IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Conemaugh Township | : | |
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| v. | : | No. 1892 C.D. 2010 |
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| Robert McKool, | : | Argued: April 5, 2011 |
| Appellant | : | |

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: August 24, 2011

Robert McKool (Landowner) appeals the order of the Court of Common Pleas of Somerset County (trial court) disposing of his Affidavit of Defense to the writ of scire facias filed by Conemaugh Township (Township) in the trial court pursuant to the provisions of the Municipal Claims and Tax Liens Law (Tax Liens Law)[1], and directing Landowner to pay the Township a total of $274,472.16. We affirm.

Landowner is the owner of a mobile home park located in Conemaugh Township,[2] Somerset County. Although there are 167 sites on the property, only 142 of the sites were occupied by mobile homes. The property contains an internal

[1] Act of May 16, 1923, P.L. 207, as amended, 53 P.S. §§ 7101-7505.

[2] Conemaugh Township is a Second Class Township. See 119 The Pennsylvania Manual 6 – 126 (2009).

sewage collection and treatment system that was constructed and maintained by Landowner. On May 26, 1988, Landowner received an initial permit issued by the Pennsylvania Department of Environmental Protection (DEP) to use the private sewage treatment system.[3] However, on December 5, 2003, DEP issued a permit set to expire on December 28, 2009, which required Landowner to connect to the Township's sanitary sewer system within 90 days after it became available to the property, to abandon the private sewage treatment system, and to notify DEP to cancel the relevant permits relating to the use of the private treatment system. See Reproduced Record (RR) at 16a-20a.

On June 15, 2005, the Township's Board of Supervisors adopted a tapping fee of $1,750.00 per sewer tap for the first phase of the Tire Hill Sewer Project. See RR at 24a.[4,5] In 2006, the Township connected the trailer park system

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[3] Landowner is also a "public water supplier" regulated by DEP under its regulations promulgated pursuant to the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, as amended, 35 P.S. §§ 721.1-721.17, as he provides water to the sites in the park that has been purchased by him from the Conemaugh Township Municipal Authority.

[4] It should be noted that Section 2502(a) of the Second Class Township Code (Code), Act of May 1, 1933, P.L. 103, added by the Act of November 9, 1995, P.L. 350, as amended 53 P.S. § 67502(a) provides, in pertinent part:

> (a) The board of supervisors may by ordinance require adjoining and adjacent property owners to connect with and use the sanitary sewer system, whether constructed by the township or a municipality authority or a joint sanitary sewer board. In the case of a sanitary sewer system constructed by the township pursuant to either section 2501 or 2516, the board of supervisors may impose and charge to property owners who desire to or are required to connect to the township's sewer system a connection fee, a customer facilities fee, a tapping fee and other similar fees as enumerated and defined by [a prior version of clause (24) of subsection (d) of Section 5607 of the Municipal Authorities Act (Act), 53 Pa.C.S. § 5607(d)(24)], as a condition of connection to a township-owned sewer collection treatment or disposal facility….

*(Continued....)*

> The board of supervisors shall send an itemized bill of the cost of construction to the owner of the property to which connection has been made, which bill is payable immediately. If the owner fails to pay the bill, the board of supervisors shall file a municipal lien for the cost of the construction within six months of the date of completion of the connection.

In turn, the Act requires a municipal authority to allocate the fee to be imposed among its various components. Section 5607(d)(24)(i) of the Act provides that the fees that may be imposed can include a connection fee, a customer facilities fee, and a tapping fee. 53 Pa.C.S. § 5607(d)(24)(i)(A), (B) & (C). More specifically, Section 5607(d)(24)(i)(C) provides that "[a] tapping fee shall not exceed an amount based upon some or all of the following parts which shall be separately set forth in the resolution adopted by the authority to establish these fees…." 53 Pa.C.S. § 5607(d)(24)(i)(C). The parts to be included in the tapping fee consist of the capacity part, the distribution or collection part, the special purpose part, and the reimbursement part. See 53 Pa.C.S. § 5607(24)(i)(C)(I), (II), (III), & (IV). "[T]he capacity part shall not exceed an amount that is based upon the cost of capacity-related facilities, including … source of supply, treatment, pumping, transmission, trunk, interceptor and outfall mains, storage, sludge treatment or disposal, interconnection or other general system facilities." 53 Pa.C.S. § 5607(24)(I)(C)(I). "[T]he distribution or collection part may not exceed an amount based upon the cost of distribution or collection facilities required to provide service, such as mains, hydrants and pumping stations." 53 Pa.C.S. § 5607(24)(I)(C)(II). However, "[a] part for special purpose facilities shall be applicable only to a particular group of customers or for serving a particular purpose of a specific area based upon the cost of the facilities…." 53 Pa.C.S. § 5607(24)(I)(C)(III). Moreover, "[t]he reimbursement part shall only be applicable to the users of certain specific facilities when a fee required to be collected from such users will be reimbursed to the person at whose expense the facilities were constructed as set forth in a written agreement…." 53 Pa.C.S. § 5607(24)(I)(C)(IV).

