Special Service Areas in Illinois

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Part Three of Three

This month's issue of the *Illinois Municipal Review* contains the final in a three part series on Special Service Areas in Illinois, prepared by Dean M. Frieders of Mickey, Wilson, Weiler, Renzi & Andersson, P.C; previous issues have discussed the creation and formation of SSAs and have explored how SSAs have changed in response to litigation and the pressures of private development.

V. How Litigation has Shaped SSAs.

While SSAs are creatures of statute, it is the case law developed from years of litigation that has fleshed out the procedural bones provided by the legislature. One of the most litigated issues involves defining exactly what properties can be subject to an SSA. Some property owners desire to be incorporated into an SSA to share costs that they would otherwise bear alone with their surrounding landowners. Other property owners seek to avoid the extra taxation and the potentially troublesome title encumbrances that SSAs create. Municipalities seek to define the "contiguous area…in which a special service is provided" to accurately tax only those properties actually receiving benefit. Attempts to create accurate SSAs, when combined with the often irregular property lines created in cities and the difficult task of making the somewhat subjective determination of which properties receive benefits, can result in SSAs that look more like Rorschach tests and less like contiguous benefit areas.

A. Burden Properties that Benefit.

A city decides to improve the conditions in one area of town by adding parking, sidewalks, seating areas, lighting, and other accoutrements designed to enable shoppers to more easily access stores in the area. The 'area' is approximately a 41 square block portion of the city. The majority of properties in the area are zoned commercial and are occupied by stores and markets that are to benefit from the new attractions. However, some of the properties are either residential or industrial and, while they may receive some aesthetic benefit from the improvements, they are not expected to receive any additional business.

The proposal to install the improvements cites a number of benefits to be provided to the retail and other commercial establishments in the area, but comes at a price tag exceeding one million dollars (in 1977 dollars, none the less). The cost is too great for the city to bear and expect to recover solely through increased revenues from businesses in the city, but the project is one that no individual shop can undertake. The city determines that the contemplated improvements are a perfect opportunity to create an SSA. The SSA is a contiguous area, defined by streets and a creek that provide its boundaries. Within the SSA, the residential and industrial properties are exempted from any additional taxation, but the majority of commercial properties are subject to the tax. The only commercial properties exempt from the tax are a few on the edges of the SSA that, if included, would result in a terribly irregular, non-contiguous shape in violation of the statute. These properties will undoubtedly benefit from the improvements, but will not be burdened by additional costs; in effect, these properties receive a windfall. As one retail establishment in the city brings a challenge to the SSA, the judicial branch of the government is tasked with determining whether the local legislature has acted appropriately in implementing a program designed by the state legislature. Ultimately, the actions of the city are upheld.

The case described above is none other than *Hiken Furniture Company v. City of Belleville*, 53 Ill.App.3d 306 (5th Dist. 1977). Hiken Furniture Company challenged the SSA on the grounds that it was not evenly spread on all of the properties within the area, as it claimed was required by the Illinois Constitution. The case illustrates some of the most important aspects of the case law on SSAs. As a primary matter, the court notes that SSAs are, and were intended to be, different from other forms of taxation.

> The grant of power [to create SSAs] was clearly a departure from the requirement of uniformity in ad valorem property taxation, and it was intended that units of general local government, that is counties and municipalities, should have the power to furnish special services and improvements to limited areas within their geographic boundaries and to impose taxes only on those areas that benefit from the service furnished or improvement received. *Id.* at 309 (Describing the constitutional roots of SSAs).

The court goes on to state the goal at the root of every SSA: to have the burden of taxation be "borne by the property benefited from the special service." *Id.* at 310.[22] Despite the difficulty in determining which properties so benefit, the statutes provide that local government must, "of necessity" make the initial determination. *Id.*[23] The determination and definition of land affected need not be based solely on geography, but rather can include any reasonable factors that the municipality deems relevant. *Grais v. City of Chicago*, 151 Ill.2d 197 (1992).

Once the initial determination is made, the court's job is to review the reasonableness of the determination.[24] While the court noted that all areas of the city could receive some benefit from increased sales tax revenues generated by the improvements, and that nearby areas of the city would benefit from aesthetic improvements, "it seems to us a reasonable determination by the city and a reasonable

basis for imposing the tax here in question that the creation of the "semi-mall" will increase the public use of retail stores and other business in the commercial area of the city and that the property immediately and directly benefited will be the commercial property." *Hiken Furniture Company,* 53 Ill.App.3d at 311.[25]

In short, so long as: 1) the properties subject to the SSA are proximate to the area receiving the special benefit, 2) there is a rational basis for the imposition of the SSA, and 3) the SSA complies with the statutory requirements on contiguity[26], the geographic definition of the SSA will be upheld.[27]

B. Permissible SSA Purposes.

There are very few, if any, things that SSAs cannot be used for. So long as an SSA meets the statutory requirements (i.e. special public purpose, benefit provided to encumbered properties), it likely will be upheld. In *Hiken Furniture Company*, the court even discussed the possibility that, if the purpose were broad enough, an SSA could be levied against an entire city, with only sparce, specific areas excepted. 53 Ill.App.3d at 310.[28]

Since most municipalities rely on statutory authorization to engage in any activity, it would make sense that they turn to the authorizing statutes to fund their projects. For example, if a municipality is to engage in the construction of a sanitary sewerage system within a portion of its boundaries, as authorized by statute, it would seem to make sense to use the method of funding also authorized by statute for that purpose.

