STATE OF MICHIGAN

COURT OF APPEALS

S.D. WARREN; BURDICK & JACKSON LABORATORIES; ESCO; HOWMET CORP; LOMAC, INC.; AGREVO USA; SUN CHEMICAL CO; CWC TEXTRON; KAYDON CORP; GENESCO, INC.; SPX CORP and KOCH INTERNATIONAL, MICHIGAN DIVISION; and LORIN INDUSTRIES, individually, and together as INDUSTRIAL USERS COMMITTEE,

Plaintiffs-Appellees,

v

COUNTY OF MUSKEGON, MUSKEGON COUNTY BOARD OF PUBLIC WORKS; MUSKEGON COUNTY DEPARTMENT OF PUBLIC WORKS,

Defendants-Appellants,

and

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

UNPUBLISHED
July 14, 1998

No. 197060
Muskegon Circuit Court
LC No. 95-032651 CE

Before: Griffin, P.J., and Holbrook, Jr., and Neff, JJ.

PER CURIAM.

Defendant Muskegon County (hereinafter "defendant"), along with the county's Board of Public Works and Department of Public Works, appeals as of right from the circuit court's order enjoining enforcement of a 1994 ordinance enacted by defendant. We affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

In 1970, defendant contracted with several municipalities and industries located within the county to provide for the creation of a major wastewater treatment system. In order to accomplish this objective, several of the plaintiff industries entered into Service Agreements with defendant. These Service Agreements established a plan for its operation and for major users of the system to participate in the construction and funding of it. Attached to the Service Agreements, and specifically made a part of the same by reference, was Exhibit D, which was entitled "Regulations for Discharge to the Muskegon County Wastewater Management System Number 1."

Section III-A of Exhibit D imposed particular limitations on the discharge of certain specified substances into the system. Section III-B of Exhibit D provided:

> It is the intent and purpose of the system to provide the maximum possible service to each Contractee and person served by the system, consistent with the preservation of public health and safety, the fulfillment of obligations under state and federal law, the successful functioning of the System, and fairness to all parties.
>
> To this end and subject to the foregoing principles, . . . the director shall have the discretion to permit a Contractee or party served by the Contractee to discharge into the system waste fluids and solids whose constituent or parameter levels do not meet those prescribed in Section III-A hereof, as they may from time to time be amended. Such exceptions may contain conditions and be issued for such period of time as the director may deem necessary or advisable.

In practice, system users were allowed to discharge in excess of the target levels established in Section III-A so long as overall treatment capacity of the system was not exceeded. Indeed, the practice of the system traditionally had been only to monitor industrial discharges without attempting to impose actual numerical limitations on them.

Paragraph 8 of the Service Agreements addresses the possibility that the regulations contained in Exhibit D may need to be amended or perhaps even repealed in order to assure that the system continues to function properly. In pertinent part, the paragraph reads:

> In accordance with the procedures set forth [in Exhibit D], the County may amend or repeal any such regulations, or promulgate new regulations if reasonably required for the proper functioning of the System and/or to achieve equity among users thereof; and, provided, however, that any such regulations or amendments thereto shall not be more stringent than those required by state and federal agencies . . . .

In 1980, amendments to Exhibit D were executed. Section III of those amendments states that the amended regulations "are generally intended to . . . prohibit the discharge . . . of sewage which causes Interference[1] or could have detrimental effects on the physical structures or operating personnel of the system, or on the general public." It then goes on to enumerate specific restrictions on discharges. Until approximately 1989, users were routinely allowed to exceed those limits, provided that the discharges did not cause interference to the system.

In recent years state and federal regulatory pressure increasingly came to bear on defendant. In 1992, the state Department of Environmental Quality issued an audit report to defendant, which stated that defendant had "failed to enforce and control all industrial contributions." In that same year, the United States Environmental Protection Agency issued an order requiring defendant to establish a system of enforceable permits or similar individual control mechanisms to regulate the discharges of large industrial users. Although both state and federal regulators were calling for defendant to implement specifically enforceable numeric limits on discharges, neither authority mandated at what level those particular limits should be set or what procedures needed to be followed when implementing and enforcing such limits.

In response to the demands made by the state and federal authorities, defendant conducted a treatment capacity evaluation of the system in the later months of 1992. During this period, the average discharge volume through the system was 34.8 million gallons per day, substantially below the design capacity of 42 million gallons per day. After calculating the system's rate of removal of pollutants during that period, defendant then calculated the system's treatment capacity for processing individual compounds based on the average discharge volumes. From these figures, defendant then deducted: (1) a ten percent safety factor; (2) a ten percent reserve for future growth of the discharge load; and (3) twenty percent as an additional insurance factor. Under the resulting uniform concentration limits established, less than half of the system's maximum treatment capacity was left for allocation to plaintiffs.

Then in 1994, instead of further amending the Service Agreements to reflect the new concentration limits, defendant chose to enact an ordinance that expressly superseded the amendments to Exhibit D. The ordinance replaced the "interference-based" limits previously in force with uniform concentration limits for industrial customers based on the 1992 calculations. These limits were not mere targets, but were absolute prohibitions, setting discharges far below what was readily allowed under the amendments to Exhibit D, and substantially below what some plaintiffs had historically discharged. Further, the ordinance allowed a user to request a "specific alternative limit," which the director of the system may grant "at his sole discretion," and which the director may discretionarily terminate, condition, or modify.

Plaintiffs sued in 1995 to enjoin enforcement of the ordinance. They argued that the effect of the ordinance was to convert what had previously been a contract right to make use of available capacity to a mere privilege subject to defendant's discretion. Finding that the ordinance failed to preserve plaintiffs' rights to maximum possible service, the circuit court concluded that the ordinance unconstitutionally impaired the contract rights of plaintiffs. The court observed that in order to satisfy state and federal regulations, defendant could establish specific numerical limits on discharges. The court noted, however, that those limits had to be premised on the system's actual maximum capacity, as well as each user's right to access that capacity. While the court allowed defendant to reserve ten percent of system capacity as a safety factor, the court found that additional reserves of capacity, including for future needs, violated plaintiffs' rights to maximum possible service.

II. ANALYSIS

Resolution of this appeal turns on an interpretation of the contracts at issue. "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are

subordinate." *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924) "Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided." *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). "Where contractual language is clear, its construction is a question of law" to be reviewed de novo on appeal. *Id.* However, where contractual language is ambiguous, "preliminary negotiations may be considered . . . to aid the court in determining the intent with which such words were used." *McIntosh, supra* at 219-220. Findings of fact made by the trial court when interpreting ambiguous contractual language will not be disturbed on appeal unless they were clearly erroneous. *Keller v Paulos Land Co*, 5 Mich App 246, 256; 146 NW2d 93 (1966).

Defendant argues that under the circuit court's interpretation of the Service Agreements and subsequent amendments, each covered user of the system would be able to individually discharge pollutants at will up to the limits of the system's capacity. Defendant asserts that by concluding that the contractual language both "expressly and impliedly give plaintiffs a right to discharge up to the maximum treatment capacity," the circuit court established a method of allocation whereby a single solitary user could exhaust the system's entire capacity.

Defendant's interpretation of the circuit court's ruling presents us with a false dilemma that we are unwilling to accept. The circuit court's conclusion that plaintiffs deserve "maximum possible service" need not be taken to mean that each user of the system has a right to exhaust all capacity arbitrarily, but may instead be interpreted to mean that each user is entitled to reasonable access to available capacity.[2] While it is true that the circuit court concluded that "[t]he plaintiffs have a contractual right to maximum possible use of the system," the court also recognized that all uses of the system "must be consistent with 'the preservation of public health and safety, the fulfillment of obligations under federal and state law, the successful functioning of the system, and fairness to all parties.'"[3] As the circuit court correctly recognized, the choice is not between on the one hand the 1994 ordinance and, on the other hand, the total absence of any discharge limits (where a single user could effectively control the entire system). Rather, there is a middle ground that recognizes that the need for establishing specific discharge limits and a permit system can be met while at the same time protecting plaintiffs' unambiguous contractual right to use the system's available capacity.

We also disagree with defendant's assertion that the 1994 ordinance was a reasonable exercise of discretion pursuant to its contractual obligation to comply with state and federal law. As the circuit court correctly observed, while the 1994 ordinance complied with the federal regulatory requirement of specific enforceable numerical limits on discharges, defendant's duty to implement such limits did not include a right to set limits at a very conservative level that comported neither with plaintiffs' contractual right to maximum use of the system nor with plaintiffs' history of usage under the contracts.

Nor did the circuit court err in finding that defendant had no contractual right to reserve capacity for unidentified future needs. To allow defendant to reserve capacity at its discretion in anticipation of future users of the system—as a manifestation of defendant's right under the contracts to provide for fairness to other parties—would be to allow defendant to render the rights of known parties to maximum possible service subservient to defendant's guess as to the unknown needs of unknown entities.[4] As the circuit court explained:

> Future potential users of the system may hook up to the system through expansion of the system, with financing of the future expansion to be resolved by the public bodies and future users so involved. Thus, it is not "necessary" to abrogate the present contract rights of plaintiffs to enable future potential users to hook up to the system.

Finally, defendant argues that the circuit court failed to afford due deference to defendant's acts of discretion in this matter. "'[T]he judicial power cannot interfere with the legitimate discretion of any other department of government. So long as they do no illegal act, and are doing business in the range of the powers committed to their exercise, no outside authority can intermeddle with them.'" *Wayne County Prosecutor v Wayne County Bd of Comm'rs*, 93 Mich App 114, 121; 286 NW2d 62 (1979), quoting *Detroit v Circuit Judge of Wayne County*, 79 Mich 384, 387; 44 NW 622 (1890). Because defendant exceeded its contractually provided scope of discretion in enacting the 1994 ordinance, it deserved no deference from the circuit court.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff

[1] "Interference" is contractually defined in pertinent part as the

> inhibition or disruption of the public sewer or the POTW [publicly owned treatment works] sewer system or the POTW's treatment processes or operation which causes or significantly contributes to a violation of any requirement of the POTW's NPDES [national pollution discharge elimination permit system] permits. The term also includes prevention of sewage sludge use or disposal by the POTW in accordance with published promulgated [federal and state rules and] regulations . . . . Pollutants in the effluent of a User shall not be considered to cause Interference where the User is in compliance with the specific prohibitions, standards, effluent standards or effluent limitations developed by the Federal government, the State of Michigan, local government or the POTW."

[2] The circuit court may be presumed to have found that the exercise of contract rights by all parties would have to be informed by traditional contract principles of good faith and fair dealing. See *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992). A user who suddenly, wantonly, and opportunistically began discharging volumes of wastewater and pollutants wholly out of proportion to its history, and of other parties' expectations, should be considered to have exceeded its right to maximum possible service for purposes of the contract, triggering defendant's right to curtail the excess pursuant to its right to protect the interests of other parties relying on the system.

[3] Quoting from Section III-B of Exhibit D. Although Exhibit D was amended, there is nothing in those amendments that explicitly or implicitly repealed the quoted language.

[4] Any existing parties who have paid consideration but not yet connected to the system may, for purposes of the contract, be considered present users whose needs must be accommodated when they are ready.