[5] In addition, Section 2502(b) of the Code provides:

> (b) When an existing sanitary sewer system owned by or leased to a township is extended or altered at the expense of a developer or other private person or corporation under the supervision of the township or a municipal authority of the township, the board of supervisors may by ordinance or resolution take over the extension or alteration and compel all owners of property which is not already connected to an existing public sanitary sewer system and which is accessible to and whose principal building is within one hundred and fifty feet from the sanitary sewer extension to make connection therewith and use the sanitary sewer system as the board of supervisors may order.

*(Continued....)*

to the Township's system through a single connection near Landowner's sewage treatment facility; the collection system installed by Landowner continued to carry the sewage from each of the units to the Township's system.

On December 23, 2008, the Township provided Landowner with notice of its intention to file a municipal lien[6] in the trial court in the amount of $306,919.50 comprised of: (1) $292,250.00 in tapping fees[7]; (2) $14,612.50 as a

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53 P.S. § 67502(b).

Moreover, Section 2502(d) of the Code provides:

> (d) The board of supervisors shall not require any commercial or industrial business to connect to the township sanitary sewer system when the commercial or industrial business is operating a private sanitary sewage treatment plant under mandate of any agency of the Federal or State Government. This exemption shall last as long as the private sanitary sewage treatment plant continues to meet the specifications and standards mandated by the Federal or State agency and for forty-five days after that. If, during the days immediately after the day a business' private sanitary sewage treatment plant is determined to be below Federal or State mandates, repairs cannot be made to bring the private sewage treatment system back up to satisfactory condition, the board of supervisors may require the business to connect to the township sanitary sewer system. The full costs of connection to and any necessary refurbishing of the township sanitary sewer system shall be paid by the business.

53 P.S. § 67502(d).

[6] Section 3601(a) of the Code provides, in pertinent part, that "[i]n addition to the remedies under law for the filing of liens for the collection of municipal claims, a township may proceed for the recovery and collection of any municipal claim by action of assumpsit…." 53 P.S. § 68601(a). As this Court has previously noted, "[o]ne of those 'remedies under law' [as stated in Section 3601 (a) of the Code] is provided in the [Tax Liens Law]." Newberry Township v. Stambaugh, 848 A.2d 173, 177 (Pa. Cmwlth.), petition for allowance of appeal denied, 580 Pa. 708, 860 A.2d 491 (2004).

[7] The amount of $292,250.00 represents the $1,750.00 tapping fee imposed on each of the 167 sites in Landowner's trailer park. See RR at 8a.

5% penalty; and (3) $57.00 in attorney fees. See Id. at 8a. When the tapping fees remained unpaid, on February 11, 2009, the Township filed a municipal lien in the trial court. See Id. at 4a.

On July 28, 2009, the Township filed a Praecipe for Writ of Scire Facias sur Municipal Lien, requesting the trial court's prothonotary to issue a writ of scire facias against Landowner in the amount of $306,919.50 plus 10% interest per annum from the date of the filing of the lien. See RR at 5a-6a. That same day, a writ of scire facias was issued by the prothonotary. See Id. at 9a. On August 13, 2009, Landowner filed an Affidavit of Defense to the writ. See Id. at 10a-13a. On July 15, 2010, a nonjury trial was conducted before the trial court.

On August 16, 2010, the trial court issued an order disposing of Landowner's Affidavit of Defense, and directing Landowner to pay the Township a total of $274,472.16 comprised of: (1) $248,000 for tapping fees (142 units at $1,750.00/unit); (2) $25,801.00 for 10% interest from July 20, 2009; and (3) $171.00 in attorney fees. Landowner then filed the instant appeal.[8]

In this appeal, Landowner claims: (1) the tapping fees imposed by the Township were void as the Township did not have the authority to impose the fees under Section 2502(b) of the Code; (2) the Township was limited to recovering the costs of connection to the Township's sanitary sewer system under Section 2502(d) of the Code; and (3) the tapping fees imposed by the Township were arbitrary.

