

COMMONWEALTH OF KENTUCKY
GALLATIN CIRCUIT COURT
CIVIL ACTION NO. 08-CI-00194

ENTERED
APR 13 2009 DL
PAM McINTYRE, CLERK
GALLATIN CIRCUIT DISTRICT COURT

CARROLL COUNTY WATER DISTRICT NO. 1

PLAINTIFF

v.

GALLATIN COUNTY WATER DISTRICT, et al.

DEFENDANTS

RECEIVED
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GENERAL COUNSEL

ORDER

*** **

This matter is before the Court on an appeal of Gallatin County Judge/Executive Kenny French's July 8, 2008 Order annexing territory by the Gallatin County Water District filed by Carroll County Water District No. 1. The Court has reviewed the record including the videotape of the May 23, 2008 Hearing, Carroll County Water District's (CCWD) Brief, Gallatin County Water District's (GCWD) Brief, Judge/Executive French's Brief, CCWD's Reply, in which it also moves to strike Judge/Executive French's Brief, and being in all ways sufficiently advised;

Judge French received a request from GCWD to change its boundaries by annexing areas with Gallatin County but within the territory of CCWD. The request was a letter from GCWD Chairman Vic Satchwell on behalf of the Commissioners. The area they requested annexing was:

Beginning at Speedway Boulevard and 1000 ft. west of Junction 1039 and Speedway Boulevard southwest to I-71, all areas south of I-71 and all other areas south of the interstate excluding any existing customers as of April 1, 2009.

GCWD requested the annexation as they were currently serving customers in the referenced area and they wanted to service future development in the area.

A public Hearing was held May 23, 2008 at the Gallatin County Courthouse. Judge French subsequently entered his Order finding pursuant to KRS 74.110:

- 1) The Gallatin County Water District's territory limits will now include the area advertised and more clearly stated as follows: All Areas

along Speedway Blvd. (a/k/a Jery Carroll Blvd.) from KY 35 to KY 1039 and extending along the same projected line to a point 1000 ft. west of the junction of KY 1039 and Speedway Blvd., thence southwesterly course to I-71, and including all of Gallatin County south of I-71 from KY 35 and the Carroll County line; excluding any existing customers as of April 1, 2008.

2) The Gallatin County Water District shall reimburse the Carroll County Water District all expenses incurred in connecting Love Brother's Truck Stop to their existing line at Tommy Crawford's residence

CCWD appeals Judge French's Order, assigning four (4) points of error for review.

- a. Carroll has the exclusive right to serve the territory annexed, and
- b. Federal law prohibits the annexation, and
- c. The annexation is procedurally defective, and
- d. The annexation order appealed from is not supported by substantial evidence.

The first issue the Court must deal with is the standard of review, and the Court will then move onto the points of error asserted by CCWD. CCWD has proposed that this Court use a *de novo* standard of review, while GCWD has argued that the Court should not disturb the findings of fact as long as they are supported by substantial evidence. In *Trimble Fiscal Court v. Snyder*, 866 S.W.2d 124 (Ky. Ct. App. 1993), the Kentucky Court of Appeals reviewed a fiscal court's decision to keep a road open. That court then used the decision in *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971), to determine that the fiscal court's decision was adjudicatory because it was determining whether a particular individual under a particular set of facts was entitled to relief. *Trimble*, 866 S.W.2d at 125-26. Since the fiscal court had acted in an adjudicatory manner, the standard of review was limited to whether or not the decision was arbitrary, including whether substantial evidence existed. *Id.* at 126. With regard to acts made by a legislative body that are policy-making or law-making, the Court in *McDonald* held that, "when the local legislative body acts in a law-making or policy-making role with the result of such action generally applicable to all affected, its action is arbitrary if there is no rational

connection between that action and the purpose for which the body's power to act exists. Where the existence of such rational connection is 'fairly debatable' the action will not be disturbed by a court." *McDonald*, 470 S.W.2d at 178. In neither instance would a circuit court consider the fiscal court's finds under a *de novo* review. This Court finds that the case at hand falls into the later category, such that if the fiscal court followed the procedures established in KRS 74.110, then this Court will review whether the action is arbitrary, meaning that it had a rational connection between the purpose and the action.

CCWD first argues it has the exclusive right to provide water service within its service territory. The Court is aware, as was stated by the parties, the Public Service Commission (PSC) issued an order dated September 15, 2008, which is on appeal in Franklin Circuit Court. The PSC stated in its Order that it lacks any authority to establish an exclusive service territory for water utilities. PSC is of the opinion that it can, however, consider competing utilities' claims to provide service to a prospective customer to prevent wasteful duplication of facilities or excessive investment.

The Kentucky judiciary has also considered the question of the exclusivity of service for a water district, albeit in a slightly different context. The courts have looked at cases where a municipality seeks to provide service to an area that is within the service area of a water district. The Kentucky Court of Appeals held that, "Surely if the legislature intended a water district to have an exclusive right, it would have so provided." *City of Cold Spring v. Campbell County Water Dist.*, 334 S.W.2d 269, 273 (Ky. 1960), *overruled on other grounds by*, *City of Georgetown v. Public Service Commission*, 516 S.W.2d 842 (Ky. 1974). The Court further added that "[t]he statutes do not grant to water districts exclusive authority to operate in the territory comprising the district." *City of Cold Spring*, 334 S.W.2d at 274. Although the issue in that case dealt with a conflict between municipalities and the water district, the Court does not find CCWD has the exclusive right to provide water service within its service territory.

