

RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000578-MR

CRITTENDEN-LIVINGSTON WATER DISTRICT

APPELLANT

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE C. A. WOODALL, III, JUDGE
ACTION NO. 15-CI-00079

LEDBETTER WATER DISTRICT

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: ACREE, JOHNSON, AND JONES, JUDGES.

JOHNSON, JUDGE: On January 25, 2017, the Livingston Circuit Court entered a declaration of rights and summary judgment which voided an agreement for the purchase of water between appellant Crittenden-Livingston Water District (“Crittenden”) and appellee Ledbetter Water District (“Ledbetter”). Crittenden argues in this appeal that the circuit court erred in declaring the agreement to be a

franchise which failed to comply with Section 164 of the Kentucky Constitution and in voiding the agreement on that basis. Because we are convinced that the recent opinion of this Court in *Southeast Bullitt Fire Protection District v. Southeast Bullitt Fire and Rescue Department*, 537 S.W.3d 828 (Ky. App. 2017), is dispositive of the issues presented, we reverse the judgment of the Livingston Circuit Court.

BACKGROUND

Ledbetter and Crittenden are non-profit water districts organized pursuant to Kentucky Revised Statutes (“KRS”) Chapter 74. Ledbetter was formed by orders of the Livingston Fiscal Court and Crittenden was formed by orders of the Fiscal Courts of both Crittenden and Livingston Counties.

In the year 2000, Crittenden and Ledbetter entered into a forty-year agreement whereby Ledbetter would purchase from Crittenden a minimum of 3 million gallons of water each month. Dissatisfied with the amount Crittenden was charging per thousand gallons of water, Ledbetter filed a complaint in 2015 alleging that the agreement was void as a franchise failing to comply with the requirements of Section 164 of the Kentucky Constitution. That section provides:

No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement,

receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

KY. CONST. § 164.

Ledbetter complained that because its agreement with Crittenden is for a period of more than twenty years and was not publicly bid, it is void and unenforceable under the Kentucky Constitution. In addition to its answer, Crittenden filed a counterclaim against Ledbetter. By agreed order, the circuit court bifurcated the proceedings and held Crittenden's counterclaim in abeyance pending a decision on the validity of the parties' agreement. After a hearing, the circuit court granted Ledbetter's motion for summary judgment, concluding that the water purchase agreement constitutes a franchise which failed to meet the requirements set out in Section 164.

This appeal followed.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, our inquiry focuses on “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scrifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). An appellate court need not defer to the trial court's decision on summary judgment because factual findings are not in issue. *Id.*

ANALYSIS

As an initial matter, we note that when the circuit court issued its opinion of January 25, 2017, it did not have the benefit of our opinion in *Southeast Bullitt Fire Protection District, supra*. The facts of *Southeast* are strikingly similar to those of this appeal. In 1979, a fire protection district created under KRS Chapter 75 contracted with a non-profit fire department under KRS Chapter 273 to provide fire protection services in the district's area. The district agreed to pay the fire department the net proceeds of a fire protection tax for the provision of these services. With minor revisions and renewals, the contract remained in place until 2015 when the district's board filed an action for a declaration that the agreement constituted a franchise which, among other things, failed to comply with the requirements Section 164. The circuit court upheld the agreement. Pertinent to this appeal, the court in *Southeast* analyzed the types of entities subject to the proscriptions and requirements of Section 164. The Kentucky Supreme Court established the definition of "franchise" as follows:

A franchise is generally defined as a right or privilege granted by a sovereign power, government or a governmental entity to a party to do some act which such party could not do without a grant from the government. A franchise is a grant of a right to use public property or at least the property over which the granting authority has control.

E.M. Bailey Distrib. Co. v. Conagra, Inc., 676 S.W.2d 770, 771 (Ky. 1984)

(citations omitted).

The court in *Southeast* noted that for a proper analysis, Section 164 must be read in conjunction with Section 163 which provides:

No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

KY. CONST. § 163. Construing these sections together, the court recognized a distinction between for-profit utilities and non-profit entities statutorily created for the provision of government services, emphasizing that the distinction “[r]emoves fire protection services from the utility category which would require a franchise and public bidding pursuant to Ky. Const. §164.” *Southeast*, 537 S.W.3d at 833.

As was the case in *Southeast*, this appeal concerns one public entity acquiring a service from another public entity in order to fulfill its public purpose, *i.e.*, the purchase of water to serve the citizens of its district. Each party is a non-profit, body corporate created and governed pursuant to KRS 74.010 *et seq.* In fact, KRS 74.070(1) unequivocally settles each district’s public character: “[t]he

commission shall be a body corporate for all purposes, and may make contracts for the water district with municipalities and other persons.” *See also Valla v. Preston Street Road Water District #1 of Jefferson County*, 395 S.W.2d 772, 774 (Ky. 1965) (“Preston District is a public corporation, sometimes called quasi-municipal, existing by virtue of KRS Chapter 74.”).

The import of the water districts’ public status was thoroughly explained by Kentucky’s highest court in an action involving a statutorily created sewer district:

When the Metropolitan Sewer District was established under the enabling statute, Chapter 76, Kentucky Revised Statutes, it became an independent body politic charged with administration of designated affairs. It was created by the sovereign power of the state as 'a public body corporate, and political subdivision'. KRS 76.010. The statute constitutes its charter. It exercises delegated powers of government which vitally affect the public health of the entire county. The Constitution in several sections recognizes the existence, present and future, of a municipal corporation other than a county, city, town or taxing district. Sections 157, 158, 159, 161, 164, 165, 180, 181. The Metropolitan District is a separate entity acting for its own purposes and possessing defined, though limited, powers of a municipal community. It meets the conventional descriptions or definitions of a 'municipality.'

Rash v. Louisville & Jefferson County Metro Sewer District, 309 Ky. 442, 217 S.W.2d 232, 236 (1949).

We are thus persuaded that, identical to the situation in *Southeast*, the public corporations in this appeal were free to contract for the provision of water service without implicating the franchise prohibitions and requirements of Section 164. Unlike a franchise, the contract did not grant governmental rights or privileges the other party did not already possess under KRS Chapter 74. It merely allowed Ledbetter to better serve its customers and fulfill its statutory duties by procuring water from Crittenden. We are therefore convinced that, under the rationale and holding of this Court in *Southeast*, the circuit court erred as a matter of law in concluding that the contract between Ledbetter and Crittenden constitutes a franchise and in voiding that agreement on that basis.

CONCLUSION

Accordingly, the January 25, 2017 judgment of the Livingston Circuit Court is reversed.

ACREE, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

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