To: New Jersey Law Revision Commission
From: Rachael Segal, Legislative Law Clerk
Re: Meaning of "user" in N.J.S. 40:14B–2(5) - *Township of Hardyston v Block 63 S 3490 Route 94 Assessed to Beaver Run Shopping*
Date: November 5, 2018

M E M O R A N D U M

Executive Summary

In *Township of Hardyston v Block 63 S 3490 Route 94 Assessed to Beaver Run Shopping*,[1] the Appellate Division considered whether a sewer lien was enforceable under the Tax Sale Law, N.J.S. 54:5–1 to –137. The Court considered whether a contractually bargained for sewer allocation charge qualified as a "sewer service charge" under N.J.S. 40:14B–3(19) and N.J.S. 40:14B–22, and whether it was a lien against a property for which a party held a tax certificate under N.J.S. 40:14B–42. The Court also considered the issue of who qualifies as a non-user under the statute. The Appellate Panel vacated and remanded to the Chancery Division, General Equity Part.[2]

Background

The case involved a tax sale foreclosure proceeding regarding an unimproved 67-acres.[3] The Hardyston Township Municipal Utilities Authority (HTMUA) had previously contracted with High Ridge Properties, LLC, to reserve sewer capacity in excess of 25,000 gallons that neighboring Sussex Borough auctioned off, pursuant to auction term requirement that a member municipality would "be the actual purchaser of the allocation for the exclusive benefit of the [b]idder."[4] High Ridge thus entered into a January 2002 Agreement with the HTMUA, "for and on behalf of Hardyston Township," to serve as the host for High Ridge acquiring Sussex Borough's 25,000 gallons of excess capacity.[5]

High Ridge and the developer, Beaver Run Shopping Center, LLC, filed separate suits unsuccessfully "challenging the quarterly 'transmission fees' Sussex charged . . . to maintain the allocation."[6] The Law Division rejected the argument, "and in June 2012 entered a judgment in favor of the HTMUA against High Ridge for $350,092 in past due sewer charges."[7] Beaver Run was also not paying taxes, and plaintiff "Township of Hardyston struck off tax sale certificate No.

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[1] *Township of Hardyston v Block 63 S 3490 Route 94 Assessed to Beaver Run Shopping*, 2017 WL 3297463 (2017).
[2] *Id*. at *6. ("[F]or further proceedings designed to ascertain the facts and apply the statutory law in accordance with the *Airwick* principles"); and see *id*. at *7 (The Court noted that, "in the event the General Equity judge determines the unpaid sewer charges are not properly a lien against the property, the judge must consider whether the reserved sewer allocation must be revoked in this proceeding.").
[3] *Id*. at *1.
[4] *Id*. at *1-*4
[5] *Id*. at *4 (The record was not developed on this point, but "it appears the costs for the allocation the HTMUA billed to High Ridge, were costs the HTMUA was billed by Sussex Borough, which it, in turn, was billed by the Sussex County Municipal Utilities Authority.")
[6] *Id*. at *1 (They also argued that the charges "amounted to illegal user fees charged against unimproved property").
[7] *Id*.

11–19 to defendant Sass Muni VI, LLC, for $173,720.62 at zero percent interest. When Sass Muni instituted its action to foreclose its certificate in January 2014, it represented that all municipal taxes and other municipal liens against the property had been, or would be, paid current. Sass Muni joined the HTMUA as a defendant in order to foreclose the HTMUA's 2012 judgment lien."[8]

Hardyston denied that all required monies "had been paid through the filing date of the foreclosure complaint," and in its answer averred it had municipal liens against the property for unpaid taxes and sewer charges."[9] Sass Muni argued that "the HTMUA's sewer lien was not enforceable under the Tax Sale Law, N.J.S.A. 54:5–1 to –137."[10] The Law Division granted Sass Muni's motion for summary judgment as to liability, sending the matter to the Office of Foreclosure as uncontested, subject Sass Muni providing proof "to the Hardyston Township Tax Collector that all municipal utility authority liens and obligations as well as all municipal tax liens and obligations have been satisfied."[11]

When Sass Muni did not enter judgment on its tax sale certificate,[12] the Township filed its own complaint to foreclose tax sale Certificate No. 2013–001A it acquired in 2013 in the principal sum of $480,166.24 for unpaid sewer allocation charges.[13] Sass Muni contested this.[14]

Sass Muni moved for reconsideration in the summary judgment in Hardyston's foreclosure and in the "summary judgment entered in its favor in its own foreclosure more than a year before, which required it to satisfy Hardyston's sewer allocation liens before entering final judgment."[15] It argued that "the validity of the Hardyston [t]ax [l]ien was never challenged" in the Sass Muni foreclosure, and that it "has never been afforded its rightful opportunity to litigate same."[16] Hardyston countered that the validity of its tax lien was litigated in the Sass Muni foreclosure.[17]