However, the method of funding provided by the sanitary sewerage system statute is not the only means of funding the project. As *Andrews v. County of Madison*, 54 Ill.App.3d 343 (5th Dist. 1977) shows, so long as a municipality is: 1) providing a service that *can* be funded by an SSA under the SSA statute, and 2) providing a service that does not have only one method of funding permitted by statute, the municipality can fund the service with an SSA even despite the existence of an alternate statutory funding scheme.[29]

For all of the purposes that SSAs can be used for, a municipality cannot be forced into providing an SSA, even if a very important and suitable purpose exists. The homeowners' association in *Briarcliffe Lakeside Townhouse Owners Association v. City of Wheaton*, 170 Ill.App.3d 244 (2nd Dist. 1988) argued that the city was or should be responsible for the maintenance of a water retention area and lake that were a component of the townhouse development, but over which the city had a blanket easement for purposes of storing storm water.

The association argued that the city had a duty, by virtue of its easement, to maintain the detention area, and by extension that the city had a duty to impose an SSA for that purpose. The city rejected the proposal, claiming that the declaration of covenants for the townhouses required the homeowners to care for the area. The court held that the Special Services Act cannot be construed to require a municipality to create an SSA, and further held that simply accepting an easement over property does not require maintaining the property. So even though a given purpose could properly be the subject of an SSA, there are no purposes that legally *require* the imposition of an SSA.[30]

C. Notice of SSA Formation.

General principles of due process apply to the formation of an SSA. Since it is a tax assessed against property, it is a deprivation of property which can only come after notice and an opportunity to be heard. Municipalities seeking to impose an SSA can rely on the large amount of case law provided in other contexts.

Courts tend to be somewhat forgiving of minor procedural failures in providing notice of SSAs, as long as the municipality makes a reasonable effort to notify all affected landowners. For example, in *Andrews*, the county assessing the SSA had published notice in the newspapers, numerous stories about the potential SSA had been written, and the county had attempted to mail notices to landowners of record. However, many of the notices were sent to banks and other financial institutions that were mortgagors of property. The initial search to determine who should be notified resulted in only 3957 notices being mailed. A later, more comprehensive search found some 6920 owners of record. Despite the obvious failure to strictly comply with the statute, the court approved of the notice process.

> Due process is not a technical conception with a fixed content unrelated to time, place and circumstances; rather it is flexible and calls for such procedural protections as a particular situation demands.… We are dealing here basically with a taxation proceeding which is *in rem* in nature. It has long been recognized that the process of taxation does not require the same kind of notice as in a judicial proceeding, where process is served to acquire jurisdiction of the parties and subject matter… Publication alone might be sufficient to satisfy due process when dealing with such a process. 54 Ill.App.3d at 356-67.

The court found that the county "substantially complied" with the statutory requirements because of the extent of the published notice and the effort to mail notice. Specifically with regard to the notices mailed to bank-mortgagors rather than mortgagees, the court found that the notices "in all likelihood did reach the owners' hands." *Id.* The fact that such practices were approved by the court should not hearten municipalities to engage in less than perfect records searches and notice mailings, but does show the flexibility of the courts in upholding the imposition of an SSA when the landowners do receive actual notice, even if by a process other than that contemplated by statute.

In whatever form the notice is ultimately received, it must accomplish the desired task of informing the landowner of the terms of the SSA that is proposed. The municipality need not show that a special benefit is being conferred, but it must provide all of the essential elements of the SSA including an adequate description of the bonds to be issued, the maximum rate of levy, etc. Even if notice is actually provided, if it fails to include these necessary elements, the municipality can be enjoined from taking any action to record the SSA. *Schwarzbach v. City of Highland Park*, 82 Ill.App.3d 807 (2nd Dist. 1980).

If the notice is successful as to some parcels but fails as to other parcels, and the parcels to which notice failed can be excluded from the SSA without causing it to be for some reason inadequate, the judicial preference has been to

exclude the parcels that haven't received notice and preserve as much of the SSA as is possible. *E.g. Village of Lake Barrington v. Hogan*, 272 Ill.App.3d 225 (2nd Dist. 1995).

The critical distinction made by courts, while it has never been announced as a concrete test, seems to be whether the notice is sufficient to reasonably inform the class of persons who are owed notice under the statute. Even if this group doesn't include all affected persons, and even if the notice is deficient in some ways, the notice will be upheld if this goal is accomplished. *E.g. Ciacco*, 85 Ill.App.3d 507 (Upholding SSA notice that incorrectly identified boundaries of SSA, since landowners of record received actual notice). To accomplish the goal, municipalities should attempt to use as many different forms of notice as possible, and to supplement statutory requirements with not required, but helpful additions. *See Sweis*, 142 Ill.App.3d 643 (Discussing value of providing map of affected area at hearing on SSA to supplement written descriptions of affected properties).

VI. Conclusion

That advice is about as sound as any possible advice on SSAs. The 'belt and suspenders' approach to designing, defining and implementing SSAs is commendable. For example, instead of merely complying with the statutory requirements, a municipality could use a landowner's waiver of objection to SSAs to simplify the implementation process. By communicating with landowners and securing their understanding of and appreciation for the SSA process, municipalities can avoid implementing misunderstood and unwanted additional property taxes, and can instead provide services paid for by those experiencing, and understanding the benefits conferred. Ultimately, that is the goal of all SSAs.

In the case of municipalities or property owners who are new to the concept of SSAs or who are unfamiliar with the new and varying ways in which they can be utilized, because of the great deal of potential complexity involved and the relatively unforgiving statutory timelines and requirements which must be satisfied, it is advisable to associate with counsel familiar with the processes and procedures associated with the areas. ■

22 While there should be some relationship between benefits and burden conferred, the "taxes imposed upon property within a [SSA] need not directly correspond to the monetary value of the benefits received." Coryn v. City of Moline, 71 Ill.2d 194, 202 (1978). Moreover, even if the SSA will benefit some encumbered properties more than others and the assessment fails to reflect this varying level of benefit, the SSA will be upheld. An SSA is not "impermissibly discriminatory merely because some properties would be immediately benefited more than others." Ciacco v. City of Elgin, 85 Ill.App.3d 507, 516 (2nd Dist. 1980).

23 "If a project reasonably could have been expected by [the municipality] to make the area taxed, in particular, a better place in which to reside or to conduct business, it qualifies as a 'special service' even though it may also redound to the benefit of the remainder of the [municipality]." Coryn, 71 Ill.2d at 201.

24 This reasonableness determination is made under the relatively lenient rational basis test. The court considers whether there is a rational basis for taxing a given area for a given special service provided. Coryn, 71 Ill.2d at 202.

25 A party challenging the reasonableness of a municipal determination as to the benefit conferred by an SSA faces a difficult task. Given the difficulty in evaluating both the "definite" and "indefinite" benefits conferred by an SSA, courts are likely to resolve disputes in opinions rendered by municipal and private experts in favor of the municipality. E.g. Ciacco, 85 Ill.App.3d 507.

26 The contiguity requirement is one that deserves a article all of its own. Contiguity has been defined in a wide array of cases involving annexation and other municipal actions. In the SSA context, areas have been held to be contiguous even if the property excludes and includes part of the same building. For example, in Grais v. City of Chicago, 151 Ill.2d 197 (1992), the city's SSA excluded the bottom 49 floors of a building but included the top 7 stories. This definition was upheld.

27 In Sweiss v. City of Chicago, 142 Ill.App.3d 643 (1st Dist. 1986), the court held that SSA boundaries would be upheld even if a landowner could prove they were arbitrary and capricious, so long as there existed a rational basis. Exactly how an SSA could both have a rational basis and have arbitrary and capricious boundaries was left unexplained.

28 The court noted that this was not the case before it, but that it was a possibility under the statutes. While the court regarded the possibility as something of an aberration, it merits note that this aberrant possibility is not at all unlike the normal system of property taxation in which a group of governmental services are grouped together and the cost for all of them is assessed against all properties receiving the services, excepting only limited categories of properties such as schools and other governmental buildings. This same principle can be applied to SSAs if, instead of providing a wide range of general services, a more limited scope of individual services were widely applied.

29 In other words, the court examined whether either the statute authorizing a municipality to provide sanitary sewers or the statute authorizing the creation of an SSA barred the municipality from using an SSA to provide sanitary sewers. While the sanitary sewer statute provided one specific method of funding, it did not prohibit other methods. With the judicial confirmation of the legislative determination that providing sewers is a "special service" the use of the SSA was affirmed.

30 If the purpose is public and benefits property owners, the limits of SSAs are almost none. They can be used for incredibly specific, local purposes and can also be used as an incredibly powerful mechanism of funding wide-ranging public projects. E.g. Grais, 151 Ill.2d 197 (Upholding city's determination that funding new mass transit system, to be funded by SSA imposed on a large area of central Chicago, was permissible public purpose for SSA).

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