SUPREME COURT, STATE OF COLORADO

Case No. 93 SC 745

Court of Appeals No. 92CA2026
Appeal from the District Court for Mesa County, Case No. 91CV264

BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE

City of Grand Junction,

Petitioner,

v.

Ute Water Conservancy District,

Respondent.

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The Colorado Municipal League (League) supports the petition for writ of certiorari filed by the City of Grand Junction (City). The League adopts the City's statement of the issues presented for review and the statement of the case. The issues are restated below for the court's convenience.

I. ISSUES PRESENTED FOR REVIEW

A. WHETHER THE DEFEASANCE, PAYMENT, CANCELLATION OF INDEBTEDNESS AND PURCHASE OF A BOND BY ITS ISSUER, RESULT IN THE DISCHARGE OF THE "UNDERLYING DEBT" TO THE BONDHOLDER, EVEN THOUGH THE PURCHASE OF THE BOND WAS STRUCTURED BY THE ISSUER WITH THE INTENT TO PRESERVE THE "UNDERLYING INDEBTEDNESS" TO THE BONDHOLDER.

B. WHETHER THE PROTECTION OF 7 U.S.C. § 1926(b) EXTENDS TO A District WHICH HAS PURCHASED, PAID AND CANCELLED ITS INDEBTEDNESS ON A DEFEASED BOND TO FARMERS HOME ADMINISTRATION IN A TRANSACTION STRUCTURED BY THE District WITH THE INTENT TO PRESERVE THE "UNDERLYING INDEBTEDNESS" TO FmHA.

C. IF SO, WHETHER THE APPLICATION OF 7 U.S.C. § 1926(b) UNDER THE FACTS OF THIS CASE VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. ARGUMENT

A. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO NUMEROUS DECISIONS OF THIS COURT AND SO FAR DEPARTS FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO MAKE CERTIORARI REVIEW APPROPRIATE. THIS COURT SHOULD GRANT THE CITY'S PETITION FOR A WRIT OF CERTIORARI.

The first issue is a state law issue. Although the bond issued by the Ute Water Conservancy District (District) to Farmers Home Administration (FmHA) is a negotiable instrument, the Court of Appeals refused even to consider the application of the Uniform Commercial Code. The refusal of the court of appeals to apply U.C.C. principles to a negotiable instrument is without precedent.

The second issue is a federal law issue. As is demonstrated in the City's petition at pages 8-10, six federal courts have already construed 7 U.S.C. § 1926(b). Their unanimous opinions provide that federal indebtedness is the threshold requirement for the protection of 7 U.S.C. § 1926(b). The trial court acknowledged that its "July 17 order [applying 7 U.S.C. § 1926(b)] goes beyond federal precedent because there are no federal cases which address advance refunding, reacquisition of the bonds by the issuer or the 1987 OBRA amendment." App. E at 3 to City's Petition for Writ of Certiorari. In brief, the application of 7 U.S.C. § 1926(b) where no federal indebtedness exists is without precedent.

The third issue is a federal constitutional issue. Two United States Courts of Appeals have already held that the Tenth Amendment to the United States Constitution is not violated by the application of 7 U.S.C. § 1926(b) because the protection of the statute is contingent upon federal indebtedness. In this case, the lower courts applied the statute even though the federal indebtedness had been cancelled.

1. <u>The court should consider the application of the Uniform Commercial Code to municipal bonds</u>.

The court of appeals refused even to consider the application of the Uniform Commercial Code's discharge provisions to the District's transactions. App. A at 9. Section 1926(b) does not facially preempt the Uniform Commercial Code, and none of the cases

construing § 1926(b) has addressed discharge issues. The lower court's opinion stands alone in the United States on the point.

Millions of dollars in municipal water revenue bonds are issued each year by Colorado municipalities. Those municipalities are now confronted with a court of appeals decision which apparently vests in a creditor (in this case, the FmHA) an unprecedented power to "structure" a transaction which results in "cancellation of indebtedness" but does not discharge the "underlying indebtedness." In reliance on Columbia Savings v. Zelinger, 794 P.2d 231 (Colo. 1990), which did not involve the cancellation of indebtedness, the court of appeals stated that "an intent to discharge a party must be present, and the determination of the intent of the parties involves a question of fact." App. A at 5.

Until now, no court has ever left "underlying indebtedness" in place after indebtedness has been cancelled by payment. Under the Uniform Commercial Code, payment of a negotiable instrument results in discharge of liability as well as the purchase of the instrument. E.g., C.R.S. § 4-3-603. See cmt. 5 ("Payment discharges the liability of the person making it.") The decision of the court of appeals is at odds with this Court's holding that "[o]nce the obligor is discharged on the instruments, he is also discharged in the underlying obligation." Lamson v. Commercial Credit Corp., 187 Colo. 382, 387, 531 P.2d 066, 969 (1975).

If both the creditor and the debtor have the power to "intend" that payment shall not cancel indebtedness, the issuers and underwriters of municipal bonds will have no means to determine when debt is discharged. Further, this would permit § 1926(b) to be utilized, not as a mechanism to protect a federal creditor's interest in securing repayment of its loan (as was the intent of the statute [see App. A at 4]), but rather as an expedient device by which a one-time debtor protects its service territory - a result never intended by the statute.

