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Nottingham Meadows, Albert/Kline v. Antrim Twp. Municipal Authority

NOTTINGHAM MEADOWS, LLC, Plaintiff, v. ANTRIM TOWNSHIP MUNICIPAL AUTHORITY, Defendant
Civil Action - Law, No. 2002-3484
EUGENE S. ALBERT, JR., and RONNIE E. KLINE, Plaintiffs, v. ANTRIM TOWNSHIP MUNICIPAL AUTHORITY, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch

Civil Action - Law, No. 2003-530

Municipality Authorities Act; Subdivision development; Fees and charges pertaining to public sewer system; Declaratory judgment

Appearances:

Andrew J. Benchoff, Esq., *Counsel for Plaintiffs*

Shawn D. Meyers, Esq., *Counsel for Defendant*

OPINION AND VERDICT

Herman, J., December 29, 2006

Introduction

Nottingham Meadows, LLC is a real estate developer licensed in Pennsylvania with its subdivision, Nottingham Meadows, located along Hykes Road in Antrim Township. Eugene Albert and Ronnie Kline own a parcel of land in Antrim Township known as the Willowdale V subdivision. Mr. Albert is also the manager of the Nottingham Meadows subdivision. Antrim Township Municipal Authority ("the Authority") is a municipal authority incorporated under the Municipality Authorities Act with its mailing address at 10655 Antrim Church Road in Greencastle. The Authority owns the wastewater and sewage collection and treatment facility which serves Antrim Township.

Before the court are two actions for declaratory relief which challenge the legality of certain fees and charges imposed on the plaintiffs by the Authority in connection with the Nottingham Meadows subdivision and future similar subdivisions and land development plans. The actions were consolidated for a bench trial before the undersigned. The court held the trial and the notes of testimony were transcribed. Counsel thereafter filed a stipulation to amend the Albert/Kline complaint and counsel submitted written argument regarding the issues raised at trial. The matter is ready for decision.

Background

Nottingham Meadows is an approved final subdivision featuring 134 lots. Development of the subdivision began in 1997. Nottingham obtained approval from the DER and the Authority in 2000 to build a sewer module for the entire subdivision. The module included collection components, specifically, the sewer main, laterals and manholes. The installation of utilities and roads was under way when the events triggering this action occurred.

Before September 25, 2000, developers paid a $980 tapping fee per equivalent dwelling unit (EDU) in order to connect to the township system. On that date, the Authority adopted a Resolution which raised

the tap fee per unit to $4,400 per EDU effective December 25, 2000. Developers who already had EDUs were allowed to pay the lower fee during that 90-day period. Nottingham gave the Authority a check for $133,280 on December 22, 2000 representing pre-payment of fees for all the lots in the subdivision at the $980 rate.[1] The Authority rejected the payment as untimely because, insofar as the final subdivision plan had not yet received final township approval, the EDUs did not actually exist on the date when the new tap fees became effective.

Antrim Township granted final approval to the Nottingham Meadows subdivision on May 8, 2001. Nottingham began constructing the collection facilities for lots 30-57 on August 10, 2001 and completed the work in June 2002 at a cost of approximately $61,121. The collection facilities included 1,410 feet of 8-inch sewer main, 29 sewer laterals, and 3 manholes. The Authority inspected the sewer improvements for those lots as they were being built and they were connected to the public system in 2001 because the inspector found they met the standards for eventual dedication to the Authority pursuant to the ordinance. Nottingham planned to construct the same improvements for the remaining lots at an estimated cost of $315,549 and anticipated it would eventually dedicate those to the township once the entire development was finished. The remaining collection facilities were 6,325 feet of 8-inch sewer main, 106 sewer laterals, and 26 manholes. The Authority's rejection of the $133,280 check had the effect of increasing Nottingham's costs by $273,000. Nottingham filed this action, asking the court to declare the higher tap fees illegal.

Nottingham Meadows delivered a proposed deed of dedication to the Authority's solicitor on or about April 8, 2004, but the Authority to date has not accepted this offer of dedication.

Eugene Albert and Ronnie Kline own land in Antrim Township known as Willowdale V containing 13.79 acres which is a subdivision approved by the township. In September 2002, the plaintiffs' predecessor in title submitted to the township a plan for re-subdivision into 6 individual residential lots which are to be served by the township sewer system. On October 29, 2001, the Authority adopted Resolution 02-01 which imposed a repair and improvement charge of $1,887.70 per EDU on any new connection to the collection system in order to address wear and tear on the system. This was done at a regularly scheduled meeting in a closed executive session lasting 45 minutes. The Authority then publicly read the proposed Resolution and it was unanimously approved after a 5-minute period for public comment. The Resolution was not advertised for the meeting nor was it listed on the official meeting agenda. Albert/Kline filed this action to challenge the validity of the repair and improvement charge.

The two actions were consolidated for trial by Order of June 22, 2005. On June 30, 2005, the Authority adopted Resolution 1-05 which imposed a tap fee of $2,842 per EDU on any new connection to the collection system effective July 1, 2005. As of the date of trial, 65 lots in Nottingham Meadows had connected to the sewer system and 65 tap fees had been paid. There were 69 remaining lots to be connected to the system and 54 tap fees had been paid in the amount of $4,400 and 11 tap fees has been paid in the amount of $2,842.

The parties stipulated the entire Nottingham Meadows subdivision received final approval before the enactment of the repair and improvement charge and therefore that charge does not apply to the Nottingham Meadows subdivision. The parties also stipulated Albert/Kline would not have to pay the repair and improvement charge for the 6 lots identified in the original complaint as being part of the Willowdale V subdivision. However, because Albert/Kline are the owners or have a financial interest in other lots in Antrim Township which in the future might be subject to the charge if later connected to the sewer system, their complaint would be amended to include those lots in this dispute.[2]

Under the Declaratory Judgments Act, "courts of record, within their respective jurisdictions, shall have the power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed..." 42 Pa.C.S.A. §7532. "Any person...whose rights, status or other legal relations are affected by a statute [or] municipal ordinance...may have determined any question of construction or validity arising under the...statute [or] ordinance...and obtain a declaration of rights, status, or other legal relations thereunder." §7533. The purpose of the Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." §7541(a); §7536.[3]

This case involves the interpretation and application of the Municipality Authorities Act, 53 Pa.C.S.A. §5607 and its prior incarnation, 53 Pa.C.S.A. §306(B).[4] The Act sets out the parameters of a municipal authority's powers with regard to fees and charges which can be imposed for the privilege of connecting to a public water or sewer system. At issue are the three Resolutions adopted by the Authority: The September 25, 2000 Resolution and Resolution 1-05 of June 30, 2005 (both pertaining to tap fees) and Resolution 02-01 of October 29, 2001 imposing a repair and improvement charge. The plaintiffs allege (1)

the Authority cannot require a tap fee and dedication of sewer improvements without giving a credit to the developer; (2) the tap fees were miscalculated; and (3) the repair and improvement charge is illegal.

Discussion

Tapping Fees

The first issue is whether Nottingham is entitled to pay the older tap fee instead of the fee of $4,400 per EDU as approved on September 25, 2000. The Authority rejected Nottingham's December 22, 2000 lump sum payment of $133,280 representing pre-payment of tapping fees for all the lots in the subdivision at the then-prevailing rate. A municipal authority may

> charge enumerated fees to property owners who desire to or are required to connect to the authority's sewer or water system. Such fees shall be based on the duly adopted fee schedule which is in effect at the time of payment and shall be made payable at the time of application for connection or at a time to which the property owner and the authority agree...

§306(B)(t).[5] The township ordinance states: "[I]f a sanitary sewer system is available [within...500 feet of the proposed subdivision...], the developer shall design and install a system which shall be connected to the public sewer system and which shall serve every property within the proposed project." Standard 315, Antrim Township Ordinance.