Landowner first claims that the tapping fees imposed by the Township were void as the Township did not have the authority to impose the fees under Section 2502(b) of the Code. More specifically, Landowner contends that,

[8]This Court's scope of review is limited to determining whether the trial court's findings of fact are supported by substantial evidence, or whether the trial court abused its discretion or *(Continued....)*

pursuant to Section 2502(b), the Township may only charge third parties for connection to the sanitary sewer system and cannot charge Landowner for such connection. In support of this assertion, Landowner relies upon the opinion of this Court in Hornstein Enterprises, Inc. v. Township of Lynn, 634 A.2d 704 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 538 Pa. 660, 648 A.2d 791 (1994).

In Hornstein Enterprises, Inc., this Court considered, in a declaratory judgment action, whether a prior version of Section 2502 empowered a township to impose tapping fees on a developer. In that case, a developer had proposed to construct a 116-unit residential subdivision. The developer had plans approved under which he would construct an internal collection system in the development that would be linked by an extension to the township authority's existing sewage system. The plans provided that the developer would construct both the internal collection system and the connection to the local township authority's system at his own expense. The developer sought to enter into a subdivision agreement with the authority to maintain the internal collection system for eighteen months before dedicating it to the authority. As a condition of the agreement, the authority sought to impose a tapping fee upon each unit in the development. In anticipation of its subsequent acquisition of the authority's system, the township also adopted a resolution imposing the same tapping fees as those of the authority. The developer initiated the declaratory judgment action after both the township and the township authority sought to impose these fees. The trial court determined that the township lacked the authority to impose the tapping fee on the developer for the connection of the houses in the subdivision to the sewer extension.

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committed an error of law. Borough of Walnutport v. Dennis, 13 A.3d 541 (Pa. Cmwlth. 2010).

On appeal, this Court affirmed the trial court's determination, stating:

> Our review of the plain meaning of Section 1501[, the prior version of Section 2502 of the Code,] compels this Court to conclude that Section 1501(b) does not authorize the Township to impose a tapping fee on Developer for the connection of the houses in Developer's subdivision. The relevant language of Section 1501(b) provides that once the Township takes over a developer's sewer extension, the Township has the authority to compel owners of property *not already connected to an existing public sewer system* and within 150 feet of an extension to connect with the extension and pay a tapping fee. However, pursuant to Section 1501(c), once the Township takes over Developer's extension, it becomes part of the Township's existing sewer system. By necessary implication, at the time that the Township takes over Developer's extension, Developer's subdivision will be "already connected" to the Township's existing system. Therefore, Developer does not fall within the category of property owners subject to the tapping fee provided in Section 1501(b).

Hornstein Enterprises, Inc., 634 A.2d at 706 (emphasis in original).[9]

In contrast, in the case sub judice, it is undisputed that the property contained an internal sewage collection and treatment system that was constructed and maintained by Landowner, and that the Township connected that internal collection system to the Township's collection system through a single connection near Landowner's sewage treatment facility. There has never been any allegation or evidence demonstrating that the internal collection system on the property was

[9] In Hornstein Enterprises, Inc., this Court also noted that the provisions of Section 507-A of the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, added by Act of December 19, 1990, P.L. 1343, as amended, 53 P.S. § 10507-A, relating to the prerequisites for assessing sewer and water tap-in fees, "[i]s not an independent grant of authority for a municipality to impose a tapping fee. Rather, as the trial court concluded, [Section 507-A of the MPC] merely prescribes *the method of calculating* a tapping fee where such a fee is

*(Continued....)*

either dedicated to, owned by, or leased to the Township, or that it was ultimately connected to the Township's collection system at Landowner's expense.

As noted above, Section 2502(b) of the Code provides, in pertinent part:

> (b) When an existing sanitary sewer system owned by or leased to a township is extended or altered at the expense of a developer or other private person … the board of supervisors may by ordinance or resolution take over the extension or alteration and compel all owners of property which is not already connected to an existing public sanitary sewer system and which is accessible to and whose principal building is within one hundred and fifty feet from the sanitary sewer extension to make connection therewith and use the sanitary sewer system as the board of supervisors may order.

53 P.S. § 67502(b). Thus, the provisions of Section 2502(b) of the Code do not apply under the facts of this case by its express terms.

