

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BASS PROPERTIES, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	No. N10A-07-009 MMJ
	)	
PUBLIC SERVICE COMMISSION OF	)	
THE STATE OF DELAWARE and	)	
NEW CASTLE COUNTY,	)	
	)	
Appellees.	)	

Submitted: April 21, 2011
Decided: July 14, 2011

APPEAL OF DECISION OF THE PUBLIC SERVICE COMMISSION
REVERSED IN PART AND REMANDED

Adam Balick, Esquire (Argued), Joanne Ceballos, Esquire, Melony Anderson, Balick & Balick, LLC, Wilmington, Delaware, Attorneys for Appellant Bass Properties, Inc.

Joseph C. Handlon, Esquire, Department of Justice, Dover, Delaware, Attorney for Appellee Public Service Commission

Mary Ann K. Dougherty, Esquire, Assistant County Attorney, New Castle, Delaware, Attorney for Appellee New Castle County

JOHNSTON, J.

Bass Properties, Inc. has appealed the decision of the Public Service Commission (“Commission”). The Commission ordered Bass to transfer title to the Lea Eara Spray Irrigation Facility (“Facility”), a wastewater treatment plant, along with three parcels of land underlying the Facility, to New Castle County. Additionally, the Commission ordered Bass to reimburse the County \$545,327.75 for repair and maintenance expenses the County incurred after assuming Facility operations.

Bass contends that the Commission committed legal error because the Commission: does not have the authority to order Bass to transfer the underlying real property; and does not have the authority to order Bass to reimburse the County for repair and maintenance expenses.

FACTUAL AND PROCEDURAL CONTEXT

In 1990, Bass constructed the Facility on its real property. The Facility collects wastewater, treats it in lagoons, and disposes the treated water by spraying it over acres of irrigation fields. The Facility serves approximately 300 residences in the Lea Eara Farms development.

On October 22, 1990, Bass and the County executed a Trust Declaration, which set forth the parties’ rights and obligations concerning the Facility. The Trust Declaration details the nature of the Facility as follows:

[T]he utility system includes all appurtenances such as manholes, pumping stations, and the sewage treatment plant including affluent line to point of final disposal and spray irrigation facilities, heretofore constructed or to be constructed, including all easements incident to the ownership and operation of said sewage system. The plant wastewater treatment facilities, storage and distribution facilities includes the sewer main and lateral lines, heretofore constructed or to be constructed, including all easements incident to the ownership and operation of said treatment system and specifically including the spray irrigation field, aeration pond and wastewater storage ponds.

The Trust Declaration outlined two scenarios wherein Bass could transfer the Facility to the County. The first contemplates a voluntary transfer at Bass's pleasure:

Bass, "at its expense, shall, unless or until [Bass] defaults . . . [a]fter completion of the utility system . . . and acceptance thereof by New Castle County, grant, convey, assign and transfer to New Castle County full title to the utility system free and clear of any liens or encumbrances together with any rights of entry required by [the County] for the purpose of operating and maintaining said utility system."

The second contemplates that the County assume control of the Facility in the event that Bass defaults on its obligations under the Trust Declaration:

Bass "shall have no further right, title or interest in the utility system or the property governed by this Declaration and shall not be entitled to any portion of the proceeds resulting from any sale of such utility system or property. [Bass] shall in that event grant, convey, assign and transfer to [the County] full title to the utility system."

In 2004, the Delaware General Assembly expanded the Commission's jurisdiction to cover public wastewater utilities. Thereafter, the Commission required public wastewater utilities to apply for a Certificate of Public Convenience and Necessity ("CPCN") to remain in operation. Bass complied, and on April 26, 2005, the Commission granted Bass a CPCN. The CPCN required that Bass comply with all applicable laws, regulations, and permit conditions.

Around this time, Bass retained Artesian Utility Development, Inc. to operate and maintain the Facility on Bass's behalf. From 2006 to 2008, however, the Facility was not profitable.

On June 24, 2008, the Delaware Department of Natural Resources and Environment Control ("DNREC") issued Bass a Spray Irrigation Permit. The Permit included a schedule of compliance for the nitrate levels in one of the Facility's wells. It required that Bass undertake repairs to reduce nitrate levels.

In August 2008, Bass, Artesian, and the County discussed that the Facility did not generate enough revenue to implement the repairs required by the schedule of compliance. Bass considered transferring the Facility to the County.

In September 2008, Artesian ceased operating and maintaining the Facility. The County assumed operations.

On January 6, 2009, the Commission issued a Rule to Show Cause Order to address whether Bass properly abandoned the Facility. Bass responded, claiming that it did not abandon the Facility, but rather “transferred” the Facility to the County pursuant to the Trust Declaration. On May 1, 2009, the County filed a Motion to Compel Compliance with 26 *Del. C.* §§ 203(A)(c) and 215.¹ The Commission concluded that Bass violated Sections 203A(c) and 215 by abandoning the Facility to the County without the Commission’s approval. The Commission ordered Bass to file an application to transfer the Facility. On June 12, 2009, Bass complied.

On March 11, 2010, a Hearing Examiner conducted an evidentiary hearing to consider Bass’s application. The County presented evidence regarding its expenditures to repair and maintain the Facility’s operations. Bass stipulated to this evidence.

On April 19, 2010, the Examiner found that Bass violated Sections 203A(c) and 215. However, the Examiner instructed that he would approve the application if Bass transferred title to both the Facility and the

¹ These code sections require that a public utility obtain permission from the Commission before abandoning property to the County.

underlying real property. Bass and the County filed exceptions to the Examiner's recommendation.

After argument on June 1, 2010, the Commission ordered Bass to transfer title to the Facility and the underlying real property to the County. The Commission ordered Bass to affirmatively transfer title; it was not a condition precedent to granting Bass's transfer application. The Commission ordered Bass to pay the County \$545,327.75. Additionally, the Commission revoked Bass's CPCN.

On July 6, 2010, the Commission memorialized its decision by issuing Order No. 7777. The Commission found that the "undisputed facts show that Bass abandoned the [Facility] upon receiving notice from DNREC that the facility was potentially leaking and would need significant repairs." The Commission also concluded that the "County took over the [F]acility . . . under protest and on an emergency basis" and "it is undisputed that the County spent \$545,327.75" to restore the Facility.

The Commission found that separating the Facility from the underlying real property would be problematic because Bass "threatened to file bankruptcy," which could "create a cloud" over the title to the underlying real property, and the County has an interest in ensuring safe and adequate utility services.

The Commission noted that its decision to order Bass to transfer the underlying real property is consistent with the Trust Declaration. The Commission found that the provisions of the Trust Declaration, read together, “evidence an intent by Bass to transfer full title to the [Facility], which . . . includes the associated real property.”

The Commission relied on 26 *Del. C.* § 201, which delineates the Commission’s jurisdiction and powers, in ordering Bass to reimburse the County \$545,327.75. The Commission emphasized that Bass did not dispute that the County’s expenses were reasonable and necessary. Further, the Commission noted that it is likely that the County will incur as much as \$600,000 in additional expenses. The Commission also cited 26 *Del. C.* § 308(a)(2), which allows it to impose penalties if a public utility is found to be inefficient, insufficient, or inadequate. Although the Commission believes that there is substantial evidence that the Facility was inefficient, insufficient, and inadequate, it found reimbursing the County more appropriate than the imposition of penalties.

STANDARD OF REVIEW

26 *Del. C.* § 510 governs the Court’s review of a Commission order as follows:

- (b) The appeal shall not be a trial de novo but shall be based upon the record before the Commission.

(c) The scope of review before the Court shall be that the Commission's findings shall be upheld if they are supported by sufficient evidence, free of error of law and not arbitrary or capricious. When factual issues are reviewed the Court shall take due account of the presumption of official regularity and the quasi-legislative function and specialized competence of the Commission.

DISCUSSION

The Commission's Authority to Order Bass to Transfer the Underlying Real Property

Parties' Contentions

Bass argues that the Commission erred as a matter of law by performing an unconstitutional taking of Bass's property. Bass claims that the Commission does not have the authority to exercise eminent domain. Assuming, *arguendo*, that the Commission had authority to take the underlying real property, the Commission did not provide Bass with just compensation. Bass also asserts that the Trust Declaration does not give the Commission the authority to transfer the underlying real property to the County. Bass points out that this is not a breach of contract action between it and the County. Assuming that the Commission has the authority to enforce the Trust Declaration, Bass contends that the Trust Declaration draws clear distinctions between the Facility and the underlying real

property and does not contemplate Bass transferring the underlying real property.

