STATE OF MICHIGAN

COURT OF APPEALS

VILLAGE OF NEWBERRY,

Plaintiff-Appellant,

v

MCMILLAN TOWNSHIP and PENTLAND TOWNSHIP,

Defendants-Appellees.

UNPUBLISHED
December 28, 2004

No. 252052
Luce Circuit Court
LC No. 99-002860-CZ

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Plaintiff Village of Newberry ("Newberry") appeals as of right the order granting summary disposition in favor of defendants Pentland Township and McMillan Township ("townships") pursuant to MCR 2.116(C)(10). This case arises out of a contractual dispute between Newberry and the townships regarding payment for pump station improvements (the "project") at a shared wastewater/sewage treatment facility ("treatment facility"). We reverse.

Newberry argues that the cost of the project should be allocated between the municipalities pursuant to the fixed-cost language of paragraph 15 of the 1976 contract that was executed by Luce County and the parties relative to the construction, operation, and maintenance of the then new treatment facility. Paragraph 15 of the contract states in pertinent part:

> The Village shall, for and on behalf of the County and Townships operate, administer and maintain the sewage treatment plant as improved by the Project (hereinafter referred to as the "Common Facilities"). The Village shall adopt annually a budget for operation and maintenance of the Common Facilities which shall include all costs of operating, administering and maintaining the Common Facilities and any improvements and additions thereto and establishing a reasonable maintenance, repair and replacement reserve therefor. The Village may include five per cent (5%) of the actual costs of operation and maintenance for administration purposes. *Fixed costs shall be allocated to each Local Unit on the basis of assigned capacity and variable costs shall be allocated on the basis of actual usage by each Local Unit.* The budget shall include credit for any surplus from the previous year or provisions for retirement of any deficit.

Newberry maintains that the cost of the project constituted a fixed cost that must be borne by the municipalities on the basis of assigned capacity, not actual usage. Newberry further contends that the trial court erred in declaring that all operation and maintenance expenses or costs incurred after the initial construction of the treatment facility are variable in nature, thereby effecting the allocation of all such future costs, not just the project at issue.

The townships argue that the project constituted a variable cost that must be borne by the municipalities on the basis of actual usage. As is evident by the positions taken by the parties, Newberry pays a larger percentage share of the project if the cost is deemed a variable cost with allocation being predicated on actual usage. There is no dispute that the townships benefit financially by having the project decreed a variable cost because the townships' actual use reflects a smaller percentage when compared to their assigned capacity. The townships also contend that all operation and maintenance costs are variable costs under the contract. The townships argue that paragraph 17 of the 1976 contract requires the parties to comply with federal and state laws in regard to grants that were utilized to build the treatment facility. Paragraph 17 provides in pertinent part:

> The Local Units hereby agree that they will comply with all state and federal requirements in connection with the EPA and WRC grants, including specifically the establishment of appropriate user charge and industrial cost recovery systems and adoption of an appropriate sewer use ordinance, in accordance with prescribed timetables.

In relation to paragraph 17, the townships refer us to 33 USC 1284(b)(1) of the Federal Water Pollution Control Act, which addresses grants for the construction of treatment works, and which provides, in relevant part, that "the Administrator shall not approve any grant for any treatment works . . . unless he shall first have determined that the applicant . . . has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant[.]"[1] The townships also rely on 40 CFR 35.929-1, which likewise addresses grants for the construction of treatment works, and it provides in part:

> The Regional Administrator may approve a user charge system based on either actual use under paragraph (a) of this section or ad valorem taxes under paragraph (b) of this section. . . .
>
> (a) User charge system based on actual use. A grantee's user charge system based on actual use (or estimated use) of waste water treatment services may be approved if each user (or user class) pays it proportionate share of operation and maintenance (including replacement) costs of treatment works

[1] In regard to this legislative provision, the Congress was primarily concerned with ensuring that treatment systems would be self-financing and was tolerant of local variations in user charge schemes. *Hotel Employers Ass'n of San Francisco v Gorsuch,* 669 F2d 1305 (CA 9, 1982).

> within the grantee's service area, based on the user's proportionate contribution to the total waste water loading from all users (or user classes).