Moreover, and more importantly, Section 2502(a) of the Code has been reenacted and amended since our opinion in Hornstein Enterprises, Inc., and confers upon the Township the powers conferred upon authorities under the Act. In particular, as noted above, the amended Section 2502(a) of the Code specifically empowers the Township to"[i]mpose and charge to property owners who … are required to connect to the township's sewer system a connection fee, a customer facilities fee, a tapping fee and other similar fees as enumerated and defined by [a prior version of clause (24) of subsection (d) of Section 5607 of the Act, 53 Pa.C.S. § 5607(d)(24)]…." 53 P.S. § 67502(a). In fact, in Hornstein Enterprises, Inc., this Court specifically noted an authority's power to impose a tapping fee on a developer for sewer connections, even where the developer constructs the sewer

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authorized…." Id. at 707 (emphasis in original).

extensions at his own expense, under this prior version of Section 5607(d)(24) of the Act. See Hornstein Enterprises, Inc., 634 A.2d at 706, n. 3 ("[I]n practice, this section has been interpreted to permit an *authority* to impose tapping fees on a developer for sewer connections even where the developer constructs the sewer extensions at his own expense. *See Pennco Builders, Inc. v. Blair Township Water and Sewer Authority*, [567 A.2d 758 (Pa. Cmwlth. 1989)], *petition for allowance of appeal denied*, 525 Pa. 608, 575 A.2d 572 (1990).") (emphasis in original).

It is true that the internal collection system installed by Landowner on the property continued to carry the sewage from each of the units to the Township's collection system. However, the use of such a pre-existing private collection system to carry waste to the larger Township collection system does not preclude the Township from imposing the instant tapping fees upon Landowner under the authority conferred by the Code. See Hornstein Enterprises, Inc. v. Lynn Township Sewer Authority, 866 A.2d 1192, 1202-1203 (Pa. Cmwlth. 2005), aff'd, 586 Pa. 508, 895 A.2d 544 (2006) ("Moreover, we agree with the trial court's interpretation of [the prior version of Section 5607(d)(24)(i)(C) of the Act] as it applied to the facts of the case *sub judice*. In its … opinion, the trial court reasoned: While it was true that Hornstein constructed an internal collection system, it was only part of the entire collection system for [the Township]. Residents of [the development] will still have to use collection lines and the trunk line beyond the development for the effluent flow to the treatment plant. We found nothing in the [prior version of the Act] which required the Authority to 'waive' the collection part as to Hornstein's development because he constructed the development's interior collection system. The fact that individuals who do not live in the development share and will share the lines outside the development with the development residents does not make waiver of the collection part of the tapping

fees mandatory…. As the trial court aptly recognized, although Hornstein constructed the [development]'s interior collection system, [the development] residents will still need to use the interceptor and collector systems constructed by the Authority to convey sewage to the treatment plant. We conclude that these facilities constructed by the Authority fall within the meaning of 'facilities necessary to supply service to the property owner or owners' in [the prior version of Section 5607(d)(24)(C) of the Act]. Consequently, we reject Hornstein's contention that the trial court erred in upholding the Authority's imposition of the collection part-existing component of the tapping fee."). Thus, Landowner's assertion that the Township did not have the authority to impose the instant fees is patently without merit.

Landowner next claims that the Township was limited to recovering the costs of connection to the Township's sanitary sewer system under Section 2502(d) of the Code. More specifically, Landowner contends that because the mobile home park is a "commercial business" under Section 2502(d), and because it was operating the private sewage treatment system pursuant to the mandate of DEP, the amount that may be recovered by the Township under Section 2502(d) is limited to the cost of connection to the Township's system.

As noted above, Section 2502(d) of the Code provides, in pertinent part:

> (d) The board of supervisors shall not require any commercial … business to connect to the township sanitary sewer system when the commercial … business is operating a private sanitary sewage treatment plant under mandate of any agency of the … State Government. This exemption shall last as long as the private sanitary sewage treatment plant continues to meet the specifications and standards mandated by the … state agency and for forty-five days after that. If, during the

> days immediately after the day a business' private sanitary sewage treatment plant is determined to be below … State mandates, repairs cannot be made to bring the private sewage treatment system back up to satisfactory condition, the board of supervisors may require the business to connect to the township sanitary sewer system. The full costs of connection to and any necessary refurbishing of the township sanitary sewer system shall be paid by the business.

53 P.S. § 67502(d).

However, in the case sub judice, it is undisputed that on December 5, 2003, DEP issued a permit set to expire on December 28, 2009, which required Landowner: (1) to connect to the Township's sanitary sewer system within 90 days after it became available to the property; (2) to abandon the private sewage treatment system; and (3) to notify DEP to cancel the relevant permits relating to the use of the private treatment system. See RR at 16a-20a. Thus, at the time that Landowner connected to the Township system, he was no longer operating the private system under DEP's mandate, and the provisions of Section 2502(d) were not applicable. See In re Township of East Hanover, 701 A.2d 313, 317 (Pa. Cmwlth. 1997), petition for allowance of appeal denied, 555 Pa. 723, 724 A.2d 937 (1998) ("[F]inally, Chesapeake contends that section 2502(d) of the [Code] prevents the Township from including Chesapeake within its public sewer system. This argument also must fail. The section 2502(d) exemption applies only when an entity is operating a private sewage treatment plant under a *mandate* of a state agency, and lasts as long as the private plant continues to meet the specifications and standards mandated by that agency. Here, there is no dispute between the parties that once the Township's public sanitary sewer system is built, Chesapeake's operating permit becomes void and must be relinquished to DEP. At that point, Chesapeake's private sewer system will no longer be mandated by DEP.

Without such a mandate, the Township may require Chesapeake's inclusion within the public sewer system.[12]…. **12.** Chesapeake argues that its mobile home park is a 'commercial business' within the meaning of section 2502(d) of the [Code]. 53 P.S. § 67502(d). We note, however, that because Chesapeake's argument fails under the 'mandate' provision of section 2502(d), we need not decide whether the mobile home park is a commercial business.") (footnote omitted and emphasis in original). Thus, Landowner's assertion that the provisions of Section 2502(d) of the Code apply in this matter is likewise patently without merit.

Finally, Landowner claims that the tapping fees imposed by the Township were arbitrary because: (1) the Township did not pass a resolution or ordinance defining what constitutes an EDU from which to calculate the appropriate tapping fees; and (2) the Township initially filed a civil complaint seeking $262,038.00 in tapping fees and then sought $292,250.00 in tapping fees in the instant action.[10]

It is true that "[i]n scire facias proceedings to enforce a municipal claim, the defendant may interpose the defense that the assessment is excessive under the applicable ordinances. Thus, affidavits of defense have been held sufficient which alleged that the assessment was improperly calculated or apportioned." 20 Standard Pennsylvania Practice 2d § 106:66 at 338 (footnotes omitted). However, our review of the record in this case reveals that neither of these allegations was raised in the Affidavit of Defense filed by Landowner in the

[10] To the extent that Landowner raises other allegations of error in this regard, they have been waived by his failure to include these claims in the Concise Statement of Matters Complained of on Appeal that he filed in the trial court. See RR at 41a-42a. Pa.R.A.P. 1925(b)(4)(vii); Lang v. Department of Transportation, 13 A.3d 1043 (Pa. Cmwlth. 2011); Borough of Walnutport.

trial court. See RR at 10a-13a. In addition, although the trial court determined that the tapping fees imposed by the Township in this case were not arbitrary, our review of the opinion filed in support of its order reveals that neither of these allegations was addressed by the trial court in its disposition of this matter. See Trial Court Opinion at 1-8.[11]

Moreover, the record in this case shows that Landowner failed to challenge the validity of instant tapping fees under the provisions of Section 5607(d)(9) of the Act.[12] As a result, Landowner was precluded from attacking the validity of the fees in the instant scire facias proceedings in the trial court. Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc., 422 Pa. 442, 221 A.2d 128 (1966); Commonwealth v. Lentz, 353 Pa. 98, 44 A.2d 291 (1945).

Accordingly, the order of the trial court is affirmed.

JAMES R. KELLEY, Senior Judge

[11] "[I]t is well-established that a party may not successfully advance a new and different theory of relief for the first time on appeal, while failing to assert on appeal other grounds which were submitted for the same purpose in the lower court…." Kemp v. Qualls, 473 A.2d 1369, 1374 (Pa. Super. 1984) (citations omitted).

[12] Section 5607(d)(9) provides, in pertinent part:

> (9) … [A]ny person questioning the reasonableness or uniformity of a rate fixed by an authority or the adequacy, safety and reasonableness of the authority's services, including extensions thereof, may bring suit against the authority in the court of common pleas of the county where the project is located…. The court of common pleas shall have exclusive jurisdiction to determine questions involving rates or service….

53 Pa.C.S. § 5607(d)(9). See also Section 1601(f) of the Code, 53 P.S. § 66601(f) ("[A]ny person aggrieved by the adoption of any ordinance may make complaint as to the legality of the ordinance to the court of common pleas.").

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Conemaugh Township | : | |
| | : | |
| v. | : | No. 1892 C.D. 2010 |
| | : | |
| Robert McKool, | : | |
| Appellant | : | |

**O R D E R**

AND NOW, this 24th day of August, 2011, the order of the Court of Common Pleas of Somerset County, dated August 16, 2010 at No. 7 Mech 2009, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge