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OCT 27 2010

Circuit Court for Lane County, Oregon
BY 

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

In the Matter of the Petition of John Brown, Bob Cassidy, Rich Cunningham, Joann Ernst and Ron Farmer, as Commissioners of the EUGENE WATER & ELECTRIC BOARD, an Oregon municipal corporation.

For the Judiciary Examination and Judgment of the Court as to the Validity of a Contract for the Sale of Water,

Case No. 16-10-09774

OPINION and ORDER

Before the Court is a Validation Petition filed by the Eugene Water and Electric Board ("EWEB"), a municipal corporation, requesting the Court exercise its authority to validate a contract for the sale of surplus water to the City of Veneta (the "Contract") pursuant to ORS 33.720(3). The City of Eugene and a group of Citizens, who are intervening parties, oppose the Petition. All parties filed Motions for Summary Judgment.

The Court heard oral argument on Petitioners' and Intervenors' Motions for Summary Judgment on September 13, 2010. Eric DeFrest represented Petitioners John Brown, Bob Cassidy, Rich Cunningham, Joann Ernst, and Ron Farmer, as Commissioners of EWEB, at oral argument. Mr. DeFrest also filed Petitioners' Motion for Summary Judgment (filed July 30, 2010) and Petitioner's Response to both Intervenors' Motions for Summary Judgment (filed August 10, 2010). Glenn Klein of the City Attorney's Office of Eugene represented the City of Eugene at oral argument. Mr. Klein also filed the City's Motion for Summary Judgment (filed Order, page 1

July 30, 2010) and the City's Response to EWEB's Motion for Summary Judgment (filed August 30, 2010). Jannett Wilson of the Western Environmental Law Center represented the Citizen Intervenor, Ashley Miller, Kevin Matthews, Charles Biggs, Friends of Eugene and LandWatch Lane County at oral argument. Ms. Wilson also filed Citizen Intervenor's Motion for Summary Judgment (filed July 29, 2010) and Response to Petitioners' Motion for Summary Judgment (filed August 26, 2010).

I. BACKGROUND

On April 16, 2010, EWEB executed a contract with the City of Veneta ("Veneta") for the sale of surplus water. In pertinent part, the Contract provides that "EWEB's responsibility under this Agreement is to sell and provide surplus water on a wholesale basis . . . to Veneta . . ." and "EWEB is not responsible for providing service, distribution service, or other services to Veneta customers."² The Contract requires Veneta to build and maintain a water transmission pipeline from EWEB to Veneta, in order to receive the surplus water.³ To build the pipeline, Veneta is seeking loan and grant funding in the approximate amount of \$16,000,000.⁴ Veneta must be able to show to potential funding sources that it is able to carry out the Contract and that EWEB will be able to sell water to Veneta⁵ to obtain the funding.⁶

On April 29, 2010, EWEB filed a Validation Petition for judicial examination and judgment for validation of EWEB's authority to enter into the Contract in this Court. The Validation Petition is an *in rem* proceeding filed pursuant to the Oregon validation statutes, ORS

¹ Purchase of Surplus Water Contract; EWEB's Ex. B at 6, ¶ 3.1

² *Id.* at ¶ 3.2

³ *Id.* at 5, ¶ 2.2

⁴ Petitioner's Validation Petition, page 3, at 16-24.

⁵ Water belongs to the state, but the City of Eugene holds water rights for municipal use from the McKenzie river through permits. ORS 537.230 requires a permit holder to use 25 percent or more of its water for "beneficial use."

⁶ Petitioner's Validation Petition, page 3, at 16-24.

33.710 to 33.720.⁷ These statutes allow a Court to review the contracts of a municipal corporation. The City of Eugene and Citizen Intervenors filed Motions to Intervene pursuant to ORS 33.720(3)⁸, which were granted on July 6, 2010. Both intervening parties oppose the Contract. None of the parties to this Petition have challenged the jurisdiction of the Circuit Court to hear and decide this matter, except as discussed below regarding land use planning goals.

