; Affirmation of Jena Rotheim, dated May 27, 2008, with attached Exhibits A-E; Affidavit of Lyle Wienick, dated May 23, 2008, with attached exhibit A-C; Mountainview Associates, L.P.'s Memorandum of Law in Support of Its Article 78 Proceeding of Jena Rotheim, dated May 27, 2008.
2. Verified Answer, dated July 3, 2008; Affidavit of Fredrick M. Grober, dated July 3, 2008, with attached exhibit A-E; Affidavit of James J. Burns, dated July 2, 2008; Affidavit of Donna Robin Endy, dated July 1, 2008, with attached Exhibit A; Village of Hunter record of Proceedings, certified by William Maley on July 1, 2008; Memorandum of Law on Behalf of Respondents in Opposition to Petitioner's Article 78 Proceeding of James J. Burns, dated July 3, 2008.
3. Affidavit of Lyle Wienick, dated July 10, 2008, with attached exhibit A-D; Reply Memorandum of Law in Support of Petition of Jena Rotheim, dated July 11, 2008, with attached exhibit A-B.

SUPREME COURT - COUNTY OF GREENE

MOTION DISPOSITION & EX PARTE ORDER REPORT

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INDEX # 08-0841 RJI # 19-08-3655 IAS JUDGE: JOSEPH C. TERESI

FILED: 05-30-2008 BY PLAINTIFF RETURN DATE: ~~06-25-2008~~ MDS TO 7/14/08 ACTION: OTHR

NATURE OF MOTION: S- PET. FOR ART. 78

MOUNTAINVIEW ASSOCIATES, LP

- vs -

VILLAGE OF HUNTER, WILLIAM MALEY, AS MAYOR AND TRUSTEE OF THE VILLAGE OF HUNTER, MICHAEL TANCREDI, AS TRUSTEE OF THE

DECISION/DISP DATE: 8/11/08 EX PARTE ORDER SIGNED: _____

TYPE: ( ) DECISION (X) DECISION/ORDER

MOTION: (X) GRANTED ( ) DENIED ( ) WITHDRAWN

REMARKS: _____

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_____

CASE CLOSED? (X) YES ( ) NO PREPARED BY: John Jarcello

** PLEASE COMPLETE AND RETURN THIS FORM TO THE CHIEF CLERK'S OFFICE UPON DISPOSITION OF THE MOTION OR SIGNING OF THE EXPARTE ORDER.
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