The judge ruled that the Hardyston lien/assessment is invalid, and ruled that the Court had "determined that authorized service charges are to be imposed only on users."[18] Hardyston appealed.[19]

The Court determined that the case "may present a novel issue, albeit not one well-framed by the proceedings to date," centering on "Sass Muni's contention that High Ridge's contractually bargained for sewer allocation charge does not qualify as a "sewer service charge" within the

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[8] *Hardyston*, 2017 WL at *1.
[9] *Id*. at *1.
[10] *Id*. at *2.
[11] *Id*.
[12] *Id*. ("[P]resumably because of the express requirement that it satisfy all outstanding sewer charges").
[13] *Id*.
[14] *Id*. (Sass Muni filed an answer and affirmative defenses, alleging as a junior lien holder its statutory right to redeem Hardyston's tax liens, and tried to dismiss the suit with prejudice).
[15] *Id*. at *3.
[16] *Id*.
[17] *Id*.
[18] *Id*. ("The rationale is that N.J.S.A. 40:14B–2(5) reiterated that all such services were provided "at the expense of the users of such services or of counties or municipalities or other persons contracting for or with respect to the same." Although it is abundantly apparent that the unimproved property will benefit from this improvement, the actual improvement does not exist.")
[19] *Id*.

meaning of the Municipal and County Utilities Authorities Law (MCUAL), N.J.S.A. 40:14B–3(19) and N.J.S.A. 40:14B–22, and thus cannot become a lien against the property of the delinquent obligor under N.J.S.A. 40:14B–42."[20]

Although the Court did not question the general proposition Sass Muni asserted, that the MCUAL "'does not authorize a special assessment or any immediate charge against a non-user,"'[21] the court was not/less convinced High Ridge could be considered a "non-user" in light of the "pass-through" arrangement it had.[22]

Regarding the sewerage authority costs, the Court found that Airwick controls.[23] The "the Airwick principles[24] are generally understood to require that the entire cost of constructing and operating a sewerage authority be fairly apportioned among those using the system and those non-users whose properties are benefitted by the availability of sewerage capacity necessary to permit development."[25] The courts have found that "those connected to the system pay for its operation and maintenance, as well as their share of the debt costs, and non-users, because not immediately benefitted by the system, make their fair share contribution to the authority's debt costs when they hook into the system in the form of a connection fee."[26] However, no published authority of which the Court was aware addressed "a situation in which a landowner has specifically contracted with a municipal utilities authority for an additional allocation of sewer capacity the authority does not have, and thus must acquire from a different source, as High Ridge did here."[27]

The Court found that, from the limited record it had, High Ridge "may not fairly be considered a "non-user" applying the principles of the Airwick line of cases."[28] The Court found that the additional allocation purchased from the Sussex County Municipal Utilities Authority only provided benefit to High Ridge, and since High Ridge was the sole beneficiary, "application of the Airwick principles would appear to require High Ridge to pay for that benefit to avoid unfairly burdening the current users of the HTMUA system."[29]

The limited record before the Court did not allow it to "resolve the question of whether High Ridge's contractually bargained for sewer allocation charge qualifies as a "sewer service charge" within the meaning of the MCUAL, N.J.S.A. 40:14B–3(19) and N.J.S.A. 40:14B–22, and is thus a lien against the property for which Sass Muni holds a tax certificate under N.J.S.A.

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[20] *Hardyston*, 2017 WL at *3.
[21] *Id*. (citing *Passaic Cty., supra*, 164 *N.J.* at 293 (quoting *Airwick Indus. v. Carlstadt Sewerage Auth.*, 57 *N.J.* 107, 121 (1970)).
[22] *Id*.
[23] *Id*. at *5.
[24] *Id*. (The first principle "is the understanding that the purpose of an annual sewer charge is to raise a sum sufficient to pay the sewerage authority's cost to (1) maintain and operate the system and (2) meet principal and interest on its bonds and any reserves for the funding of its debt." The second principle is "the recognition that every property within a sewerage authority's service area benefits").
[25] *Id*. (Based on the pillars, the Court concluded that "the [L]egislature intended that the installation and construction costs, *i.e.*, debt service charges, should in the first instance be financed by the actual users but should ultimately be borne by all the properties benefited, including the unimproved lands").
[26] *Id*.
[27] *Id*. at *6.
[28] *Id*.
[29] *Id*.

40:14B–42."[30]

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding this issue in order to determine whether defining "user" in N.J.S. 40:14B–2(5) or modifying it in some other limited way, would aid in constitutionally interpreting the provision and potentially obviate the need for additional litigation regarding the issue addressed in *Township of Hardyston v Block 63 S 3490 Route 94 Assessed to Beaver Run Shopping.*

[30] *Hardyston*, 2017 WL at *6 (finding that the court was without adequate information of the negotiations and agreements between the parties, the 2004 litigation settlement and the reasons behind the unsuccessful challenges to the transmission charges).