CCWD also argues in its Reply Brief that pursuant to OAG 63-666, GCWD has no legal authority to annex territory that is already part of CCWD. In 1963, the Attorney General addressed three questions concerning water districts, including a question that stated: "Can a water district acquire an existing water district?" In his opinion, the Attorney General cited *Juett v. Town of Williamstown*, 58 S.W.2d 411 (Ky. 1933) for the proposition that a municipal corporation, like a water district, only has the powers that they are expressly given, or necessarily implied, by the statutes. The Attorney General concluded that one water district could not annex the territory of another water district and thus "absorb" it. This is distinguishable from the case at hand since GCWD does not seek to absorb CCWD or any of the customers that CCWD currently serves, GCWD is only seeking to expand its territory, albeit into the territory of another water district. So, GCWD may expand its territory, but it cannot "take over" the territory already occupied by CCWD. The two water districts would share the territory and the Public Service Commission would assign the appropriate district to provide water.

CCWD's next argues Federal Law confirms its exclusivity. Both CCWD and GCWD have obtained federal funding through 7 U.S.C. § 1926(a). Pursuant to 7 U.S.C. § 1926(b):

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

CCWD argues that this statute protects its territory from encroachment by GCWD. The Sixth Circuit Court of Appeals stated,

This provision prevents local governments from expanding into a rural water association's area and stealing its customers; the legislative history states that the statutory provision was intended to protect "the territory served by such an association facility against [other] competitive facilities" such as local governments, as otherwise rural water service

might be threatened by “the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.”

Le-Ax Water Dist. v. City of Athens, 346 F.3d 701, 705 (6th Cir. 2003). This Court notes at the outset that the case at hand does not fall within the legislative history as both organizations are rural water associations. Nevertheless, CCWD claims that GCWD is expanding into its territory, acting as a competitive facility, in violation of the statute. In order to prevail under this statute, CCWD must establish the following: “1) it is an 'association' within the meaning of the Act; 2) it has a qualifying outstanding FmHA loan obligation; and 3) it has provided or made service available in the disputed area.” *Adams County Regional Water Dist. v. Village of Manchester*, 226 F.3d 513, 517 (6th Cir. 2000). CCWD clearly meets the first two factors, the question is regarding the third, to which this Court now turns.

The Sixth Circuit Court of Appeals has interpreted the third prong to mean that a water district must have a legal duty to serve the area and must have pipes in the ground ready to physically serve the area. *Le-Ax*, 346 F.3d at 706. Since the territory in question was already part of CCWD's territory, there is little question that it had a legal duty to service the areas in question. When determining the physical aspect of the determination, the Sixth Circuit has held:

[W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.

Lexington-S. Elkhorn Water Dist. v. City of Wilmore, 93 F.3d 230, 237 (6th Cir.1996). In the case at hand, Gallatin County Judge Executive found that CCWD did not have the current capacity within or adjacent to the property it claims to be protected under Section 1926(b).

CCWD's next argument is that Judge French failed to follow procedural steps to enlarge

boundaries of GCWD. KRS 74.110 states the procedural requirements GCWD must follow to annex the territory. Section (1) requires the commission to file a petition with the county judge/executive, describing the territory to be annexed or stricken off, and setting out the reasons therefor. Judge/Executive French received correspondence from Vic Satchell, Chairman of the Board on behalf of the GCWD Commissioners dated February 14, 2008, in which they requested the extension of GCWD boundaries. Satchwell's letter stated they were writing to petition Judge/Executive French pursuant to KRS 74.110. The letter described the territory to be annexed and the reasons therefor. Judge/Executive French described the request in his Order. The Court finds GCWD met this requirement.

Section (2) requires notice of the petition be given pursuant to KRS 424, and any resident of the water district or the territory proposed may file exceptions and objections within 30 days after the notice. Section (3) requires the Judge/Executive set the matter for hearing. Judge/Executive French received public comments until May 12, 2008, held a public meeting May 23, 2008, and held a public hearing May 12, 2008. He found the hearing was duly advertised and GCWD provided two affidavits from Denny Kelley Warnick, Publisher of the Gallatin County News, that it published legal notices of the hearing on April 16, 2008 and May 14, 2008. In dealing with the same statutory requirements, the Kentucky Supreme Court held that, "Substantial compliance in regard to publication requirements has been authorized in *Queenan v. City of Louisville*, 213 Ky., 816, 233 S.W.2d 1010 (1950). The purpose of the statute is to allow the public an ample opportunity to become sufficiently informed on the public question involved." *Conrad v. Lexington-Fayette Urban Co. Gov't*, 659 S.W.2d 190, 195 (Ky. 1983). The Court finds GCWD met the notice requirements.

Section (3) requires that Judge/Executive French enter an order annexing or striking off the proposed territory if he finds it is reasonably necessary. Judge/Executive French found GCWD's sought annexation reasonably necessary and entered his July 8, 2008 order. Although this Court finds

that the Judge/Executive French was supported by substantial evidence, it need only find that the action was not arbitrary. The Court finds that Judge/Executive French and GCWD followed the commands of KRS 74.110 and that there was a rational connection between the action and the purpose for which the body's power to act exists.

IT IS HEREBY ORDERED AND ADJUDGED that the Order issued by Judge/Executive French on July 8, 2008 is **AFFIRMED**.

IT IS FURTHER ORDERED that CCWD's Motion to Strike Judge/Executive French's Brief is **OVERRULED**.

SO ORDERED this 10th day of **APRIL, 2009**.



**JAMES R. SCHRAND, JUDGE
GALLATIN CIRCUIT COURT**

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