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WHAT CONSTITUTES "BENEFITS" FOR URBAN DRAINAGE PROJECTS

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A tunnel which, though serving no useful purpose as an isolated transportation unit, is intended to furnish an avenue or highway to be leased to public transportation agencies, is a public improvement for a public use, for which taxes may be imposed.[1]

INTRODUCTION

Colorado has a history of finding legal justification for public improvements as the holding above witnesses. *Milheim v. Moffat Tunnel Improvement District,* a famous Colorado case, involved an even more famous engineering feat, that of boring a railroad tunnel, with provisions for a 108-inch water pipe, through the Rocky Mountains. That case has set a precedent upon which proponents of urban drainage projects may also rely. In order to use the *Milheim* precedent to advocate such a cause, however, it is important to understand the distinction between assessing property for *general benefits* which accrue to the community at large as contrasted with assessing property for the *special benefits* which must accrue directly and solely to the owner of the land in question and not to others. *Milheim* approved of the former method of assessing, although most of its language related to the special benefits the property owners would receive.

Most public improvements, including urban drainage projects, are financed with revenues obtained from taxes paid by the public.[2] Drainage improvements in rural areas have long been financed by establishing drainage districts[3] which assess rural lands for the cost of building and maintaining drainage facilities, while urban areas have been given authority to use local improvement and special improvement districts to build drainage works.[4]

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[1] *See* Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710 (1923), *aff'g* 72 Colo. 268, 211 P. 649 (1922).

[2] Private funds sometimes are received. User fees are becoming more popular as a means of financing public projects, *e.g.*, airport facilities, sewage treatment works, turnpikes, water works, because such fees relate to services received as opposed to the value of one's property.

[3] COLO. REV. STAT. ANN. § 47-1-1 (1963).

[4] COLO. REV. STAT. ANN. § 89-2-1 (1963): "It shall be lawful . . . to construct any of the local improvements mentioned in this article and to assess the cost thereof . . . upon the property especially benefited by such improvements." Further, "Such improvements may also consist of the construction of sewers . . . ." *id.* § 89-2-2(1)(a) (1963).

In local improvement districts, the property owners vote on the issue of whether their property should be taxed to pay for the improvements. Whether their property will be *generally benefited* to the extent of the additional taxes is the determinative issue. In special improvement districts, the property owners are assessed in relation to the *special benefits* bestowed upon their property by the construction of the improvement. The assessing government eventually has the burden of showing these benefits.

In the application of user fees toward the construction of urban drainage projects, the users are entitled to question whether the fee paid is commensurate with the cost of the facility and the *benefits* received from the use of such facility. Any responsible governmental builder will clearly delineate the *benefits* to be received by his constituents from proposed drainage projects *before* adding to the taxation burden of those same constituents the amount necessary to derive revenues to pay for the drainage projects. Therefore, whether the urban drainage project is of *general benefit* or *special benefit*, someone in government—whether administrative, legislative, or both—has to know what the judicial branch ultimately may hold to be a legal *benefit* for which taxpayers may be taxed.[5] One objective of this article is to provide some background on what courts may decide on urban drainage projects as to *special* versus *general* benefits.

Drainage projects have had minimal success in competition with other public improvements (such as housing, transportation, etc.) because the *benefits* of drainage projects have been narrowly construed in those cases involving *special improvement districts* as a taxing mechanism, in which *special benefits* have to be proved. The main undertaking of this article is to demonstrate that the narrow *special benefit* viewpoint is to be distinguished from the *general benefit* definition so that public builders of urban drainage projects may have the justification needed to merit their use of taxpayers' dollars. Additionally, the legal meaning of *benefits* as interpreted by the courts in different factual settings will be examined.

I. SPECIAL BENEFITS

> The commonplace problem of surface water drainage has been around for so long that some municipal officials have ignored the

[5] Legislation is needed in most jurisdictions to define "benefit"; see proposal presented in CONCLUSION *infra*.