Because the Authority requires a developer to build, install, connect and dedicate sewer improvements as a precondition of development, Nottingham asserts it was entitled to pre-pay the fees for the entire development even before it reached the final connection and dedication stage. According to Nottingham, the Authority would not have regularly inspected the improvements for lots 30-57 as they progressed toward completion if the Authority did not contemplate their eventual dedication to the township and therefore the Authority was bound to accept the $133,280 check based on the lower rate still in effect on December 22, 2000. In essence, final approval and dedication were a fait accompli and to refuse pre-payment at the lower rate is contrary to §306(B)(t), the ordinance, and the customary practices of the Authority in handling the development of subdivisions.

In the alternative, Nottingham seeks a credit for the higher tap fees it paid in order to proceed with building the collection component for lots 30-57 as required by the Authority. Because Nottingham has already paid $61,121 to build those components as mandated by the Authority and then paid $315,549 more for the rest of the sewer improvements, it cannot be charged a tap fee under §306(B)(t)(1)(iii) which provides: "In lieu of the payment of [the tapping] fee, an Authority may require the construction and dedication of only such capacity [or] collection facilities necessary to supply service to the property owner or owners."[6] Nottingham maintains it should get a credit for the collection part of the tap fee and should only have to pay the capacity part of the tap fee for each lot connected to the system because the ordinance requires installation of improvements as a precondition of development and Nottingham built those improvements during a time when the developers' rate was $980 per EDU.[7] We find Nottingham is not entitled to pay either the lower rate for the entire subdivision, nor is it entitled to a credit for the collection part of the tap fee for the first 65 lots which were connected to the system in 2001.

The record is clear that Nottingham lacked final township approval for this subdivision as of December 22, 2000 at the time its manager Eugene Albert delivered the check to the Authority. Indeed, the township did not grant final approval until May 8, 2001 because it was not until on or about then that Nottingham received the necessary bonding information and a letter of credit for the subdivision. (Defendant's exhibits #10 and #11.) Because Nottingham had not received final approval as of December 22, 2000, in effect it then had no existing EDUs, as was necessary in order to get the benefit of the lower rate under the Resolution. As to this, we note §125-21 of the township ordinance which indicates no subdivision or land development plan may receive final approval until all sewer fees are paid, except for tap fees, which can be paid when building permits are issued for every EDU. We agree with the Authority that one practical result of this interpretation is there is no need to later refund the tapping fees to the developer in the event the final plan does not receive township approval. The fact that Nottingham ended up being subject to the higher tap fee does not render the September 25, 2000 Resolution a nullity.

With regard to the claim that a credit is due, the record is clear Nottingham delivered a proposed deed of dedication to the Authority's solicitor on or about April 8, 2004, but this has not been accepted to date by the Authority. This is by no means a unique situation, according to Antrim Township Manager, Benjamin Thomas, who testified other facilities exist in the township which are connected to the sewer system which nevertheless have not been dedicated to nor are owned by the Authority.[8]

Section 306(B)(t)(1)(iii) states: "In lieu of the payment of [the tapping] fee, an authority **may** require the construction and dedication of only such capacity [or] collection facilities necessary to supply service to the property owner or owners." (Emphasis supplied.) A municipal authority may charge "certain enumerated fees....at the time of application for connection **or at such other time as the property owner and the Authority agree**." §306(B)(t). (Emphasis supplied.) This latter provision clearly indicates the legislature anticipated that developers and municipal authorities could reach agreements as to whether sewer facilities would in fact be dedicated to the authority and/or whether the developer would receive a credit for such dedication and that this would take place **before** sewer facilities were actually constructed.

The Authority does not mandate that sewer facilities which connect to the township sewage system and deliver wastewater to it be dedicated to the Authority, as was made clear by the testimony from Mr. Thomas. Despite the fact that Mr. Albert has significant experience with building homes and developing properties in Antrim Township, he did not discuss with the Authority the possibility of establishing a rate of reimbursement of a portion of the tap fee in the event the sewer improvements were eventually dedicated to and transferred to the Authority. Based on the foregoing, the Authority was not and is not compelled to accept the constructed sewer facilities and therefore Nottingham is not entitled to a credit for such facilities if these are dedicated to the Authority absent an agreement with the Authority.

