IN THE SUPREME COURT OF FLORIDA

FILED
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ALLEN'S CREEK PROPERTIES, INC., etc.

Petitioner,

vs.

CITY OF CLEARWATER, etc.

Respondent.

CASE NO. 86,123

District Court of Appeal, 2nd District - No. 94-01849

ON QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS

On August 5, 1968, the City of Clearwater formally adopted a policy, by resolution, whereby sewer service would not be provided outside city limits. (R-606)(A-6). The only exceptions to this policy are (1) property which is not contiguous and cannot be annexed into the city, in which case an agreement to annex at a later time is accepted, (2) some properties within the city limits of Largo but which that city cannot presently serve (by express agreement with the City of Largo), and (3) some properties which were provided sewer service over twenty years ago for public health reasons, pursuant to a special act of the legislature. (T-113-114, 134, 182-188).

Clearwater's policy of not providing sewer service outside city limits has existed and has been enforced without interruption both before and after the "201" study and the interlocal agreement with Largo. Neither the study nor the interlocal agreement has effected Clearwater's policy and practice. (R-606) (A-5) (T-108, 114, 133, 140, 142).

In the late 1970's Clearwater, together with some of the surrounding cities in the central Pinellas County area, participated in a study project called the "Central Pinellas 201 Facilities Plan". This project was carried out under the auspices of the Florida Department of Environmental Protection and the U.S. Environmental Protection Agency ("EPA"), authorized pursuant to Public Law 92-500 (T-39-45, 49, 69)(A-3). Its purpose was to identify the most efficient, cost-effective, and environmentally

sound plan for treating sewage. (T-72, 73, 79, 80, 81).

One of the parameters of the study was the use of service areas in order to determine the scope of facilities which might be necessary in the future and to determine the optimum method of sewage treatment (T-63, 68). The geographical descriptions of these service areas were, in fact, taken from an unrelated traffic study. (T-48). Although the cities receiving grant moneys from the federal government for sewage projects were required to participate in the study, the service areas delineated in the study were never intended to be binding other than for purposes of the study. (T-61, 69)).

Upon completion the "201" study was forwarded to the EPA by the Florida Department of Environmental Protection. Because "deep well injection" was not favored by the EPA, the study was never approved by the EPA or the State of Florida and no attempt was made to implement its provisions. (T-68, 139). No attempt was made to implement the plan itself.

Clearwater discontinued its study of deep well injection and moved ahead with a method of wastewater treatment not recommended by the 201 study. Clearwater chose, with state legislative approval, to develop a process whereby its wastewater was treated to a very high level of purity and discharged into the waters of Tampa Bay and Clearwater Bay. (T-139). The development and implementation of this advanced wastewater treatment process was accomplished without federal moneys but was instead funded with approximately 55 million dollars of Clearwater's own money. (T-66-

77, 139, 212-214). While this has provided Clearwater with an adequate supply at present, sewer service is nevertheless in critical supply. (T-213-214).

EPA mandates and directives are contained in permits which the EPA issues to cities. The EPA has never issued to Clearwater any permits which include a mandate or directive to furnish sewer service outside city limits. (T-61-62).

The "interlocal agreement" entered into between Clearwater and the City of Largo was not entered into as an act of compliance with the 201 Plan. (T-141). The primary purpose of this interlocal agreement between Clearwater and Largo was to curtail the unnecessary duplication of capital expenditures. (T-217, 146).

The interlocal agreement between Clearwater and Largo contains <u>no</u> requirement that either party provide services to anyone, and contains no prohibition against requiring a potential customer to annex into the City before providing those services. (R-604, 605) (A-4, 5).

The evidence presented at trial established that Allen's Creek was free to install its own treatment facility or make arrangements to obtain sewer service from Largo (T-134, 143).

Last, but not least, is the fact that the development contemplated by Allen's Creek, included several apartment complexes together with a quarter of a million square feet of office space. (T-177). This extensive development is permissible under Pinellas County's comprehensive plan but <u>not</u> under Clearwater's comprehensive plan. (T-169-170).

SUMMARY OF ARGUMENT

Under the facts and circumstances of this case Clearwater cannot be compelled to provide sewer service to Allen's Creek whose property is located outside city limits. Generally no city can be compelled to provide services outside its city limits and while exceptions to this general rule exist none are applicable to this case.

The facts of this case demonstrate that Clearwater has not conducted itself like a "public utility". It has not manifested the requisite intent to provide sewer service to residents and nonresidents alike. Clearwater's policy is and has been not to provide sewer service to nonresidents. Nothing exists which would give Allen's Creek a specific contract right to unconditional sewer service.

Requiring annexation as a precondition for providing sewer service is a valid exercise of Clearwater's police power. In an effort to protect its own best interests it is quite proper and lawful to require annexation as a condition for receiving sewer service.

The Second District and Fourth Districts have spoken to this issue and both districts are in agreement. Moreover, their decisions are consistent with the weight of authority across the country.

ARGUMENT

I. CLEARWATER HAS NOT ACCEDED TO THE STATUS OF A PUBLIC UTILITY AND IS UNDER NO DUTY TO PROVIDE SEWER SERVICE OUTSIDE CITY LIMITS.

The law in Florida does not require that a city provide municipal services outside its city limits. Allstate Insurance Company v. City of Boca Raton, 387 So.2d 478 (Fla. 4th DCA 1980) This rule is also followed by most jurisdictions across the country. A city may provide services to non-residents, but such extensions of service are not mandated. See, §180.191, F.S. (1993).

The primary exception to this general rule involves those cities which have demonstrated a willingness to serve residents and nonresidents alike and which have been treated, therefore, as public utilities. The question of whether cities can be required to service nonresidents turns on this point. In those cases in which cities have not demonstrated the required willingness to serve nonresidents they have not been treated as public utilities and, as a result, have not been required to serve nonresidents. City of Stow v. City of Cuyahoga Falls, 454 N.E. 2d 561, 7 Ohio App. 3d 108 (1982); Andres v. City of Perrysburg, 546 N.E. 2d 1377, 45 App. 3d 51 (1988); Yakima County Fire Protection District No. 12 v. City of Yakima, 858 P. 2d 245, 122 Wash. 2d 371 (1993); The context of the cases dealing with this issue involve cities which

require annexation (or an agreement to annex) as a precondition to receive municipal services, whether that service is water or sanitary sewer services.

In City of Stow v. City of Cuyahoga Falls, supra, for example, property owners brought suit to require the City of Stow, to provide water service to their properties which were located outside city limits. The trial court upheld the city's policy of requiring annexation as a condition for obtaining municipal services and stated as follows:

> "In protecting the best interests of the municipality, it is not improper to establish an annexation policy [with regard to providing municipal services]." 454 N.E. 2d at 563.

Andres v. City of Perrysburg, supra, also involved a suit by property owners whose property was situated outside the city limits of the City of Perrysburg. The city required an agreement to annex as a condition for the extension of its sewer services outside city limits. The court refused to force the city to provide municipal services outside city limits holding that:

> "Such a condition [requiring annexation] has been held to be a valid exercise of the municipality's police power .... the city can legally impose such a requirement on non-resident users." 546 N.E. 2d at 1381.

Yakima County Fire Protection District No. 12 v. City of Yakima, supra, presented a case in which non-resident property owners had entered into annexation agreements in order to receive sanitary sewer service to be provided by the City of Yakima, Washington, outside its city limits. The Court held that the city

had no duty to provide municipal services outside city limits and could require an agreement to annex as a precondition to providing the service. 858 P.2d at 246; see, City of Little Rock v. Chartwell Valley Ltd. Partnership, 772 S.W. 2d 616, 299 Ark. 542 (1989); 48 A.L.R. 2d at 1230. Okemo Trailside Condominiums, Inc. v. Blais, 380 A. 2d 84 (Vt. 1977). See also 48 A.L.R. 2d 1222, 1230.

Clearwater has adopted a policy whereby it will provide sewer service only to its residents. This policy, in conjunction with the city's comprehensive plan, provides Clearwater with some measure of control over the development of the properties it serve. If Clearwater were required to provide service outside its city limits, its comprehensive plan and land development regulations would not apply to those properties. The city's comprehensive plan includes a plan for its infrastructure, including the sewer system, which is based on land development allowed under the comprehensive plan. If the city is required to serve areas that are developed outside the city's control, and governed by the more permissive development schemes of Pinellas County or some other city, Clearwater will not be able to effectively plan for the provision of sewer service or other municipal service it must provide to its residents not to mention what it may be required to provide to nonresidents beyond its municipal limits.[1]

Clearwater's current policy allows it to plan for the sewage

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1 If the city is required to provide sewer service outside its limits, what other municipal services will it be required to provide to nonresidents?

treatment capacity it has available and which it has decided should be reserved for its residents. If it cannot control how many sewer customers it will have or how intensively those customers will develop their property, it is severely hampered in its attempt to plan so as to ensure that its infrastructure will keep pace with development?

Allen's Creek is a perfect example of the reason underlying the city's policy. Allen's Creek wishes to develop under the jurisdiction of the less restrictive comprehensive plan of Pinellas County. Clearwater's comprehensive plan is more restrictive and does not allow the type of extensive development proposed by Allen's Creek. Why should Allen's Creek get the benefit of developing under the less restrictive county plan and the benefit of Clearwater's sewer service?

The Florida case which discusses this issue and which is factually most similar to the case at bar is Allstate Insurance Company v. City of Boca Raton, 387 So. 2d 478 (Fla. 4th DCA 1980).[2] In 1965, the Palm Beach County Regional Planning Board formulated and issued "A Plan for Regional water Supply, Treatment and Distribution and Regional sewage Collection, Treatment and Disposal," wherein it designated the City of Boca Raton as the "Designated Agent" of the Boca Raton Service Area. The City of Boca Raton accepted the plan and the designation. Subsequently,

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2 The Second District Court of Appeals found the Allstate to be the case the whose facts and circumstances most closely resembled those of the case at bar and, consequently, found this case to be most persuasive.

Allstate requested water and sewer services for a tract which was outside the city limits of Boca Raton but within the unincorporated area of the Boca Raton Service Area. Allstate had been unable to develop its tract because it could not obtain water or sewer service. Although Allstate's property was located outside city limits the City of Boca Raton refused to extend service to Allstate unless it met certain zoning and planning restrictions in developing the property.

The objective of the "plan" in Allstate was to establish areas of responsibility for water and sewer supply, service and disposal and designate an agent (provider) for that given area. The City of Boca Raton was the designated agent for the area in which Allstate's property was located and as such the city was the exclusive source for water and sewer services. Allstate (like Allen's Creek in the case at bar) contended that this plan mandated that the city provide water and sewer service to its property even though it was located outside city limits. Furthermore, Allstate (again like Allen's Creek) contended that the city was prohibited from requiring it to comply with city zoning and planning ordinances.

In its opinion the court stated that "...[a]ll parties concede that generally a municipal corporation has no duty or responsibility to supply services to areas outside its municipal boundaries." Id., at 479. After examining the "plan," the court found that it "...should not be construed to require the city to furnish these services outside its municipal boundaries." Supra at

480. The "plan" did not require it and the Regional Planning Board could not require it.

The court did, however, conclude that

> "...if the City of Boca Raton was in non-compliance with the Plan, the **remedy** is not to force compliance by requiring the city to provide water and sewage but instead to withdraw the agency designation from the city." Id. at 480. (emphasis supplied).

Allstate was advised that it was free to seek water and sewer service elsewhere. Allen's Creek occupies a position which is virtually identical to Allstate's and Clearwater (like Boca Raton) should not be compelled to provide sewer service outside city limits. Allen's Creek (like Allstate), is free to procure sewer service elsewhere.

Allen's Creek's argument that Clearwater is required to provide it with sewer service is based upon its contention that Clearwater, by participating in the "Central Pinellas 201 Facilities Plan" and the interlocal agreement with the City of Largo, has somehow "acceded" to the status of a public utility. This argument is without merit.

The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §2, 86 Stat. 816, was enacted for the purpose of eliminating the discharge of pollutants into navigable waters by 1985. The act provided for federal funding to create plans for area waste treatment management, grants for the construction of treatment works, and oversight by the United States Environmental Protection Agency (EPA) and Florida Department of Environmental

Protection (FDEP) . Clearwater participated in the 201 Plan. The study focused on the disposal of treated wastewater by a method known as "deep well injection". It also provided for "service areas" to determine the scope of facilities which would be required. Clearwater approved the final 201 Plan which included a description of an area of responsibility known as the "exclusive service areas" of the City in which Allen's Creek's tract of land is located. The 201 Plan, as adopted by Clearwater, was submitted to the EPA for approval.

The EPA rejected the Plan because it no longer favored the use of deep well injection as a method of wastewater treatment. Clearwater discontinued its study of deep well injection and instead went forward to develop, with approximately fifty-five million dollars of its own funds, an alternative method of wastewater treatment not recommended by the 201 Plan. Neither the EPA nor the FDEP nor Clearwater ever attempted to implement the 201 Plan.

The "interlocal agreement" referred to throughout this case is an agreement that Clearwater and the City of Largo entered into in 1983 and which defined their respective sanitary sewer service areas. This agreement provides that Clearwater and Largo would not compete to supply sewer services. It also provides that each would provide the other with wholesale sewer services for portions of each exclusive service area which fell within the city limits of the other. The geographical areas delineated by the interlocal agreement were almost identical of the areas contemplated by the

201 Plan.

The District Court of Appeals found the "201 Plan" similar in design and intent to the "plan" in Allstate. The 201 Plan itself was never implemented and the City's participation in the plan did not require it to provide unconditional service to nonresidents within its service area. Likewise, the Interlocal Agreement is merely an agreement of convenience between municipalities and likewise carries no requirement, by its own terms or otherwise, that Clearwater provide unconditional service to nonresidents.

"Acceding" to the status of a public utility is not accomplished merely by providing sewer or water service to residents. It is necessary for the city to "...hold [itself] out as serving or ready to serve all members of the public, who may require it, to the extent of [its] capacity." Robinson v. City of Boulder, 547 P.2d 228, 229 (Col. 1976).

Case law across the country and in Florida is in general agreement. Cities who have not demonstrated a willingness to serve all comers, residents and nonresidents alike, have not been determined to have acceded to the status of a public utility.

Those cities which have, however, manifested the willingness to serve nonresidents and residents alike have been treated like "public utilities". Each case cited by Allen's Creek to support its position that Clearwater must provide it with sewer service has no application here because, unlike Clearwater, each city was already acting as a provider of sewer services (and in some cases water) to nonresidents and property owners located outside city

limits.

The cases (and their respective municipalities) cited by Allen's Creek illustrate the concept that *only by serving nonresidents and residents alike*, i.e., acting like a public utility, do cities become public utilities. Of course, this fact makes these cases inapplicable here.

The City of Boulder was providing and actively seeking to provide water and sewer service to residential subdivisions outside city limits. As a result Boulder was treated like a public utility. Robinson v. City of Boulder, 547 P.2d 228 (Colo. Supr. 1976).

The City of Dover was already providing sewer services to non-city residents when it sought to discriminate against Delmarva Enterprises, Inc., a developer. Delmarva Enterprises v. Mayor and Council of the City of Dover, 282 A.2d 601 (Del. Supr. 1971), subsequent appeal, 301 A.2d 276, 277 (Del. Supr. 1973).

The City of Westminster was providing water service to nonresidents and purchased a water works company which also served nonresidents and had, in fact, entered into contracts to serve other nonresidents of the city. Westminster was held to have undertaken to supply water service to nonresidents as well as residents and, consequently, the court treated it like a public utility. Bair v. Mayor and City Council of Westminster, 221 A.2d 643, 645 (Md. Ct. App. 1966).

Both the City of Cumberland the City of Milwaukee were providing water service to residential and business customers who

were nonresidents. This fact was paramount in each court's determination that the respective city was holding itself out as a public utility and should be treated as such. Mayor and City Council of Cumberland v. Powles, 258 A.2d 410, 413 (Md.Ct. App. 1969); City of Milwaukee v. Public Service Commissioner, 66 N.W. 2d 716, 720 (Wis. Supr. 1954)

Turning to the Florida cases cited in support of Allen's Creek's position, we find that Florida has also consistently looked to whether a city has demonstrated the willingness to serve residents and nonresidents alike. In Florida, as elsewhere, only those cities which have done so have been treated like public utilities.

For example, the City of Winter Park was engaged in selling sewer service beyond its city limits. This fact resulted in it being treated like a public utility. The real holding of this case is, however, was that Winter Park could not prohibit a nongovernmental utility company from providing service with its service area, especially when it lacked the capacity to do so itself. City of Winter Park v. Southern States Utilities, Inc., 540 S.2d 178, 180 (Fla. 5th DCA 1989).

The Sebring Utility Commission cases involved a governmental entity, i.e., the Sebring Utilities Commission, which actively served customers outside the city limits of Sebring. Having found that it had undertaken to serve residents and nonresidents alike, thereby behaving like a public utility, the court held that it should be treated like one and that it could not engage in

discriminatory practices. Sebring Utilities Commission v. Home Savings Association of Florida, 528 So.2d 26, 27 (Fla. 2d DCA 1987); and Edris v. Sebring Utilities Commission, 237 So.2d 585 (Fla. 2d DCA 1970)

City of Clearwater v. Metco Development Corporation, 519 So.2d 23 (Fla. 2d DCA 1987), involved the issue of potable water service. Metco owned and wished to develop property outside the city limits of Clearwater. The city, however, declined to provide the service. The court noted that the city was already providing water service to other customers including other Metco properties which were located outside city limits. In addition, the court determined that the city had entered into a contractual relationship with Pinellas County under which it agreed to supply certain unincorporated areas (including the Metco property) with water. Therefore, the city was not allowed to condition this contractual duty upon annexation. 519 So.2d at 24.

The salient fact which distinguishes these cases from the case at bar is that in these cases the cites involved had demonstrated a willingness to serve and were serving residents and nonresidents alike.

Clearwater, on the other hand, has consistently adhered to its policy of providing sewer service only to residents.[3] This was

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[3] The only exceptions to this policy are (1) property which is not contiguous and cannot be annexed into the city, in which case an agreement to annex at a later time is accepted, (2) some properties within Largo but which Largo cannot presently serve, by agreement with the City of Largo, and (3) some properties which were provided sewer service over twenty years ago for public health reasons, pursuant to a special act of the legislature.

the policy it adopted in 1968 and which has been followed both before and after the short life of the "201 Plan" and both before and after the interlocal agreement with the City of Largo. It has done nothing which could be construed as demonstrating an intent to become a public utility.

II. A MUNICIPALITY MAY PROPERLY CONDITION THE PROVISION OF SEWER SERVICE ON ANNEXATION.

Clearwater is not actively seeking to annex this property and has taken no steps to do so. If Allen's Creek wishes to voluntarily annex into the city, the city will certainly entertain its petition for annexation.

The simple fact underlying this case is that Clearwater does not extend sewer service to nonresidents. Its residents and taxpayers have invested nearly fifty-five million dollars of their money to create a system which can handle its waste and wastewater in an environmentally appropriate manner.

If Allen's Creek chooses to remain a "nonresident", so be it. Clearwater does not seek to impose residency upon it. But if Allen's Creek chooses to remain a nonresident and thereby deprives itself of sewer service from Clearwater that is the choice Allen's Creek has made. It should not be heard to say it wants the benefits of being a resident of the City of Clearwater while at the same time shrinking from the burdens and responsibilities that

accompany those benefits. That is like to wanting to eat the cake, but not wanting to deal with the calories.

In Town of Magnolia Park v. Homan, 118 So.2d 585 (Fla.2d DCA 1960), the principal authority relied upon by petitioner, Magnolia Park had "declared its intention to annex" land belonging to Homan. The landowner objected. The court stated that "...the power [of annexation] must be exercised in strict accord with the statutes conferring it." Id, at 588.

The Magnolia Park case has nothing whatsoever to do with the factual situation presented by the case before us. Clearwater does not seek to annex property owned by Allen's Creek. Allen's Creek has simply been told that the city will only provide sewer service to residents. Should Allen's Creek choose to take advantage of this opportunity, it can petition the city pursuant to §171.044, Fla. Stat. (1993). This statute, dealing with voluntary annexation, is the only annexation statute applicable to our case. Even a quick reading of this rather short statute will reveal that the city is perfectly within its rights to accept Allen's Creek's petition to annex its property to the City of Clearwater.

Policies requiring voluntary annexation have been determined to be proper, City of Stow v. City of Cuyahoga Falls, supra at 563, and "... a proper exercise of police power." Andres v. City of Perrysburg, supra at 1381.

Allen's Creek's reliance on the statutes dealing with annexation is misplaced. Clearwater is not required by law to extend services to nonresidents but it may accept petitions to

annex from nonresidents who wish to avail themselves of city services. Otherwise, they are free to seek those services elsewhere.

CONCLUSION

Allen's Creek sits outside the city limits of Clearwater and covets the municipal services available to city residents. It seeks to force Clearwater to provide it with sewer service while at the same time remaining outside the City's municipal limits. This, of course, will allow it to avoid some impact fees and to develop its property more extensively than would be allowed under the City's comprehensive plan. The City of Clearwater, on the other hand, is left with supplying service to an extensive development which is exempt from Clearwater's comprehensive development plan.

The decision of the Second District Court of Appeals is consistent with the decisions of other District Courts in Florida as well as the cases decided by the Supreme Court of Florida. It is also consistent with the position adopted in other jurisdictions pertaining to municipal services.

The authorities cited by Allen's Creek clearly do not provide an exception to the general rule. Clearwater cannot be compelled to supply sewer service to areas outside its municipal boundaries because it has not manifested the required intent to provide sewer services to residents and nonresidents alike. Therefore, it has not "acceded" to the status of a public utility.

This Court should refuse to accept jurisdiction of this case and allow the well reasoned decision of the Second District Court of Appeals to stand.

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I HEREBY CERTIFY that a copy of the foregoing was sent by U.S. Mail, postage prepaid, to R. Nathan Hightower, Esq., and Susan W. Fox, Esq., Counsel for Petitioner, Post Office Box 1669, Clearwater, Florida 34617, this 11th day of September, 1995.

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