In light of these provisions and paragraph 17 of the contract, the townships argue that the application of a user charge system, predicated on actual usage, is required and Newberry is mandated to pay for the project and any other operation and maintenance costs through proportionate user charges. It appears that the townships are also implicitly asserting that the language in the above-quoted federal statute and administrative rule referencing the operation, maintenance, and replacement of treatment services and works must be considered in conjunction with paragraph 15 of the contract, rendering all operation and maintenance costs under paragraph 15, including the cost of the project, variable costs to be allocated based on actual usage. This is so because of the necessity of a user charge system.

With respect to the townships' motion for summary disposition, the trial court, speaking from the bench at oral argument on the motion, stated:

> Operation and maintenance is all inclusive. And the Court finds that this remedial correction, improvement, upgrading, or replacement is under the operation and maintenance and, thus, under the terms of the contract is a variable cost to be allocated on the basis of actual usage by each – each local unit.
>
> The fact that the local unit is not the end user, but has customers, does not vary this language. It would surely be contemplated that the individual customers served would be served by their local unit.

The written order granting summary disposition in favor of the townships referenced the language of 33 USC 1284 and provided:

> [T]his Court does hereby issue a declaratory judgment that the ongoing operation and maintenance costs attributable to the common facilities as defined in the contract between the parties, including any improvements and additions thereto, shall be paid out of the operation and maintenance budget reserves which shall be paid for through the user fees established pursuant to Section 1284 . . . to ensure that each recipient of waste treatment services will pay its proportionate share of the cost of operation and maintenance (including replacement) of any waste treatment services as provided by the federal and state regulations under which the grants were received for construction of the common facilities pursuant to the contract of the parties[.]

The trial court's comments from the bench and its order suggest that the court believed that Newberry was responsible for applying a user charge system based on actual usage across municipal lines in order to collect revenues to fund the operation and maintenance budget, thereby funding the project.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The proper interpretation of a contract is a question of law that is also subject to de novo review on appeal. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). Under MCR

2.116(C)(10), a party may move for summary dismissal of a claim based on the assertion that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The motion tests the factual support for a claim, and when reviewing the motion, the court must consider all of the documentary evidence in a light most favorable to the nonmoving party. *Id.*

When presented with a contractual dispute, a court must read the contract as a whole with a view to ascertaining the intention of the parties, determining the nature of the parties' agreement, and enforcing it. *Detroit Trust Co v Howenstein*, 273 Mich 309, 313; 262 NW 920 (1935); *Whitaker v Citizens Ins Co of America*, 190 Mich App 436, 439; 476 NW2d 161 (1991). Absent ambiguity, contractual language must be construed and enforced according to its plain and ordinary meaning. *Farm Bureau Mut Ins Co of Michigan v Buckallew*, 262 Mich App 169, 178; 685 NW2d 675 (2004); *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). Technical and constrained constructions are to be avoided. *Id.*

Our review of paragraph 15 of the contract makes clear that Newberry is responsible for operating, administering, and maintaining the treatment facility, along with being responsible for adopting a budget to cover operation and maintenance costs, including improvements and additions, which entails the project at issue; Newberry has dropped its argument that the project cost should be treated as if it was an initial construction cost. Newberry is also responsible for establishing a reserve to cover reasonable maintenance, repair, and replacement costs. The contract further makes clear, by way of its allocation language, that Newberry's budget shall be funded by local units, which necessarily includes the townships as well as Newberry. As indicated in another portion of paragraph 15, "[t]he Townships shall pay their share of the budget for operating the Common Facilities to the Village quarterly[.]" Thus, the townships are responsible for partially funding the project.

While paragraph 15 of the contract does state that Newberry is responsible for adopting an annual budget and a reserve for operation and maintenance, it does not state that all costs of operating, administering, and maintaining the treatment facility are to be considered variable costs. If that were the case, it would render the reference to fixed costs meaningless. Our Supreme Court recently reiterated that "courts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). The only reasonable interpretation of paragraph 15 of the contract is that it was understood and intended that the costs of operating, administering, and maintaining the facility and any improvements and additions would include both fixed costs and variable costs. Fixed costs are to be allocated to each municipality "on the basis of assigned capacity," and variable costs allocated "on the basis of actual usage by each Local Unit."

A question thus arises regarding the interplay between paragraph 15 and paragraph 17 and the law regarding water treatment grants as cited by the townships. The townships' position appears to be that Newberry is required to utilize a single user charge system, predicated on actual usage, into which the townships, or the residents of the townships, would pay in order to defray the costs of the project. Accordingly, payment for the project and all operation and maintenance costs are to be based on actual usage. We note that this interpretation runs contrary to the language in paragraph 15 of the contract.

The county and the parties agreed to comply with federal and state requirements in connection with the grants. These laws relate to the establishment of a user charge system or system of charges by the grant applicant or grantee. See 33 USC 1284 and 40 CFR 35.929-1. The 1976 contract indicates that "the *County* has made application for and expects to receive State and Federal grants . . . ." [Emphasis added]. But this case addresses a treatment system that crosses different jurisdictions and multiple municipality lines, with Newberry being solely accountable for operating the treatment facility and adopting the budget. We find helpful 40 CFR 35.929-2(e), which provides:

> Adoption of system. One or more municipal legislative enactments or other appropriate authority must incorporate the user charge system. If the project is a regional treatment system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with . . . §§ 35.929 through 35.929-3. These user charge systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works. The public shall be informed of the financial impact of the user charge system on them and shall be consulted prior to adoption of the system[.]

As reflected in this rule, *each of the parties* was required to establish a user charge system in order to pay toward the operation and maintenance costs of the treatment facility because each was and is a recipient of waste treatment services of the Newberry treatment facility located in the county. See *City of New Brunswick v Borough of Milltown*, 686 F2d 120, 124-128 (CA 3, 1982)(addressing 40 CFR 35.929-2(e)). We note that paragraph 17 speaks of the local *units* agreeing to establish appropriate user charge *systems*. Thus, any Newberry user charge system would not reach the townships or their residents. Accordingly, the respective obligations of the parties, the municipalities themselves, in regard to operation and maintenance costs, including the project, are determined solely by paragraph 15 of the contract. In other words, paragraph 15 of the contract determines how much the townships must allocate relative to the Newberry budget, and each municipality, separately, should be relying on its own user charge system to fund the allocation. User charges relate to the residents and businesses within a particular municipality. Therefore, although Newberry had to establish a user charge system or system of charges, it would pertain to its residents and businesses, not the townships or the townships' residents and businesses.[2]

Of course, this returns us to paragraph 15 and the question whether the project is a fixed or variable cost. We first hold that, to the degree the trial court ruled that all operation and maintenance costs are variable, thus effecting future allocations, the court erred because the contract delineated between fixed and variable costs. We also hold that the project cost

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[2] We note that 33 USC 1284(b)(4) provides that, even within a municipality, a system of charges "may be based on something other than metering the sewage or water supply flow of residential recipients of waste treatment services . . . ." See also *New Brunswick, supra* at 124 n 2.

particularly at issue here represented a fixed cost. The plain language of the contract and, assuming ambiguity, the documentary evidence, including deposition testimony, establishes that the cost of the pump station project was a fixed cost because it was not dependent on usage or activity. The pump station project was an expense that needed to be done to remedy a defective condition that existed from the time the pump was constructed. Thus, it was not a variable cost in the sense that the cost of replacing would have varied with the usage of the pump. A variable cost of operation and maintenance would be a cost like electricity. The project cost was a one-time definite and fixed cost that by its solitary nature was not variable, which is defined as "changeable," "capable of being varied," or "deviating from the usual type." *Random House Webster's College Dictionary* (2001). The pump station is part of the infrastructure needed for the entire system. Accordingly, the trial court erred in granting summary disposition to the townships.[3]

Reversed and remanded for entry of judgment in favor of Newberry. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer

[3] In light of our ruling, it is unnecessary to address Newberry's argument that the trial court granted relief beyond the scope of matters pled or argued, nor is it therefore necessary to address the townships' argument that Newberry's "relief beyond the scope" argument was not preserved below.