II

The next issue is whether the maximum allowable tap fee of $4,400 per EDU was properly calculated. The fee was composed of two parts: a capacity component of $227.78 and a collection component of $4,187.74, as originally calculated and recommended to the Authority as the basis of the September 25, 2000 Resolution. These figures were later revised to support a maximum allowable tap fee of $5,480, broken down between a capacity component of $2,253 and a collection component of $3,227. It is important to note this higher fee has not been imposed as of now and there are no plans by the Authority to do so in the near future. Nottingham alleges the maximum allowable tap fee is only $1,350, consisting of a capacity component of $188.74 and a collection component of $1,161.26. (Plaintiff's exhibit #16.)

Nottingham's argument is two-fold. First, both $5,480 and $4,400 are excessive, and second, Nottingham should have to pay only the capacity part for each connected lot because Nottingham has contributed to the functionality of the system by constructing and connecting its facilities to the system, whether or not the Authority eventually accepts those facilities for dedication. We focus on the first contention insofar as we have already concluded Nottingham is not entitled to a credit for facilities it constructed in the absence of an agreement with the Authority under §306(B)(t).[9]

The evidence shows Antrim Township and the Authority began planning for future land development in 1990 after census figures and other information indicated the township was poised for significant population growth. The township supervisors and the Authority realized large-scale subdivisions and a dramatic increase in the numbers of users of the system represented a substantial additional burden on the sewage treatment plant and the water collection system. By 1998, the treatment plant had reached its EPA permitted limit in terms of the number of gallons of wastewater it could treat on a daily basis. The capacity of the plant was expanded between 1998 and 2000 under the direction of Brinjac Engineering, Inc. according to the permitting process set down by the DEP.

Faced in 2000 with a large increase in the number of residential users and the need for continuous system expansion and upgrades, the Authority asked Brinjac Engineering to develop a new tap fee. Tammie Myers, a civil engineer employed in July of 2000 by that firm, calculated the maximum allowable increase in the tap fee. It was she who arrived at the figures which formed the basis for the $4,400 tap fee adopted by the Authority on September 25, 2000, which she referred to in her report as "Preliminary Act 203 Calculations." (Defendant's exhibit #1, report of July 27, 2000.) The evidence shows the township and the Authority experienced a 24% increase in demand from 1990, and it has been even more explosive in the last several years, far beyond what was expected and accounted for in the township's 1990 Comprehensive Plan.

David Brinjac is the CEO for Brinjac Engineering, Inc. and is a highly experienced engineer with 25 years of experience planning, designing and managing multiple complex engineering projects for many agencies within the Commonwealth, including municipal authorities and other political entities. He is thoroughly familiar with this Authority's sewer system's facilities and operations, having served as the project manager responsible for the design and implementation of the treatment plant upgrade in 1998-2000. In addition to being the Authority's fact witness, he was accepted as qualified to give an opinion in the field of civil engineering, including as to the calculation of tap fees for the disposal of sewage and other wastewater matters for municipal authorities.

Mr. Brinjac reviewed Ms. Myers' report and found she had incomplete data at her disposal when

she calculated the tap fee. Specifically, she appeared unaware of certain grants received by the Authority to do the system upgrade. Such information is relevant in arriving at the most accurate maximum allowable tap fee. Mr. Brinjac recalculated the maximum allowable tap fee using the best historical cost information available to him, gleaned from a 1981 bond issue by the Authority, whereby the historical costs of the sewage facility were used to arrive at current costs using an accepted inflation index, a process known as "trending." (Defendant's exhibits #4 and #5.) This is a method whereby the original cost of a sewage treatment facility is adjusted for the passage of time to account for the cost to construct the same facility at a future time when the cost would be greater than the original construction costs. Hornstein v. Lynn Township, 866 A.2d 1192 (Pa.Cmwlth. 2005). After trending for the period between 1981 through 2000, Mr. Brinjac deducted all interest, financing fees, outstanding debt and grants received by the Authority (from the EPA and the Farmers Home Administration). In his view, the most accurate way to determine the number of gallons per day per EDU was to divide the permit limit for the plant's capacity which is 700,000 gallons per day by the existing number of EDUs at the time (2,231). This resulted in the figure of 314 gallons per day per EDU. (Defendant's exhibit #24, report of February 21, 2005.) Using EDUs as the unit of calculation is permissible under the Act.