The Uniform Commercial Code, which has been adopted across the United States, provides clear, certain rules of discharge which cannot be reconciled with the lower court's conclusion that an issuer can cancel his indebtedness by payment, but leave the "underlying indebtedness" in place.

Although C.R.S. § 4-3-103(1) provides that Art. 3 is inapplicable to investment securities, courts and commentators have unanimously established that it is proper to look to Art. 3 of the U.C.C. "for guidance" when Art. 8 is silent on an issue, because a bond is a negotiable instrument. E.g., E. F. Hutton & Co. v. Manufacturers Nat'l Bank of Detroit, 259 F. Supp. 513, 517 (E.D. Mich. 1966); New Jersey Bank, N.A. v. Bradford Securities Operations, Inc., 690 F.2d 339, 343 (3rd Cir. 1982); 4 W. Hawkland, Uniform Commercial Code Series § 3-103:02, at 29 (1992).

Other courts and commentators have addressed the legal effect of a refunding. The cases are collected in the City's petition at

page 8. One of the cases should be noted: 2416 Corp. v. Board of Trustees of the University of Illinois, 209 Ill. App.3d 504, 568 N.E.2d 276, 281 (1991). The Illinois court paraphrased a sentence from The Dow Jones - Irwin Guide to Municipal Bonds (1987) at the referenced pages. For this court's convenience, the entire paragraph is quoted:

> Many refunded municipal bonds were originally issued as revenue bonds. Revenue bonds are usually secured by the fees and charges generated by the completed projects, such as toll roads, water and sewer systems, hospitals, airports, and power generating plants. The specific security provisions are promised by the bond issuer in the bond trust indenture before the bonds are sold. The trust indenture describes the flow-of-funds structure, the rate or user-charge covenant, the additional-bonds test requirements, and other covenants. Many refundings occur because an issuer wants to eliminate restrictive bond covenants such as rate-charge covenants, additional-bonds tests, or mandatory program expenditures. A refunding eliminates, or defeases, the earlier covenants since the bonds are deemed to have been paid once they are refunded and cease to exist on the books of the issuing jurisdiction.

(emphasis added) The Dow Jones-Irwin Guide to Municipal Bonds (1987) at p. 52.

The League has not been able to find another case in the United States where underlying indebtedness remained after indebtedness was cancelled by payment. The League respectfully urges this court to review the first issue, and to hold that "underlying indebtedness" is discharged when indebtedness is cancelled by payment.

2. The court should consider not only the federal law issue but also the constitutional issue.

Until now, no court has ever applied 7 U.S.C. § 1926(b) absent federal indebtedness. The statute has not been amended since it was enacted in 1961. The City's petition cites six decisions which unanimously required federal indebtedness. (Petition at 9) There are no contrary decisions.

Section § 1926(b) was applied in this case to preclude a home rule City from providing water service, a power expressly granted by Art. XX, §§ 1 and 6, Colorado Constitution. Two United States Courts of Appeals have already held that the Tenth Amendment is not violated because the right granted by § 1926(b) is contingent upon the existence of an outstanding federal debt. Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1216 (10th Cir. 1988), cert. denied, 490 U.S. 1067 (1989); City of Madison v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057, 1061 (5th Cir. 1987). In this case, the court of appeals has held that all indebtedness on the bond was cancelled by payment. It follows from Glenpool and Madison that the Tenth Amendment bars the application of 7 U.S.C. § 1926(b).

The League respectfully submits that the federal law issue and the federal constitutional issue should be reviewed by this court, and that this court should hold that 7 U.S.C. § 1926(b) is inapplicable, where, as here, there is no federal debt outstanding.

3. This court should consider the effect of the court of appeals decision on the provision of uniform fire protection to the overlap areas.

One of the statutory purposes of annexation is to provide services uniformly and to avoid the duplication of governmental facilities. See, In Re Incorporation of Town of Eastwood v. City of Aurora, 198 Colo. 440, 601 P.2d 1374 (1979); see also, Morgan v. Town of Palmer Lake, 608 P.2d 852 (Colo. App. 1980) (ordering disconnection for failure to provide water service notwithstanding an annexation "condition" that the town had no duty to provide service). By definition, the overlap areas involved in this case lie not only within the District but also within the City. Some of the District's water lines are inadequate, however, to meet the specifications of the City's fire protection ordinances (Nos. 2497 and 2506). Indeed, the District's resistance to a City ordinance requiring the District to upgrade its water lines for fire protection purposes led to this lawsuit. The District sought a declaration that certain sections of "Ordinance No. 2497 and Ordinance No. 2506 are unlawful and invalid insofar as they give the City the power to require Ute to upgrade its pipelines for fire protection purposes." District's Complaint at 7.

The judgment of the court of appeals effectively awards an exclusive service area lying within a home rule City to a water conservancy District which, according to a brief which it filed in the trial court, has no duty to provide fire protection:

> [T]he Water Conservancy Act, C.R.S. § 37-45-101 et seq., does not impose a duty on a water conservancy District to provide fire protection, either in the form of supplying water or maintaining and providing hydrants. The Act makes no mention of fire protection. The Act contemplates the construction and operation of "works", which are defined to include "facilities, improvements and property necessary or convenient for the supplying of water for domestic, irrigation, power, milling, manufacturing, mining, metallurgical, and other beneficial uses." C.R.S. § 37-45-103(10). Accordingly, pursuant to the cases discussed above the District has no legal obligation to provide hydrants or other fire protection facilities to the City without compensation for such facilities. Furthermore, the City cannot shift to the District the costs of providing facilities to discharge its obligation to provide fire protection services to property within the City. (emphasis added)

Memorandum Brief of [District] in Support of Motion for Summary Judgment at 59-60.

The Court's attention is respectfully directed to Water Works District No. II v. City of Hammond, 1989 WL 117849 (E.D. La. 1989). Since the decision is not reported in Federal Supplement, a copy of the Lexis printout is included at Appendix B. The court reached a result which continues two unrelated pipeline systems in use -- one for fire protection and the other for domestic water service.

> [W]hile the City will be enjoined from supplying water service to the areas as indicated in these findings and conclusions, the City shall have the right to maintain and use its water mains and pipelines for fire protection purposes . . . The right of the Water District to supply water service under § 1926(b) to locations within its franchise

> coexists with the rights of the City to provide fire protection.

Water Works, App. A at 6.

The Water Works court stated that "§ 1926(b) does not, however, permanently curtail the City's authority, because it applies only while the federal debt is outstanding," and the "City may and does regulate growth within that part of [the City of] Madison served by [the rural water District] so as to assure minimum standards of water service such as adequate fire hydrants." App. B at 6. If, as the District argued in the present case, a District in Colorado has no duty even to provide adequate fire hydrants and adequate pressure, the City and other cities affected by the lower court's rulings may have to construct separate pipeline systems to provide fire protection.

III. CONCLUSION

Wherefore, the League respectfully urges this Court to grant the City's petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE** was deposited in the U.S. mail this ____ day of December, 1993, postage pre-paid, addressed to the following:

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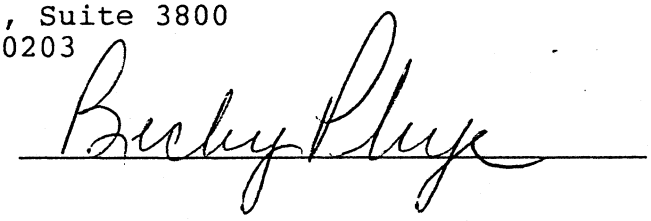

COLORADO COURT OF APPEALS
No. 92CA2026

October 21, 1993

Ute Water Conservancy District,,

Plaintiff-Appellee and Cross-Appellant,

v.

City of Grand Junction,

Defendant-Appellant and Cross-Appellee.

Appeal from the District Court of Mesa County
Honorable David A. Bottger, Judge
Honorable Nicholas R. Massaro, Judge
No. 91CV264

Division II
Opinion by JUDGE NEY
Tursi and Taubman, JJ., concur

JUDGMENT AFFIRMED IN PART,
VACATED IN PART, AND
APPEAL DISMISSED IN PART

Opinion Modified, and As Modified,
Petition for Rehearing DENIED

Williams, Turner & Holmes, P.C., Mark A. Hermundstad, William D. Prakken, Grand Junction, Colorado, for Plaintiff-Appellee and Cross-Appellant

Daniel E. Wilson, City Attorney, John P. Shaver, Assistant City Attorney, Grand Junction, Colorado; Grimshaw & Harring, P.C., Wayne B. Schroeder, Ronald L. Fano, Peter J. Whitmore, Denver, Colorado, for Defendant-Appellant and Cross-Appellee

Defendant, City of Grand Junction (city), appeals the judgment of the trial court entered in favor of plaintiff, Ute Water Conservancy District (district). Plaintiff cross-appeals that judgment. We affirm in part, vacate in part, and dismiss the appeal in part.

The district was formed in 1956 to supply water to certain unincorporated areas of Mesa County. At that time, the city was surrounded by the district, but there was no overlap of the city's and the district's boundaries.

This lack of overlap ended when the city annexed territory within the boundaries of the district. These annexations resulted in controversy over which entity, the city or the district, would provide water service in areas which lay within the boundaries of both.

For a number of years, this controversy was resolved by written agreements between the city and the district. However, at trial, the city sought to terminate the current contract, and the court ordered that it could do so provided reasonable notice was given. That portion of the trial court's order has not been appealed.

As a further matter, the city and the district each sought the exclusive right to provide water service to the overlap areas. The trial court determined that under federal statutes the district had that right. It is this determination that the city appeals.

The district cross-appeals the trial court's determination

that it is not a municipality governed by the provisions of §31-35-402(1), C.R.S. (1986 Repl. Vol. 12B), and, thus, would require the consent of the city to provide service at some future time.

I.

The city contends that the trial court erred in its conclusion that the district has the exclusive right to provide water service in the overlap areas for a certain length of time. We do not agree.

During its existence, several financial transactions were made by the district to establish and improve its water system. Pertinent to the action before us are bond transactions which occurred in 1981, 1983, and 1988.

In 1981, the district issued revenue bonds which were bought by the federal Farmers Home Administration (FmHA). As security for the bond issue, the district pledged its revenues.

In 1983, in a transaction known as "advance refunding," the district refinanced the 1981 bonds by issuing a new series of bonds. The proceeds from the 1983 refunding bonds were placed into an escrow account and from there were used to pay the principal and interest on the 1981 bonds as such amounts came due. The escrowed bond proceeds replaced the district revenues as security for the 1981 bonds, and those revenues became the security for the 1983 refunding bond issue.

In 1988, pursuant to the Omnibus Budget Reconciliation Act of 1986, 7 U.S.C. 1929a note (1988), (OBRA) and the Continuing Appropriations Act of 1987, the district purchased its 1981 bond

issue from FmHA. In so doing, the district's indebtedness to FmHA was cancelled, and the paying agent for the escrowed funds was directed by FmHA to make all future payments on the 1981 bond directly to the district.

At issue here is the effect of Section 306(b) of the Consolidated Farm and Rural Development Act, 7 U.S.C. §1926(b)(1988), on those transactions. That section states:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar services within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event. (emphasis added)

Under the statute an "association" is defined as an "entity which has received a loan from the Secretary (FmHA)" Pinehurst Enterprises, Inc. v. Town of Southern Pines, 690 F. Supp. 444, 452 (M.D.N.C. 1988). The city does not dispute that the district is such an entity. However, it is the position of the city that the district has by its financial transactions removed itself from the protection afforded by 7 U.S.C. §1926(b).

A.

First, the city maintains that the district, in advance refunding its 1981 bond issue, redeemed the bond and thus removed itself as debtor when the escrowed funds became the source and security for repayment. In support of this argument, it cites

Glenpool Utility Services Authority v. Creek County Rural Water District No. 2, 861 F.2d 1211, (10th Cir. 1988), cert. denied, 490 U.S. 1067, 109 S.Ct 2068, 104 L.Ed.2d 632 (1989)(to meet the threshold requirements of 7 U.S.C. §1926(b), there must be a continuing indebtedness under Section 1926); Water Works District No. II v. City of Hammond, No. CIV.A.86-0187, 1989 Westlaw 117849, (E.D. La. 1989) (Section 1926(b) applies only while the water association is indebted to FmHA).

The district, on the other hand, argues that the bond was not redeemed but merely "defeased" and, therefore, that the term of the note continues and is still outstanding. It finds support for this position in City of Virginia v. Northland Office Properties Limited Partnership, 465 N.W.2d 424 (Minn. App. 1991)(a bond which has been advance refunded is still outstanding) and in the uncontradicted testimony of its expert in municipal finances that the defeasance did not discharge the underlying obligation. We agree with the district.

According to its legislative history, the purpose of 7 U.S.C. §1926(b) is:

> to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system.

Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311, 315 (7th Cir. 1989). Furthermore, it was the intent of Congress "to encourage rural water development" and "to safeguard the viability and financial security of such associations (and FmHA's

loans)." City of Madison v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057, 1060 (5th Cir. 1987).

The intent of Congress, therefore, was not limited to protection of FmHA but extended to protect the entity which had incurred debt to develop rural water service. This interpretation is in accord with the conclusion of Jennings Water, Inc. v. City of North Vernon, 682 F. Supp. 421 (S.D. Ind. 1988), aff'd, 895 F.2d 311 (7th Cir. 1989), that Congress intended 7 U.S.C. §1926(b) to be read broadly.

Here, although the original lien on the district revenues brought about by the 1981 bond issue was discharged, those revenues were at the same time encumbered by the refunding issue of 1983. The district's indebtedness thus remains, even though the source of repayments for the 1981 bonds has shifted to the escrowed funds. Furthermore, should the escrowed funds be insufficient, the shortfall would be made up from district revenues, which are also the basis of payment for the 1983 bonds.

Our supreme court, in Columbia Savings v. Zelinger, 794 P.2d 231 (Colo. 1990), held that a cancellation or renunciation of an instrument made unintentionally or by mistake has no effect. An intent to discharge a party must be present, and the determination of the intent of the parties involves a question of fact.

Under the circumstances here, we cannot conclude that the 1983 bond issue satisfied the district's debt to FmHA. The district structured its transactions with the

intent to preserve the indebtedness to FmHA, and its expert so testified in detail and without contradiction. Hence, we agree with the trial court's conclusion that the 1983 transaction did not serve to relieve the district of its underlying debt to FmHA and did not remove it from the protection afforded by 7 U.S.C. §1926(b). See 2416 Corp. v. Board of Trustees, 209 Ill. App. 3d 504, 568 N.E.2d 276 (1991)(trial court should not ignore municipal bond expert's opinion as to meaning to be ascribed to terms of art in a specialized area of the law).

B.

The city alternatively argues that the district's indebtedness to FmHA was satisfied when it purchased its 1981 bond from FmHA in 1988 and, consequently, that the district is not entitled to protection under 7 U.S.C. §1926(b). We are not persuaded.

OBRA and the Continuing Appropriations Act of 1987 required that FmHA sell certain assets. The Agricultural Credit Act of 1987, 7 U.S.C. 1929a at 846 (1988), amended OBRA to require that the Secretary of Agriculture first offer for sale to the issuer any notes or other obligations held under the Consolidated Farm and Rural Development Act.

The district took advantage of this opportunity to purchase its 1981 bond at a substantial discount, and the bond was assigned to the district. At that point, FmHA ceased to own the bond, and the administrator of the escrowed funds was directed by FMHA to make payments of principal and interest to the district

as such amounts came due.

While it is true that upon the assignment of the bonds to it the district was no longer indebted to the federal government, we conclude, for the reasons stated above, that the underlying debt did not cease to exist and that 7 U.S.C. §1926(b) still applied to safeguard the viability and financial security of the district. See City of Madison v. Bear Creek Water Ass'n, Inc., supra.

Moreover, the circumstance presented here is specifically addressed by OBRA, 7 U.S.C. 1929a at 846 (1988):

> (g) Applicability of Prohibition on Curtailment or Limitation of Service. Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section. (emphasis added)

The city maintains that when Congress directed that the protection of 7 U.S.C. §1926(b) should be applicable to all obligations thus sold, it intended to safeguard a third party's entitlement to payment and not to extend protection to debtors who had purchased their own notes at a discount. However, the city cites no authority in support of this argument, and we prefer to rely upon the plain language of the statute which references all notes and obligations.

Additionally, we conclude that this provision, when read in conjunction with the provision that such notes or obligations be offered first to the issuer, clearly indicates the intent of Congress that the protection of 7 U.S.C. §1926(b) apply as long

as the underlying obligation evidenced by the note exists.

Accordingly, we agree with the trial court's conclusion that 7 U.S.C. §1926(b) prohibits the city from providing water service to the overlap areas so long as the district's 1981 water revenue bond remains outstanding.

C.

The city, relying upon 7 U.S.C. §1929a(e)(1988), argues that the district's liability has been discharged. Again, we are not persuaded.

The pertinent language provides:

> The Secretary and any subsequent purchaser of such notes or other obligations sold by the Secretary on a nonrecourse basis shall be relieved of any responsibilities that might have been imposed had the borrower remained indebted to the Secretary.

While the statute relieves the obligations of the Secretary and the subsequent purchaser, it does not so absolve the borrower. Here, the district is both purchaser and borrower. And, because we conclude that it is the district's position as borrower that is at issue here, the statute is inapposite.

D.

The city contends that the trial court erred by its refusal to address as untimely the city's argument, raised in a post-trial motion, that the application of 7 U.S.C. §1926(b) is in violation of the Tenth Amendment which reserves powers not delegated to the United States, or prohibited by the Constitution, to the States or the people. Assuming, arguendo, that the argument was timely raised, we conclude that the

statute's conflict with the Tenth Amendment previously has been addressed in City of Madison v. Bear Creek Water Ass'n, Inc., supra.

There, the court concluded that because the application of §1926(b) was restricted in time and scope so as not to disable the city severely from performing its function, it did not violate the Tenth Amendment. The city maintains that the Madison analysis is premised upon the existence of an outstanding federal debt and, thus, is not applicable here. We do not agree.

The Madison court determined that §1926(b) did not permanently curtail the city's authority because it applies only while the federal debt is outstanding. Nevertheless, our interpretation of the court's ruling is that it turns upon the scope of the curtailment of authority rather than upon the existence of federal indebtedness. Consequently, under the facts here, in which the city is limited only in its provision of water services to a defined area and that limitation is of a temporary nature, we conclude that there is no offense to the Tenth Amendment.

E.

Because we have determined that the trial court correctly based its decision upon the applicable federal statutes, we do not address the contentions of the city which rest upon provisions of the Uniform Commercial Code as adopted by our General Assembly.

II.

The district, on cross-appeal, contends that the trial court

erred in its conclusion that the district is not a municipality for the purposes of §31-35-402(1) and, consequently, that the city has exclusive right to provide water service to the overlap areas when the district's 1981 debt is repaid.

Because almost three decades may elapse before the protection afforded by 7 U.S.C. §1926(b) is lost to the district, we conclude that the decision of the trial court to address this issue was premature.

Furthermore, the issue of who has the right to provide water service to the overlap areas when the district's 1981 debt is repaid presents no justiciable controversy at this time. Therefore, we vacate that portion of the trial court's judgment.

III.

Finally, the city contends that the trial court erred in its general award of costs to the district. Here, no specific award of costs was made, and the trial court retained jurisdiction pending the outcome of a relevant case currently before the supreme court, Board of County Commissioners v. Crystal Creek Homeowners Ass'n (Colo. No. 92SA312, pending as of Oct. 1, 1993). Tus, the city's appeal of this issue is untimely, and we dismiss it without prejudice.

The judgment is affirmed in part, vacated in part, and the appeal is dismissed as to the award of costs.

JUDGE TURSI and JUDGE TAUBMAN concur.

Citation Rank(R) Database Mode
Not Reported in F.Supp. R 1 OF 1 ALLFEDS Page
(CITE AS: 1989 WL 117849 (E.D.LA.))

WATER WORKS DISTRICT NO. II OF TANGIPAHOA PARISH
v.
CITY OF HAMMOND
CIV. A. No. 86-0187.
United States District Court, E.D. Louisiana.
Oct. 3, 1989.
FINDINGS AND CONCLUSIONS

LIVAUDAIS, District Judge.

