IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Southersby Development Corp.	:	
	:	
v.	:	No. 1756 C.D. 2010
	:	
Borough of Jefferson Hills,	:	Argued: April 5, 2011
	:	
Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 10, 2011**

Borough of Jefferson Hills (Borough) appeals from the Order of the Court of Common Pleas of Allegheny County (trial court) that granted Southersby Development Corporation's (Southersby) Motion for Summary Judgment (Motion). The trial court determined that there were no genuine issues of material fact and, pursuant to the Pennsylvania Municipalities Planning Code (MPC)[1] and the Municipality Authorities Act (MAA), 53 Pa. C.S. §§ 5601-5623, the Borough was required to reimburse a portion of the tapping fee that it collected for each lot in a residential development to Southersby, which had constructed the development and built sanitary sewer system lines to extend the public sanitary sewer system throughout the development. For the following reasons, we affirm.

[1] Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101 – 11202.

Southersby is the developer of Patriot Pointe, which is located within the municipal boundaries of the Borough. Patriot Pointe includes three subdivisions: Phase I, Phase II, and Phase III. At the time the law suit commenced, construction on Phase III had not yet begun. Southersby executed Developer's Agreements with the Borough for Phase I on June 14, 2004, and Phase II on July 25, 2005. As part of the Agreements, Southersby was required to build sanitary sewer lines that expanded and extended the Borough's public sanitary sewer system throughout Patriot Pointe at its own expense. These improvements were dedicated, approved and accepted by the Borough pursuant to Ordinance 795 and Ordinance 804. After the Borough accepted the sanitary sewer lines constructed by Southersby, the Borough charged a tapping fee in the amount of $1,500 per lot to owners/users as a condition to providing them access to the Borough's municipal sewer system.

On September 25, 2008, Southersby filed a Mandamus Complaint and Request for Declaratory Relief against the Borough. The Complaint sought the issuance of mandamus to require the Borough to reimburse Southersby a portion of the tapping fee in the amount of $900 per lot pursuant to Section 5607(d)(24)(i)(C)(IV) of the MAA, 53 Pa. C.S. § 5607(d)(24)(i)(C)(IV), and to notify Southersby when it collected a tapping fee pursuant to Section 5607(d)(31)(v) of the MAA, 53 Pa. C.S. § 5607(d)(31)(v). On April 28, 2010, Southersby filed the Motion. Essentially, Southersby argues that the Borough's tapping fee is more than it is permitted to charge under Section 5607(d)(24)(i)(C)(IV) of the MAA. According to the Borough's own revised "Tap In Fee Study," the Borough can charge, at most, $515.76 for the tapping fee, which includes $319.83 for the capacity part and $195.93 for the collection part.

(Revised June 2005 "Tap In Fee Study" at 1, R.R. at 191a.)[2] Any additional amount being charged would necessarily be considered reimbursement to Southersby, which constructed the facilities at its own expense. The Borough filed a cross-motion for summary judgment (Cross-Motion), arguing that the provisions of the MAA did not require reimbursement because there was no written agreement between Southersby and the Borough providing for reimbursement, and there were no property owners outside of Patriot Pointe that connected to the Patriot Pointe sewer system.

The trial court agreed with Southersby that it was entitled to reimbursement and, therefore, granted Southersby's Motion and denied the Borough's Cross-Motion. The Borough was ordered to reimburse Southersby $115,656.66, which was the amount requested by Southersby. The Borough's appeal is now before this Court for disposition.[3]

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[2] The revised "Tap In Fee Study" provides that "Act 203 of 1990, amended in 2003 provides for the imposition of three separate fees that are designated to allow the Borough to recover capital costs associated with the sanitary sewer system. *These fees are the only charges that a Borough is authorized to impose for the right to utilize the existing sanitary sewer system.* . . ." (Revised June 2005 "Tap In Fee Study" at 1, R.R. at 191a (emphasis added).) With regard to the tapping fee, the study provides:

a) Capacity Component	$ 319.83
b) Collection Component	$ 195.93
c) Special Purpose Component	As Applicable
d) Reimbursement Component	As Applicable
Tap Fee	$ 515.76

[3] "This Court's scope of review of a grant of summary judgment is limited to determining whether the trial court committed an error of law or abused its discretion." Page v. City of Philadelphia, ___ A.3d ___, ___ n.5, No. 1542 C.D. 2010, 2011 WL 2749671, at *2 (Pa. Cmwlth. July 18, 2011).

On appeal, the Borough contends that the trial court erred because: (1) the MPC and MAA do not require reimbursement; and, alternatively, (2) there are factual issues concerning the collected tapping fees that would require a trial on damages before reimbursement can be ordered. We will discuss each issue in turn.

