

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE

APPEAL OF:

THE CITY OF WILMINGTON

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Appeal No. 92-26

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on March 9, 1993. The Board members present were Thomas J. Kealy, Chairman, Joan Donoho, Clifton H. Hubbard, Jr. and Ray K. Woodward. Steven C. Blackmore, Deputy Attorney General, advised the Board. Appellant The City of Wilmington ("Wilmington") was represented by First Assistant City Solicitor Pamela J. Scott. The Secretary of the Department of Natural Resources and Environmental Control ("Secretary") was represented by Deputy Attorney General David L. Ormond. The Board affirms the decision of the Secretary.

SUMMARY OF THE EVIDENCE

Wilmington's appeal involved Water Transfer Permit No. T-92-0001 ("Permit") and a proposed interconnection between Wilmington and Wilmington Suburban Water Corporation ("Wilmington Suburban") and transfer of up to ten million gallons of water per day. The Permit imposed certain conditions on Wilmington, including a requirement that Wilmington obtain a Certificate of Public Convenience and Necessity ("CPCN") and water allocation permits. The Permit also stated

that violations of Permit conditions "are subject to penalties provided in 7 Del. C., ch. 60." Permit, page 3, condition 10. In general, Wilmington contends that it is not subject to the CPCN requirements because its water transfer project falls within a specific statutory exemption and, in any event, sovereign water utilities are not governed by the CPCN requirements. The Secretary argued that the statute requiring CPCNs does not exclude municipalities generally and it does not exclude this project specifically.

This appeal focused on legal argument and statutory interpretation. However, Wilmington presented the testimony of Michael D. Sprague, Wilmington's Commissioner of Public Works. Mr. Sprague testified that Wilmington has been providing water service to City residents since the early 1800s. Service has been extended to certain nearby individuals outside the City limits in the last twenty or thirty years. Wilmington's water source is the Brandywine River. The interconnection agreement between Wilmington and Wilmington Suburban allows these two entities to share water resources. Wilmington Suburban will be allowed to purchase up to ten million gallons per day. The capital outlays necessary to complete the interconnection with Wilmington Suburban are approximately six or seven million dollars. The transfer point for this interconnection would be located within Wilmington's existing service area. Wilmington also has a cooperative relationship with other water utilities; it has approximately ten water interconnection agreements. Wilmington is concerned that, if it subjects itself to

regulation by the Secretary, it might be ordered to provide water service to other individuals at a high capital cost.

FINDINGS OF FACT

1. The Permit authorizes Wilmington to transfer up to ten million gallons of water per day to Wilmington Suburban. Wilmington will spend millions of dollars to complete the capital improvements necessary to transfer this water. The construction might take two or three years. Clearly, this proposed water transfer is a major project.

2. The water transfer point will be located near Route 202 and Augustine Cut-Off, which is within Wilmington's existing service territory. See Wilmington Exhibit 1. The water may be transferred to Wilmington Suburban's 38th and Spruce Street storage reservoir or an alternative location. See Permit, p. 1. Wilmington Suburban will then transfer this water to service an area outside of Wilmington's existing service area.

3. Wilmington presently provides water service to approximately 37,000 individuals, including service to some areas outside of City limits. See Wilmington Exhibit 1. Wilmington's charter gives the city authority to provide water service to its citizens and to residents within ten miles of city limits.

4. Interconnections and cooperation agreements among water utilities guarantee greater access to available supplies of water and generally serve the best interests of State.

5. It is uncertain whether Wilmington Suburban will use this water to expand its customer base or serve customers within its present service area. However, this additional water supply would allow Wilmington Suburban to service additional customers and/or territory.

6. Wilmington no longer challenges the requirement that it obtain water allocation and water transfer permits, only the requirement that it obtain a CPCN.

#### CONCLUSIONS OF LAW

Wilmington contends that a CPCN is not required here since the statute requiring CPCNs, 7 Del. C. sec. 6075 et seq., exempts this water transfer project. Section 6076 states:

No water utility shall begin the business of a water utility nor shall any water utility begin any extension of its business or operations without having first obtained from the Secretary a certificate that the present or future public convenience and necessity requires or will require the operation of such business or extension. This section shall not be construed to require any water utility to secure such a certificate for any extension within the perimeter of any territory already served by it.

The statutory language does not exclude municipal water utilities, since "water utility" is expansively defined as "any person or entity operating within this State any water service, system, plant or equipment for public use." 7 Del. C. sec. 6002(27). Neither section 6002(27) nor section 6076 provides an exemption for municipal water utilities. The General Assembly knows how to draft legislation excluding municipal utilities, see 22 Del. C. sec. 1309; 26 Del. C. sec. 202(a).

Language in statutes is interpreted in accordance with its common and ordinary meaning. 1 Del. C. sec. 303. Thus, an exemption for municipal utilities should not be implied in section 6076 or in the definition of water utilities here since it is not contained in the statutory language.

Under section 6076, the CPCN requirement does not apply to "any extension" of Wilmington's "business or operations" within the area "already served" by Wilmington. The common and ordinary meaning of "extension" includes additions, expansions or enlargements. The American Heritage Dictionary (New College Ed. 1981). Thus, construction of an interconnection costing millions of dollars to provide up to ten million gallons of water per day to a nearby water utility would constitute an extension under the ordinary meaning of section 6076. While the water which Wilmington prepares to transfer will originate within Wilmington's existing area, along with the transfer point, the water will then be transported outside of the Wilmington service area. Since the purpose of the interconnection is to service Wilmington Suburban territory or customers outside of Wilmington's existing territory, this project must be considered an extension outside the territory already served. Wilmington's focus on the water origination and transfer points ignores the big picture--the purpose of this project and Wilmington's role. Wilmington cannot ignore its investment and participation by saying this is another utility's expansion project. Wilmington's argument that this is an extension of Wilmington Suburban's territory, and Wilmington

Suburban should be the only utility governed by the CPCN requirement is contrary to the statutory language and the ordinary meaning of "extension." While Wilmington's charter authorizes services up to ten miles beyond City limits, the territory Wilmington already serves is not that extensive and, in any event, Wilmington Suburban's territory, where this water may be sent, extends beyond this ten mile limit. See Wilmington Exhibit 2.

Wilmington next argues that the purpose behind the CPCN statute was to limit the CPCN requirement to areas not presently served by water utilities. See 7 Del. C. sec. 6075. The focus of the CPCN statute is upon areas not presently served by water utilities but the statutory language and use of the term "extension" indicates that the CPCN statute applies to projects such as the extension here. The general language explaining the "purpose" behind this statute should not override the specific language in the definitions section. The ordinary meaning of the clear and unambiguous language must be followed by this Board. See Coastal Barge Corp. v. Coastal Zone Industrial Control Board, Del. Supr., 492 A.2d 1242, 1246 (1985). The best interests of the State are served by giving the Secretary general jurisdiction over municipal and other water utilities through the CPCN process; the statutory language shows that this is what the General Assembly intended.

Wilmington contends that its sovereign water service operations should not be subject to regulation by the State since the CPCN statute was not intended to preempt the field of

municipal water utility regulation. Wilmington also argues that its home rule charter authorizes water service, which Wilmington provides, and its charter has the effect of State law. Home rule municipalities are entitled to assume powers which the General Assembly is authorized to grant, so long as such powers are not specifically denied by statute. See 22 Del. C. sec. 802. Therefore, Wilmington argues that it has the "complete powers of legislation and administration in relation to its municipal functions which are not denied by State statute." Wilmington Memorandum of Law, page 3, citing Gage v. City of Wilmington, Del. Supr., 293 A.2d 555, 557 (1972). However, the cases which Wilmington cites, including Gage, State v. Putnam, Del. Super., 552 A.2d 1247 (1988) and Steinberg v. Frawley, 633 F.Supp. 548 (D.Del. 1986), do not dictate the result Wilmington seeks.

The State has the authority to enact general regulatory laws in areas of general concern under its police power. Home rule charters, enacted by sovereign municipalities, do not prohibit the State from requiring such entities to comply with State laws of general application. See 22 Del. C. sec. 835(a)(2); City of Wilmington v. Lord, Del. Super., 340 A.2d 182, 183 (1975); see also 56 Am. Jur.2d Municipal Corps., sec. 128. In Lord the Court stated:

The home rule charter accepts the grant of municipal sovereignty and like the state constitution is read as a limitation on the governmental unit's powers, not as a grant of specific powers. Thus, as a home rule city, Wilmington is to be considered the sovereign for the purposes of municipal functions. The General Assembly's

authority to deny Wilmington powers through general statutes is not inconsistent with Wilmington's status as a sovereign any more than the federal legislative power to restrain action by Delaware is inconsistent with the State's status as a sovereign.

Id. at 183-84 (citations omitted).

Wilmington's adoption of home rule status "does not remove it from the control of the state." Steinberg, 633 F.Supp. at 551. The CPCN statute is a general limitation on Wilmington's powers. It is not a State attempt to preempt or totally occupy the field of municipal water utility regulation, but rather a restriction on the powers of water utilities to expand. The General Assembly has denied or retracted a portion of the broad powers given to Wilmington to operate its water utility. The State is entitled to do this. See, e.g., Gage, 293 A.2d at 557; Putnam, 552 A.2d at 1249. Wilmington's water utility may continue to operate under its guidelines, subject to the CPCN laws. A state law which attempted to regulate a purely local municipal issue might be improper, see 56 Am. Jur.2d Municipal Corps, sec. 128, however the CPCN statute is a law of general application and proper legislation.

The language of the CPCN statute is clear; we do not need to discuss implied preemption and related arguments. Further, Wilmington concedes that it is governed by State laws of general application including the public health and fire prevention laws in Title 16. Conflicts and ambiguities between statutes and ordinances should be interpreted in a harmonious manner, if possible. See Getty Refining & Marketing Co. v. Leavy, Del. Super., 438 A.2d 1236, 1238 (1981); 1A Sutherland



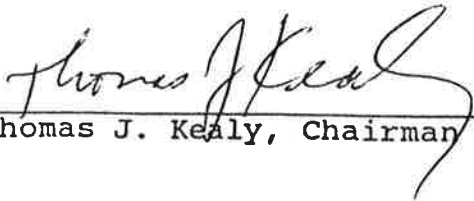
Statutory Construction, sec. 30.05 (4th Ed. 1985). Here, Wilmington continues to have the full authority of an independent sovereign to operate its municipal water system, however, the General Assembly has determined that Wilmington's expansion shall be subject to general State regulation through the CPCN process. Wilmington relinquished its appeal under the two water transfer sections, but the above analysis would apply to these issues as well.

Wilmington does not wish to be subject to the CPCN requirements because it is concerned that the Secretary would then have the power to force Wilmington at some future time to extend service to an area it does not wish to serve. This concern arises from 7 Del. C. sec. 6078 which states that the "Secretary may, after hearing, upon notice, by order in writing, require every water utility to establish, construct, maintain and operate any reasonable extension of its facilities where such extension is consistent with the Delaware Comprehensive Water and Wastewater Facilities Plan." If the Secretary were to order extension, Wilmington would have the right to an appeal to test the proper interpretation of this statute, but Wilmington's concerns appear valid. However, the General Assembly provides the Secretary with his powers and authority and any request from Wilmington for an exemption or amendment to the Secretary's powers should be addressed to the General Assembly.

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CONCLUSION

For the foregoing reasons, the decision of the Secretary is unanimously affirmed.

  
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Thomas J. Kealy, Chairman

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Joan Donoho

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Clifton H. Hubbard, Jr.

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Ray K. Woodward

DATE:

CONCLUSION

For the foregoing reasons, the decision of the Secretary is unanimously affirmed.

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Thomas J. Kealy, Chairman

*Joan Donoho*  
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Clifton H. Hubbard, Jr.

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Ray K. Woodward

DATE: May 25, 1993

CONCLUSION

For the foregoing reasons, the decision of the Secretary is unanimously affirmed.

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Thomas J. Kealy, Chairman

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Joan Donoho

*Clifton H. Hubbard Jr. 3/9/93*  
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Clifton H. Hubbard, Jr.

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Ray K. Woodward

DATE: May 9, 1993

CONCLUSION

For the foregoing reasons, the decision of the Secretary is unanimously affirmed.

Thomas J. Kealy, Chairman

Joan Donoho

Clifton H. Hubbard, Jr.

/s/ Ray K. Woodward  
Ray K. Woodward

DATE: May \_\_\_\_\_, 1993

