IN THE SUPREME COURT OF FLORIDA

ALLEN'S CREEK PROPERTIES, INC., etc.,	:	
Petitioner,	:	**Case No. 86,123**
vs.	:	**District Court of Appeal 2nd District No. 94-01849**
CITY OF CLEARWATER, etc.	:	
Respondent.	:	

ON QUESTION CERTIFIED BY DISTRICT COURT OF APPEAL TO BE OF GREAT PUBLIC IMPORTANCE

REPLY BRIEF OF PETITIONER

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REFERENCES

The Petitioner, ALLEN'S CREEK PROPERTIES, INC., will be referred to in this brief as "ALLEN'S CREEK" or "PETITIONER". The Respondent, CITY OF CLEARWATER, will be referred to as "CLEARWATER", "CITY", or "RESPONDENT". All references to the record will appear as (R-), with all references to the trial transcript to appear as (T-).

ARGUMENT

CLEARWATER has presented its argument in two (2) subsections, the first argument asserting that CLEARWATER has not acceded to the status of a public utility and is therefore under no duty to provide sewer service to an area outside its city limits, with the second argument asserting that a municipality may properly condition the provision of sewer service on annexation. ALLEN'S CREEK will reply to each of the CITY'S arguments in the order raised by the CITY in its Answer Brief.

I. CLEARWATER HAS ACCEDED TO THE STATUS OF A PUBLIC UTILITY AND HAS A DUTY TO PROVIDE SERVICE OUTSIDE CITY LIMITS.

ALLEN'S CREEK asserts that CLEARWATER does have a duty to provide sewer service outside its city limits, to users located within CLEARWATER's exclusive sewer service area. While municipalities like CLEARWATER cannot generally be required to provide municipal services outside their city limits, a recognized exception to this general rule applies to municipalities which accede to the status of a public utility. CLEARWATER falls into this exception and, therefore, has an obligation to provide sewer service to users located within the area it has claimed, its exclusive sanitary sewer service area.

CLEARWATER argues that it has not demonstrated a willingness to serve residents and nonresidents alike and is therefore not a "public utility" with a duty to provide service. In support of this contention, the CITY steadfastly asserts that its sewer policy is to "provide sewer service only to its residents". However, an examination of

the actual practice of the CITY, as shown by the uncontroverted evidence in this case, reveals that the CITY's policy is to provide sewer service to users in its exclusive sewer service area, with non-residents located within the area required to annex or agree to future annexation in return for sewer service. CLEARWATER admitted in its brief filed with the Second District Court of Appeal and in its brief filed with the instant Court that it provides sewer service to users located outside its city limits. While the quid pro quo to providing service to the nonresident is an agreement to annex into the City when the requirements of Chapter 171 of the Florida Statutes can be met, CLEARWATER has clearly demonstrated a willingness or, more appropriately, a desire, to serve these nonresidents, with the express goal of eventually expanding the municipal city limits to the boundaries of its exclusive sewer service area.

The existence of the interlocal agreements between alternative municipal sewer service providers provides the framework for ALLEN'S CREEK's argument that CLEARWATER has a duty to provide sewer service. Specifically relating to the instant case, the interlocal agreement between CLEARWATER and the City of Largo, while not expressly obligating the municipalities to provide sewer service to their respective areas, creates exclusive geographic areas in which each municipality will provide sanitary sewer service. Further, the interlocal agreement references an agreed "annexation boundary line" between each municipality and mirrors the exclusive sewer service area to said annexation boundary line. The implication in the agreement is crystal clear: the municipalities will each have an exclusive geographic area to which they will provide sewer service. CLEARWATER and the City of Largo, with the blessing of Pinellas

County, voluntarily agreed to the geographic area comprising each exclusive sewer service area, with each area knowingly comprised of the municipal city limits of the respective cities, together with unincorporated areas of the County. If CLEARWATER's policy is to provide sewer service only to residents, why include unincorporated areas within the exclusive service area, precluding residents of such unincorporated areas from sewer service from any other viable alternative source of sewer treatment?

CLEARWATER cites this Court to several out of state cases in support of its position that the CITY has no duty to provide service to nonresidents. Two (2) cases cited by CLEARWATER, City of Stow v. City of Cuyahoga Falls, 454 N.E. 2d 561, 7 Ohio App. 3d 108 (1982) and Andres v. City of Perrysburg, 546 N.E. 2d 1377, 45 App. 3d 51 (1988) are decisions applying Ohio law which holds that public utility services provided to nonresidents by a municipality may be subject to whatever conditions the municipality deems necessary provided such conditions are not arbitrary and capricious, based upon state constitutional grounds. Andres at 1380. In Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima, 858 P.2d 245, 122 Wash. 2d 371 (1993), the Supreme Court of Washington, while upholding an annexation for sewer service policy, expressly recognizes the exception applicable to circumstances where a city holds itself out as willing to supply sewer or water service to an area where a city is the exclusive supplier of sewer or water service in a region extending beyond the borders of the city. Yakima at 251. None of the cases cited by CLEARWATER address a situation where the municipal sewer service provider, upon

which a duty to provide sewer service is being sought, involves an exclusive sewer service area which has been created in favor of the municipality.

In contrast, ALLEN'S CREEK cites several out of state cases supporting the argument that a duty to provide services exists when examined in connection with an exclusive sewer service area: Delmarva Enterprises, Inc. v. Mayor and Council of the City of Dover, 282 A.2d 601 (Del. 1971), subsequent appeal 301 A.2d 276 (Del. 1971); Robinson v. City of Boulder, 547 P.2d 228 (Colo. 1976); and Barbaccia v. County of Santa Clara, 451 F.Supp. 260 (N.D. Cal. 1978). Other cases supporting Petitioner's position include: City of Milwaukee v. Public Service Commission, 66 N.W.2d 716 (Wisc. 1954); Bair v. Mayor and City Council of Westminster, 221 A.2d 643 (Md. Ct. App. 1966) and Mayor and City Council of Maryland v. Powles, 258 A.2d 410 (Md. Ct. App. 1969).

A review of the cases from other jurisdictions cited by both parties reveals one common theme: a municipal sewer service provider which has established an exclusive sewer service area which includes nonresidents, assumes a duty to provide sewer service to the residents located within the exclusive area. CLEARWATER's policy is to serve the users located within its exclusive sewer service area, compelling those nonresident users to annex into the city. By creating a service area exclusive to other providers, CLEARWATER assumes an obligation, implied by law, to provide service to its area. Several Florida decisions support this proposition.

The Fifth District, in The City of Winter Park v. Southern States Utilities, Inc., 540 So.2d 178 (Fla. 5th DCA 1989), ruled that "all corporations which voluntarily

undertake to engage in performing a service of a public nature, whether a governmental agency such as a municipality, or a private corporation, assume an obligation, implied by law, to render to all of the public in the area sought to be served, a service reasonably adequate to meet the just requirements of those sought to be served. Winter Park at 180. The Winter Park case involved an exclusive sewer service zone which the city tried to enforce. Although the court refused to enforce the exclusivity of the sewer zone, it determined that Winter Park, by creating an exclusive sewer zone, assumed a duty it had undertaken to provide. Winter Park at 180. In Williams v. The City of Mount Dora, 452 So.2d 1143 (Fla. 5th DCA 1984), the fifth district held that within the geographic territory a public utility has undertaken to serve, and concerning which it has the exclusive legal right to provide necessary services, a public utility has a legal duty to provide service on an equal basis to all users who apply for service. Williams at 145, 146. Williams, like Winter Park, concerned an exclusive sewer service area.

CLEARWATER relies heavily on the Fourth District case of Allstate Insurance Company v. City of Boca Raton, 387 So.2d 478 (Fla. 4th DCA 1980). While appearing to be extremely similar to the instant facts, several critical differences exist which distinguish this case. In Allstate, the Court was not dealing with an exclusive sewer service area. Rather, the plan in question in Allstate simply prioritized the options available to the sewer customer. The customer was not precluded from obtaining the required sewer service from an alternative available source. In the instant situation, CLEARWATER has created an exclusive sewer service area, precluding customers located within said area from obtaining sewer service from any other alternative source.

The exclusive nature of the sewer service area, and CLEARWATER's provision of sewer service to users within said exclusive area, gives rise to a duty imposed upon CLEARWATER to provide sewer service to residents and nonresidents alike.

CLEARWATER attempts to distance itself from the duty imposed upon municipal utility providers serving exclusive service areas by arguing that their service area is not exclusive and that ALLEN'S CREEK has alternative sewer service available. This argument is simply not true. Only two (2) potential alternatives other than CLEARWATER exist for sewer service to ALLEN'S CREEK: (1) service from the adjoining municipal sewer service provider (City of Largo) and (2) private sewer treatment system. Both of these options are unavailable. Provided the City of Largo was willing to provide sewer service to ALLEN'S CREEK, CLEARWATER must consent to this involvement (T-88, 89, 153, 216). No record evidence exists to support a contention that CLEARWATER would consent to such an alternative. As to a private sewer treatment plant, the uncontroverted evidence established that a permit for such a plant, in light of the readily available and proximate sewer treatment available from CLEARWATER, would be virtually impossible to obtain. Further, the application of Chapter 381 of the Florida Statutes, together with legislative policy discouraging private treatment facilities, would require a hookup to CLEARWATER's system within one year of the private treatment plant going on line.

Finally, CLEARWATER argues that it should not be required to provide sewer service to non-residents not subject to the CITY's comprehensive plan as it will be unable to plan appropriate infrastructure needs. Further, CLEARWATER questions why

ALLEN'S CREEK should get the benefit of developing under the less restrictive county plan and benefit by obtaining CLEARWATER's sewer service. These arguments are baseless. ALLEN'S CREEK did nothing to subject itself to the predicament in which it now finds itself. It was CLEARWATER, in conjunction with the City of Largo, that created the geographic areas of the sewer service areas. It was CLEARWATER which established the exclusiveness of the sewer service area. ALLEN'S CREEK, in an attempt to develop vacant land located within an unincorporated area of Pinellas County, was directed by the county to obtain sewer service from CLEARWATER, as its property fell within CLEARWATER's exclusive sewer service area. Upon application to CLEARWATER for sewer service, ALLEN'S CREEK is advised that it must annex into CLEARWATER in order to obtain sewer service. ALLEN'S CREEK, through no act of its own, faces what amounts to extortion; annex into the city in return for sewer services; if you don't like it, don't build. This practice, which will continue unfettered unless this Court puts a stop to it, forces property owners to surrender rights and surrender autonomy from municipal practices in return for access to a basic need, sanitary sewer service.

II. A MUNICIPALITY MAY NOT PROPERLY CONDITION THE PROVISION OF SEWER SERVICE ON ANNEXATION.

ALLEN'S CREEK asserts that a municipality may not condition the provision of sewer service upon annexation as to nonresidents located within the municipality's exclusive sewer service area established pursuant to interlocal agreements with neighboring municipal sewer service providers. CLEARWATER takes the opposite

position, arguing that the CITY is not seeking to annex unincorporated areas within its exclusive sewer service area, but will entertain nonresidents' petitions for annexation. Such an argument is preposterous and can be likened to the choice a groom has at a shotgun wedding.

ALLEN'S CREEK did not choose to be located within CLEARWATER's exclusive sewer service area. It does not choose to be annexed into CLEARWATER. It does, however, choose to develop its vacant land, said development consistent with applicable land use and zoning restrictions imposed upon the property by Pinellas County. ALLEN'S CREEK's desire to develop its property, however, has been severely restricted by the unilateral imposition of a requirement to annex as a precondition to obtaining sewer service from the exclusive provider of such service. This scenario essentially requires ALLEN'S CREEK, or any other nonresident owning undeveloped property within the exclusive sewer service area, to capitulate to CLEARWATER's demand for annexation and, therefore, submit its development to rules imposed upon it by CLEARWATER. Any annexation which occurs as a result of this forced agreement falls far outside the legislative intent of Chapter 171 of the Florida Statues and renders the statutory protection allowed a nonresident resisting proposed annexation useless.

CLEARWATER, pursuant to statutory authority, may properly charge an impact fee to any nonresident user of its sewer service. Further, CLEARWATER may, and does, charge a twenty-five (25%) percent surcharge on monthly use to nonresident users. CLEARWATER, therefore, will suffer no economic harm by providing sewer service to those nonresident users located within its exclusive sewer service area.

CLEARWATER, in conjunction with the City of Largo and Pinellas County, unilaterally determined the geographic area of its exclusive service area and chose to include unincorporated areas within the service area. Once established, the CITY has set out on a mission to capture all areas located within its exclusive sewer service area into its municipal city limits, armed with the weapon of sewer service denial.

CLEARWATER misses the point of ALLEN'S CREEK's argument regarding the requirement of annexation in return for sewer service. Annexation is a creature of statute and, as such, must be strictly construed. Chapter 171 of the Florida Statutes in no way authorizes a municipality to achieve or induce annexation by withholding the provision of utility service which it is under a duty to provide. Applying the rules of strict statutory construction, such a practice should be eliminated.

CONCLUSION

A municipal sewer service provider, which creates an exclusive sewer service area unto itself pursuant to interlocal agreements with neighboring municipal sewer service providers, assumes a duty to provide sewer service to all users located within its exclusive sewer service area, regardless of whether the user is a resident or nonresident. CLEARWATER seeks to expand its municipal city limits by imposing the requirement of annexation upon nonresident users located within its exclusive sewer service area in return for the provision of sewer service. A similar policy tying the provision of water by CLEARWATER to nonresidents which CLEARWATER was obligated to serve was struck down in City of Clearwater v. Metco Development Corporation, 519 So.2d 23 (Fla. 2d DCA 1987) and the CITY's policy tying annexation to the provision of sewer service should meet a similar fate.

The question certified to this Court as being of great public importance should be answered in the negative. Without a determination of the viability of this practice by CLEARWATER and other municipal utility suppliers throughout the state, the right of property owners will continue to be subjected to the practice of annexation by capitulation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief has been sent by U.S. Mail to Paul Richard Hull, Esquire, Assistant City Attorney, at P.O. Box 4748, Clearwater, Florida 34718, this 6th day of October, 1995.

R. Nathan Hightower