[Cite as *Southwest Licking Communicty Water & Sewer Dist. v. Bd. of Edn. of Reynoldsburg School Dist.*, 2010-Ohio-4119.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SOUTHWEST LICKING COMMUNITY WATER & SEWER DISTRICT	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellant/ Cross-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2010 CA 00006
BOARD OF EDUCATION OF THE REYNOLDSBURG CITY SCHOOL DISTRICT, ET AL.	:	
Defendants-Appellees/ Cross-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas Case No. 09 CV 01474

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 1, 2010

APPEARANCES:

For Plaintiff-Appellant:

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Delaney, J.

{¶1} This appeal concerns a dispute over who may provide water and sanitary sewer service to a 69-acre parcel of property in Licking County, Ohio that was purchased by the Reynoldsburg City School Board ("Board") in 2008. The property is located in the City of Reynoldsburg ("City"). Subsequent to the purchase, the Board entered into design and construction contracts for a new high school and elementary school. In July 2009, the Board submitted an application to the Ohio EPA for a permit to install water and sewer lines so the new schools could be connected to the City's system.

{¶2} On August 24, 2009, Plaintiff-Appellant Southwest Licking Community Water and Sewer District ("District") filed a complaint against the Board and the City in the Licking County Court of Common Pleas for declaratory and injunctive relief on August 24, 2009, seeking, *inter alia,* a declaration that the District has the sole and exclusive right to provide water and sanitary sewer services at the location; that the Board's actions in connecting with the City violates the District's court-defined service area; is inconsistent with Ohio's Water Quality Management Plan; and negatively impacts the District's finances.

{¶3} The Ohio EPA granted the Board's application for permit to install the water and sewer lines on October 21, 2009.

{¶4} On November 4, 2009, the trial court granted a preliminary injunction against the Board and the City enjoining any further action to connect water and sewer service to the location.

{¶5} On November 12, 2009, the Board filed an answer and counterclaim against the District. In the counterclaim, the Board sought declaratory relief that it had the right under the State's Water Quality Management Plan to select the provider for water and sewer services to the property. The Board also sought compensatory damages due to the District's actions in halting the off-site construction of the schools, which are scheduled to open in the fall of 2011. The City also filed an Answer.

{¶6} A bench trial was conducted on December 11 and December 14, 2009. The District and the Board presented witnesses and the parties entered into a joint stipulation of facts. At the conclusion of the Board's evidence, the trial court orally granted a motion for directed verdict made by the City and dismissed the District's complaint.

{¶7} On December 17, 2009, the trial court issued a detailed decision explaining its reasons for granting the directed verdict. The trial court set forth factors it found to be legally relevant to the issues before it. Specifically, it considered the following: (1) the City's right to provide water and sewer services within its boundaries and the constitutional grant of home rule to municipal corporations; (2) the lack of statutory protection to the District from loss of territory by annexation; (3) the issuance of the permit to install by the Ohio EPA; (4) the Ohio EPA's refusal to designate this location as an area to be exclusively served by the District; (5) the ability of both the City and District to provide comparable service to the location; (6) the Board's desire to obtain the services at the lowest cost and to use the same service provider for all of its buildings, which is the City; and (7) although the District may lose potential revenue,

there was no evidence presented as to the elimination or reduction of service within its territory as a result of the new schools connection to the City.

{¶8} On January 11, 2010, the District filed a notice of appeal.[1]

{¶9} On January 15, 2010, the District also filed a Motion to Restore Preliminary Injunction, which this Court denied on January 22, 2010.

{¶10} The District raises one Assignment of Error:

{¶11} "I. THE LICKING COUNTY COURT OF COMMON PLEAS ERRED IN CONCLUDING THAT APPELLEE CITY OF REYNOLDSBURG'S RIGHT TO PROVIDE WATER AND SEWER SERVICES TO THE DISPUTED AREA OUTWEIGHED APPELLANT SOUTHWEST LICKING COMMUNITY WATER AND SEWER DISTRICT'S RIGHT TO FURNISH WATER AND SEWER SERVICES TO THAT AREA BECAUSE IN APPLYING THE *TEATER* BALANCING TEST TO WEIGH THE RESPECTIVE INTERESTS OF THE PARTIES, THE COURT NOT ONLY ALLOCATED AN INAPPROPRIATE AMOUNT OF WEIGHT TO THE RELEVENT FACTS AND CIRCUMSTANCES AND THUS, THE TRIAL COURT'S DECISION WAS CONTRARY TO LAW OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶12} The District is a political subdivision formed in 1989, pursuant to R.C. Chapter 6119, to provide water and/or sewer service to rural areas located in Licking County. The District's court-defined service area includes Etna Township in Licking County. In 1995, the District installed water and sewer mains on Summit Road in the township.

[1] Although it appears the Board's counterclaim remains pending before the trial court, we deem the December 17, 2009 entry to be a final appealable order.

{¶13} A 123-acre parcel in the township was annexed to the City of Reynoldsburg in 2005, including a 69-acre parcel along Summit Road, which was ultimately purchased by the Board in 2008 from a private owner for construction of the schools.

{¶14} The City intends to provide water and sewer services to the Board via long-standing agreements with the City of Columbus for the provision of these services

{¶15} The District asserts on appeal that both they and the City have equal authority under Ohio law to provide water and sewer services to the location.[2] The District argues the Ohio Supreme Court's decision in *City of Columbus v. Teater* (1978), 53 Ohio St.2d 253, 374 N.E.2d 154, although factually distinguishable, required the trial court to balance the City's right to provide utility services within its boundaries, with the General Assembly's police power authorizing the formation of Chapter 6119 rural water districts.

{¶16} In *Teater*, the Ohio Supreme Court was asked to determine whether a state statute pertaining to preservation of certain of the state's rivers [R.C. 1501.17] was a valid exercise of the state police powers under Section 36 of Article II of the Ohio Constitution, which did not unconstitutionally infringe upon the Home Rule authority granted to municipalities under Section 3 of Article XVIII and Sections 4, 5 and 6 authorizing municipalities to operate public utilities. In deciding this question, the Supreme Court stated:

[2] We note the District's position on appeal appears inconsistent with its goal of obtaining declaratory relief that it has the "sole and exclusive right to provide sanitary sewer and water services" to the Board. Complaint, 1 Prayer for Relief.

{¶17} "The police power [footnote omitted] and the power of local self-government are constitutional grants of authority equal in dignity. The state may not restrict the exercise of self-government within a municipality. Furthermore, a municipality may exercise the police power within its borders. However, the general laws of the state remain supreme in the exercise of that power, even if the issue is one which might also be a proper subject of municipal legislation. *Canton v. Whitman* (1975), 44 Ohio St.2d 62, 66 337 N.E.2d 766, appeal dismissed, 425 U.S. 956, 96 S.Ct. 1735, 48 L.Ed.2d 201(1976)." Id. at 257.

{¶18} The Supreme Court found R.C. 1501.17 was not facially violative of Sections 3 through 7 of Article XVIII of the Ohio Constitution. In so holding, the Court stated:

{¶19} "The authority enjoyed by municipalities under Article XVIII cannot be extinguished by the General Assembly. Nevertheless, under appropriate facts, the power possessed by the General Assembly under Section 36 of Article II can override the interest of a city in constructing water supply impoundments located outside its corporate limits. Ultimately, the judiciary must determine the facts in such controversies balance the rights of the state against those of the municipality and endeavor to protect the respective interests of each. In such instances, the outcome of the constitutional argument involved will depend upon the facts and circumstances of the case. [footnote omitted]". Id. at 261.

{¶20} The Ohio Supreme Court has subsequently applied the *Teater* analysis to other water and sewer services cases. In *Delaware County Bd. of Commrs. v. City of Columbus* (1986), 26 Ohio St.3d 179, 497 N.E.2d 1112, the court stated: "[t]his court

has often held that the General Assembly cannot impose any restrictions or limitations upon the power to 'operate' a public utility granted to a municipality by Article XVIII of the Ohio Constitution. (Citation omitted). However, appellee contends, and we agree, that the power to regulate sewer districts '[f]or the purpose of preserving and promoting the public health and welfare,' under R.C. 6117.01 constitutes a valid exercise of state police power. As we held in *Columbus v. Teater* (1978), 53 Ohio St.2d 253, 257, 374 N.E.2d 154 [7 O.O.3d 410], '[t]he police power and the power of local self-government are constitutional grants of authority equal in dignity.'"

{¶21} In *Bd. of County Commrs. of Ottawa County v. Village of Marblehead*, 86 Ohio St.3d 43, 1999-Ohio-80, 711 N.E.2d 663, the court declined to find that Article XVIII of the Ohio Constitution confers absolute authority on a municipality to construct and maintain a water supply system with its borders and to contract for water services for its residents. Instead, it found that the statute at issue, R.C. 6103.04, permits a county sewer district to complete an existing county water service project when territory within the project area acquires municipality status through annexation during the pendency of the county project. Justice Cook, writing for the majority, stated: "[a]lthough Article XVIII of the Ohio Constitution grants municipalities the exclusive authority to provide their residents with utility services, a statute that limits the municipality's power is not unconstitutional if the purpose of the statute is an exercise of the state's police powers and is not a substantial infringement upon the municipality's authority." The Court proceeded to balance the interests of the parties and found no substantial infringement upon a municipality's power to operate utilities.

{¶22} The City and the Board urge this Court to find that a "balancing test" is inapplicable because the City has the exclusive right to provide water and sewer service to the location pursuant to Ohio Const. Article XVIII, Section 4, which states: "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service." Simply put, the City and Board believe the District's reliance upon *Teater* and other Ohio case law is misplaced because no case has addressed the exact issue at hand, which is whether the City has the exclusive right to provide water and sewer services within its corporate boundaries. We disagree. Based upon the Supreme Court's analysis in *Teater, Columbus* and *Marblehead*, as discussed above, we believe a balancing test is the proper state law basis for resolving this dispute. See also, *Northern Ohio Rural Water v. Erie County Board of Commrs.*, 347 F.Supp.2d 511 (N.D. Ohio, 2004) (applying a balancing test indicated in *Columbus,* supra, for disputes involving water service when both parties have statutory authority to provide the same)

{¶23} The City and Board alternatively argue that if the *Teater* balancing test applied, they would prevail for several reasons. First, Appellees submit that the State's Water Quality Management Plan, specifically the 208 Plan for this area, as adopted pursuant to the federal Clean Water Act, states that "[l]and parcels within the Southwest Licking Regional FPA [Facility Planning Area] that are annexed by a municipality may obtain sewer services from that municipality or the District." In addition, the Ohio EPA has denied the District's "lock-in" petition for this area and has granted a permit to install to the Board to connect to the City's system. These factors, along with others,

demonstrate the State's exercise of "police power" weighing in favor of the City having the right to provide service.

{¶24} The trial court also made several factual findings in favor of Appellees, such as: (1) although the District has lines on site, the City's lines are not far away; (2) the City already provides service in the general area, and (3) both utilities could provide comparable service to the site.

{¶25} In response, the District strenuously argues the state enacted Chapter 6119 granting the rural water districts the right to provide water and sewer services within their court-defined territory and the District's ability to amortize its construction debt will be compromised as well as its ability to obtain future funding and reduce overall costs if the Appellees prevail. The District also states the Ohio EPA has charged it with "lead responsibility" for this area under the 208 plan.

{¶26} Upon careful review, we are persuaded the trial court approached this matter correctly and did not err in finding that Appellees succeed under a balancing test. While the District has the "pipes in the ground", the General Assembly did not see fit to protect rural water associations from encroachment of its service area by annexation; the Ohio EPA has permitted the Board to install connection lines to the City and has conversely denied the District's request to "lock in" this service area; and the State's Water Quality Management Plan indicates the Board may obtain sewer services from either the District or the City.

{¶27} We decline Appellant's invitation to provide "proper guidance as to the appropriate factors to consider" in applying a balancing test and "the appropriate weight to allocate to each factor." Appellant's Brief, p. 31. Such an approach would be

contrary to the instructions of the Ohio Supreme Court in *Teater* and its progeny that the unique facts and circumstances of each case will determine the outcome of the constitutional argument surrounding a balancing of rights afforded to municipalities and the valid exercise of the state's police power.

{¶28} The District's Assignment of Error is overruled.

Cross-Appeal I.

{¶29} A notice of cross-appeal was also filed by the Board on January 20, 2010.

{¶30} The Board raises one Assignment of Error:

{¶31} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING THE TESTIMONY OF THE SCHOOL DISTRICT'S EXPERT WITNESS, JACOB BOOMHOUWER."

{¶32} In light of our disposition of the District's Assignment of Error, the Board's cross-appeal is rendered moot.

{¶33} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

[Cite as *Southwest Licking Communicty Water & Sewer Dist. v. Bd. of Edn. of Reynoldsburg School Dist.*, 2010-Ohio-4119.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

SOUTHWEST LICKING COMMUNITY WATER & SEWER DISTRICT Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
BOARD OF EDUCATION OF THE REYNOLDSBURG CITY SCHOOL DISTRICT, et al. Defendants-Appellees/ Cross-Appellant	:	Case No. 2010 CA 00006

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

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HON. JOHN W. WISE