The Commission and the County respond that the Commission had the authority to transfer the underlying real property pursuant to Section 201(a), which provides:

The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title. Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility, and, in so regulating, the Commission shall consider the interests of subscribers, if any, of the entity attaching to the public utility's facility, as well as the interests of the consumer of the public utility service.

Additionally, the Commission and the County argue that the Trust Declaration dictates that, in the event that the County assumes control of the Facility, Bass would lose its ownership interest in the Facility and the underlying real property. The Commission and the County contend that the Commission did not perform an unconstitutional taking because Bass voluntarily abandoned both the Facility and underlying real property. Finally, the County asserts that the Facility is inextricably intertwined with the underlying real property. The County emphasizes that the Facility treats

wastewater in lagoons and sprays the treated water onto irrigation fields for disposal. Therefore, the County claims, the underlying real property must be transferred along with the Facility.

Analysis

The United States Constitution provides that “public property [shall not] be taken for public use, without just compensation.”² Similarly, the Delaware Constitution provides that no person’s property shall “be taken or applied to public use without the consent of his representatives, and without compensation being made.”³ In the absence of a specific grant of authority by the General Assembly, an agency may not exercise eminent domain.

The Court finds that Section 201(a) does not grant the Commission the authority to exercise eminent domain. The General Assembly did not expressly or impliedly grant the Commission this authority.⁴ It is unnecessary that the Commission exercise eminent domain to regulate the “rates, terms and conditions for any attachment . . . to any pole, duct, conduit, right-of-way or other facility of any public utility.” Section 201(a)

² U.S. CONST. amend V.

³ Del. Const. art. I, § 8.

⁴ An example of the General Assembly’s grant of the authority to exercise eminent domain is 17 *Del. C.* § 132(c)(3) (The General Assembly empowered DelDOT to “lay out, open, widen, straighten . . . reconstruct and maintain any state highway.”); *State v. Teague*, 2009 WL 929935, at *2 (Del. Super.) (“DelDOT is authorized to exercise the State’s power of eminent domain” in order to establish a “permanent system of state highways along the route or routes of travel as will accommodate the greatest needs of the people of this State.”) (citing *Cannon v. State*, 807 A.2d 556 (Del. 2002)).

contemplates that the Commission regulate public utilities. It does not contemplate the taking of real property, or, more specifically, the taking of title to real property to expand an existing public utility.

Assuming, *arguendo*, that the General Assembly had granted the Commission the authority to exercise eminent domain, the Commission did not provide Bass with just compensation. In order to exercise eminent domain, a governmental body must follow established procedures to comport with due process.⁵

The Commission and the County have presented no valid or compelling justification for transferring title to the underlying real property. The County's argument that the underlying real property is inextricably intertwined with the Facility is unpersuasive. Without title to the underlying real property, the County still enjoys unlimited, unrestricted, and unilateral use of the Facility. The use easement will run with the land, and cannot be eliminated or restricted for so long as the Facility is in use.

The Court also finds that the Commission does not have the authority to order Bass to *affirmatively* transfer title to the Facility. For the reasons previously discussed, the Commission does not have the authority to exercise eminent domain. The Commission has the authority to revoke

⁵ *Cf.* 29 Del. C. § 9505.

Bass's CPCN, thereby precluding the Facility's operation as a public wastewater utility. Bass does not challenge the Commission's revocation of its CPCN. The Commission cannot, however, order Bass to concomitantly transfer title to the Facility. Under these circumstances, whether to apply for voluntary abandonment of the Facility is Bass's decision.

Finally, the Court finds that the Trust Declaration does not imbue the Commission with the authority to order a transfer of the underlying real property. In *Artesian Water v. Cynwood Club Apartments*,⁶ an analogous case, the Delaware Supreme Court held that the Commission correctly avoided adjudication of a debt controversy between the parties.⁷ The Court explained that the Commission may “‘fix just and reasonable standards . . . regulations, practices . . . or services to be furnished, imposed, observed and followed thereafter by any public utility’; and may ‘require every public utility to furnish safe, adequate and proper service.’”⁸ Because the Commission “does not sit as a court of law,” its jurisdiction does not include adjudicating a debt controversy between the parties.⁹

⁶ 297 A.2d 387 (Del. 1972).

