

FOR PUBLICATION

ATTORNEYS FOR APPELLANTS:

CHRISTOPHER J. WHEELER

Stout & Wheeler, P.C.

Angola, Indiana

JONATHAN O. CRESS

Simmons-Brown & Cress PC

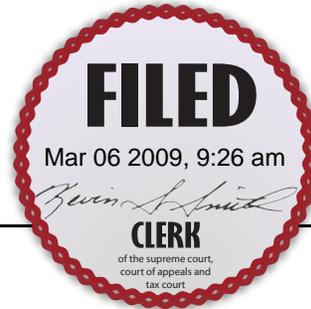
Angola, Indiana

ATTORNEY FOR APPELLEE:

JOHN R. GASTINEAU

Eberhard & Gastineau, P.C.

Fort Wayne, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

BLEDSOE’S, INC., and JOHN CRESS d/b/a)
WEST OTTER LAKES ESTATES,)

Appellants-Defendants,)

vs.)

No. 76A03-0806-CV-272

STEUBEN LAKES REGIONAL)
WASTE DISTRICT,)

Appellee-Plaintiff.)

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0603-CC-101

March 6, 2009

OPINION - FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Defendants, Bledsoe's, Inc. (Bledsoe's) and John Cress d/b/a West Otter Lake Estates (Cress), appeal the trial court's grant of summary judgment to Appellee-Plaintiff, Steuben Lakes Regional Waste District (the District).

We affirm in part, reverse in part, and remand for further proceedings.

ISSUES

Cress raises two issues, the first of which Bledsoe's joins, which we restate as:

- (1) Whether Ordinance No. 2002-03 is unconstitutionally vague for failing to define the terms "mobile home park" and "trailer park"; and
- (2) Whether Cress should be required to pay sewage fees for the period prior to which his property was connected to the sewage system.

FACTS AND PROCEDURAL HISTORY¹

In 1998, the District began to consider construction and installation of a centralized sanitary sewage collection and treatment system. The proposed system was to replace the existing system and to provide services for areas not previously served within the District's territory. Throughout 2001, the District's Board repeatedly discussed the necessity of defining different users of the proposed system, such as single and multi-unit houses, apartments, mobile homes, and campgrounds, so that rates could be based on these classifications.

¹ We remind all parties that the table of contents for each appendix filed with this court shall identify each item by date. Ind. Appellate Rule 50(C).

On April 18, 2002, the District passed and adopted Ordinance No. 2002-03, a “SEWER RATE ORDINANCE.” (Cress App. p. 48). Among other things, the ordinance set out rates for residential properties and commercial properties. Residential properties were to be charged based on a flat rate monthly charge system. Commercial properties were to be charged based upon monthly use amounts.

Further, Ordinance No. 2002-03 defined certain terms, including “Campground,” “Mobile home,” and “Motor home.” (Cress App. pp. 48-49). A “Campground” is defined, in pertinent part, as:

real property . . . set aside . . . for the parking or accommodation of recreational vehicles, tents, camper trailers, camping trucks, motor homes and/or similar shelters This term does not include a property which accommodates mobile homes, in which such accommodations account for more than 25 percent of the total accommodations provided to guests in a calendar year. A campground is not a mobile home park.

(Cress App. pp. 48-49). The term “Mobile home” is defined, in pertinent part, as “a residential structure that is transportable in one or more sections, which structure is 8 body feet . . . or more in width, over 35 feet in length with the hitch, built on an integral chassis, designed to be used as a dwelling when connected to the required utilities.”

(Cress App. p. 49). And the term “Motor home” is defined, in pertinent part, as a “vehicular-type unit 35 feet or less in length and 8 feet or less in width, primarily designed [as] temporary living quarters for camping or travel use.” (Cress App. p. 49).

Under Ordinance No. 2002-03, a campground is considered a commercial property, and therefore billed for its actual use, but a mobile home park or trailer park is considered a residential property and billed at a flat monthly rate per space available or dwelling unit.

