

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

THE TOWN OF SMYRNA, a municipal )  
corporation of the State of Delaware, )  
DEE A. WATSON, JR., and D. WAT )  
L.L.C., a Delaware limited liability )  
company, and GOLDSBOROUGH ROAD )  
DEVELOPMENT, L.L.C., )

Petitioners, )

v. )

C.A. No. 04C-11-047 LAMB

KENT COUNTY LEVY COURT, the )  
governing body of Kent County, a )  
political subdivision of the State of )  
Delaware, and NEW CASTLE COUNTY, )  
a political subdivision of the State of )  
Delaware, )

Respondents. )

***MEMORANDUM OPINION***

**Submitted: December 17, 2004**

**Decided: January 24, 2005**

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*D. WAT, L.L.C.*

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LAMB, Vice Chancellor<sup>1</sup>

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<sup>1</sup> Sitting by designation pursuant to Article IV, Section 13 of the Delaware Constitution.

The Town of Smyrna lies along the northern border of Kent County. It recently annexed lands to its north that used to lie within the unincorporated area of New Castle County. At the time of the annexation, New Castle County provided no sewer service to the lands involved. Nevertheless, it later asserted a continuing governmental interest in the collection and treatment of waste from the annexed lands. Smyrna brings this action (joined by interested land owners) for a declaration that the town has the right to collect sewage on the annexed land and contract with Kent County for the treatment of that sewage without New Castle County's consent.

Because the annexation eliminated the governmental power of New Castle County over the annexed lands, the court concludes that New Castle County has no cognizable governmental interest in the collection or treatment of waste generated on the annexed lands. Nor does New Castle County have any cognizable commercial or proprietary interest in the collection or treatment of that waste since it has never provided, and has no contractual right to provide, sewer service to those lands. Rather, the Town of Smyrna has the governmental power to construct sewer collection and transmission lines over its lands and is plainly empowered to contract with Kent County for the treatment of that waste, all without the need to seek or obtain the consent of New Castle County.

## I.

The plaintiffs are the Town of Smyrna, a municipal corporation of the State of Delaware; Dee A. Watson, Jr.; D. WAT, L.L.C., a Delaware limited liability company; and Goldsborough Road Development, L.L.C. These plaintiffs sued Kent County Levy Court, the governing body of Kent County, a political subdivision of the State of Delaware, and New Castle County, also a political subdivision of the State of Delaware.

### A. Background Facts

In 1996, Smyrna and Kent County entered into an “Agreement for Services” whereby Kent County agreed to accept for transmission and treatment all sewage generated by or through Smyrna’s collection lines. At the time, Smyrna was located almost entirely within the geographical boundaries of Kent County except for a small undeveloped area along the northerly border of Kent County which was located in New Castle County. The Agreement provides that Kent County is required to provide facilities sufficient to perform the services in question,<sup>2</sup> and, should existing facilities become inadequate, to expand its sewage treatment

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<sup>2</sup> Article IV of the Agreement states, in pertinent part: “[Kent County] shall provide and maintain facilities sufficient to carry out the services [transmission and treatment of sewage] . . . including but not limited to pumping facilities for all Transmission Lines and all other requisite transmission and treatment facilities.”

capacity.<sup>3</sup> In addition, the Agreement contains an arbitration provision which requires that any dispute arising out of, or related to, the Agreement be submitted to binding arbitration.

On August 18, 2003, Smyrna annexed some 500 acres of land lying to the north of its then-existing town limits. This land formerly had the status of unincorporated land within New Castle County subject to the power of that county's government. The annexation was officially opposed by New Castle County and by various state and county officials, but there is no contention that the annexation was illegal. Soon after its opposition to the annexation failed, New Castle County publicly asserted that Smyrna and Kent County are prohibited from extending sewer services to the annexed land under the terms of their contract without New Castle County's consent. Kent County acceded to this position and advised Smyrna that it would not accept sewage originating from the annexed land.

Watson and D. WAT own several parcels of land included in the 500-acre annexation. On or about December 17, 2003, Watson and D. WAT requested from Smyrna application forms and advice with respect to the requirements necessary to develop their property. On December 22, 2003, Smyrna responded that, until the

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<sup>3</sup> Article V(B) of the Agreement states, in pertinent part:

[Kent County] shall contract to expand Transmission Line capacity if and when monthly capacity of any particular Transmission Line has reached ninety percent (90%) of its available transmission capacity. Similarly, [Kent County] shall contract to expand treatment capacity if and when Kent County Wastewater Treatment Facility reaches ninety percent (90%) of its average monthly capacity.

issue of sewer service to the area was resolved, it would not entertain any applications for subdivision or site plan approval in that area. The Town of Smyrna, Watson and D. WAT then filed suit in the Court of Chancery.

On March 26, 2004, Goldsborough, another owner of portions of the annexed land, filed a complaint in the same court against Kent County and New Castle County seeking similar relief. By stipulation filed July 7, 2004, the two cases were consolidated.

B. The Litigation

The original complaint demanded two forms of relief. First, the complaint sought a declaratory judgment that Smyrna is authorized to extend its sewer services to the annexed land and that Kent County is contractually obligated to provide sewer transmission and treatment services for all the sewage collected by Smyrna from all lands located in the territorial limits of the town, including the annexed land, without the consent of New Castle County. Second, the complaint sought specific performance of the Agreement.

The plaintiffs moved for judgment on the pleadings. Kent County cross-moved to dismiss on grounds that the contract claims were subject to a broad arbitration clause and that, if the claim for specific performance was dismissed, the Court of Chancery otherwise lacked subject matter jurisdiction to hear the dispute. On November 9, 2004, the Court of Chancery dismissed the contract claims

without prejudice in favor of arbitration and transferred the remaining claim for declaratory judgment to this court.<sup>4</sup>

The matter is now before the court on the plaintiffs' renewed motion for judgment on the pleadings, in connection with which the parties have submitted additional briefs. This is the court's decision on the motion.

## II.

The counties of Delaware are political subdivisions possessing only those restricted powers and duties granted by statute.<sup>5</sup> A county has no right or duty to insist on providing services, sewer or otherwise, to a municipality located outside the governmental boundaries of the county, because this would exceed its statutory grant of authority.<sup>6</sup> This is true even if the incorporated municipality was formerly a part of the unincorporated county and was annexed to a city.<sup>7</sup> Instead, Smyrna indisputably has the power to provide sewage treatment to lands inside its limits and to its inhabitants.<sup>8</sup> Following the annexation, Smyrna has the exclusive governmental power, and responsibility, to provide sewer services to the annexed

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<sup>4</sup> *Town of Smyrna v. Kent County Levy Court*, 2004 WL 2671745, at \*1 (Del. Ch. Nov. 9, 2004).

<sup>5</sup> *State v. Warwick*, 108 A.2d 85, 89 (Del. 1954).

<sup>6</sup> *See New Castle County v. New Castle*, 372 A.2d 188, 190 (Del. 1977); 9 *Del. C.* § 2203 (“No sewerage system, or any part thereof, shall be constructed or maintained within the boundaries of any city or town situated in the County without the consent of such city or town.”).

<sup>7</sup> *See City of Wilmington Fire Dept. v. State Fire Prevention Comm'n*, 2000 WL 140790 (Del. Super. Feb. 3, 2000) (“In short, the bedrock on which the Court's decision rests is its conclusion that by operation of law, a municipal annexation transfers responsibility for municipal services . . . to the municipality. That transfer, in large measure, is what an annexation is about.”).

<sup>8</sup> 74 Del. L. Ch. 176, § 22.1 (“The Town shall have full power and authority to operate a system for the collection, transfer, and/or treatment of sanitary sewage for the Town and the inhabitants thereof.”).

properties. Moreover, since Smyrna has the authority to provide sewer services itself, it also has the power to contract with Kent County to provide such services. The General Assembly expressly granted this power to Smyrna in its Town Charter.<sup>9</sup>

In response to this reasoning, New Castle County argues that Kent County cannot provide sewer services to areas within the geographic boundaries of New Castle County, without New Castle County's consent, because this would be "unreasonable." First, in its brief, New Castle County describes in great detail the "Livable Delaware" initiative, which seeks to direct growth to areas where the state, county, and local governments are most prepared for it, in terms of infrastructure investment and thoughtful planning. This initiative, since codified by the General Assembly, sets out a detailed procedure for annexation. For instance, Livable Delaware requires that any city or town proposing to extend its boundaries by annexation must depict the proposed annexation as an area "for

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<sup>9</sup> 74 Del. L. Ch. 176, § 4.5 ("The Town may exercise any of its powers or perform any of its functions . . . by contract or otherwise, with the State of Delaware or with any agency or political subdivision thereof . . ."); 74 Del. L. Ch. 176, § 22.1 ("The Town Council shall have the power to enter into contracts with the Kent County Levy Court (or its successors) or with the Government of New Castle County (or its successors) with regard to [operating a sewage system.]"); *see also Levy Court of Kent County v. City of Dover*, 333 A.2d 161, 163 (Del. 1975) holding that a county has the authority to contract with a municipality to furnish the services, such as sewer, that it has decided the public interest requires in a given area of the county).



future annexation” on its comprehensive plan,<sup>10</sup> and sets out a process for state review and certification of county and municipal comprehensive plans.<sup>11</sup>

Nothing in this legislation provides a basis for New Castle County’s proposed “reasonableness” limitation on the ability of a town to provide sewer services to properties annexed over the objection of responsible state officials. On the contrary, the legislation takes a very different approach to the problem of regulating growth. Under this law, notwithstanding the increased role for the state executive in municipal land use decision making, the municipality retains the ultimate power to adopt a comprehensive plan and to proceed with an annexation.<sup>12</sup> This ultimate power is counterbalanced by a statutory provision allowing the state to withhold state funds and grants intended for growth and infrastructure development whenever a municipality adopts a comprehensive plan that has not been certified by the Governor. It is this power to withhold funds, not some vague “reasonableness” standard, that was enacted to counterbalance the power of municipalities to undermine state land use planning through excessive use of the power of annexation.

Second, New Castle County states, correctly, that the General Assembly has provided exclusive authority to each of the three Delaware counties to provide

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<sup>10</sup> 22 *Del. C.* § 101(1).

<sup>11</sup> 29 *Del. C.* § 9103.

<sup>12</sup> *See* 29 *Del. C.* § 9103(f).

*governmental* services to the areas described within their statutorily prescribed boundaries. However, an exception exists for incorporated areas, which may provide governmental services within their defined boundaries. New Castle County then states that local governmental entities, such as New Castle County, Kent County, and Smyrna, are statutorily restricted to provide *governmental* services to areas within their boundaries.<sup>13</sup> Moreover, while New Castle County admits that Kent County may provide sewer services outside of its boundaries as a proprietary function, it caveats this admission by contending that any such provision must be reasonable. New Castle County argues that, “since the General Assembly allocated the authority to provide governmental services, any alteration of this statutorily prescribed allocation would be inherently unreasonable unless all affected governments agreed.”<sup>14</sup> Again, the court must disagree.

Generally, the powers of a government are of two types: governmental and proprietary.<sup>15</sup> While the characterization of a function as either governmental or proprietary is often difficult, it is settled law that a city supplying sewer services to

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<sup>13</sup> In support of this contention, New Castle County cites numerous statutory provisions which restrict Kent County’s authority to its geographic boundaries, none of which specifically prohibits Kent County from providing sewer services to the annexed properties, absent consent from New Castle County. For example, 9 *Del. C.* § 4902 restricts Kent County’s zoning authority to the unincorporated portions of Kent County. Because it decides the case on other grounds, the court will assume, without holding, that local governmental entities are statutorily restricted to provide governmental services to areas within their boundaries.

<sup>14</sup> Resp’t New Castle County’s Supplemental Argument at 2.

<sup>15</sup> *Simon v. Town of Seaford*, 197 A. 681, 685 (Del. Ch. 1938).

an area outside the city limits is acting in its proprietary capacity.<sup>16</sup> Likewise, a county supplying sewer services to an area outside of its governmental limits is acting in its proprietary capacity. Plainly, Kent County may contract to provide proprietary services to Smyrna to take and treat waste generated within the city limits of that town. It is irrelevant that some portion of that waste was generated on lands that were formerly subject to the governmental powers of New Castle County.

New Castle County finds further evidence of this “reasonableness” requirement in 30 different provisions of the *Delaware Code*. But New Castle County cannot win on sheer volume of citation alone. None of the provisions of the *Delaware Code* cited specifically require Kent County to get New Castle County’s permission to provide proprietary services, nor does any such provision exist. In contrast, Smyrna’s Town Charter—enacted by the General Assembly—specifically empowers it to contract with either Kent County or New Castle County to provide sewer services.<sup>17</sup> That specific grant of power clearly governs the outcome of this case.<sup>18</sup>

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<sup>16</sup> *New Castle County v. New Castle*, 372 A.2d 188, 190 (Del. 1977).

<sup>17</sup> *See* 74 Del. L. Ch. 176, § 22.1.

<sup>18</sup> The result would be different if it were necessary for any part of the Smyrna waste collection system to be placed on lands lying within the jurisdiction of New Castle County. In that case, the court assumes, New Castle County’s consent would be required before sewage pipes could be placed on its lands. Here, however, the facts are otherwise and the result is that New Castle County has no right to either consent or object.

### **III.**

For the above reasons, the petitioners' request for declaratory relief will be granted. Counsel for the petitioners are directed to submit a form of order, on notice, on or before January 31, 2005.