Russell McIntosh is Assistant Vice President of Financial Services for Herbert, Rowland & Grubic, Inc., a consulting engineering firm based on Harrisburg. The plaintiffs offered him as a witness for the purpose of giving an opinion as to why Brinjac Engineering's tap fee calculations were inaccurate and unreasonable. Although Mr. McIntosh does not hold an engineering degree, he has experience with how municipal authorities arrive at fees and charges for utilities services and advises developers about whether an authority has properly calculated the rates for such services under the Act. (Plaintiff's exhibit #15, report dated August 8, 2005.)

Mr. McIntosh accepted the basic figures utilized by Brinjac Engineering but disagreed with how those figures were used to derive the tap fee. The crux of his analysis was Mr. Brinjac erred in trending before subtracting grants because this resulted in a higher fee than the approach he himself used whereby grants were subtracted before trending, resulting in a lower fee. Section 306(B)(t) of the Act allows a municipal authority

> to charge certain enumerated fees to property owners who desire to or are required to connect to the authority's sewer or water system. Such fees shall be based upon the duly adopted fee schedule at the time of payment and shall be payable at the time of application for connection or at a time to which the property owner and the authority agree. In the case of projects to serve existing development, fees shall be payable at a time to be determined by the authority. An authority may require that no capacity be guaranteed for a property owner until the tapping fees have been paid or secured by other financial security...

This section does not set forth the precise method which must be followed when calculating tap fees. Mr. McIntosh himself conceded §306(B)(t)(1)(iii) did not specifically require grants to be subtracted before trending and there is nothing in the Act which expressly prohibits Mr. Brinjac from calculating the components of the tap fee as he did. Although Mr. McIntosh's view was that using gallons per day per EDU as the unit of calculation results in less accurate water usage figures than does gallons per day, the Act does not prohibit a municipal authority from utilizing gallons per day per EDU to calculate tap fees. Nottingham has not persuaded the court that the figure of 314 gallons per day per EDU was arrived at through an inherently flawed or unreasonable methodology. Hornstein, *supra*.

It is well-established the burden of proving a municipal authority has abused its discretion in setting rates, charges or fees rests on the challenging party, who must prove the authority has committed a "manifest and flagrant abuse of discretion" or there has been "an arbitrary establishment of the rate system." Citizens Against Unfair Treatment, by Michael v. Scott Township, 616 A.2d 756, 759 (Pa.Cmwlth. 1992). The burden is on the challenging party to prove the municipal authority abused its discretion by establishing a rate system which was either unreasonable or lacking in uniformity. West v. Hampton Township Sanitary Authority, 661 A.2d 459 (Pa.Cmwlth. 1995). Nottingham has not presented sufficient evidence to meet this burden.

III

The final issue pertaining to the tap fees is whether the manner in which the Authority adopted the September 25, 2000 Resolution complied with the Act, and if the Authority did not so comply, whether the remedy must be a nullification of the Resolution. Section 306(B)(t)(2) states: "Every Authority charging a tapping, customer facilities or connection fee shall do so at a public meeting of the Authority. The Authority shall have available for public inspection a detailed itemization of all calculations clearly showing the manner in which the fees were determined."

The minutes of the September 12, 2000 special meeting indicate the proposed tap fee and that the

proposed increase was to come before the Authority for a vote at the regular meeting set for September 25, 2000. The minutes indicate the $4,400 fee was based on Ms. Myers' calculation of $4,415.52 as being the maximum allowable fee. (Defendant's exhibit #22.) Nottingham argues that Ms. Myers' calculations, which formed the basis for the higher tap fees, should not have been adopted for three reasons: first, they were designated by Ms. Myers herself as "preliminary" in her July 2000 report; second, they were later considered incomplete by Mr. Brinjac; and third, her calculations were not available for public review before the Resolution was adopted because they were not attached thereto. We cannot agree with Nottingham on these points, and even if we did, they would be insufficient grounds for nullifying the Resolution.

First, the fact the initial calculations underlying the $4,400 tap fee were entitled "preliminary" and Mr. Brinjac in reviewing those calculations found them to be based on incomplete information does not in any way undermine their use by the Authority in imposing this new fee. If anything, as discussed above, Mr. Brinjac found all the data available to him justified an even higher maximum allowable tap fee than the one arrived at by Ms. Myers.

Next, the Act requires the calculations to be available for public inspection, but this does not necessarily equate with attaching them to the Resolution. All that is required is for the calculations to be produced if someone requests it. The evidence indicates the calculations were in the possession of the township manager who is the records custodian for the township and the Authority. The evidence also shows Mr. Albert did not ask to see the calculations before the Resolution was adopted. Finally, even if the Act required the figures to be attached to the Resolution, no penalty is specified for failing to do so. We therefore refuse to nullify the Resolution or the tap fees on this basis.

Repair and Improvement Charge

On October 29, 2001, the Authority adopted Resolution 02-01 which imposed a repair and improvement charge of $1,887.70 per EDU on any new connection to the Authority collection system. The charge is to be collected from every resident, developer or entity

> Section 1A...which desires to obtain final approval of a land development and/or subdivision planned for residential lots by Antrim Township Municipal Authority to connect those lots on to the Authority's wastewater collection system...
>
> Section 2A...which desires to obtain final approval of a land development and/or subdivision planned for non-residential lots by Antrim Township Municipal Authority to connect those lots on to the Authority's wastewater collection system...

Resolution 02-01 indicates that "due to age and wear and tear, certain portions of the Authority's collection facility, specifically pump stations and force mains and other appurtenances are in need of improvement and repair" and the Authority is granted the exclusive right under §306(B)(h) to establish and collect rates and other charges for the purpose of improving and repairing its wastewater collection facilities, so long as those are reasonable and uniformly calculated.

The evidence shows more than half of the Authority's sewer system's 24 lift stations were (and are) in need of replacement because they are 25 years old and coming to the end of their useful life. In addition, significant upgrades to the transmission lines were necessary in order to reduce the infiltration of groundwater into the system. At the same time, the township was (and is) faced with an influx of ever-larger residential subdivisions and land development proposals, resulting in an explosive increase in the number of system users. As noted above, the evidence shows the township and the Authority experienced a 24% increase in system demand from 1990, and this demand has been even greater in the last three years, far beyond what was expected and accounted for in the township's 1990 Comprehensive Plan. Estimating a 10% flow increase for future growth, Mr. Brinjac arrived at the charge by calculating the existing repair and improvement needs of the collection system and dividing that number by the existing number of EDUs currently being serviced by the system. He used the 225 gallons per day per EDU figure used by Ms. Myers, not his own later figure of 314 gallons per day per EDU, and this supported his conclusion that $1,887.70 was in fact a conservative figure for the charge. (Defendant's exhibit #25, report of February 21, 2005; defendant's exhibit #8, containing supporting cost estimates and calculations.)

To summarize the Albert/Kline argument: the charge is not a permitted one because it is not specifically enumerated in the Act; the charge duplicates the costs included in the tap fee which is also paid by new connections, despite the Resolution's language which asserts otherwise; and the charge is not uniformly applied because it is collected only from those developers or persons seeking approval of subdivision plans and not on users of the system who are responsible for past wear and tear and have

benefitted from using the facilities. Central is the interplay between §306(B)(h) and §306(B)(t) of the Act.[10]

Section 306(B)(t) permits a municipal authority to "charge enumerated fees to property owners who desire to connect to the authority's sewer or water system." The statute lists those fees as either connection fees, customer facilities fees or tapping fees. §306(B)(t)(1). "No [municipal] authority shall have the power to impose a connection fee, customer facilities fee, tapping fee or similar fee except as provided specifically under this section." §306(B)(t)(3). Albert/Kline argues the repair and improvement charge is impermissible because such a charge is not specifically enumerated in the Act. In response, the Authority points to §306(B)(h) which permits an authority to "fix, alter, charge and collect **rates and other charges** in the area served by its facilities at reasonable and uniform rates to be determined exclusively by it, for the purpose of providing for the payment of the expenses of the Authority for the construction, improvement, repair, maintenance and operation of its facilities and properties..." (Emphasis supplied.) As the Authority correctly points out, this section provides no guidance as to the meaning of the phrase "rates and other charges" and therefore does not by itself prohibit a municipal authority from imposing a charge designated as a repair and improvement charge.

Albert/Kline also contend the charge represents a double charge of those costs already included in the new tap fee. Under §306(B)(t), the tap fee is charged "in addition to any charges assessed against the property in the construction of a sewer or water main by the Authority [such as] any other user charges imposed by the Authority pursuant to clause (h) and shall not include costs included in the calculation of such fees." Section 306(B)(t)(1)(iii)(E)(I) states: "In arriving at the cost to be included in the tapping fee components, the same cost shall not be included in more than one part of the tapping fee." Also, "No tapping fees may be based upon or include the cost of expanding, replacing, updating, or upgrading facilities serving existing customers in order to meet stricter efficiency, environmental, regulatory, or safety standards or to provide better service to, or meet the needs of, existing customers." §306(B)(t)(1)(iii)(E)(II).

The Authority acknowledges the cost of calculating a tap fee cannot include maintenance and operation expenses which are defined under §306(B)(t)(1)(iii)(E)(III) as "expenditures made during the useful life of a sewer or water system for labor, materials, utilities, equipment accessories, appurtenances and other items which are necessary to manage and maintain the system capacity performance and to provide the service for which the system was constructed." However, in the Authority's view, the repair and improvement charge is permissible under §306(B)(h) which, as previously discussed, specifically allows a municipal authority to "fix, alter, charge and collect rates and other charges...for the purpose of providing for the payment of the expenses of...improvement, repair, maintenance and operation of its facilities..."

The Authority acknowledges it cannot impose any connection fee, customer facilities fee, tapping fee or other similar fee except as specifically provided in §306(B)(t). The language of the Resolution itself specifically indicates the Authority understood it could not use any part of the repair and improvement charge "in lieu of, or base the calculation of the charge to include any of the factors or elements which are included in the connection fee, customer facilities fee, or tapping fee, since the Authority has already established and collects a tapping fee to cover the cost of paying for existing facilities which collect and treat the wastewater within those areas served by its system." The Authority did not in fact include maintenance and operation expenses in the new tap fee and therefore the plaintiffs are not subject to an improper double charge.

With regard to whether the charge is reasonable and uniformly applied, Albert/Kline complain the Resolution is unfair because it places the entire burden of the expense related to the existing repair and improvement needs of the system solely upon those individuals and developers seeking subdivision approval where those individuals and developers have not created the existing problems with the system. In their view, the Resolution does not take into account the added revenue created by the tap fees, connection fees and monthly user fees which will be obtained from future connections to the system.

We find the Resolution does not place the sole burden on new connectors but apportions critically-needed upgrade expenses between current and future users; the cost is apportioned between the charge set under the Resolution and the debt assumed by the township and the user fees charged to current customers. Also, new connectors and future users have and will greatly contribute to the burden of the entire system, making it wholly reasonable to require such users to pay some of the cost of repairing the old system insofar as each new connection adds stress and flow to an already strained system and compels the Authority to increase capacity and repair existing facilities. Furthermore, any developer which builds sewer facilities is in fact making use of and obtaining the benefit of the upgraded public system because system components are interconnected. Any substantial limitations or even failures of any of the pump stations, for example, would affect not just current users but future users as well since such problems could potentially limit the ability of any new residents or subdivisions to connect to the system in the first place. We are not persuaded that the approach adopted by the Authority was arbitrary or unreasonable.