*1 Trial of the liability issues in this matter was held before the Court sitting without a jury. The parties submitted numerous memoranda both prior to and subsequent to the trial of this matter. Extended settlement negotiations have taken place subsequent to the trial of this matter, but have not been fruitful. The Court sincerely believed that a compromise of the matter would have best served the private interests of the parties as well as the greater public interests of the present and future water consumers residing in Water Works District No. II of Tangipahoa Parish and the City of Hammond. It is with great reluctance that the following opinion is issued as the Court regrets the hardships which may be imposed upon the residents of the Water Works District No. II as a result thereof. But, because the Court is bound by and has a sworn duty to follow the law, the Court rules as follows. To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are so adopted; to the extent that any of the following Conclusions of Law constitute Findings of Fact, they are also so adopted.

This is an action by the plaintiff, Water Works District No. II of Tangipahoa Parish (the "Water District"), against the defendant, the City of Hammond (the "City"), seeking damages and an injunction prohibiting the City from providing water service to water consumers in the Water District's exclusive service area. The intervenor herein is the United States of America, through the Farmer's Home Administration (the "FmHA"), who loaned the Water District two million dollars in 1974 for the acquisition and construction of the water supply system and to whom the Water District is still indebted as a result of that loan. These findings and conclusions are limited to the entitlement of the Water District to injunctive relief and, to a limited extent, the liability of the City for damages. The remaining damage issues shall be determined during the second phase of this bifurcated trial.

I.

The city of Hammond is a municipality located in Tangipahoa Parish, Louisiana. On January 27, 1984, and for several years prior thereto, the Police Jury of Tangipahoa Parish was the governing authority for Tangipahoa Parish. It has since been replaced by a Parish Council.

On February 24, 1981, the Police Jury enacted an ordinance pursuant to LSA-R.S. 33:3811, et seq creating Water Works District No. II of Tangipahoa Parish. Simply stated, the boundaries of this Water District included all of the lower end of Tangipahoa Parish except for the area included in the corporate limits of the city of Hammond as the corporate limits existed on that date. The Water District entirely surrounded the City.

On October 11, 1983, the Policy Jury enacted an ordinance which granted the

Water District a franchise to operate a waterworks system in the Water District. In order to buy and improve the existing private water supply system in the area, the Water District applied for a loan from the Farmer's Home Administration (FmHA). The date of the initial application was March 4, 1981. The first date when funds were actually loaned by the FmHA to the Water District was January 27, 1984. Thus, the loan term began on January 27, 1984. The amount of the FmHA loan to the Water District is two million dollars. Revenue bonds were issued and pledged to secure the loan. The Water District is still indebted to the FmHA for repayment of the balance of the loan.

*2 Prior to January 27, 1984, the Water District was incapable of supplying water to any location within its boundaries. On January 27, 1984, the loan was consummated and the Water District became the owners of the private water companies, principally the Greater Tangipahoa Utility Company and the Southeast Hammond Water Company, which had heretofore provided water services to customers in the area.

The City of Hammond began an annexation program in 1979, adding the areas immediately adjacent to its northern western and southern boundaries to its corporate limits. Between 1980 and May, 1984, virtually all of the areas east of Interstate Highway 55 and north of Interstate Highway 12 were annexed by the City and are now included in its corporate limits. The areas lying east of the City are mostly undeveloped and afford the City its greatest growth potential. Although some areas east of the City have already been annexed, there is potential for additional annexation on the east side of the City.

Subsequent to January 27, 1984, the City has extended its boundaries by annexation of the following areas:

(1) Petro Truck Stop area south of I-55, annexed February 7, 1984;

(2) Hammond Municipal Airport property, annexed February 7, 1984;

(3) Tangipahoa Parish School Board property on Highway 190 West between Old Baton Rouge Highway and Highway 190, annexed May 15, 1984;

(4) Westin Oaks Commercial Park at the intersection of I-55 and Highway 190, south of Highway 190 and East of I-55, annexed on July 17, 1984;

(5) Bob Geer's one-street subdivision on Old Baton Rouge Highway near Timberlane Subdivision, annexed on August 21, 1984;

(6) One-fifth of an acre where Olivia's Air Conditioning is located on Highway 190 East of Hammond, annexed on September 18, 1984;

(7) 435 acres belonging to Southeastern Louisiana University north of Hammond Municipal Airport, annexed on May 7, 1984;

(8) Oakridge Estates Subdivision north of Oak Knoll Country Club, annexed on May 7, 1984;

(9) Whitmar Acres, Beechwood Subdivision and Magnolia Ridge, annexed on March 13, 1986;

(10) Woodbridge Subdivision, annexed on March 17, 1987.

All of the above areas are located in the Water District as created on February 24, 1981. The City presently supplies the water services to these areas.

The following areas were annexed by the City prior to January 27, 1984, but are located in the Water District as created on February 24, 1981. Water service by the City to these areas did not begin, however, until after January 27, 1984.

(1) The Palmetto Street area, annexed on September 2, 1980, with water service

beginning in the summer of 1984;

(2) The Highway 190 East annexation, annexed on June 1, 1982, with the first billing by the City for water service on February 15, 1984;

The following areas have not been annexed by the City and are presently outside of the City limits, but are currently receiving water service by the City:

*3 (1) Aiken Lane and South Elm Street areas;

(2) North Range Road areas;

(3) Highway 190 West, Lato Lane, Live Oak Avenue, Recile Lane, and Brandy Lane Areas;

(4) North Morrison Boulevard areas;

(5) Flora Park areas;

(6) Woodland Park areas east of South Range Road;

(7) Muscarello Road areas, north, south, east, and west;

(8) Areas adjacent to East Street and Range Road;

(9) Highway 190 West areas adjacent to annexed Tangipahoa Parish School Board areas;

(10) Highway 190 East areas adjacent to annexed Pleasant Ridge Road areas.

Lincoln Park is an area which has been annexed by the City prior to January 27, 1984, but whose water is presently being served by the Water District.

By joint stipulation, the parties agreed that the Water District does not have the necessary pipes to supply water to several of the locations listed above which are in the Water District's water service area, but which are presently being supplied water by the City. The water to these areas has never been supplied by the Water District. Rec. Doc. 55. These locations include:

(1) Locations within the Highway 190 East annexation area which are East of the intersection of Highway 190 and Pleasant Ridge Road;

(2) The entirety of the Oak Ridge Estates Subdivision;

(3) The Hammond Municipal Airport property;

(4) The Hammond Industrial Park north of the Airport and fronting Fagan Road and Conrad Drive;

(5) Whitmar Acres Subdivision;

(6) The 435 acres described in Ordinance No. 2010, known as the SLU property;

(7) Flora Park Subdivision;

(8) Beechwood Subdivision;

(9) Magnolia Ridge;

(10) Green Acres Subdivision.

The parties have further stipulated that the City can continue to supply water service to these areas, as well as to such others where written waiver has been or in the future may be granted by the Water District, because the Water District does not have the necessary pipes or other equipment to provide reasonably prompt water service. An order prohibiting water service to these areas would work a significant and unacceptable hardship to the residents therein as they would be without water supply services.

The City has a fire department which provides fire protection services to all areas, including those that have been annexed since 1981, within its corporate limits. As there are City water lines in those areas outside the corporate limits to which the City supplies water services, the City also provides fire protection services to those areas.

Several of the areas which were annexed by the City after January 27, 1984,

particularly subdivisions built by developers, had water systems in place at the time of annexation. These annexed areas, which include Whitmar Subdivision, Beechwood Subdivision, Magnolia Ridge Subdivision, Woodbridge Subdivision, Westin Oaks Commercial Park, Geer Subdivision, and Oak Ridge subdivision, were constructed by real estate developers. The water system within the area itself was constructed by the developer. The developers then formally dedicated the water pipelines in place to the City of Hammond. Hammond then simply tied the system already in place to its water main and began supplying water to the water consumers in these locations. In addition to supplying water to these areas, the City also provides fire protection services as these areas have been annexed and are presently included within th corporate limits of Hammond.

II.

*4 This Court has jurisdiction of this action under 28 U.S.C. s 1331, federal question jurisdiction, as this action arises under the laws of the United States pursuant to 7 U.S.C. s 1926.

The statute in question, 7 U.S.C. s 1926, is also known as the Consolidated Farm and Rural Development Act. The statute allows the Farmer's Home Administration to provide funds to rural water associations for the purpose of developing water supply systems to rural areas. Subsection (b) of the statute dealing with the indebtedness of a rural water association to the FmHA provides:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be th basis of requiring such association to secure any franchise, license, or permi as a condition to continuing to serve the area served by the association at th time of the occurrence of such event.

7 U.S.C. s 1926(b).

Controlling jurisprudence from this circuit has construed the statute as "unambiguously prohibit[ing] any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion." City of Madison, Mississippi v. Bear Creek Water Association, Inc., 816 F.2d 1057, 1059 (5th Cir.1987). The court there held that s 1926(b) forbids condemnation of an FmHA-indebted water association's assets, finding that Congress established a "bright line" rule which prohibits condemnation throughout the term of the FmHA loan, even if the amount of indebtedness is $1.00.

In reaching this conclusion, the City of Madison court found two overriding Congressional purposes behind s 1926, these being "1) to encourage rural water devlopment by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." 816 F.2d at 1060. The Court finds, as did the court in the City of Madison, that the case at bar exemplifies the problems s 1926 was enacted to remedy. By supplying water to areas annexe after January 27, 1984, which the Water District is capable of serving, or which it can serve with minor adjustments to the already existing system, the

City has eroded the Water District's customer base, raising per-user cost and adversely impacting the Water District's revenues. Any adverse impact on Water District revenues obviously affects the viability and financial security of the Water District's and the FmHA's loans. Therefore, the Court finds that the City has violated s 1926(b) by supplying water to locations within the Water District after January 27, 1984, the date the FmHA loan term began and the date that water service first was provided or made available by the Water District.