The primary argument in opposition to the Contract stems from the meaning of "water service" as used in (1) The Eugene City Charter (2) The Eugene City Code, and (3) Eugene City Council Resolution 2643⁹. The intervening parties argue that the Eugene Charter, Code, and City Council Resolution authorize the Eugene City Council to control "water service" outside city limits and that the sale of surplus water is included in the definition of "water service." Therefore, according to the intervening parties, EWEB does not have authorization to enter into the Contract with Veneta without approval from the Eugene City Council. EWEB, on the other hand, argues that "water service" does not extend to the sale of surplus water, and therefore, EWEB is not obligated to obtain approval from the Eugene City Council prior to the execution of the Contract. The Citizen Intervenors also argue that the terms of the Contract, namely the construction of the water pipeline from Eugene to Veneta, violates Oregon's land use planning laws, and therefore make the Contract invalid. EWEB argues that consideration of Oregon's land use planning laws is not an appropriate or necessary part of this proceeding.

⁷ The Oregon validation statutes allow a governing body to bring an *in rem* proceeding for the purpose of having judicial examination and judgment of the court as to the regularity and legality of the authorization of any contract and the validity of the contract. ORS 32.710(2)(d).

⁸ ORS 33.720(3) allows "any person interested" to contest the validity of the contract by timely appearing before expiration of ten days after the completion of publication of notice directed to all "electors, freeholders, taxpayers, or other interested persons."

⁹ EWEB's Ex.'s A, F, and I, respectfully.
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II. DISCUSSION

A. The Meaning of "Water Service"

1. The Eugene City Charter

The City of Eugene and the Citizen Intervenors argue that the Eugene City Charter (the "Charter") grants the Eugene City Council, not EWEB, authority to approve the sale of water to an entity located outside of Eugene's city limits. They find this grant of authority in provision 44(3) of the "Charter," which states, in relevant part, "the [EWEB] board shall maintain and operate the water utility of . . . the City of Eugene, subject to control by the council of extension of water service." The City of Eugene and the Citizen Intervenors argue that the Contract, which is for the sale of surplus water from EWEB to the City of Veneta, is an "extension of water service" within the meaning of the Charter, and therefore the Eugene City Council has final authority on whether this sale can proceed.

To determine the meaning of "water service," the Court must engage in statutory interpretation methods set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 (1993).¹⁰ First, the Court should look at the text and context of the Charter and determine if the term is defined elsewhere. If the term is not defined in text, the Court examines the legislative history to glean legislative intent. If the legislative history is ambiguous, the Court must determine the meaning from common, trade, or other statutory usage of the same or similar terms.

All parties agree that "water service" is not defined anywhere in the Charter, therefore the Court cannot determine the meaning of the term from text or context of the Charter. The Court

¹⁰ See also *Stats v. Gaines*, 211 Or.App. 356, 360 (2007) (holding "we look to the text of the statute in context and, if necessary, to legislative history and other interpretive aids")
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is left to consider the legislative history or alternatively the common, trade, or other statutory meaning of the same or similar term.

The City of Eugene and Citizen Intervenors' Argument

The City of Eugene and Citizen Intervenors¹¹ argue that the legislative history of Charter provision 44(3) supports their position that "extension of water service" includes the sale of surplus water. The Charter provision 44(3) was adopted by voters in 1976 as part of a special city election. The City of Eugene argues that in 1976 there was clear voter intent to give the city council control over water service outside city limits to prevent urban sprawl, and that intent to prevent sprawl applies to the sale of surplus water in addition to direct water service to customers. The City of Eugene presents exhibits in support of its legislative history argument, including (1) a pamphlet distributed to voters describing provision 44(3) prior to the election, (2) minutes from an August 5, 1976 City Council meeting where the provision was discussed, (3) a memorandum distributed at this meeting, and (4) a memorandum from legal counsel to EWEB answering certain questions about the roles of City Council and EWEB.¹²

Language from 1976 pamphlet provided to voters prior to the special election describing several provisions, including 44(3), states in relevant part:

Sections 44, 45, and 47 of the revised charter clarify language . . . and set forth with greater precision the relationship between [EWEB] and the City Council . . . The City Council will control the extension of water service as an essential tool in land use planning and the control of urban sprawl.¹³

The City also presents a memo distributed at an August 5, 1976 City Council meeting where Charter revisions were discussed. The memo states:

¹¹ Citizen Intervenors "adopt" the City of Eugene's legislative history arguments.

¹² City of Eugene's Ex.'s 1, 3, 2, and 8, respectively.

¹³ Charter Revision Presented to Voters; City of Eugene's Ex. 1 at 4. Order, page 5

... One of the major benefits negotiated in the revision of the charter was a clear statement that EWEB is subordinate to the City Council as it relates to extension of the water utility – a significant benefit now assisting us in dealing with issues of urban sprawl.¹⁴

The minutes from that meeting read: "... on the water utility, the most important conclusion reached was that ... the city should have control over the water extension policy and its relationship to the general plan."¹⁵

Finally, the City of Eugene provides a memo from legal counsel Douglas S. Mitchell to EWEB in 1988 when EWEB asked legal counsel certain questions, including "Does EWEB have the authority to approve the sale of water outside the City of Eugene to those extra-territorial areas presently served by EWEB?"¹⁶ The answer was the Eugene City Council, not the Eugene Water and Electric Board, "controls the extension of water service" and "'extension of service' ... includes provision of water to an existing use, to a new use, and intensification of an existing use, or a change in use."¹⁷

The City of Eugene argues that the Court should look to this legislative history to aid in its interpretation of the term "water service" in provision 44(3) and that the legislative history makes clear that "water service" includes the sale of surplus water to other municipalities. Particularly, the City emphasizes that because the voter information stated that "the city council will control the extension of water service as an essential tool in ... the control of urban sprawl," the term "water service" should include the sale of surplus water because such a sale has the potential to encourage and generate sprawl between Veneta and Eugene. At oral argument, the City argued that language provided

¹⁴ City of Eugene Inter-Departmental Memorandum; City of Eugene's Ex. 2 at 1.

¹⁵ Eugene City Council Committee of The Whole Minutes: August 5, 1976; City of Eugene's Ex. 3 at 1.

¹⁶ Memorandum re Request for Allocation of Service Territory and Extension of Water Service: December 27, 1988; City of Eugene's Ex. 8 at 30.

¹⁷ *Id.* at 32.

to voters prior to an election of a Charter amendment is the best source from which to ascertain voter intent.

EWEB's Argument

EWEB argues that the legislative history of provision 44(3) does not make clear that "extension of water service" should naturally include the sale of surplus water to other municipal entities. Instead, EWEB argues that the Court should interpret the language of the Eugene City Charter according to its plain meaning and in context with related state statutes. Particularly, EWEB argues "extension of water service" has been predominately interpreted by Oregon statutes and regulations as the provision of water service to end customers, and not the sale of surplus water to other utilities. EWEB does not dispute that EWEB's broad authority is limited by the phrase, "subject to control by the council of extension of water service," but rather argues that this portion of the charter is a narrow exception that refers to the direct provision of water service to customers outside the city limits, not the sale of surplus water to other municipal utilities.

EWEB argues that "water service" was never defined in the 1976 voter materials or city council meeting materials presented by the City, and therefore it is not clear that the sale of surplus water was intended to be included in that term. EWEB provides additional legislative history from a 1976 city council meeting, where the minutes reflect that a point of clarification was raised that requested members of the Council-EWEB subcommittee clarify the meaning of "extension of water service," but was not further addressed by the Council.¹⁸ In the absence of this further clarification, EWEB argues that the legislative history does not show that the sale of surplus water should be included in "extension of water service" in Charter provision 44(3).

¹⁸ Eugene City Council Minutes: August 16, 1976; EWEB's Ex. L at 7. Order, page 7

Instead, EWEB argues the Court should rely on the meaning of "extension of water service" as defined in other Oregon regulations and in its trade usage, as direct service to customers.

The Court finds that the legislative history does not conclusively show that "extension of water service" naturally includes the sale of surplus water. The legislative history is ambiguous with regard to voter intent as to whether the "extension of water service" includes the intergovernmental sale of surplus water. Therefore, the language of the Eugene City Charter should be interpreted according to trade and common usage and in context with other Oregon statutes.