I. Reimbursement under the MPC and MAA

Section 507-A of the MPC[4] provides that "[n]o municipality may charge any tap-in connection or other similar fee as a condition of connection to a municipally owned sewer or water system unless such fee is calculated as provided in the applicable provisions of" the MAA. 53 P.S. § 10507-A(a). Section 5607(d)(24) of the MAA sets out the power "[t]o charge enumerated fees to property owners who desire to or are required to connect to the authority's sewer or water system. Fees shall be based upon the duly adopted fee schedule." 53 Pa. C.S. § 5607(d)(24). Section 5607(d)(24)(i) states that "[t]he fees may include any of the following if they are separately set forth in a resolution adopted by the authority" which are: (A) Connection fee; (B) Customer facilities fee; and (C) Tapping fee. 53 Pa. C.S. § 5607(d)(24)(i). At issue before this Court is Section 5607(d)(24)(i)(C), which sets out the requirements for a "Tapping fee." Complicating this matter is the fact that the General Assembly amended the "Tapping fee" provisions of the MAA between the development of Phase I and Phase II of Patriot Pointe. What has not changed is that the "Tapping fee" is comprised of 4 "parts": the Capacity part (defined in Section 5607(d)(24)(i)(C)(I)); the Distribution or collection part (defined in Section 5607(d)(24)(i)(C)(II)); the Special purpose part (defined in Section 5607(d)(24)(i)(C)(III) and not at issue in this case); and the

[4] Section 507-A of the MPC was added by the Act of December 19, 1990, P.L. 1343.

Reimbursement component or part (defined in Section 5607(d)(24)(i)(C)(IV)). Therefore, we will address Phase I and Phase II separately in an effort to simplify this complicated matter.

A. Phase I

Before the MAA was amended, it defined the Reimbursement component as follows:

> **(IV) Reimbursement component**. An amount necessary to recapture the allocable portion of facilities in order to reimburse the property owner or owners at whose expense the facilities were constructed as set forth in paragraphs (31) and (32).

Former 53 Pa. C.S. § 5607(d)(24)(i)(C)(IV). Paragraph 31 was not amended, and provides:

> **(31)** Where a property owner constructs or causes to be constructed at his expense any extension of a sewer or water system of an authority, the authority shall provide for the reimbursement to the property owner when the owner of another property not in the development for which the extension was constructed connects a service line directly to the extension . . . .

53 Pa. C.S. § 5607(d)(31). Paragraph 32 was deleted by the amendment, but was in effect during the development of Phase I. The "paragraph (32)" to which the Reimbursement component definition referred provided:

> **(32)** If a sewer system or water system or any part or extension owned by an authority has been constructed at the expense of a private person or corporation, the authority may charge a tapping fee. The authority shall refund the tapping fee or any part of the fee to the person or corporation who paid for the construction of the sewer or water system or any part or extension of it.

Former 53 Pa. C.S. § 5607(d)(32).

The Borough focuses on the Reimbursement component's requirement that the facilities had to be "constructed as set forth in paragraph[] 31," to argue that it is not authorized to reimburse Southersby for Phase I tapping fees. The Borough contends that, because there have been no property owners not in the development who have tapped into the Patriot Pointe system, no reimbursement is required under this provision. The Borough argues that Paragraph 32, which was in effect during Phase I, must be read in conjunction with Paragraph 31 and, together, they clearly establish that Southersby is precluded from being reimbursed because there have been no connections to the sewer system from outside Patriot Pointe. We disagree.

This statute, like every enactment of the Legislature, must be analyzed in accordance with the established rules of statutory construction. There is a presumption "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." Section 1922(1) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1922(1). Additionally, all the language of a statute must be given effect. "The Legislature cannot be deemed to intend that its language be superfluous and without import." Daly v. Hemphill, 411 Pa. 263, 273, 191 A.2d 835, 842 (1963).

With regard to Phase I, we agree with Southersby that, under the provisions of the MAA that were applicable at that time, the Borough could keep only the Capacity part of the tapping fee ($319.83) and the remaining portion ($1,180.17) would be the "Reimbursement part" of the tapping fee.[5] To conclude that

[5] The Borough collected $1,500 per lot, even though it was only allowed to charge $319.83 for the Capacity part and $195.93 for the Collection part, resulting in a maximum fee of

Paragraph 31 controls, and not Paragraph 32, would essentially render Paragraph 32 superfluous. Paragraph 32 states that the Borough "shall refund the tapping fee or any part of the fee to the person or corporation who paid for the construction of the sewer." Former 53 Pa. C.S. § 5607(d)(32). This language requires the Borough to reimburse Southersby any portion of the tapping fee that the Borough cannot legally keep under the provisions of the MAA. Because the Borough can keep only the Capacity part portion of the tapping fee, the remaining portion of the tapping fee must constitute the Reimbursement part. Accordingly, Southersby is entitled to the Reimbursement part of each tapping fee, in the amount of $1,180.17, that was collected or will be collected by the Borough for Phase I because Southersby's construction costs per connection were greater than that amount.

B. Phase II

At the time the Developer's Agreement for Phase II was executed, the MAA was amended, which became effective June 2005. This amendment changed the definition of the Reimbursement part such that the definition of the Reimbursement

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$515.76. (Memo to Borough from Borough Engineer, July 7, 2005, R.R. at 201a.) Of this chargeable fee, the Borough can keep only the Capacity part of the tapping fee because Southersby is the collector, not the Borough. Southersby contends that there "is no dispute that the Borough does not have a right to charge the collection part of the tap fee for Patriot Pointe because Southersby constructed the collector sewer facilities in Patriot Pointe." (Southersby's Br. at 12.) In fact, the engineer that prepared the revised "Tap In Fee Study" explained that "[t]he collection component recovers the costs associated with the construction of the collector sewers, excluding any sewers dedicated to the Borough by developers." (Revised June 2005 "Tap In Fee Study" at 2, R.R. at 192a.) The Borough, in its reply brief, does not contest Southersby's claim that the Borough may not collect the Collection part of the tapping fee, but just generally contends that there are genuine issues of material fact as to the calculation of the tapping fee. However, other than its own revised "Tap In Fee Study," the Borough has not introduced any other evidence to support its calculation of the fees.

part for Phase II is different than the definition of the Reimbursement component for Phase I. The current definition of the Reimbursement part, which applies to Phase II, provides as follows:

> **(IV) Reimbursement part**. The reimbursement part shall *only be applicable* to the users of certain specific facilities when a fee required to be collected from such users will be *reimbursed to the person at whose expense the facilities were constructed as set forth in a written agreement between the authority and such person at whose expense such facilities were constructed.*

53 Pa. C.S. § 5607(d)(24)(i)(C)(IV) (emphasis added).

The Borough contends that the Developer's Agreement for Phase II does not specifically set forth a provision that requires reimbursement to Southersby and, therefore, it is not required to reimburse Southersby under the amended definition of the Reimbursement part, 53 Pa. C.S. § 5607(d)(24)(i)(C)(IV). Moreover, the Borough argues that when the MAA was amended, former Paragraph 32 was deleted in its entirety, but Paragraph 31 remained. Therefore, the Borough contends that Paragraph 31 controls the outcome of this matter and that, because a party outside Patriot Pointe has not connected to the system, the Borough is not required to reimburse tapping fees to Southersby for Phase II. Again, we disagree.

With regard to Phase II, the amended Section 5607(d)(24)(i)(C)(IV) of the MAA, which does not refer to Paragraphs 31 or 32, controls. Thus, the Borough is not correct that Paragraph 31 controls the reimbursement for Phase II. Rather, after the amendment, Paragraph 31, 53 Pa. C.S. § 5607(d)(31), became a stand-alone provision that governs the procedure for reimbursement only when a

property owner from outside an intended development connects to sewer lines constructed by a private person or company.

At issue here is the interpretation of the amended Section 5607(d)(24)(i)(C)(IV), which states that a Reimbursement part "shall only be applicable . . . when a fee required to be collected from such users will be reimbursed to the person at whose expense the facilities were constructed as set forth in a written agreement between the authority and such person at whose expense such facilities were constructed." 53 Pa. C.S. § 5607(d)(24)(i)(C)(IV). In this case, Southersby constructed the facilities at its own expense as set forth in a written agreement with the Borough.[6] The Borough argues that, in order for it to have to remit any of the fees it collected to Southersby, the MAA requires that the written agreement between the Borough and Southersby include a specific provision providing for such reimbursement. That is, the Borough argues that "as set forth in a written agreement" refers to the reimbursement of the fees collected. First, we note that it appears that a Reimbursement part can only be collected where it falls within the description in this section ("shall *only* be applicable"). When read as a whole, we believe that the phrase "as set forth in a written agreement" refers to an agreement to construct the facilities at the expense of a person, not an agreement to reimburse the person for such construction. The phrase "as set forth in a written agreement" immediately follows the phrase "were constructed," and therefore, would appear to relate to the construction. We note

[6] The Developer's Agreement between Southersby, as the Developer, and the Borough was executed on July 27, 2005. The Agreement is a 17-page document detailing certain public and private improvements, and specifying that Southersby was responsible for the expense of constructing the sewage facilities at issue. (Developer's Agreement, R.R. at 90a-106a.)

that it would be impractical to require an agreement to set forth a specific dollar amount for reimbursement because the agreement is entered into *before* the construction of the facilities; thus, the ultimate construction costs are not certain. Therefore, we believe the trial court correctly interpreted the MAA. Because the Borough collected a $1,500 tapping fee for each lot, of which it could only charge and recoup $319.83, the remainder of the tapping fee had to constitute the Reimbursement part. 53 Pa. C.S. § 5607(d)(24)(i)(C)(IV). Therefore, like the trial court, we conclude that Southersby is entitled to the Reimbursement part of each tapping fee, in the amount of $1,180.17, that was collected or will be collected by the Borough for Phase II.

II. Remand to Determine Reimbursement

Finally, the Borough argues that, pursuant to Bellefonte Area School District v. Deak, 779 A.2d 1240 (Pa. Cmwlth. 2001), the trial court erred in accepting the estimated damages in Southersby's Motion and prematurely entering judgment on that basis. The Borough asserts that a trial is necessary in order to properly determine the damages because there are genuine issues of material fact regarding the calculation and payment of the tapping fee. In its Complaint, Southersby originally sought reimbursement in the amount of $900 per tapping fee paid. Yet, in its Motion, Southersby stated that the $1,180.17 portion of the tapping fee is the Reimbursement component. The Borough contends that discovery, to date, evidences that the factual issues surrounding the Borough's tapping fee calculation have not been fully developed. In addition, the Borough argues that surrounding communities are charging comparable, and in most cases even higher, tapping fee amounts. Therefore, the Borough argues that a material issue of fact exists as to

the calculation and setting of tapping fees. Moreover, the Borough asserts that documents Southersby produced shows that Southersby, as the owner of 12 lots, may have paid tapping fees directly to the Borough and, to the extent it did pay these fees, it can reasonably be expected to have passed these costs onto its own real estate buyers. Accordingly, the Borough argues that reimbursement would result in duplicative payments to Southersby.

We do not find that a remand is necessary. It is not disputed that the Borough collected a tapping fee in the amount of $1,500 per lot in Phases I and II and that the Borough wishes to keep the entire fee. The question before this Court is what, if any, part of that tapping fee must be reimbursed to Southersby *as a matter of law* under the MAA. As Southersby points out, this is a question of law and not a subjective estimate of damages that would need to be presented to a jury as was the case in Deak, 779 A.2d at 1244-45.

In paragraph 18 of the Complaint, Southersby states that "Chapter 18, Part 4B of the Borough Ordinance establishes $900.00 per EDU of the stipulated sum of $1500.00 as the proper reimbursement amount." (Complaint ¶ 18.) However, the Complaint goes on to state that Southersby "lacks an adequate remedy at law to compel the Borough to provide the Plaintiff with notice of all new connections and *to pay the [R]eimbursement component of the sanitary taps*," (Complaint ¶ 29 (emphasis added)), and requests relief "[d]eclaring that the Borough has a legal obligation to pay over to the Plaintiff *the proper reimbursement* for each residential customer tapping into the sanitary sewer facilities constructed by Plaintiff…." (Complaint ¶ 32(a) (emphasis added).) Thus, contrary to the

Borough's assertion, Southersby requested more than a $900 reimbursement per tapping fee charged – Southersby requested "the proper reimbursement" from the tapping fees collected by the Borough. (Complaint ¶ 32(a).) Since we have determined that, as a matter of law, the trial court was correct in ordering Southersby to be reimbursed the Reimbursement part of the tapping fee ($1,180.17) collected by the Borough for each lot in Phases I and II that was charged a tapping fee, there is no need to remand this matter to the trial court to clarify its order. Additionally, with regard to any future tapping fees collected by the Borough for Phases I and II that were not set forth in the trial court's Order, our decision would collaterally estop the Borough from denying payment of the Reimbursement part ($1,180.17) for each lot to Southersby for Phases I and II.

We also address Southersby's assertion that a remand is necessary for the trial court to amend its Order, for clarification purposes, to include tapping fees collected by the Borough for Phase III, which was constructed after the Complaint was filed. However, the issue of tapping fees charged for Phase III is not before this Court for disposition. The Complaint did not include a pleading of facts related to Phase III tapping fees and, thus, we will not order the Borough to reimburse Southersby for any tapping fees charged in Phase III.

Accordingly, for the reasons set forth in this opinion, we affirm the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Southersby Development Corp.	:	
	:	
v.	:	No. 1756 C.D. 2010
	:	
Borough of Jefferson Hills,	:	
	:	
Appellant	:	

O R D E R

NOW, August 10, 2011, the Order of the Court of Common Pleas of Allegheny County in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge