

17-0120

FILED

2017 JAN 27 AM 10:40
IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

SWVA, INC.,

J.E. HOOD
CIRCUIT COURT
CABELL CO. WV

Petitioner,

v.

Civil Action No. 16-C807
Christopher D. Chiles, Judge

HUNTINGTON SANITARY BOARD and
CITY COUNCIL OF THE CITY OF HUNTINGTON,

Respondents.

**ORDER DENYING PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION
AND TEMPORARY RESTRAINING ORDER AND DISMISSAL OF COMPLAINT**

On the 10th day of January, 2017 came the Petitioner SWVA, INC. ("SWVA") by counsel Joseph M. Ward and the law firm of Frost Brown Todd, LLC for a hearing on the Petitioner's Motion for Preliminary Injunction and Temporary Restraining Order ("Motion") and Respondent Huntington Sanitary Board's ("HSB") Response in Opposition ("Response"). At that time, the Court also took up SWVA's Petition for Writ of Mandamus ("Petition"), the merits of which were folded into the Motion. HSB appeared by counsel Robert R. Rodecker and the law firm of Kay Casto & Chaney PLLC. The City Council of the City of Huntington ("Council") appeared by Scott Damron, City Attorney.

Petitioner filed its Complaint and Petition for Writ of Mandamus and Injunctive Relief and its Motion and Memorandum in Support of such Motion on December 27, 2016. SWVA's Motion sought to (i) compel compliance or enjoin noncompliance with the public notice provisions of *W.Va. Code* §24-2-11(l) with respect to a proposed ordinance pending before the Council for hearing and passage on December 27, 2016 ("Ordinance"); (ii) prohibit any further

consideration by the Respondents of the Ordinance; and (iii) annul any decision made by the Council in violation of *W.Va. Code* §24-2-11(l). Similarly, the Petition sought (i) a declaration that the projects to be funded by the Ordinance were “not in the ordinary course of business” for HSB and, therefore, HSB and the Council were required to comply with the public notice provisions of *W. Va. Code* § 24-2-11(l), and (ii) to mandate HSB and Council to comply with the public notice provisions of *W. Va. Code* § 24-2-11(l) and that Council not vote on the Ordinance unless and until the public notice requirements were complied with. HSB filed its Response and its Memorandum of Law in Support of such Response on January 5, 2017, asserting that the hearing and consideration of the Ordinance had been adopted on December 27, 2017 and arguing that much of the relief requested was moot and that the Petitioner was not entitled to the remaining forms of relief requested in that the public notice provisions cited by Petitioner do not apply because the capital improvements are in the ordinary course of business, the Petitioner had an adequate remedy at law, and the Petitioner had not exhausted its administrative remedies. The Court has considered the Motion and Response and all Memoranda of Law, including all documentary evidence attached thereto; the pleadings filed herein; the relevant legal authorities; and the arguments of counsel and finds it appropriate to **DENY** Petitioner’s Motion for Preliminary Injunction and Temporary Restraining Order and to **DISMISS** this matter for the reasons stated herein and on the basis that the capital improvements approved by the Council in its adoption of the Ordinance were in the ordinary course of business and as such proper notice was provided and the Petitioner has an adequate remedy at law that precludes relief in injunction and mandamus as prayed for by the Petitioner in its Complaint and Motion.

In support of its rulings, the Court specifically **FINDS** as follows:

FINDINGS OF FACT

1. SWVA is an industrial customer of the Board.
2. The Board is a sub-unit of the City of Huntington (“City”) authorized by *W.Va. Code* §16-13-3 to operate and maintain the City’s sanitary sewer collection and treatment system (“System”).
3. The Council, as governing body of the City, has the power and duty to establish rates and charges for customers of the System after a public hearing, at which all customers of the System and others shall have an opportunity to be heard. Subsection (h) sets forth the notice requirements for the adoption of a rate ordinance. *W.Va. Code* §16-13-16.
4. Prior to the December 27, 2016 hearing before the Council and the Council’s consideration of the Ordinance, the Board and Council followed the provisions of *W.Va. Code* §8-11-4 and §16-13-16 regarding notice that is required for the adoption of municipal sewer rate ordinances. Although not required to do so, the Board and Council forwarded a press release to the *Huntington Herald Dispatch* newspaper to give notice to the customers of the fact that a hearing on the Ordinance would be held at 7:30 P.M. on December 27, 2016 at which interested parties could appear and be heard.
5. On December 15 and December 22, 2016, the entire Ordinance was published.

Said Ordinance states that the purpose of the rate Ordinance was to:

... provide revenues sufficient for the Sanitary Board of the City of Huntington to pay the daily expenses associated with the operation of its sewer system, to provide working capital reserves as required by Chapter 24 of the West Virginia code, and to provide sufficient revenues to cover the costs associated with capital improvements and associated debt service. . . .

In addition to providing the public with the proposed rates, the Ordinance informed the public that:

... any person interested may appear before Council on the 27th day of December, 2016, at 7:30 p.m., which date is not less than 10 days subsequent to the date of the first publication of notice of this Ordinance, and present protests. At such hearing all objections and suggestions shall be heard and the Council shall take such action as it shall deem proper on the premises.

6. On December 16 and December 23, 2016, a second notice was published which provided notice of the proposed Ordinance, that a copy of the Ordinance was available at the Huntington City Clerk's office, and that a hearing on the proposed Ordinance would be held at 7:30 P.M. on December 27, 2016, at which all interested parties could appear and be heard.

7. The press release submitted to the newspaper contained information on the basis for the rate increase, the time and place of the hearing on the ordinance, and that interested members of the public could appear and be heard.

8. During its consideration of the Ordinance, the Council discussed the scope and nature of nine (9) capital improvements (the "Capital Improvements"), the cost of and timing for which was included in the rates proposed by the Ordinance, and whether such capital improvements were "in the ordinary course of business" as that term is used in *W.Va. Code* §24-2-11(l).

9. Before adopting the Ordinance on December 27, 2016, the Council was advised by legal counsel for HSB that the Capital Improvements considered by the Council were "in the ordinary course of business."

CONCLUSIONS OF LAW

10. *W.Va. Code* §24-2-11 was amended in 2015 and added subsection (l) which is applicable to the City. Subsection (l) establishes notice requirements for certain construction projects of large publicly owned water and sewer utilities which meet the requirements of the subsection. Such notice requirements are applicable only if a construction project is NOT “in the ordinary course of business”.

11. The Capital Improvements considered by Council are “in the ordinary course of business” and, therefore, the forms of notice provided for under *W.Va. Code* §24-2-11(l) were not required prior to passage of the Ordinance.

12. By adopting the Ordinance, the Council implicitly stated that the Capital Improvements considered by the Council were “in the ordinary course of business.”

13. By providing the statutory notice required by *W.Va. Code* §8-11-4 and §16-13-16, and forwarding the press release to the newspaper, the Board and Council provided public notice sufficient to satisfy the only notice requirements to which the Ordinance was subject.

14. In Syllabus Pt. 1 in the case of *Hechler v. Casey*, 175 W.Va. 434, 222 S.E.2d 799 (1985), our Supreme Court of Appeals stated:

The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the court will act. Syl. Pt. 1, *Daurelle v. Traders Federal Savings & Loan Association*, 143 W.Va. 674, 104 S.E.2d 320 (1958).” Syl. Pt. 1, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984).

The Court also stated:

Similarly, this Court held in Syl. Pt. 4, *Wheeling v. Morris Plan Bank & Trust Co.*, 155 W.Va. 245, 183 S.E.2d 692 (1971): “proceedings in equity for injunctions cannot be maintained

where there is an administrative remedy provided by statute which is adequate and will furnish proper remedy. Hechler v. Casey, Supra, at 440, 806.

15. The Petitioner has an adequate remedy at law under *W.Va. Code* §§24-2-1(b)(6) and (7) to contest the Ordinance. *W.Va. Code* § 24-2-1(b)(6) grants the Public Service Commission jurisdiction over large municipal utilities, such as HSB, with regard to the investigation and resolution of disputes involving their “rates, fees and charges,” and *W.Va. Code* § 24-2-1(b)(7) provides that customers of those large municipal utilities may bring complaints before the commission regarding those rates fees and charges.

16. Regarding Petitioner’s request for relief in mandamus, our Supreme Court of Appeals has stated in *State ex rel. Rist v. Underwood*, 206 W.Va. 258, 524 S.E.2d 179 (1999) at 262 and 183:

Traditionally, we have confirmed mandamus to “limited and truly exceptional circumstances.” *State ex rel. School Bldg. Auth. V. Marockie*, 198 W.Va. 424, 432, 481 S.E.2d 730, 738 (1996) (citations omitted). *Accord State ex rel. Charleston Bldg. Comm’n v. Dial*, 198 W.Va. 185, 191, 479 S.E.2d 685, 701 (1996). This Court applies a now-familiar three-part test to determine whether mandamus relief is appropriate:

A writ of mandamus will not issue unless three elements coexist- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. Pt. 3, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).


17. Because the Capital Improvements proposed by the Board are “in the ordinary course of business” and are not subject to the notice requirements of *W.Va. Code* §24-2-11(l), and the Petitioner has an adequate remedy at law under *W.Va. Code* §§24-2-1(b)(6) and (7), the relief sought by the Petitioner in its Complaint and Motion is not available.

WHEREFORE, this Court ORDERS that Petitioner's Motion for a Preliminary Injunction and Temporary Restraining Order is DENIED and this civil action is DISMISSED WITH PREJUDICE. The Petitioner's objections and exceptions are noted and preserved. The Court finally ORDERS that the Circuit Clerk send certified copies of this Order to all counsel at the following addresses: Robert R. Rodecker, Esq., Kay Casto & Chaney PLLC, P.O. Box 2031, Charleston, WV 25327; Joseph M. Ward, Esq., Frost Brown Todd, LLC, Laidley Tower, Suite 401, 500 Lee Street, Charleston, West Virginia 25301-3207; Scott Damron, Esq. City of Huntington, 800 Fifth Avenue, Huntington, West Virginia 25701.

ENTERED this 27th day of January, 2017.


HONORABLE CHRISTOPHER D. CHILES


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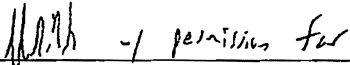
STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON JAN 27 2017


GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS JAN 27 2017


JEFFREY E. HOOD, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

Approved By:


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