The Court notes that Oregon statutes and Eugene City Charter, taken together, give EWEB the authority to sell surplus water to other municipalities. ORS 225.020(1) gives cities the power to build and operate water systems within and without its boundaries for use by citizens and for profit, if such power is contained in the city's charter.¹⁹ This power includes the ability to sell and dispose of water for domestic, recreation, industrial, and public use within and without its boundaries.²⁰ Additionally, ORS 225.030 states that a city owning and operating a waterworks system for supplying water for its inhabitants may also "sell, supply, and dispose of water or electricity from such system to any person within or without the limits of the city" and "may make contracts in reference to the sale and disposal of water . . . for use within or without the corporate limits." These statutes, when read along with Eugene City Charter Provision 44(3), which gives EWEB the authority to "maintain and operate the water utility . . . of the city, subject to control by the council of extension of water service," give EWEB the authority to make contracts for the sale of surplus water.

¹⁹ ORS 225.020(1) reads "When the power to do so is conferred by or contained in its charter or act of incorporation, any city may build, own, operate and maintain waterworks, water systems, railways and railroads, electric light and power plants, within and without its boundaries for the benefit and use of its inhabitants and for profit."

²⁰ ORS 225.020(1)(a).

Clearly EWEB's authority is limited by the phrase "subject to control by the council of extension of water service." However, "extension of water service" does not inherently include the intergovernmental sale of surplus water. Further, when read in context, the statements presented by the City from these materials shows that they were made only in contemplation of extending water service to customers outside of city limits, not an intergovernmental agreement for the sale of water. Particularly, the concern for "urban sprawl" was in reference to the extension of water service, in the narrow sense, outside the Eugene-Springfield Metro Plan Urban Growth Boundary ("UGB"). The sale of surplus water between EWEB and Veneta for Veneta to distribute to its citizens does not directly create "urban sprawl" outside the Eugene-Springfield UGB in the same way.

In Oregon statutes and regulations the phrase "water service" denotes direct service to water customers, not the sale of surplus water to other water utilities. Specifically, OAR 860-036-0900(1) states that "[u]tility service' does not include service provided through or by the use of any equipment, plant, or facilities solely for the production and sale of water to other water utilities." EWEB further asserts that the custom usage of the phrase "water service" according to The Water Dictionary means the "[s]mall water line . . . that allows movement of water from a water main to or into a building."²¹

Finally, the Court notes that both before and after the 1976 amendment of the Eugene Charter, EWEB has sold surplus water to other area utilities, without any challenge for the council. The City of Eugene argues that the City challenged EWEB's contract with the Willamette Water Company. However, the Willamette Water Company's proposed extension of

²¹ The Water Dictionary, 2nd Ed. American Water Works Ass'n (2010) at 554; EWEB's Ex. D at 3. Order, page 9

water service was adjacent and contiguous to the Eugene Springfield UGB, unlike Veneta, which is a non-contiguous city.

The legislative history of the Charter, as presented by the City of Eugene and the Citizen Intervenors does not clearly indicate that "extension of water service" includes the sale of surplus water. Instead, the Court looks to the trade and other statutory usage of "water service," which does not extend to the sale of surplus water, and therefore EWEB's authority to enter into the Contract is not limited by the Charter.

2. The Eugene City Code

The City of Eugene argues that in addition to being limited by the Eugene City Charter, EWEB is limited by the Eugene City Code from selling water outside of the city. The City finds this limitation in Eugene City Code provision 2.212. Provision 2.212 states: "the city, including EWEB, shall not provide water, water service, or sewer service outside the city limits except as authorized pursuant to the city charter, this code, and adopted resolutions." The City of Eugene asserts that this provision unambiguously prohibits EWEB from providing water outside the city limits unless approved by the Eugene City Council and certain conditions are met. Eugene Code provision 2.212 also provides an application process by which EWEB can seek approval for the sale of water from the city manager. The City argues that EWEB needed to go through that process prior to entering into the Contract with Veneta and failed to do so.

EWEB argues that the language in provision 2.212 of the Eugene City Code makes clear that EWEB is limited in its authority to provide water or water services "except as authorized pursuant to the city charter . . ." Therefore, the Eugene Code is constrained by the language of the Eugene Charter, which as noted above, does not restrict EWEB from selling surplus water to other municipalities. Also, EWEB points out that EC 2.212 was amended in 2007 to make a

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distinction between "water" and "water service", indicating Eugene City Council intended these to be two different concepts. The Court notes that EC 2.212 therefore recognizes the very distinction the Court adopts above.

The language of Eugene City Code 2.212 makes the code provision subject to the Eugene City Charter. Since the Court finds that the Eugene City Charter grants EWEB the authority to engage in the intergovernmental sale of surplus water, EWEB is not limited by the Eugene City Code from entering into the Contract with Veneta.

3. City Council Resolution 2643

The City of Eugene also argues that City Council Resolution 2643, which establishes the City of Eugene's water policy, similarly prohibits EWEB from selling water outside of the City without City approval. The Resolution begins with:

The power of the City to maintain and operate a water utility is vested by Charter in [EWEB] subject to regulation by the City Council. The primary purpose and major duty of EWEB is to provide service to the residents of the City. The City does not intend ordinarily to supply service beyond the corporate limits of the City. . . . The extension of urban services, particularly water, into outlying areas has encouraged urban development at distant, isolate sites, which has led in turn to the need for extension of other, more expensive and less profitable services.²²

The City of Eugene argues that EWEB's Contract with Veneta is inconsistent with Resolution 2643, and therefore should not be deemed valid by the Court.

EWEB argues that the City of Eugene's position that the Contract is inconsistent with City Council Resolution 2648 is flawed because EWEB is not seeking to supply water service to residents of Veneta, only to sell surplus water to Veneta for its own provision of water service to its residents. The Court agrees. As in the Eugene City Charter and the Eugene City Code, the

²² City of Eugene Resolution #2643, March 1977; City of Eugene's Ex. 7 at 3 Order, page 11

language in Resolution 2643 does not contemplate the sale of surplus water to other municipalities.

In sum, the Court finds that the EWEB is not limited by the Eugene City Charter, the Eugene City Code, or Eugene City Council Resolution from entering into the Contract with Veneta.

B. Land Use Planning Laws

The Citizen Intervenors offer an additional argument that Oregon land use laws, which are organized around 19 statewide land use planning goals, are meant to ensure that urban development remains inside UGB's. The Citizen Intervenors believe the Contract, which requires building a water transmission pipeline between the Eugene and Veneta, violates Oregon's land use planning laws by building urban infrastructure outside of the UGB's of both of the cities. The Citizen Intervenors assert that because the contract requires Veneta to build this pipeline, the Contract is invalid.

The Court expressly declines to address this issue. The land use planning concerns are not relevant to the immediate validation proceeding. Further, jurisdiction on this issue does not properly lie with the Circuit Court. The relevant statutes require Veneta to submit its proposal to build the pipeline to Lane County.²³ Once Lane County makes a determination on whether or not the pipeline can be built, the opposing party may ask for the decision to be reviewed by the Land Use Board of Appeals ("LUBA").²⁴ Decisions made by LUBA are appealable to the

²³ Lane Code § 16.212(4)(i); consistent with ORS 215.213(1)(e)

²⁴ ORS 197.825(1) "... the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district"

Oregon Court of Appeals.²⁵ Therefore, this Court declines to make a decision on whether or not the construction of a pipeline would violate land use planning laws.

III. ORDER

Petitioner EWEB's Motion for Summary Judgment is GRANTED; City of Eugene's Motion for Summary Judgment is DENIED; and Citizen Intervenors' Motion for Summary Judgment is DENIED. Mr. Defreest shall prepare the judgment which shall, by reference, incorporate this Opinion and Order.

Dated this 27 day of October, 2010.



Karsten H. Rasmussen, Circuit Court Judge

KHR/eeg

²⁵ ORS 197.850(1) "any party to a proceeding before the Land Use Board of Appeals . . . may seek judicial review of a final order issued in those proceedings";

ORS 197.850(3)(a) "Jurisdiction for judicial review . . . is conferred upon the Court of Appeals."