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December 7, 1983

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In the Matter of
Philadelphia Electric Company
(Limerick Generating Station, Units 1 and 2)
Docket Nos. 50-352 and 50-353

Dear Board Members:

Transmitted herewith for the information of the Board is a copy of the "Opinion and Order of the Court," dated December 5, 1983 by Judge Isaac S. Garb in Sullivan v. Bucks, et al.

Sincerely,

Troy B. Conner, Jr.

Troy B. Conner, Jr.
Counsel for the Applicant

TBC:mwm

Attachment

cc: Service List
without attachment

D503

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Andrew G. Gay, Esquire of Gay & Chacker, for plaintiff
Glenn S. Gitomer of Blank, Rome, Comisky & McCauley, Esqs. for Defts. Bucks County, Elaine P. Zettick, Andrew J. Warren and Carl L. Fonash
James M. McNamara, Assistant City Solicitor
D. Donald Jamieson, Esq. of Mesirov, Gelman, Jaffe, Cramer & Jamieson for deft. Neshaminy Water Resources Authority
Jeremiah J. Cardamone, Esq. for North Wales Water Authority & North Penn Water Authority
Robert W. Valimont for Phila. Electric

COURT OF COMMON PLEAS OF BUCKS COUNTY - CIVIL

DANIEL J. SULLIVAN	:	No. 83-8358-05-5
	:	
V.	:	
	:	
COUNTY OF BUCKS and ELAINE P. ZETTICK, ANDREW L. WARREN and CARL L. FONASH -Individually and as Members of the Board of Commissioners of the County of Bucks and NESHAMINY WATER RESOURCES AUTHORITY	:	

OPINION AND ORDER OF THE COURT

On November 18, 1983 the Board of Commissioners of the County of Bucks adopted Ordinance 59 whereby the county sought to take over the project of the Neshaminy Water Resources Authority (NWRA) having to do with the water diversion project at Point Pleasant under and pursuant to the Municipality Authorities Act of 1945 and specifically §18 (A) of that Act. See the Act of July 10, 1957, P.L. 683, §3, 53 P.S. 321 (A). By virtue of that ordinance the county likewise purported to assume all of the obligations incurred by the Authority with respect to that project. Virtually immediately upon the enactment of that ordinance the plaintiff herein, as a taxpayer and as in the nature of a class action on behalf of all taxpayers of Bucks County, instituted this action in equity to enjoin the county from implementing that ordinance. The County of Bucks and the three County Commissioners

were named as defendants as was the Authority. Contemporaneous with the filing of the action in equity an application was made for a temporary restraining order. A hearing was held on November 29, 1983. At the beginning of the hearing Philadelphia Electric Company (PECO) as well as the North Penn Water Company and the North Wales Water Company petitioned for and were permitted to intervene on the side of the plaintiff. PECO likewise filed its own complaint in equity and likewise sought a temporary restraining order.

At the hearing evidence was presented on behalf of the plaintiff as well as the Authority, PECO and the two water companies. No evidence was presented by the County although the depositions of Commissioners Carl Fonash and Andrew Warren were made part of the record on behalf of the plaintiff. Essentially it was the position of the plaintiff that on the present state of the record the ordinance was of no effect because the County is without power to assume the project and the obligations of the Authority, that what the County purports to do would be an infringement of contractural rights under prohibitions of the United States and Pennsylvania Constitution against impairment of contract, and further that irreparable harm would result if the County were to take over the project and the ensuing obligations.

A preliminary injunction will issue only where there is an urgent necessity to avoid injury which cannot be compensated for by damages and should never be awarded except when the rights

of the plaintiff are clear. It should not issue unless greater injury will be done by refusing it than by granting it. Herman v. Dixon, 393 Pa. 33 (1958).

The essential prerequisites for the issuance of a preliminary injunction are; (1) that it is necessary to prevent immediate and irreparable harm which could not be compensated by damages; (2) that greater injury would result by refusing than by granting it; (3) that it properly restores the parties to their status as they existed immediately prior to the alleged wrongful conduct. Of great significance is the determination that the activities sought to be restrained are actionable and that the injunction sought is reasonably suited to abate such activity. Unless the plaintiff's right is clear and the wrong manifest, a preliminary injunction will not generally be awarded. Albee Home, Inc. v. Caddie Homes, Inc., 417 Pa. 177 (1965).