⁷ *Id.* at 389.

⁸ *Id.* (citing 26 Del. C. §§ 121, 124, 131, and 135).

⁹ *Id.*; Cf. *Georgia-Pacific Corp. v. Delmarva Power & Light Co.*, 1992 WL 396307 (Del. Ch.). The Delaware Court of Chancery held that the Commission has exclusive jurisdiction to hear a natural gas customer's action for injunctive relief to modify the terms of its service. *Id.* at *6. Georgia-Pacific fueled its facility with natural gas, supplied by Delmarva, pursuant to a Commission-approved tariff. *Id.* at *1. The

In this case, the parties’ dispute over the Trust Declaration is akin to the facts in *Artesian*. The Trust Declaration is a contractual agreement between Bass and the County—the terms of which Bass and the County dispute. The parties agreed that, under specific circumstances, Bass could transfer the Facility to the County. Whether that transfer included the underlying real property is disputed. Determining the nature of the Trust Declaration is a dispute between Bass and the County. The Court finds that the Commission lacks jurisdiction to enforce the Trust Declaration. The Trust Declaration does not justify Commission’s decision to order Bass to transfer the underlying real property.

THEREFORE, the Court holds that the Commission lacks authority to transfer to the County title to the real property underlying the Facility.

Commission drafted the tariff pursuant to several orders it had issued, which created the Commission’s “extensive administrative procedure . . .” *Id.* Delmarva refused to modify the terms of Georgia-Pacific’s natural gas service as requested by Georgia-Pacific. The Court held that the Commission has exclusive jurisdiction to hear Georgia-Pacific’s petition for injunctive relief because the tariff was approved by the Commission and drafted pursuant to the Commission’s orders. *Id.* at *6. Although the tariff was a contract between Georgia-Pacific and Delmarva, it was “an expression of regulatory policy.” *Id.* The record in this case, however, does not establish that the Commission was involved in the drafting of the Trust Declaration or that the Trust Declaration was “an expression of regulatory policy.” In any event, *Georgia-Pacific* does not provide authority for the proposition that the Commission has the power to transfer title to real property.

The Commission's Authority to Order Bass to Reimburse the County

Parties' Contentions

Bass argues that the Commission lacks the authority to order Bass to reimburse the County for its repair and maintenance expenses. Specifically, Bass asserts that Section 201(a) does not grant the Commission this authority. Bass again contends that the Trust Declaration does not obligate it to pay the County's expenditures because this not a breach of contract action between Bass and the County.

The Commission and the County respond that the Commission has the authority to attach costs to the transfer of the Facility pursuant to Section 201(a) and Section 308(a)(2). Section 308(a)(2) provides:

If the Commission finds that the public utility's facilities, products or services are inefficient, insufficient or inadequate, it may impose such penalty upon the public utility as may be necessary to restore such facilities, products or services to a state of efficiency, sufficiency or adequacy. Upon significant improvement in such services, products or facilities, the Commission may, after hearing, remove or reduce the penalty imposed.

Analysis

The Commission conceded at argument that there is no legal precedent supporting its contention that it has jurisdiction to decide whether Bass must directly reimburse the County.

For the reasons previously discussed, the Commission lacks jurisdiction to enforce the Trust Declaration. The Trust Declaration cannot be the basis for the Commission's decision to order Bass to reimburse the County.

Sections 201 and 308 combine to give the Commission broad authority. However, such authority is not unlimited. The Court finds the Commission and the County's argument—that Section 201(a) grants the Commission the authority to order Bass to reimburse the County—unpersuasive. Section 201(a) concerns the Commission's jurisdiction and the extent of its regulatory power. It does not address attaching costs to the transfer of a public utility or penalizing a public utility.

Section 308(a)(2) concerns penalizing a public utility if its services are inefficient, insufficient, or inadequate. Section 308(a)(2) does not contemplate attaching costs to the transfer of a public utility. Although, the Commission mentioned that it could have penalized Bass under Section 308(a)(2), the Commission ordered that Bass reimburse the County for its repair and maintenance expenditures under Section 201(a).

If the Commission had imposed penalties pursuant to Section 308(a)(2), the money would have gone to the Delaware State General Fund directly, instead of to the County. The Court understands, and is

sympathetic to, the Commission’s motivation to place proceeds within direct control of the County, to enable the County to effectively operate the Facility. Nevertheless, such public policy concerns are not dispositive. The issue before the Court is whether the Commission has the legal authority to order payment directly to the County.

Pursuant to Section 203A(c)(1), “no public utility shall abandon or discontinue . . . any regulated public utility . . . under a certificate of public convenience and necessity . . . without first having received Commission approval” A public utility must apply for an abandonment or discontinuance, and prove that the abandonment or discontinuance is “reasonable, necessary and not unduly disruptive to the present or future public convenience and necessity.”¹⁰ In response, the Commission may investigate or hold hearings on the matter if necessary or appropriate.¹¹ Additionally, the Commission may “attach reasonable terms and conditions to the granting of such approval.”¹² If a public utility cannot or will not meet the Commission’s terms and conditions, it may withdraw its application for abandonment and continue to operate. The Commission,

¹⁰ 26 *Del. C.* §§ 203A(c)(2) and (3).

¹¹ 26 *Del. C.* § 203A(c)(4).

¹² *Id.*

however, reserves the right to impose penalties to restore the public utility to a state of efficiency, sufficiency, or adequacy.¹³

The Commission may seek injunctive relief in the Court of Chancery to prevent the abandonment of a public utility in violation of Section 203A(c).¹⁴

Requiring Bass to transfer title to the underlying real property is not a reasonable term or condition, under Section 203A(c)(4), to attach to the approval of an abandonment application. As previously discussed, the County enjoys unlimited, unrestricted, and unilateral use of the Facility without title to the underlying real property.

However, if a party wishes to transfer a public utility to the County, and the public utility is in need of significant repairs, it is reasonable that the party pay what is necessary to restore the public utility. Here, Bass abandoned the Facility at a time when, according to the County's evidence, it needed \$545,327.75 in repairs.

On March 11, 2010, Bass stipulated to the evidence of the cost of needed repairs. At oral argument in this appeal, Bass conceded that it was a "strategic," or "tactical," decision not to dispute the reasonableness or necessity of the County's expenditures. Bass acknowledges that it could

¹³ 26 *Del. C.* § 308(a)(2).

¹⁴ 26 *Del. C.* § 203A(c)(7).

have disputed the evidence. Instead, Bass took the position that determining the reasonableness and necessity of the remedial costs was not within the Commission's jurisdiction. The Hearing Examiner agreed. The issue of whether the County's expenditures actually were reasonable and necessary, however, is not before the Court.

THEREFORE, the Court finds that the Commission has the authority under Section 203A(c)(4) to condition Bass's application for abandonment on Bass reimbursing the County. Requiring Bass to pay the restoration amount is reasonable. Bass is free to accept or reject this condition.¹⁵

If Bass rejects this condition, thereby forfeiting its option of legally abandoning the Facility, the Commission has the authority under Section 308(a)(2) to penalize Bass for the Facility's inefficiency, insufficiency, or inadequacy. That amount *could* be calculated as the County's expenditures to repair and maintain the Facility.

Finally, if Bass withdraws its application to transfer the Facility, but refuses to return to the Facility and assume operations, the Commission may seek injunctive relief in the Court of Chancery.

¹⁵ Of course, if the parties wish to negotiate transfer of title to the underlying real property, in exchange for the restoration costs, or a portion thereof, they may do so.

CONCLUSION

The Commission does not have the authority to exercise eminent domain and cannot order Bass to transfer title to the real property underlying the Facility. Under the circumstances in this case, the Commission does not have jurisdiction to enforce the Trust Declaration. The Commission does not have the authority under Section 201(a) to order Bass to directly reimburse the County.

THEREFORE, the Public Service Commission's Order No. 7777 is hereby **REVERSED IN PART AND REMANDED** to the Public Service Commission for a Decision Consistent with this Opinion.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston