IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LYCOMING COUNTY WATER AND SEWER AUTHORITY, Plaintiff,	:	DOCKET NO. 14-02,724
vs.	:	1525 CD 2015
VALLEY TRUCK VENTURES, LLC., Defendant	:	**APPEAL 1925(b)**

OPINION AND ORDER
Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This Court issues the following Opinion and Order pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) in response to the Lycoming County Water and Sewer Authority ("LCWSA")'s appeal of this Court's Opinion and Order entered July 28, 2015 ("Order"). This matter arises out of a Praecipe for Writ of Scire Faicas in the amount of $4,920.19 filed October 20, 2014. Following a hearing, the Court awarded LCWSA $2,160.08 and denied a tapping fee assessed for an additional use to the property where no change in use occurred at the property. No change in use occurred at the property since November 8, 2004, when LCWSA's Sewer Lateral Inspector confirmed that the number of equivalent dwelling units (EDU) assessed matched the use at the property. *See*, LCWA's Exhibit "A" ¶ 8 at 2 (unnumbered).

In its concise statement of matters complained of an appeal, LCWSA raises eight errors as follows.

1. Whether the Court erred in denying Plaintiff/Appellant Lycoming County Water and Sewer Authority's motion on the tapping fee ($3,500.00) and dismissing the claim as to the tapping fee.
2. Whether the Court erred in applying equitable considerations to its decision to dismiss the claim against Defendant/Appellee Valley Truck Ventures, LLC as to the tapping fee.
3. Whether the Court erred in concluding that the burden was on the Plaintiff/Appellant Lycoming Counter Water and Sewer Authority to establish the correct usage at the time of the connection in 2004 or before the property changed hands.
4. Whether the Court erred in concluding that the claim as to the tapping fee should be dismissed where the application for connection made no mention of the residential

use of the property and neither the current nor prior owner disclosed the residential use of the property to the Lycoming County Water and Sewer Authority until the current owner completed and returned the EDU assessment report adding a residential use to the property.

5. Whether the Court erred in concluding the claim as to the tapping fee should have been dismissed where Plaintiff/Appellant Lycoming County Water and Sanitary Authority followed its established Rules and Regulations.
6. Whether the Court erred in concluding the claim as to the tapping fee should have been dismissed where Plaintiff/Appellant Lycoming County Water and Sanitary Authority is permitted under the Pennsylvania Municipality Authorities Act.
7. Whether the Court erred in concluding the claim as to the tapping fee should have been dismissed where the Court's balance of the equity in favor of Defendant/Appellee Valley Truck Ventures, LLC effectively bars Plaintiff/Appellant Lycoming Water and Sewer Authority from recovering the tapping fee when it first learned of the additional residential use at the property and when the Court's ruling creates an unreasonable burden on Plaintiff/Appellant Lycoming County Water and Sewer Authority and municipal authorities in general to monitor changes in use or incorrect and/or false representations as to use or change in use.
8. Whether the Court erred in concluding the claim as to the tapping fee should have been dismissed where the Court failed to recognize the presumption of regularity which attaches to the actions Plaintiff/Appellant Lycoming County Water and Sewer Authority where Plaintiff/Appellant Lycoming County Water and Sewer Authority followed its established Rules and Regulation and the Pennsylvania Municipality Authorities Act.

In support of the Court's decision, this Court respectfully relies upon its reasons stated in its Order dated July 28, 2015 and respectfully submits the following.

At issue is this Court's dismissal of LCWSA's tapping fee assessed on December 17, 2013. The tapping fee was assessed despite there being no application for connection or additional use and no change in use occurring at the property since the original connection in 2004. The Court found that the residential tenancy on the second floor existed at the time of the original EDU assessment and connection.[1] At that time, a LCWSA Sewer Lateral Inspector approved a checklist, confirming that "the number of EDU's paid for match[ed] the actual number of EDU's[.]" *See,* LCWA's Exhibit "A" ¶ 8 at 2 (unnumbered), dated November 8, 2004. In that document, the LCWSA Sewer Lateral Inspector further approved and confirmed

[1] This Court notes that LCWA does not contest the finding that a mixed use existed at the property at the time of the initial EDU assessment in its Concise Statement.

that there were garages and/or apartments connected to the lateral stub and that the EDU's paid for were appropriate. *See,* LCWA's Exhibit "A" ¶ 9 at 2 (unnumbered).

LCWSA made no inquiry as to the usage at the property for over 9 years, from November 8, 2004 (the date that the LCWSA Sewer Lateral Inspector approved the EDU's) until the beginning of 2013. In the beginning of 2013, LCWSA employed Jessica Dincher, its Customer Compliance Analyst, to "put in place a procedure for reviewing EDU assessments of various properties." Notes of Testimony, April 9, 2015, (N.T.) at 4. As part of that procedure, Ms. Dincher reviewed all of the properties, and sought information from properties that did not have an assessment within the prior 3 year period. Id. An "EDU Assessment Report" was sent to those properties for completion by the owners. That inquiry revealed that the EDU assessment in 2004, approved by the LCWSA Sewer Lateral Inspector, did not, in fact, match the EDU assessment for the property. A revised EDU assessment of 2.5 was made based upon the information received by LCWSA from the current property owner in the completed "EDU Assessment Report." *See*, LCWSA's Exhibit "D" at page 5 (unnumbered). In making its determination, LCWA incorrectly stated in its comments/determination section: "started renting upstairs apt[.]" *See*, LCWSA's Exhibit "D" at page 5 (unnumbered). In fact, as stated previously and as found by this Court, the residential tenancy on the second floor existed at the time of the initial EDU assessment and connection, which an LCWSA inspector approved for 1.5 EDUs.

There was no evidence of any deception by the current or former owner with respect to the information provided to LCWSA in making its EDU assessment. The former owner completed an application for permit to connect to the sanitary sewer system of the Lycoming County Water and Sewer Authority dated October 28, 2004. That application did not request information as to whether the property had a combined use. Instead the application requested the

"type of connection requested[.]" "Type" is singular. One option was selected; a commercial connection was requested. There was no suggestion on the form that more than one use could or should be selected. There was no option for mixed use. On December 10, 2013, the current owner completed an "EDU Assessment Report" as requested by LCWSA. Unlike the application form completed by the prior owner in 2004, this form listed "combination" as a type of use. The current owner circled "combination" and specified the use as "Garage + Residential[.]" Nothing on the form stated that the owner "started renting upstairs apt[.]" In fact, as the Court found and which is not contested here, there was no change in the actual use occurring at the property. The residential use on the second floor was "open and notorious." The Court found credible the testimony that it is apparent by looking at the building that there is an apartment on the second floor. The second floor has windows. And, the front door says "apartment." N.T. at 32.

The Court does not believe its ruling creates an unfair burden on water and sewer authorities, particularly in light of the facts and circumstances of this case. LCWSA can continue to rely upon an initial inspection, self-reporting from property owners, and regular requests for updated information. There was no deception evidenced in the present case. This ruling does not create a burden to verify owner responses. Instead, there is a burden to request the specific information needed to make a correct assessment at the time of connection, to inspect the property at some point during or soon after the connection process, and to periodically request updated information. This is precisely the burden already relied upon in rural areas. Christine Weigle, the executive director of LCWSA, testified that in rural areas they "need to rely on the application to connect and then subsequent [EDU] assessments and follow-up inspections." N.T. at 7:12-15. Weigle further testified that "[i]t can be very burdensome for us to have to inspect

individual properties on a regular basis. A lot of changes can get made. Apartments can be converted into multiple apartments. … The outside structure doesn't look the same or we have received no notice from the property owner." N.T. 7:25; 8:1-7. The present ruling does not require LCWSA to inspect individual properties on a regular basis. Instead, an inspection done at or around the time of connection should have revealed the second floor residential use. The present case did not involve a change made, apartments being converted or an instance where an outside structure does not reflect the true usage. In the present case, the residential use on the second floor was "open and notorious," and apparent by looking at the outside of the building. Furthermore, in the present case, when LCWSA requested the specific information in its EDU Assessment Report, LCWSA received the full information to make the correct EDU assessment by self-report from the owner.

The Court believes some aspects of the errors have been waived. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302. LCWSA waived errors numbered 2 and 7 as to the equities of the case. LCWSA argued that the equities weighed in its favor; it did not argue that the Court must ignore the equities of the case. Notes of Testimony, April 9, 2015, (N.T.) at 37, 39. Since LCWSA never questioned whether the Court could consider the equities of the case, that issue was waived. Similarly, LCWSA waived errors numbered 5, 6, 7 and 8 as LCWSA never contended that the Court must rule in its favor if LCWSA's Rules and Regulations were followed, if a tapping fee is permissible under the Pennsylvania Municipality Authorities Act or that the Court must rule in its favor under a presumption of regularity. N.T. 37-40.

For these reasons, and those stated in this Court's Order and Opinion entered July 28, 2015, this Court respectfully requests that the Commonwealth Court affirm.

BY THE COURT,

October 22, 2015
Date

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Richard A. Gray, J.

cc: J. David Smith, Esq. & J. Michael Wiley, Esq. for Plaintiff/Appellant
Norm Lubin, Esq. for Defendant/Appellee
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