

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UNPUBLISHED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.

MARKEY, J. (dissenting).

Although I have no quarrel with the majority's presentation of the facts and law pertaining to this case, I do, however, disagree with its conclusion on the relevant issues. Consequently, I would affirm the trial court's ruling.

Specifically, the majority first holds that "to the degree the trial court ruled that all operation and maintenance costs are variable, thus affecting future allocations, the court erred because the contract delineated between fixed and variable costs." Again, although I agree with the majority's presentation of the facts and its quotation of the pertinent portions of the contract, particularly paragraph 15, I conclude that the trial court correctly determined that the costs involved with operation and maintenance are variable. The pump station expense was a replacement for the existing system and for which the contract in paragraph 15 provided when it required that the village adopt an annual budget which includes an amount for "repair and replacement reserve."

As defendants indicate, variable costs are "costs which change directly with the amount of the business activities conducted. These costs include material and labor expenses related to the production of a product or business activity." quoting Dictionary of Business Terms; Barrons Business Guide, 3rd Ed, (2000). Because the process for establishing a budget as set forth in paragraph 15 of the contract specifically provides that the operation and maintenance costs must include improvements and additions to the common facilities, I, too, conclude that the pump station project at issue constituted a variable cost.

Moreover, again, contrary to the majority's conclusion, reading the contract in this manor does not "render the reference to fixed costs meaningless." There certainly are fixed costs.

Fixed costs are the costs which do not change or fluctuate with business activity. Examples of fixed costs include salaries for employees, interest expense, rent, depreciation, and insurance expenses. Although the cost of the pump project at issue here is finite, and as such could be considered “fixed” in that sense, the *necessity* for it is a direct result of the “business activity” of operating a waste treatment facility. It is both fair and consistent with the contractual language that each of the municipalities participating and sharing the waste treatment facilities also pay its pro rata share for the new pump project based on how much it uses.

Furthermore, other fixed costs here would include the administrative costs of the project and the expenses incurred in retiring the debt, all of which would be allocated on an asset capital basis. Other variable costs would include the operation and maintenance of this facility, which per the contract, must be allocated on the basis of how much each local unit actually uses the facility. This interpretation and reading of the contract is supported by the plain language of the contract and the previous history of the parties’ understanding.

So, in conclusion, I would hold that the pump station project at issue here constituted a variable expense because it entailed operation and maintenance expenses as set forth and contemplated in paragraph 15 of the contract; consequently, I would affirm the trial court.

Jane E. Markey