Finally, the plaintiffs allege the charge is not in conformity with §125-21 of the township ordinance which states no subdivision or land development may receive final approval until all applicable fees set forth in §110-9 have been paid. Section 110-9(B)(1)(b) states: "The developer shall make application to the township to connect into the existing sewer system, present plans of his...proposed sewer extension, pay the tapping fees for each physical connection to the existing sewer system, pay the connection fees to each EDU in the proposed subdivision...,[and] pay the township inspection fees." Albert/Kline argue the ordinance does not include a "repair and improvement charge," nor does it contain any provision for the addition of other charges necessary before final approval can be granted. However, as the Authority points out, the ordinance does not limit fees to those specifically enumerated in §110-9; the Authority may disapprove a subdivision plan for failure of the developer to pay the fees in the first paragraph of the Resolution. This contention by the plaintiff fails for the same reason discussed above with regard to §306(B)(h) and (t) of the Act.

The plaintiffs have failed to meet their burden of proving the Authority committed a manifest or flagrant abuse of discretion or has arbitrarily and unreasonably established the repair and improvement charge. Allegheny Ludlum Corporation v. Municipal Authority of Westmoreland County, 659 A.2d 20 (Pa.Cmwlth. 1995).

VERDICT

Now this 29th day of December 2006, the court hereby denies the request for declaratory relief sought by the plaintiffs and grants the request for declaratory relief sought by the defendant. The Resolution adopted on September 25, 2000 imposing a $4,400 tapping fee and Resolution 1-05 adopted on June 30, 2005 imposing a $2,842 tapping fee are permissible under §306(B)(t)/§5607(d)(24) of the Municipality Authorities Act. Resolution 02-01 adopted on October 29, 2001 imposing a repair and improvement charge is permissible under §306(B)(h)/§5607(d)(9) of the Municipality Authorities Act.

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[1]The old rate was $1,500 for individual residential users and for developers who did not have large-scale infrastructural improvements in place.

[2]These properties are a 10-lot subdivision on Ridge Road owned by Ron Gene Properties, LLC; a 3-lot subdivision on Molly Pitcher Highway owned by Mr. Albert (formerly Danco Properties); and a development on Molly Pitcher Highway in the vicinity of Cedarbrook owned by Ron Gene Properties, LLC.

[3]The Authority initially filed preliminary objections to Nottingham's amended complaint, arguing there was no matter which was then ripe for adjudication under the Declaratory Judgments Act. After receiving briefs and hearing oral argument, this court issued an Opinion and Order on January 21, 2004 overruling the objections and directing the Authority to answer the amended complaint.

[4]53 Pa.C.S.A. §5607 became effective on June 30, 2005.

[5]This section corresponds to §5607(d)(24).

[6]This provision corresponds to §5607(d)(24)(i)(C).

[7]We discuss the difference between collection components and capacity components later.

[8]Those properties are listed in the Authority's exhibits #12 - 17 as follows: The Greens of Greencastle subdivision (1991); State Line Motel Econolodge (1986); Greens of Greencastle Limited Partnership (1992); Community Refuse Limited, a/k/a Grey Bonnet Corporation (1997); Sheeley and Golden, owners of a mobile home park and the State Line Motel (1985); Community Refuse Limited, a/k/a Grey Bonnet Corporation (1987).

[9]To clarify the terminology, the capacity component of the tap fee pertains to those

components of the system such as waste water treatment plants, pumping stations, force mains (major interceptors such as large diameter sewers which operate by gravity to convey the water to treatment plants) which have specific capacities established by permit. Other system components facilitate wastewater collection and include sewer mains, manholes and related appurtenances by which wastewater is gathered and directed to the capacity component. Nottingham did not build any capacity component - it built a sewer line to collect sewage from homes in the subdivision.

[10]Corresponding to §5607(d)(9) and §5607(d)(24), respectively.