> flood and health hazards which outmoded drainage systems pose to our growing cities.[6]

When the above statement was made in 1968 by this author, it was a reflection of the practical frustration inherent in trying to use the special improvement district as a funding mechanism for drainage improvements.[7] The legal hurdles that have developed over the years in *special assessment* cases have been enough to discourage the most energetic public works official from ever attempting to solve drainage problems. A brief review of this method of financing *special* drainage improvements will show that the narrow legal interpretation of *benefits* relates to the *method* of financing, not to the *need* for urban drainage improvements.

Most statutory enactments which relate to the authority of local governments to construct drainage improvements follow this general form:

> The City and County shall have the power to contract for and make local improvements, to assess the cost thereof wholly or in part upon the property especially benefited . . . .[8]
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> . . . .
>
> . . . [and] the cost shall be assessed in proportion to the benefits received.[9]

This method of financing an improvement follows the historical language contained in the statutory authorization[10] allowing farmers to join together in a district to drain their lands by tiling, building drainage channels, or deepening existing natural waterways. Property owners pay the cost of such projects by assessing a mill levy against properties in the district commensurate to *benefits* received.

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[6] Editorial preface to Shoemaker, *An Engineering-Legal Solution to Urban Drainage Problems*, 45 DENVER L.J. 381 (1968).

[7] *Id.* Since that article was published, and to a great extent because of the article, the Colorado Legislature in 1969 provided for the establishment in the Denver metropolitan area (Adams, Arapahoe, Boulder, Denver, Douglas, and Jefferson Counties) of the Urban Drainage and Flood Control District with a mill levy authority of one-tenth mill for planning purposes and authority to seek 2 mills for construction of projects. COLO. REV. STAT. ANN. § 89-21-22(4) (Supp. 1969), *as amended*, § 89-21-22(4) (Supp. 1971). In 1973, the Colorado Legislature added an additional authorization to the Board of four-tenths mill for construction of drainage and flood control improvements. Ch. 286, § 1, [1973] Colo. Sess. Laws 996.

[8] CITY AND COUNTY OF DENVER, COLO., CHARTER § A2.4.

[9] *Id.* at A2.6.

[10] COLO. REV. STAT. ANN. § 47-4-1(1) (1963): "The tracts of land which will receive most and about equal benefits shall be marked one hundred, and such as are adjudged to receive less benefits shall be marked with a less number denoting its per cent of benefit."

It is noteworthy that nowhere in the entire 18 sections of the Colorado statute[11] is the word *benefits* defined. This legislative failure to define *benefits* has delegated the duty to the courts. The cases do not directly define *benefits,* but rather tell what *benefits* are not. This narrow negative interpretation of *benefit* legislation discourages municipal officials interested in building drainage improvements. What follows is the putting into perspective of what appears to be the narrow meaning of *benefits* in *special assessment* cases. In each case a particular property taxpayer, *not* the general public, brought the appeal based on the owner's contention that *his* property was not *specially* benefited, essentially meaning that it received no more benefit than anyone else's property. All of the following factual situations are matched against the special improvement financing theory that the basis of the right to levy an assessment for an improvement is the particular benefit received by the property charged.[12]

A landmark case is *Ferguson v. Borough of Stamford,*[13] where the court stated that improvements may not be assessed upon those benefited only as members of the community at large, nor may they be assessed to an amount greater than the amount of benefits conferred. Like all other taxation, improvements should be apportioned, as far as possible, equitably among all who are similarly interested. Stated another way, a general benefit alone will not support a special assessment to help pay the cost of a drainage project. There must be a special benefit to the specific property to be charged which increases its value, relieves it from a burden, or adapts it to a superior or more profitable use.[14]

Another case defining the elements of *special benefit* with greater certainty is *Peterson v. Thurston,*[15] where it was declared proper to consider whether a drain would make land more valuable for tillage, or more desirable as a residence, or more valuable in the general market, the final test being the influence of the proposed improvement on the market value of the property.

In *Hoepner v. Yellow Medicine County,*[16] a county in Minnesota proposed to convert part of a natural waterway into a public drainage ditch and outlet. The plaintiff's land was separated

[11] COLO. REV. STAT. ANN. § 47-4-1 (1963).
[12] 25 AM. JUR. 2d *Drains and Drainage Districts* § 45 (1966).
[13] 60 Conn. 432, 22 A. 782 (1891).
[14] 25 AM. JUR. 2d *Drains and Drainage Districts* § 46 (1966).
[15] 161 Neb. 758, 74 N.W.2d 528 (1956).
[16] 241 Minn. 6, 62 N.W.2d 80 (1954).

from the natural waterway by about 1,000 feet, and the land had some sloughs, the largest of which drained through a private open ditch across a neighbor's land to the natural watercourse. The Minnesota Supreme Court stated:

> [The] question presented . . . is whether a landowner as a matter of law receives assessable drainage benefits in a drainage improvment proceeding . . . solely by reason of the fact that the surface water on his land is drained into the public ditch involved even though he had a right to use, in its natural condition, the outlet which is to be the public ditch and even though there is no showing that the public ditch offers a better outlet.[17]

The county contended that the deepening of the creek would facilitate tiling of plaintiff's land and give an advantage of subsurface drainage. Plaintiff contended that the open ditch presently used adequately drained the subsurface; and, in fact, that the open ditch had a greater capacity for drainage than any tile which could be installed. The county further contended that plaintiff's outlet to the natural water course was only based on the oral permission given by the neighbor and that the public improvement would make the outlet more accessible. The Minnesota Supreme Court found the plaintiff *not* to be *specially* benefited and based its finding on the language of the statute involved:[18] "[L]ands may be assessed for benefits when the construction of the drainage system 'Makes an outlet more accessible, or otherwise directly benefits such lands or properties.' "[19] The court held neither to be the case here.

In *Cirasella v. Village of South Orange,*[20] the question was raised whether or not a storm-sewer improvement provided a peculiar benefit to the plaintiff's property which was not contiguous to the storm-sewer improvement and was not contiguous to any pipe or pipes carrying surface drainage into the storm-sewer. The storm-sewer improvement had been built to carry the surface runoff from the lands of plaintiff and others. The New Jersey court, in affirming a lower court ruling that plaintiff's lands were not *benefited,* stated:

> Assessments as distinguished from other kinds of taxation, are those special and local impositions upon the property in the immediate vicinity of municipal improvements, which are necessary to pay for the improvement, and are laid with reference to the special benefit

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[17] *Id.* at 9, 62 N.W.2d at 83.

[18] MINN. STAT. § 106.151 (1971).

[19] Hoepner v. Yellow Medicine County, 241 Minn. 6, 10, 62 N.W.2d 80, 84 (1954).

[20] 57 N.J. Super. 522, 155 A.2d 134 (1959).

> which the property is supposed to have derived therefrom . . . . The foundation of the power to lay a special assessment or a special tax for a local improvement of any character, whether it be opening, improving or paving a street or sidewalk or constructing a sewer, or cleaning or sprinkling a street, is the benefit which the object of the assessment or tax confers on the owner of the abutting property, or the owners of property in the assessment of special taxation district, which is different from the general benefit which the owners enjoy in common with the other inhabitants or citizens of the municipal corporation. Accordingly, it is now well settled in most jurisdictions that adjacent property may be specially assessed to defray, in whole or in part, the cost of local improvements by which such property is especially benefited. That doctrine, as stated, is based for its final reason on enhancement of values. That is to say, the whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. Whether the property has been specially benefited by an improvement is generally regarded a question of fact, depending on the circumstances in each case, for the determination of the proper tribunal. The broad question is whether the general value of the property has been enhanced, not whether its present owner receives advantage.[21]

In *Frank v. Renville County*,[22] another Minnesota case, the factual dispute was set forth in some detail and illustrates in words the historical conflict in most *special assessment* drainage cases. The county constructed a drainage ditch across the plaintiff's land and determined that benefits accrued to the land.

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[21] *Id.* at 525, 155 A.2d at 137 *citing In re* Public Service Elec. & Gas Co., 18 N.J. Super. 357, 363, 87 A.2d 344, 346 (App. Div. 1952). For purposes of determining whether property will be benefited by creation of a parking district, "[b]enefit is usually considered as tending to reflect enhancement in the market value of property . . . . Local zoning ordinances are matters which help determine market values . . . ." Jeffery v. City of Salinas, 232 Cal. App. 2d 29, 37, 42 Cal. Rptr. 486, 493 (1965).

When the owner of a lot is taxed for municipal improvements, the *benefit* is not the benefit to the public at large *but to the owner of the lot.* The phrases *benefits* and *increased value* are interchangeable terms since, where tax is apportioned according to the increased value of a lot, they are the same thing as the value of the benefit which the owner receives from the improvement. Garret v. City of St. Louis, 25 Mo. 505, 511, 69 Am. Dec. 475, 478 (1857).

Benefit is the increment of value to land affected by improvement and represents the difference between market value of land before improvement and immediately after improvement. Assessments for improvements must be such special, pecuniary benefits as result to a particular landowner by reason of his ownership of land affected, as distinguished from general benefits to the public. Maywood Land Co. v. Rochelle Park T., 13 N.J. Misc. 841, 181 A. 696 (1935).

The terms "benefits" and "to be benefited," as used in an act providing for organization of flood control districts, mean that a landowner has received, or will receive, by reason of improvement, an increase in market value of his property. Weyerhaeuser Timber Co. v. Banker, 186 Wash. 332, 342, 58 P.2d 285, 289 (1936).

[22] 242 Minn. 172, 64 N.W.2d 750 (1954).

Damages to the plaintiff's land were also established and the plaintiff appealed both counts, that benefits were assessed too high, and damages too low. The plaintiff's position was that a 200-acre farm which produced an average annual income of $12,500 could not be benefited to the extent of $3,000 by any drainage system when only 3 or 4 acres of crop on his land was lost in 2 out of 5 years because of inadequate drainage. He further claimed his land was substantially and materially damaged by construction of a 40-foot ditch across his land.

The county contended the improvement would necessitate less maintenance than plaintiff's tile system; result in water moving more rapidly from the tract; and water would be cleared from several acres where it was covered most of the time. Plaintiff further contended that the creation of the banks (caused by increasing the depth of the ditch from 8 to 10 feet), the cost of a bridge crossing over the ditch, and resulting inconveniences to his farming operations were damages for which he should be compensated. The Minnesota Supreme Court reversed the lower court and remanded the case for a new trial on both issues: The *benefits* assessed to the plaintiff and the damages awarded to him.

Colorado's Supreme Court has spoken decisively and consistently on the same issue.[23] In *Santa Fe Land Improvement Co. v. City & County of Denver,*[24] a sanitary sewer special improvement district case, the court found support for special assessments under the theory that the property against which they are levied derives some special, immediate, and peculiar benefit by reason of the improvement, in addition to, and different from that enjoyed by other property in the community outside of the district in which the improvement is made. That is, the local improvement peculiarly *enhances the value* of the property against which the assessment is levied, to an amount equal to, if not in excess of, the amount of the special assessment.

In *Hildreth v. City of Longmont,*[25] upholding a district court ruling that property was benefited, the Colorado Supreme Court stated:

> Generally speaking, only such benefits are to be assessed as it is

[23] Milheim v. Moffat Tunnel Improvement Dist., 72 Colo. 268, 211 P. 649 (1922). Legal practitioners have questioned, however, whether the landmark case of *Milheim* is a special benefit case or general benefit case, or whether, because of the novelty of the subject matter as opposed to a sewer or street improvement case, the court came to its conclusions using both *special benefit* and *general benefit* language.

[24] 89 Colo. 309, 313, 2 P.2d 238, 239 (1931).

[25] 47 Colo. 79, 105 P. 107 (1909).

> reasonably apparent the property will receive other than the general benefit to the community, and nothing is to be considered a benefit which does not enhance the value of the property. Vacant lots may have no present use for a sewerage system; but it adds to their value by giving them a sanitary *advantage* which renders them salable at a price which otherwise they could not command, because of their desirability . . . .[26]

Town of Fort Lupton v. Union Pacific Railroad Co.[27] was an action by the railroad to enjoin the city of Fort Lupton from assessing railroad property for street and curb improvement. The railroad pointed out that the street improvement provided no additional access for its customer traffic, no increase in revenues to the railroad, and no physical benefit to the railroad's property. The Colorado Supreme Court affirmed a lower court's finding that no benefit inured to the railroad despite the city's contention that a declaration of benefits by the city council shall be prima facie evidence of the fact that the property assessed is benefited in the amount of the assessments.[28]

It should be apparent at this point that some differences exist among the various definitions of *special benefits,* depending upon whether urban or rural land is involved. The above cases are in general agreement that urban land is specially benefited if its market value is increased by the installation of storm or sanitary sewers. Thus, even vacant urban land may be specially benefited by such improvements, as its market value and salability increase. It should be noted that the increase in value is a benefit which may never be converted to cash by a landowner if he never sells or transfers his land, and thus may never be realized. In the case of a sanitary sewer, the actual use thereof is a benefit tangible enough to justify assessment.

When rural land is involved, the above cases seem to imply that a *present* special benefit is necessary. Rural land often seems to require some agriculturally-related benefit, such as drainage of flooded land for use as crop land, or increasing runoff to promote earlier planting. These benefits are often balanced against cost

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[26] *Id.* at 86, 105 P. at 114 (emphasis added).

[27] 156 Colo. 352, 399 P.2d 248 (1965). *See also* District 50 Metropolitan Recreation Dist. v. Burnside, 167 Colo. 425, 448 P.2d 788 (1968). In *Burnside,* the Colorado Supreme Court upheld a statute which excluded railroad property from levy for recreational district purposes. The court stated: "The section is a legislative declaration of what is obvious — that the property excluded would not benefit from, or have any use for, playgrounds, golf courses and swimming pools." *Id.* at 431, 448 P.2d at 791. It would be helpful if the legislature were to set forth what constitutes benefits, or criteria for public officials to use.

[28] *Id.* at 354, 399 P.2d at 249.

and inconvenience to the rural land owner. Increase in land value may also be a consideration in assessing rural drainage projects.

Special benefits, then, have at least one common denominator in economic value. If a monetary benefit can be shown to have accrued to a landowner by reason of an improvement (increased market value, increased crop production, etc.), then special assessment becomes more feasible. Difficulties may arise where no value can be assigned to an improvement by a landowner, such as the drainage of land used as a refuse dump by the owner.

In all cases where the special improvement assessment has been upheld, the burden was on the assessing government to show that the improvement had a unique and distinguishable benefit to the particular land owner assessed, apart from and beyond benefit to the public at large.

II. General Benefits

It would be most helpful to builders of urban drainage improvements if legislative bodies defined potential types of benefits from urban drainage projects, leaving exact dollar amounts to the facts of each proposed improvement. Thus, if a special improvement district were determined the best method of financing the improvement, the types of benefits would have to be evaluated with respect to each piece of property assessed. On the other hand, if property were to be assessed generally for the cost of the improvement, the types of benefits would only have to be evaluated for the total area covered by the district to answer the general question of whether benefits equalled or exceeded the cost of the improvement.

There are several resources to assist legislators in drafting types of benefits. Benefit has been defined as "[a]dvantage; profit; fruit; privilege,"[29] and also as:

> [a] contribution to prosperity; whatever adds value to property; advantage; profit; whatever promotes our prosperity, happiness, or enhances the value of our property rights, or rights as citizens, as contradistinguished from what is injurious.[30]

Moreover,

> "[b]enefit" is not limited to pecuniary gains, nor to any particular kind of advantage; it refers to what is advantageous, whatever promotes prosperity or happiness, what enhances the value of the prop-

[29] Black's Law Dictionary 200 (4th ed. 1951).

[30] Ballentine's Law Dictionary 131 (3d ed. 1969). See National Surety Co. v. Jarret, 95 W. Va. 420, 121 S.E. 291 (1924) for a testamentary definition of benefit.

> erty or rights of citizens as contradistinguished from what is injurious.[31]

Benefit has also been defined in general terms in cases. The leading Colorado case of *Milheim* goes into some detail as to what constitutes a *benefit.*[32] A number of plaintiffs brought suit to enjoin the defendants from proceeding under a statute creating a tunnel improvement district, the ground of the action being that plaintiffs' property would be burdened by an illegal tax. Issues of law and fact were presented as to the benefit to the property subject to assessment. The District Court of Jefferson County heard evidence upon the question of benefits and found for the defendants. The Colorado Supreme Court affirmed.

The Tunnel Improvement District in *Milheim* was created for the construction of a transportation tunnel through the continental divide for transportation between the western and eastern portions of the state. Properties in nine counties were to be assessed. One of the contentions of the plaintiffs was that the improvement was not for public use. The Colorado Supreme Court stated:

> [A] use may be public though not many persons may enjoy it. This is well established, the requirement being that the improvement be open to use by all persons who have need of it.[33]

If the business proposed to be carried on is essentially for public *benefit* and *advantage,* then the use is public. In determining a public use, the criteria followed by the court consisted of (a) the physical conditions of the country; (b) the needs of a community; (c) the character of the benefit which a projected improvement may confer upon a locality; and (d) the necessities for such improvement in the development of the resources of a state.[34]

It was further contended by the plaintiffs that the benefits were unequal. The court stated: "The law does not require that the benefits should be exactly equal."[35] The plaintiffs further objected on the grounds that no special benefits accrued to the property owners in Jefferson County because of the tunnel. The court noted:

> [T]he tunnel will make possible the delivery of coal in Denver at a

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[31] A. Booth & Co. v. Weigand, 30 Utah 135, 83 P. 734 (1906).

[32] Milheim v. Moffat Tunnel Improvement Dist., 72 Colo. 268, 211 P. 649 (1922).

[33] *Id.* at 270, 211 P. at 651.

[34] *Id. citing* Tanner v. Treasury Tunnel, Mining & Reduction Co., 35 Colo. 593, 596, 83 P. 464, 465 (1906).

[35] *Id.* at 273, 211 P. at 653.

> considerably lower freight rate, and hence make it probable that the growth and prosperity of the city will be materially promoted. That being true, the lands in Jefferson County within this district will assuredly increase in value with the growth of Denver.[36]

A concurring opinion in *Milheim* further observed that:

> The area of the district is one which is cut off from intercourse with the rest of the world for many weeks in the year . . . . The lack of easy communication, and, for some periods during the year, of any communication at all, with other parts of the state, interrupts and jeopardizes commercial intercourse of all kinds. Products from this vast and fertile territory cannot be marketed with any degree of assurance. The proposed improvement is needed and will benefit the district in a peculiar and local way above any possible benefit to the state at large.[37]

The broad interpretation of *benefit* by the Colorado Supreme Court lends credence to a possible effort by the Colorado Legislature to define *benefit*.

Courts in other jurisdictions have also expanded upon the meaning of benefits for purposes of justifying taxation of property to defray the costs of improvements. In a recent Florida case involving the ecological impact of a proposed project, *Seadade Industries v. Florida Power & Light Co.*,[38] it was held that since the constitution declared the policy of the State as to natural resources, the protection of resources is an appropriate matter for consideration in condemnation cases. In *Seadade,* the plaintiff maintained that the proposed canal to carry spent cooling water from a generating plant to the body of water into which it was to be discharged, was unnecessary because the spent water would harm the permanent body of water. The Florida Supreme Court found that the defendant successfully showed that the discharge would be acceptable and no irreparable harm would result. The type of benefit under consideration related to preservation of a permanent body of water.

A case distinguishing assessment for benefits to the general public from assessments to particular property not specially benefited, is *Crampton v. City of Royal Oak.*[39] Royal Oak had created a special assessment district in a downtown area for development of pedestrian malls and plazas, among other improvements. Plaintiffs contended their property would not be "specially bene-

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[36] *Id.* at 278, 211 P. at 654.

[37] *Id.* at 290-91, 211 P. at 658.

[38] 245 So. 2d 209 (Fla. 1971).

[39] 362 Mich. 503, 108 N.W.2d 16 (1961).

fited" and that the city's method of assessing, *i.e.*, one part on assessed value of the land for general tax purposes and the second part based on closeness or remoteness and square footage of each parcel, was in error.

The Michigan Supreme Court in *Crampton* reversed a lower court decision which had upheld the assessor's method. In declaring that special assessments must be based on special benefits to particular parcels of property and not on assessed valuation, the court referred to an earlier Michigan decision, *Grand Rapids School Furniture Co. v. City of Grand Rapids,*[40] in which it was stated that assessors "are simply to apportion a fixed amount, not with reference to values alone, but also with reference to needs, necessities, and advantages."[41] The Michigan Supreme Court also reaffirmed an earlier principle that "future probable advantages may be considered in assessing benefits, and that incidental benefits may be taken into account as well as those directly received by the land."[42] The court further stated:

> The improvement here involved is not primarily one for the protection of property but is designed to benefit the city as a whole, and the property within the assessment district specially, by promoting the use and enjoyment thereof and enhancing its value. . . .
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> . . . .
>
> In a case of this nature, consideration must be given to the purpose to be attained by the public improvement sought.[43]

In this case, the assessment was set aside by the court and the municipality was given the right to substitute a new assessment based on benefits received by each parcel of land within the assessment district.

In a dissenting opinion, Justice Black observed that what could be benefits for some in the assessment district could be detrimental for others in the district. He quoted from the city's brief as follows:

> It takes no great imagination to see that an area easily accessible to pedestrian and motorist alike in safety, free from fast moving through traffic and congested local traffic with its attendant noise, fumes, and general commotion, systematically and conveniently planned and laid out, generously interspersed with large free parking areas, and beautified with landscaping and decorative malls and plazas, is to be preferred far and away over its opposite counterpart.[44]

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[40] 92 Mich. 564, 52 N.W. 1028 (1892).
[41] *Id.* at 569, 52 N.W. at 1029.
[42] 362 Mich. at 522, 108 N.W.2d at 24.
[43] *Id.* at 523, 108 N.W.2d at 25-26.
[44] *Id.* at 532, 108 N.W.2d at 29.

Justice Black then went on to agree with these benefits as related to some property owners, but pointed out that the diverted traffic, fumes and noise could be a detriment to others:

> Such a project benefits, yes. The shopper is convenienced and attracted by comfortable ways of spending money, and the adjacent places of business do more business. But that business, so attracted, must be taken from other less attractive spots. Such is Confucius' law of competition. It affords no basis for compulsive contribution of those adversely affected, or at least those who receive no like benefit.[45]

This case is particularly important because it establishes types of benefits that may be present. The special assessments were set aside as a mechanism for financing the proposed improvement because there was inadequate evidence to support the types of benefits as related to specific parcels.

Health and sanitation improvements have also been cited by several courts as a type of benefit for assessing lands for drainage improvements.[46] As related to this type of benefit, the cases seem to indicate that even though it is impossible under the circumstances to ascertain the exact monetary benefit resulting directly to land from an urban drainage project relieving a health and sanitation problem, the land may nevertheless be subject to assessment on the basis of the improvement to health and sanitation.

III. Legislative Action

"[T]he Legislature is . . . invested with a wide discretion . . . [in] imposing a tax . . . ."[47] A state legislature, in the absence of any constitutional restriction, may fix the basis of assessment or taxation, and whenever it does so, such method must be followed to the exclusion of any other.[48] As was noted previously,[49] the Colorado statutes use the word *benefits,* but nowhere do the statutes define the term.[50] Since the legislature has seen fit to relate assessments and taxation to benefits, specifi-

[45] *Id.* at 533-34, 108 N.W.2d at 30.

[46] Garden of Eden Drainage Dist. v. Bartlett Trust Co., 330 Mo. 554, 562, 50 S.W.2d 627, 631 (1932): "What is termed hill land, when contiguous to or surrounded by swampland, may be greatly benefited by draining such disease producing swamps, or the means of ingress and egress to and from such lands . . . ." *See also* Dean v. Wilson, 267 Mo. 268, 183 S.W. 611 (1916).

[47] Bedford v. Johnson, 102 Colo. 203, 210, 78 P.2d 373, 377 (1938).

[48] Clark v. City of Royal Oak, 325 Mich. 298, 38 N.W.2d 413, *cert. denied,* 338 U.S. 890 (1949).

[49] *See* text accompanying note 11 *supra.*

[50] No statutory definition of benefit in other jurisdictions has been discovered.

cally as related to drainage projects, the next step should be the establishment of criteria for determining what constitutes types of *benefits.*

The engineers and planners who are working with urban drainage projects can provide valuable assistance to the legislature in defining *benefits* from drainage improvements by outlining the particular benefits inherent in such projects.

CONCLUSION

The need for adequate urban drainage and flood control systems in metropolitan areas is clear. However, implementation of such systems is being hindered by hesitancy of local officials to act in light of the statutory requirement that assessments be made according to *benefits* received, while the meaning of *benefits* remains undefined. The following proposed statutory definition of *benefit* would help to clarify the situation, and its enactment would be a positive step toward encouraging needed urban drainage improvements.

The term *benefit*, for the purpose of assessing a particular property within a drainage district (or special improvement district), may include any one or more of the following:

a. Any increase in the market value of the property;
b. The provision for accepting the burden from specific property for discharging surface water onto servient property in a manner or quantity greater than would naturally flow because the dominant owner made some of his property impermeable;
c. Any adaptability of property to a superior or more profitable use;
d. Any alleviation of health and sanitation hazards accruing to particular property or of public property in the district if the provision of health and sanitation is paid for wholly or partially out of funds derived from taxation of property owners of the district;
e. Any reduction in the maintenance costs of particular property or of public property in the district if the maintenance of the public property is paid for wholly or partially out of funds derived from taxation of property owners of the district;
f. Any increase in convenience or reduction in inconvenience accruing to particular property owners, including the facilitation of access to and travel over streets, roads, and highways;
g. Aesthetic, ecological or recreational improvements accruing to particular property owners as a direct result of the drainage improvement.
h. The dollar value or values of any one or more of the above a. through g. accruing to a specific parcel of property or the total property of a taxing entity shall be determined as related to the cost of the specific improvement.

The United States Supreme Court has ruled that the fact

that lands included in a drainage district will receive no direct benefit is not per se enough to exempt them from assessment.[51] erefore, assessment according to the above types of benefit is well within judicial limits.[52] The legislature should take the necessary action to enact such a provision defining types of benefits. It is a broader definition than most state courts have followed and is a step toward encouraging the construction of needed urban drainage improvements, while at the same time affording protection to property to be assessed from irresponsible charges.

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[51] Miller & Lux, Inc. v. Sacramento Drainage Dist., 256 U.S. 129 (1921).

[52] *See also* Morton Salt Co. v. City of S. Hutchison, 159 F.2d 897 (10th Cir. 1947); Barten v. Turkey Creek Joint Dist., 200 Kan. 489, 438 P.2d 732 (1968); Curtis v. Louisville & Jefferson County Metropolitan Sewer Dist., 311 S.W.2d 378 (Ky. 1958).