Sewer System Repairs/Exaction: Arkansas Supreme Court Addresses City of Blytheville Fee

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The Arkansas Supreme Court in a February 6th opinion addressed whether a $5.00 fee assessed by the City of Blytheville, Arkansas ("Blytheville") constituted an illegal exaction in violation of the Arkansas Constitution. See Lanina Watson, et al. v. City of Blytheville, Arkansas and its Sewer Department, 2020 Ark. 51.

The $5 fee was utilized for Blytheville's repairs and upgrades to its sewer system.

The sewer repair and upgrades were necessitated by Blytheville's entering into a Consent Administrative Order ("CAO") with the Arkansas Department of Environmental Quality ("ADEQ") on August 6, 2008. ADEQ had identified various Clean Water Act National Pollution Discharge Elimination System ("NPDES") permit violations at Blytheville's three wastewater treatment facilities. The required repairs and upgrades were estimated to cost approximately $2.5 million.

Blytheville enacted Ordinance 1701 on January 19, 2010, to obtain the funds necessary to comply with the CAO. The ordinance provided that the $5 charge would be levied each month per sewer user for a period not to exceed five years. Further, it provided that the fee would be an additional charge on each monthly statement for water and other services.

Because of concerns that the $5 fee would not be enough to provide $2.5 million, negotiations with ADEQ reduced the repair requirements to a cost of $1.5 million. Blytheville determined that the goals of the fee were met in February 2014. Consequently, it repealed the ordinance. The city was stated to have exceeded its goal by $7,971 (raising a total of $1,507,971.

Plaintiff Watson filed a class-action complaint against Blytheville alleging that the $5 monthly fee constituted an illegal exaction in violation of Article 16, Section 13 of the Arkansas Constitution. She further alleged in part:

. . . that the revenue shortfall in Ordinance 1701 "was due to the City of Blytheville using its general fund revenue to maintain and upkeep a city owned golf course, making donations to civic organizations, and mismanaging city funds, all while neglecting to upgrade, maintain, and service the city-wide sewer system" . . . the ordinance was passed for the sole purpose of increasing general revenue, that the fee was being used to maintain traditional government functions, and that it did not bear a "rational relationship to the costs and expenses the sewer department actually incurs" or to customer usage.

Watson characterized the fee as a tax. In addition, she argued alternatively that if the Circuit Court found that the $5 fee was not an illegal exaction that any amount collected in excess of $1.5 million should have been refunded.

Blytheville moved for summary judgment and in support included an affidavit and expert opinion of an individual. The affidavit attested that:

[t]he $5 fee established by City of Blytheville Ordinance 1701 is referred to as the "Milestone Study." It was separately accounted for in all of the accounting documents for the City of Blytheville Sewer Department. Two items were included in the accounting for the Sewer Department related to the Milestone Study. Item number 399 in the monthly budget was labeled "Revenue Milestone Study," and item number 695 was labeled "Expenditures Milestone Study." The City of Blytheville also maintains audited reports detailing all of its financial expenditures for each prior fiscal year.

Blytheville's Mayor stated that the funds were designated for improvements to the sewer system required by the CAO and were only used for such improvements.

Watson filed a countermotion for partial summary judgment attaching portions of depositions from City board members, the Mayor, and head of the Sewer Department.

The Circuit Court conducted a hearing and determined that the $5 fee was not a tax and granted summary judgment to Blytheville.

The Court on appeal stated that to bring an illegal-exaction claim based on an "illegal tax" the exaction must be a tax and not a fee. It further noted that a city can assess a fee for providing a service without obtaining public approval but a tax could not be levied without taxpayer approval. Also, the Court noted it is not bound by designations such as "fee" or "tax."

As a result, the Court looked "to the true nature of the exaction rather than its name to make that determination." The fee, in order not to be denominated a tax, must be:

- Fair and reasonable
- Bear a reasonable relationship to the benefits conferred on those receiving the services

Two previous decisions were cited by the Court:

- *Harris v. City of Little Rock* - fee used to repay revenue bonds for park and recreational improvements was not a tax since only those who directly benefited were required to pay the fee (and were only used for the improvement of the parks).
- *Morningstar,* 2011 Ark. 350 (Hot Springs) - stormwater utility fund to meet the mandates resulting from an NPDES permit and imposing a monthly fee on corporate and residential utility accounts deemed a fee because funds were only used for the purpose for which it was created.

The Court held that the Blytheville fee was not an illegal exaction because only those persons who directly benefited from the sewer services were required to pay. The funds collected were accounted for separately and used only for their designated purpose.

Further, the fee was considered "fair and equitable" because it conferred a benefit on ratepayers by enabling a city to fund its state-mandated obligations (i.e., the CAO) and provided it a properly functioning sewer system.

A copy of the opinion can be downloaded here.