A preliminary injunction should only be granted where injury is immiñent and, if committed, irreparable, and will not generally be awarded where the complainant's right is not clear or where the wrong is not manifest. Keystone Guild, Inc. v. Passas, 399 Pa. 46 (1960); Hilltown Township v. Mager, 6 Pa. Commonwealth Ct. 90 (1972); Zebra v. School District of the City of Pittsburgh, 4 Pa. Commonwealth Ct. 642 (1972) and Alabama Binder and Chemical Corp. v. Pennsylvania Industrial Chemical Corp., 410 Pa. 214 (1963). The plaintiff must establish that it is his legal right, not doubtful or uncertain, to the specific relief

sought. Otherwise the preliminary injunction should not issue. Vulcanized Rubber and Plastic Company v. Scheckter, 400 Pa. 405 (1960). In determining the propriety of a temporary restraining order the court does not make a searching inquiry into the facts, and particularly refrains from making any evaluation of the merits or the facts of the underlying dispute. Perloff Brothers, Inc. v. Cardonick, 406 Pa. 137 (1962).

We do not believe that the plaintiff has established the clear legal right which constitutes a prerequisite to the issuance of a temporary restraining order.

We are not convinced on this brief record that it has been demonstrated that the County lacks the power under the relevant provisions of the Municipality Authorities Act to take over the project and the Authorities' obligations under §18 (A) of the Act. The plaintiff relies in this regard upon County of Mifflin v. Mifflin County Airport Authority, 437 A.2d 781 (Commonwealth Ct. 1981). In that case the Commonwealth Court held that the lower court did not err in dismissing the action in mandamus brought by the County to implement the enactment of its ordinance under this section. The Court held that, mandamus representing an extraordinary remedy which will not be granted in doubtful cases and will issue only where there is clear and specific legal right in the plaintiff and a corresponding duty in defendant, the plaintiff's right was not sufficiently clear. That case was distinguished by an opinion of this court in Lower Southampton Township Board of Supervisors v. Lower Southampton Township Municipal Authority,

39 Bucks Co.L. Rep. 74 (1982.

On this record there are several distinguishing features. To begin with, in Mifflin, it was noted that there had been no compliance with the Local Government Unit Debt Act, the Act of April 28, 1978, P.L. 124, No. 52, §1, 53 P.S. 6780-1 et seq, preliminary to the assumption by the County of the debt obligations of the Airport Authority. In this case and on this record, it is established that the County complied with the provisions of this Act, or rather its predecessor, in 1973 with respect to the bond indentures of the Authority and that is evidenced by a certificate of compliance issued by the Department of Consumer Affairs.

The court in Mifflin was likewise concerned with and to some extent applied §14, 53 P.S. 317, of the Municipality Authorities Act and read that section together with §18 (A). The distinction between these two sections is apparent on their face and was graphically described in the Lower Southampton Township case. Essentially §18 (A) deals with the circumstance where the creating governing body determines to take over the project from the Authority it created, thereby, logically, assuming all of the debts and obligations of the Authority. Section 14 deals with a situation where the Municipal Authority determines to divest itself of some or all of its projects by conveying them to the governing body. Obviously, the Legislature recognized that a Municipal Authority should not be permitted to foist its debts and obligations upon the governing body without its consent. Therefore, before a Municipal Authority may divest itself of its projects, it must first demonstrate that

it has paid and discharged all bonds issued by it under §14 but no such requirement is set forth in §18 (A). In fact, §18 (A) specifically provides that the governing body in implementing that section shall assume "all of the obligations incurred by the Authorities with respect to that project." We can understand why the Commonwealth Court in Mifflin may have been concerned about this particular facet of the case where there was no demonstrated compliance with the Local Government Unit Debt Act. In addition, the bond obligations in Mifflin specifically provided that those bond obligations shall not be assigned or transferred to any other party. No such prohibition is found in the bond indentures in the case before us. Therefore, plaintiff has failed to demonstrate a clear right to the relief he seeks based upon his argument of unlawfulness of the ordinance.

On this record we are unable to find sufficient evidence to establish the plaintiff's clear right to the injunction it seeks at this stage of the proceedings based upon the impairment of contract argument. Clearly both the United States and Pennsylvania State Constitutions prohibit any legislative action by the State or its units of local government which impair the integrity of existing contracts. See United States Trust Company of New York v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L. Ed. 2d 92 (1977); Pennsylvania Labor Relation Board v. Zelem, 459 Pa. 399 (1974) and Helicon Corp. v. Borough of Brownsville, 449 A.2d 118 (Pa. Commonwealth Ct. 1982). However, the only thing that has happened thus far in this case is the adoption of the ordinance in question. No actions have been taken as yet by the County to implement that

rights if the County takes over the project, assumes all debts and other obligations, and then proceeds to fulfill the contract obligations which it would then have assumed. The thrust of the plaintiff's contention in this regard is, essentially, an anticipatory breach by the County based upon certain public statements made by the County Commissioners, which are not of record, and the depositions of both Commissioners Fonash and Warren. Commissioner Warren in his deposition clearly and unequivocally testified that it is his intention once the ordinance is implemented to stop the project and breach various of the contracts entered into by the Authority (and in some cases the County as well). However, Commissioner Fonash was somewhat less forthcoming. Essentially, it was his testimony that he desired that the project be stopped but that his intention at the time of the deposition was merely to declare a moritorium of 60 days on the construction itself, pursuant to the construction contract, and then attempt to negotiate some alternative with the contracting parties. It is far from clear from his deposition that it is his intention, under all circumstances, to flat out breach the various contracts with PECO and Montgomery County. Although it may be argued that the implementation of this ordinance may work, in some way, a forfeiture on the outstanding bonds, that matter is far from clear in view of Fonash's testimony that it would be his intentions to stand behind and pay off the bonded indebtedness as required by the indentures. Furthermore, we are not satisfied,

on this record, that the implementation of the ordinance, standing alone, would somehow impair the security of the bond holders. Compare United States Trust Company of New York v. New Jersey, supra. Essentially, the difficulty with plaintiff's position at this time, is that the only thing that has happened thus far has been the enactment of an ordinance, solely a legislative action by the Board of Commissioners.[1]

It is true that at the hearing there was some evidence of the possible damages which could occur to the County if the contracts with PECO and Montgomery County were breached. There was likewise testimony regarding the damages due to the contractor himself. These latter damages, although running into several million dollars are not of sufficient magnitude as to constitute irreparable injury. However, there was testimony from PECO to the effect that a breach of its contract and the failure to deliver water to its Limerick plant when the first reactor is anticipated to be ready for operation, sometime in the late summer of 1984, would result in damages of approximately $56,000,000.00 per month until such water is delivered and the reactor put into operation. Quite obviously, if the ultimate were to occur and it were to take PECO anywhere from two to five years, as testified, to find an alternative source of cooling water for its reactor, the damages are not only probably irreparable, (to the taxpayers of Bucks County as well as PECO) but in fact staggering. However, until a sufficient and adequate record can be made to establish clearly and unequivocally that this is what may reasonably be anticipated to occur, we do not believe that a temporary restraining

order is appropriate absent a clear showing of right.

We believe that the decision we reached today is not only consistent with but dictated by the constitutional principle of separation of powers and the judicial principle of judicial restraint. It is presumed that municipal officers act properly for the public good. Robinson v. Philadelphia, 400 Pa. 80 (1960) and Hyam v. Upper Montgomery Joint Authority, 399 Pa. 446 (1960). Courts will not sit in review of municipal actions involving discretion, in the absence of proof of fraud, collusion, bad faith or arbitrary action equating an abuse of discretion. Blumenschein v. Pittsburgh Housing Authority, 377 Pa. 566 (1954). In the absence of proof of fraud, collusion, bad faith or abuse of power, courts do not inquire into the wisdom of municipal actions and judicial discretion should not be substituted for administrative discretion. Goodman Appeal, 425 Pa. 23 (1967) and Parker v. Philadelphia, 391 Pa. 242 (1958). See also Webber v. Philadelphia, 437 Pa. 179 (1970).

No court has the power to strike down a statute except for constitutional reasons, even where it believes the statute unwise or productive of socially undesirable results. Estate of Armstrong v. Pennsylvania Board of Probation, 405 A.2d 1099 (Pa. Commonwealth Ct. 1979). The judiciary should not intrude into the legislative area of government unless it is demonstrated that the legislative body, whether it be at the State level or municipal, has acted in a manner violative of the Constitution, Acts of the General Assembly or the organic law of the

municipality or in a manner wherein the legislative body lacks the power or authority to act. The wisdom of the legislative act is not within the court's judgment. Mastrangelo v. Buckley 433 Pa. 352 (1969). It is not sufficient that opponents disagree with the wisdom of the legislative body's action. A court of equity will not substitute its determination of what may be wise for the decision of the appropriate governmental body, absent a showing of bad faith, or abuse of power. Parker v. Philadelphia, supra. The question of the wisdom of the acts of a legislative body are, ordinarily, not for the court, there being a presumption that the legislative officials act lawfully in the exercise of their discretion. We recognize that it is the duty of the court to inquire into that exercise, and if it is found that the discretion of the other branch of government has been abused, we may interfere and relieve against oppressive or arbitrary action. Breinig v. Allegheny County, 332 Pa. 474 (1938). However, it is the duty of this court to execute the legislative will in the manner prescribed in statutes so long as no constitutional provision is violated, regardless of the hardship of a particular case or whether our opinion as to what the law ought to be coincides with that of the Legislature. Chester School District's Audit, 301 Pa. 203 (1930).

The means chosen by the Legislature must be reasonably designed to achieve permissible ends. However, the role of the judiciary in scrutinizing the particular approach selected by the legislative body is a limited one. We do not, at the

invitation of a disgruntled taxpayer or taxpayers, reassess the wisdom and expediency of alternative methods of solving public problems. It is the province of the Legislature and not the judiciary to determine the means necessary to confront and solve public problems. Our inquiry is limited to a determination of whether the means selected are so demonstrably irrelevant to the policy of the Legislature as to be arbitrary and irrational. Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1 (1975). As was stated in Leahey v. Farrell, 362 Pa. 52 (1949):

> "Under the system of division of governmental powers it frequently happens that the functions of one branch may overlap another. But the successful and efficient administration of government assumes that each branch will cooperate with the others. As was said by the late Chief Justice Moschzisker (when a Judge in Common Pleas No. 3 of Philadelphia) reported in Commonwealth v. Mathues, 210 Pa. 372, 406, 59 A. 961: ' . . . the presumption always is that public officers will perform a public trust, not that they will default therein or abuse the trust, and we prefer to believe that the legislature have performed, and will continue to perform, their trust, rather than to stand in any fear of a wrong being attempted at some time in the future by one branch of the government against another, even if the power to commit such a wrong be admitted to exist, which we thoroughly believe is not so.'" (Italics in original)

Bearing these principles in mind, we believe that the evidence presented at this hearing was insufficient to justify the entry of the temporary restraining order because that would constitute a direct intrusion by this court into the

legislative and executive functions of the Board of County Commissioners. We emphasize that our action today merely denies the applications for a temporary restraining order. We have not reached, nor could we, the ultimate merits of the controversy engendered by these complaints in equity. Thus far the Board of County Commissioners has merely enacted an ordinance which, on the surface, it has the right to do. Thus far no further actions have been taken. Although they may be anticipated and their results may be ominous, we are not in a position at this time to make those determinations. We do not, at this time, know whether the Board of County Commissioners will in fact breach the various contracts involved in these proceedings. Only one of three Commissioners has unequivocally stated his intention to do so. The second has equivocated, the third incumbent has not been heard from and her term of office will end on the first Monday of January, 1984. The person elected to replace that Commissioner has likewise not been heard from. Therefore, at this time, to attempt to assume what the actions of the Board of County Commissioners will be is purely speculation, a basis upon which we do not believe we may take the serious step of intruding ourselves into the legislative function.

The foregoing should not be construed in any way as a determination that upon an appropriate record the injuctive relief sought will not finally be granted. We do not decide whether or not, ultimately, Mifflin would be a basis upon which

to find that the County's actions in attempting to take over the project are unlawful. We are unable to determine at this time that the actions to be taken by the County in the future, whatever they may be, will have the effect of impairing various of the contract rights before us. Without knowing those matters, we obviously are unable to determine with sufficient clarity, that there will be irreparable harm.

For the foregoing reasons we deny the application for a temporary restraining order.

ORDER

AND NOW, to wit, this 5th day of December 1983, it is hereby ordered that the applications for temporary restraining orders are denied.

By the Court,

P.J.