No definition of “Mobile home park” or “Trailer park” was provided in Ordinance No. 2002-03.

In November 2003, due to higher than anticipated bids, the District approved Ordinance No. 2003-06, which adjusted upward the rates to be charged sewer system users, but did not alter the classifications found in Ordinance No. 2002-03. In December 2003, the District awarded contracts for the project. That same month, the District began charging users of the system partial rates authorized by Ordinance No. 2003-06 for the period while the system was under construction. In May 2005, the District sent a letter to each user informing them that the project had been completed, each user not already connected to the system was to connect to the system, and a previously set connection fee was due prior to connection. That same month, the District began billing customers the full rates as set out in Ordinance No. 2003-06. In December 2005, the Board adopted Ordinance No. 2005-06, which again adjusted upward the rates charged to property owners for sewer services, but did not alter the classifications described in Ordinance No. 2002-03.

In the latter half of 2003, the staff of the District reviewed the properties which would be served by the sewer system. The staff concluded that the structures on the property of Bledsoe’s fit the definition of “Mobile homes” as set out in Ordinance No. 2002-03. They also determined that the manner in which Bledsoe’s used its property did not fit the definition of a campground per Ordinance No. 2002-03, and thus concluded that the property was a mobile home park. Similarly, the staff examined Cress’ property and concluded that the structures on Cress’ property were mobile homes as defined by

Ordinance No. 2002-03, and the manner in which the property was used did not fit that ordinance's definition of a campground. Rather, the staff concluded, Cress' property was a mobile home park.

In June 2005, Bledsoe's began paying less than the full amount of its monthly charges. Additionally, Bledsoe's did not pay the capital and connection charges that it had been assessed. As a result of Bledsoe's failure to pay, the District asserted liens against the real property owned by Bledsoe's consisting of a lien in the amount of \$132,073.82 in November 2005; a lien in the amount of \$46,055.81 in May 2006; a lien in the amount of \$18,212.91 in September 2006; a lien in the amount of \$33,575.00 in February 2007; and a lien in the amount of \$26,691.83 in June 2007.

Beginning in January 2004, Cress stopped paying the monthly amounts charged to him by the District. Additionally, he did not pay the capital and connection charges that were assessed against his property. In response, the District asserted liens against the real property owned by Cress. In November 2005, the District asserted a lien in the amount of \$46,799.77; a lien in the amount of \$14,119.35 in May 2006; a lien in the amount of \$5,594.85 in September 2006; and a lien in the amount of \$9,518.83 in February 2007.

On March 1, 2006, the District filed a Complaint against Bledsoe's and Cress.² On April 26, 2006, Bledsoe's filed its answer and counterclaim, which the District answered on May 11, 2006. On May 22, 2006, Cress filed his answer and affirmative defenses. On

² None of the parties has provided us with a copy of the Complaint filed by the District. Nor does the record on appeal contain other filings such as the motion for summary judgment or certain materials designated to the trial court. We will assume that the parties do not believe these pleadings and evidence are necessary to a consideration of the issues raised on appeal. *See* App. R. 50(A)(2)(f).

June 28, 2007, Cress filed a counterclaim. On September 5, 2007, the District filed its motion for summary judgment. On April 25, 2008, the trial court held a hearing on the motion for summary judgment and also heard argument on the constitutionality of the ordinances. On May 2, 2008, the trial court granted the District's motion for summary judgment on all claims and denied Cress' counterclaim.

Bledsoe's and Cress now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

The purpose of summary judgment is to terminate litigation where there is no factual dispute and the matter may be determined as a matter of law. Ind. Trial Rule 56(C); *Fowler v. Brewer*, 773 N.E.2d 858, 861 (Ind. Ct. App. 2002), *trans. denied*. The moving party must make a *prima facie* showing that there are no genuine issues of material fact. *Id.* If the moving party meets this burden, the responding party must set forth specific facts showing the existence of a genuine issue for trial. T.R. 56(E); *Fowler*, 773 N.E.2d at 861. Summary judgment will be affirmed on appeal if it is sustainable on any theory or basis found in the evidence designated to the trial court. *Fowler*, 773 N.E.2d at 861. When reviewing the grant or denial of summary judgment, our standard of review is *de novo*. *Univ. of S. Indiana Found. v. Baker*, 843 N.E.2d 528, 531 (Ind. 2006).

II. Are the Ordinances Unconstitutionally Vague?

Bledsoe's and Cress join to argue that Ordinance No. 2002-03, 2003-06, and 2005-06 are unconstitutionally vague for failing to provide definitions for the terms

“mobile home park” or “trailer park.” The District contends that, by reading the ordinance as a whole and giving the terms their plain and ordinary meaning, the ordinance is sufficiently specific.

When considering the meaning of an ordinance, courts apply the same rules of construction as those applied to the construction of statutes. *Green v. Hancock Co. Bd. Of Zoning Appeals*, 851 N.E.2d 962, 967 (Ind. Ct. App. 2006). “Foremost, among those rules is the directive to ascertain and give effect to the intent of the legislature,” or in this case, the District. *Id.* Essential to this effort is a consideration of the goals sought to be achieved and the reasons and policies underlying the ordinance. *Id.* In doing so, we interpret the ordinance as a whole, and give words their plain, ordinary, and usual meaning. *Weida v. City of West Lafayette*, 896 N.E.2d 1218, 1223 (Ind. Ct. App. 2008). If the language is clear and unambiguous, it is not subject to judicial interpretation. *Raab v. Town of Schererville*, 766 N.E.2d 790, 792 (Ind. Ct. App. 2002), *trans. denied*.

Much like zoning ordinances, the ordinances at issue should be precise, definite, and certain in expression so as to enable both the landowner and the District to act with assurance and authority regarding classification decisions. *See Hendricks Co. Bd. Of Com’rs v. Rieth-Riley Const. Co.*, 868 N.E.2d 844, 852 (Ind. Ct. App. 2007). “This requirement is dictated by due process considerations in that the ordinance must provide fair warning as to what the governing body will consider in making a decision.” *Id.* However, an ordinance is cloaked with a presumption of constitutionality, and we place upon the party challenging it the burden to show unconstitutionality. *Lex, Inc. v. Bd. of Trustees of Town of Paragon*, 808 N.E.2d 104, 110 (Ind. Ct. App. 2004), *trans. denied*.

A review of the ordinances reveals that the various users of the system are split into classes based on location of the properties. Thereafter, each class is broken into five categories: residential, commercial, governmental, institutional, and industrial. The terms “mobile home park” and “trailer park” are always found in the residential category of each class, but if one of the two terms exists, the other does not. Therefore, we conclude that the terms are used interchangeably and meant to represent the same form of residential use.

Helpful to our analysis, Ordinance No. 2002-03 has provided definitions for the terms “Campground,” “Mobile home,” and “Motor home.” (Cress App. pp. 48-49). As we have explained above, a “Campground” is defined, in pertinent part, as:

real property . . . set aside . . . for the parking or accommodation of recreational vehicles, tents, camper trailers, camping trucks, motor homes and/or similar shelters This term does not include a property which accommodates mobile homes, in which such accommodations account for more than 25 percent of the total accommodations provided to guests in a calendar year. A campground is not a mobile home park.

(Cress App. pp. 48-49). The term “Mobile home” is defined, in pertinent part, as “a residential structure that is transportable in one or more sections, which structure is 8 body feet . . . or more in width, over 35 feet in length with the hitch, built on an integral chassis, designed to be used as a dwelling when connected to the required utilities.”

(Cress App. p. 49). And the term “Motor home” is defined, in pertinent part, as a “vehicular-type unit 35 feet or less in length and 8 feet or less in width, primarily designed [as] temporary living quarters for camping or travel use.” (Cress App. p. 49).

The ordinance has expressly distinguished the terms “Motor home” and “Mobile home,” separating the two by size and typical use: camping and travel use for motor homes versus dwelling use for mobile homes. In part, the ordinance relies upon the difference between the two to define what a campground is not, effectively defining what a mobile home park is in the process. To say it another way, by expressly stating that properties for which more than twenty-five percent of its annual accommodations are accountable to mobile homes are not “Campgrounds,” and that a “Mobile home park” is not a “Campground,” the District has implicitly stated that real property set aside for recreational vehicles for which more than twenty-five percent of its annual accommodations are accountable to mobile homes is a mobile home park.

The goals and policies of the ordinance are to recoup the costs of installing the new sewer system while charging users for the waste that they generate. It appears to be the opinion of the District that mobile homes should be considered a residential type of use, and should be charged accordingly, unless the mobile homes constitute a small portion of the annual accommodations for a campground. If customers such as Bledsoe’s and Cress wish to be treated as a campground and billed as a commercial property, their option is clear: reduce the amount of annual accommodations on their real property attributable to mobile homes. All together, we conclude that the ordinances are sufficiently specific to provide fair warning to users such as Bledsoe’s and Cress.

III. Pre-Connection Collection

Cress argues that the District was not entitled to bill him for sewer usage prior to his connection to the sewer system. The District responds that Cress should be barred

from raising this issue because Cress did not raise it before the trial court. However, at the hearing on the District's motion for summary judgment, the District plainly stated that one of the issues it had raised was "whether the District is statutorily authorized to charge users for periods when sewage is not actually being collected and treated." (Transcript p. 4). The District went on to summarize, "In other words, what we have asked the Court to consider is whether the District acted rationally and within its powers granted by statute, in the rate making, billing and collection decisions it made." (Tr. p. 5). Further, Cress' amended answers and affirmative defenses expressed as an affirmative defense that the District "has billed for services which were not provided to . . . Cress." (Cress App. p. 10). Therefore, we conclude that this issue was at play before the trial court, and is now properly before us.

The District also presents arguments on the merits. Their main contention is that Indiana statutes permit the District to charge anticipated users prior to actual connection.

Indiana Code section 13-26-11-6 provides:

Unless the board finds and directs otherwise, the sewage works are considered to benefit every:

- (1) lot;
- (2) parcel of land; or
- (3) building;

Connected *or to be connected* under the terms of an ordinance requiring connections with the sewer system of the district as a result of construction work under the contract. The rates or charges shall be billed and collected accordingly.

(Emphasis added). Indiana Code section 13-26-11-5 provides:

A district may bill and collect rates and charges for the services to be provided after the contract for construction of a sewage works has been let

and actual work commenced in an amount sufficient to meet the interest on the revenue bonds and other expenses payable before the completion of the works.

These statutes unambiguously provide opportunity for waste districts to bill properties that have yet to be connected to a sewage system, but are in the process of being connected.

However, Cress essentially contends that the District has directed otherwise, or more specifically, by Ordinance No. 2002-03, the District has directed that charges for use are to begin after connection to the system. For authority, Cress cites to *City of Hobart Sewage Works v. McCullough*, 656 N.E.2d 1185 (Ind. Ct. App. 1995), *disapproved of on other grounds by Kantz v. Elkhart County Highway Dep't*, 701 N.E.2d 608 (Ind. Ct. App. 1998), *trans. denied*. In *City of Hobart*, the McCulloughs purchased a property, believed it to be connected to the sewer system, lived there for seven years and then leased the property, all the while paying the city a monthly fee for usage of the sewage system. *Id.* at 1187. A sewage problem arose, and when attempting to remedy the problem, the McCulloughs learned that the residence was not connected to the sewage system, but was connected to a septic tank instead. *Id.* Subsequently, they learned that, although a prior owner had paid a “tap-on fee,” the house had never been connected to the sewer system. *Id.* In ruling that the trial court had correctly entered a judgment awarding the McCullough’s compensation for the payments they had made to the city for sewage services, we focused on a provision in the city’s relevant ordinance, which provided:

For the use of the services rendered by sewage works, rates and charges shall be collected from the owners of each and every lot, parcel or real estate or building that is connected with the city sanitary system or otherwise discharges sanitary sewage, industrial wastes, water or other liquids, either directly or indirectly, into the sanitary sewage system of the city. Such rates and charges include user charges, debt service costs, excessive strength surcharges and other service charges, which rates and charges shall be payable as hereinafter provided and shall be in an amount determinable as follows

Id. at 1188. Our interpretation was that “[t]his ordinance provides that usage fees are only charged and collected from owners that are actually connected or discharge waste into the city sewer system.” *Id.*

While the facts before us vary from those presented in *City of Hobart*, Ordinance No. 2002-03 contains a provision nearly identical to the provision we have quoted above. Specifically, Section 3 of Ordinance No. 2002-03 provides:

For the use of and service rendered by the sewage works, rates and charges shall be collected from the owners of each and every lot, parcel of real estate, or building that is connected to the District’s sanitary system, or otherwise discharges sanitary sewage, industrial waste, water or other liquids, either directly or indirectly, into the sanitary sewage system of the District. Such rates and charges shall include user charges, excessive strength surcharges, and other services charges, which rates and charges shall be payable as hereinafter provided, and shall be in an amount determined as follows

(Cress App. p. 53).

The District argues that we should ignore the similarities of Ordinance 2002-03 to the ordinance in *City of Hobart*, and instead follow another opinion from our court, *Raab v. Town of Schererville*, 766 N.E.2d 790 (Ind. Ct. App. 2002), *trans. denied*. In *Raab*, we held that an individual was required to pay for provided garbage services although he did not use them. *Id.* at 794. However, we explicitly distinguished the ordinance at issue in

Raab from the ordinance in *City of Hobart* because the ordinance in *City of Hobart* “assess[ed] fees against only those residents who were ‘actually connected to or discharge[d] waste into the city sewer system.’” *Id.* at 794 (quoting *City of Hobart*, 656 N.E.2d at 1189). Because the District chose to use the exact language used by the City of Hobart regarding connection or discharge to the sewer system when drafting its ordinance, we must follow our precedent from *City of Hobart*. Therefore, we conclude that the District has directed that user charges and service charges are to be collected from property owners who are connected to or somehow otherwise discharge waste into the sewage system.

It is undisputed that a portion of the liens levied against Cress’ property was for usage charges billed prior to Cress having been connected to the sewer system. The superintendent of the District’s Board, Tim Frederick, stated by sworn affidavit, that in May, 2005, the District “sent users the first bill that charged the full rates.” (Cress App. p. 25). There has been no contention by the District that Cress discharged waste into the sewers although not connected. Therefore, as a matter of law, the liens levied against Cress for unpaid sewer bills are at least bloated.

That being said, there is one notable and important difference between the ordinance at issue in *City of Hobart* and Section 3 of Ordinance No. 2002-03. Section 3 of Ordinance No. 2002-03 does not prohibit “debt service costs” from being billed until after connection or discharge to the sewer system, as the ordinance in *City of Hobart* did. (Cress App. p. 53); *City of Hobart*, 656 N.E.2d at 1188. A substantial portion of the monthly fees billed to Cress were likely attributable to paying for the debt incurred by the

District for the installation of the sewage system. Indeed, all of the Ordinances—Nos. 2002-03, 2003-06, and 2005-06—state that part of the monthly fees are attributable to “debt services.” (Cress App. pp. 54, 68, and 73). Billing customers for such an expense prior to connection would fall within the District’s discretion. *See* I.C. § 13-26-11-5. Therefore, we remand to the trial court so that it may determine what portion of the monthly bills which Cress did not pay were for debt services, and therefore properly billed to him.

CONCLUSION

Based on the foregoing, we conclude that the ordinances are not unconstitutionally vague. Further, we conclude that the trial court erred by granting summary judgment to the District on its claim that it had properly billed Cress prior to his property’s connection to the sewage system.

Affirmed in part, reversed in part, and remanded for further proceedings.

DARDEN, J., concurs.

VAIDIK, J., concurs in part and dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

BLEDSOE’S, INC., and JOHN CRESS d/b/a)
WEST OTTER LAKES ESTATES,)

Appellants-Defendants,)

vs.)

No. 76A03-0806-CV-272

STEUBEN LAKES REGIONAL WASTE)
DISTRICT,)

Appellee-Plaintiff.)

VAIDIK, Judge, concurring in part, dissenting in part

I concur that Ordinance No. 2002-03 is not unconstitutionally vague for failing to define the terms “mobile home park” and “trailer park.” I also agree that Cress may be assessed his share of the “debt service costs” of building the sewage system despite the fact that he was not connected to it. I respectfully part ways with my colleagues on the lone issue of whether Cress is liable for paying his sewage usage fees during the time he refused to connect to the system. In my view, he is liable for these user fees.

In construing Ordinance No. 2002-03, we must look to the ordinance as a whole, construing it to give effect to the intention of the legislature as expressed in the ordinance, considering its objects and purposes. *Woods v. Brown County Plan Comm'n*, 446 N.E.2d 973, 976 (Ind. Ct. App. 1983). “An ordinance will not be construed so as to defeat its purpose if it is sufficiently definite to be understood with reasonable certainty.” *Van Vactor Farms, Inc. v. Marshall County Plan Comm'n*, 793 N.E.2d 1136, 1143 (Ind. Ct. App. 2003) (quotation omitted), *trans. denied*. Here, the preamble of the ordinance provides that “it is necessary to establish a schedule of rates and charges so as to produce sufficient revenue to pay expenses of the maintenance and operation, to provide funds for necessary replacements and improvements to the sewage works, and pay annual principal and interest requirements on debt issued to fund the proposed project[.]” Appellant’s App. p. 48. Further, the ordinance states that “[e]very person whose premises are served by said sewage works shall be charged for the services provided.” *Id.* at 52. In the same section of the ordinance, these charges are called user charges and “are levied to defray the cost of operation and maintenance (including replacement) of the sewage works.” *Id.* Undeniably, as accurately quoted by the majority, the ordinance, in another section, provides that “[f]or the use of and service rendered by the sewage works, rates and charges shall be collected from the owners of each and every lot, parcel of real estate, or building that *is connected* to the District’s sanitary system” *Id.* at 53.

Reading this ordinance in its entirety and considering the intention of the drafters as expressed therein, in my view, the ordinance authorizes the District to charge both “debt service costs” and user fees to those persons served by the sewage system. Indeed,

the overall purpose of this ordinance, and ones similar to it, is to provide a comprehensive municipal sewage system designed to eliminate waste within the entire municipality. The intent is not to provide a waste disposal system for the convenience of the individual citizens, but to protect the public health as a whole. *Raab v. Town of Schererville*, 766 N.E.2d 790, 794 (Ind. Ct. App. 2002), *trans. denied*. Further, the intent of the ordinance is to spread the costs of this community improvement among those served by it. As Cress' property is served by the system, he may be charged for both fees. His decision not to connect his properties to the sewage system does not relieve him from his responsibility to share in its cost.

The majority relies heavily on the *City of Hobart* decision in its opinion. But *City of Hobart* is distinguishable. First, the ordinance at issue here is notably different than the *City of Hobart* ordinance. In particular, as quoted above, this ordinance allows for every person whose premises are served by the sewage system to be charged for the services provided. The majority reads this provision, in my view, too restrictively by determining that it allows for charging only "debt service costs" and not user fees. Second, and just as importantly, the user in *City of Hobart* paid sewer fees for years before realizing that he was not connected to the system. In other words, the property owner in *City of Hobart* was not responsible for failing to connect to the system. Here, we have quite a different story. Cress was not connected to the sewer system because he refused to do so. To allow him to avoid the charges because of his own refusal to connect to the sewer system allows him to undermine the very purpose of the ordinance. Accordingly, I respectfully dissent on this issue.