*5 The Water District seeks both injunctive relief, prohibiting the City from opening any new meters and from continuing to supply water service to those areas which it is presently serving, but which are located within the Water District, and damages. By stipulation, the Water District and the City agreed that no injunction would be sought prohibiting the City from supplying water to those enumerated areas which the Water District does not have the necessary pipes to provide reasonably prompt service. The Court further finds that as to these areas, the Water District is not entitled to damages because it did not have the capability of supplying water thereto and thus, under s 1926(b), water service was not "provided" or "made available" by the Water District. These areas include the following:

(1) Locations within the Highway 190 East annexation area which are east of the intersection of Highway 190 and Pleasant Ridge Road;
(2) The entirety of the Oak Ridge Estates subdivision;
(3) The Hammond Municipal Airport property;
(4) The Hammond Industrial Park north of the airport and fronting Fagan Road and Conrad Drive;
(5) Whitmar Acres subdivision;
(6) Woodbridge subdivision;
(7) Green Acres subdivision located east of Hammond;
(8) The 435 acres referred to in Ordinance No. 2010 known as the SLU property;
(9) Flora Park subdivision;
(10) Any other area where a written waiver from the Water District has been granted to the City.

The parties have further stipulated that the Water District does have the necessary pipes to provide reasonably prompt water service to the following areas:

(1) Lincoln Park subdivision;
(2) The Highway 190 East annexation area lying west of the intersection of Highway 190 East and the Pleasant Ridge Road;
(3) The Woodland Park subdivision area lying from the center of Easy Street and proceeding in an easterly direction;
(4) Recile Lane lying off of U.S. 190 west of Hammond;
(5) The Petro Truck Stop annexation area;
(6) The Tangipahoa Parish School Board property annexed under Ordinance 1060;
(7) The Olivia's Air Conditioning location on Highway 190 East;
(8) The property lying adjacent to and along Highway 190 West from the Tangipahoa Parish School Board property annexed under Ordinance No. 1060 and proceeding in a westerly direction except for the Winn Dixie location and the Westin Oaks development;
(9) Monistere Lane located west of I-55 running north and south parallel to I-55;
(10) Adjacent to Muscarello Road (Lane) which runs north and south parallel to

U.S. Highway 51 from Wardline Road, but not that portion of Muscarello Road (Lane) which runs in an east-west direction from U.S. Highway 51;

As to these areas, the Water District is entitled to an injunction, prohibiting the City from continuing to supply water to any location in the above listed areas (to take effect 90 days from date of entry of the order) and prohibiting them from opening any new meters in these areas. The determination on the issue of damages, [FN1] if any, as to these areas shall be made at the next phase of the trial.

*6 The parties were unable to reach a definite stipulation as to the ability of the Water District to provide water service to several additional areas. With respect to these areas, under the "bright line" rule of s 1926(b) and the City of Madison, the Court shall issue an injunction prohibiting the City from supplying water to these areas, the injunction to take effect 90 days from date of entry of the order. Determination as to these locations on the entitlement to damages, if any, shall be made in the damages phase of the trial. These areas include:

(1) Brandy Lane in Geer subdivision;
(2) Aiken Lane and Live Oak Avenue;
(3) The Westin Oaks commercial development;
(4) Muscarello Road (Lane) in an east-west direction from U.S. Highway 51.

Notwithstanding any other finding by the Court regarding the entitlement of the Water District to injunctive relief under s 1926(b), the City has a duty to provide fire protection to all its residents. The Court finds no authority for the Water District's argument that its rights to supply water service under s 1926(b) are superior to the City's duty to furnish fire protection to its residents. Therefore, while the City will be enjoined from supplying water service to the areas as indicated in these findings and conclusions, the City shall have the right to maintain and use its water mains and pipelines for fire protection purposes.

The Water District also contends that it is entitled to use the water mains and water lines which were dedicated to the City to supply water to areas within the District at no cost to the Water District. The Court finds no authority for this argument in any of the jurisprudence construing s 1926(b). The right of the Water District to supply water service under s 1926(b) to locations within its franchise coexists with the rights of the City to provide fire protection. As stated by the court in City of Madison,

Section 1926(b) does not, however, permanently curtail the city's authority, because it applies only while the federal debt is outstanding. Additionally, the city may and does regulate growth within that part of Madison served by Bear Creek so as to assure minimum standards of water service such as adequate fire hydrants. The city can and has in the past collaborated with Bear Creek to collect municipal bills for sewer service. It may also, pursuant to FmHA regulations, agree to purchase facilities from Bear Creek. The limits on the provision of water service are thus restricted in time and in scope so as not to disable the city severely from performing its governmental function. At most, Section 1926(b) ordains a dual water authority function within a municipal area for a period of time.

816 F.2d at 1061.

III.

Accordingly, because s 1926(b) prohibits a municipality from providing water

services to an area within a rural water association's exclusive franchise while the water association is indebted to the FmHA, the Court concludes, as a matter of law, that the plaintiff Water Works District No. II is entitled to injunctive relief as found herein. The Court shall issue a judgment so ordering such relief consistent with this opinion.

FN1. Water District's request for damages strikes the Court as being somewhat incongruous with its desire that the City continue to provide service to those areas within the District that it cannot itself serve. It seems that in one breath the Water District asks for damages from the City and in the next breath asks the City to favor it by providing services where it cannot.

END OF DOCUMENT

Appendix B