

STATE OF MICHIGAN
COURT OF APPEALS

SOUTH LYON WOODS ASSOCIATES, L.L.C.,
Plaintiff-Appellant/Cross-Appellee,

UNPUBLISHED
October 18, 2012

v

CITY OF SOUTH LYON,

No. 305159
Oakland Circuit Court
LC No. 2010-112172-CK

Defendant-Appellee/Cross-
Appellant.

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

In this dispute regarding the constitutionality of a local ordinance, plaintiff appeals by right the trial court's amended order granting summary disposition in favor of defendant. On cross-appeal, defendant contests the portion of the same order that required defendant to reimburse plaintiff for late fees assessed by defendant. We affirm both portions of the trial court's order.

Plaintiff challenges the constitutionality of the local ordinance that governs billing adjustments on water bills. The ordinance reads as follows:

If a meter has been tested at the request of a consumer and shall have been determined to register "fast" the city shall credit the consumer with a sum equal to the percent "fast" multiplied by the amount of all bills incurred by said consumer, within the three months prior to the test, and if a meter so tested is determined to register "slow," the department may collect from the consumer a sum equal to the percent "slow" multiplied by the amount of all the bills incurred by the consumer for the prior three months. When the department on its own initiative makes a test of a water meter, it shall be done without cost to the consumer, other than his paying the amount due the city for water used by him as above provided if the meter is found to be "slow."¹ [South Lyon Ordinance, § 94-60.]

¹ According to the ordinance, the three-month limit on credits for overcharges applies only when a consumer has requested a meter test. The record in this case does not indicate when, if ever,

The trial court concluded that the ordinance is constitutional, because it is rationally related to the legitimate objective of promoting the efficient and orderly administration of water service. We review the trial court's decision on the constitutional issue de novo. *Twp of Yankee Springs v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004). Similarly, "[t]his Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint and will be granted if, after reviewing all of the pleadings, documents, depositions or other evidence submitted in the light most favorable to the nonmoving party, the evidence "fails to establish a genuine issue regarding any material fact, [and] the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 120.

Plaintiff first asserts that the ordinance violates the constitution's substantive due process protections. Our review of this assertion begins with the presumption that the ordinance is valid. *People v Rapp*, 492 Mich 67, ___; ___ NW2d ___; (July 27, 2012, No. 143343, slip op p 4). Plaintiff has the burden of establishing invalidity. *Id.* To meet this burden, plaintiff must demonstrate that the ordinance allows an arbitrary exercise of government power. *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998). Specifically, plaintiff must show that the ordinance has no rational relationship to a legitimate governmental interest. *Conlin v Scio Twp*, 262 Mich App 379, 389-390; 686 NW2d 16 (2004). As our Supreme Court explained in *Muskegon Area Rental Ass'n v City of Muskegon*, 465 Mich 456, 464; 636 NW2d 751 (2001) (citations omitted):

"Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. Thus, to have the legislation stricken, the challenger would have to show that the legislation is based "solely on reasons totally unrelated to the pursuit of the State's goals," or, in other words, the challenger must "negative every conceivable basis which might support" the legislation.

Applying these standards, we conclude that plaintiff has failed to meet its burden of establishing the invalidity of the ordinance. Municipalities, such as defendant, are authorized by both statute and constitution to operate public utilities. Const 1963, art 7 § 24; MCL 117.4h(4). The authorization to operate utilities must include the responsibility to develop mechanisms to monitor their efficient administration. The ordinance, particularly when viewed in its contextual framework, provides a means for defendant to investigate and monitor water usage. It delineates

plaintiff requested a meter test. By stipulating that there are no material facts in dispute, plaintiff has apparently conceded on appeal that it did request a meter test, and that the date of the request is immaterial to its claims.

a procedure to contest the accuracy of usage and for a resolution of disputes. The ordinance thus advances the legitimate governmental interest of allowing defendant to efficiently administer a service it is authorized to provide and to limit its liability when errors arise in the provision of the service.

Plaintiff argues that the ordinance's three-month restriction for receiving a credit on an overcharge is arbitrary. Our Supreme Court defined the term "arbitrary" in *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984) (internal quotation marks omitted), as follows:

Arbitrary is: [W]ithout adequate determining principle Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.

In the ordinance, defendant opted to use a short, restricted timeframe for obtaining a credit. This option does not render the ordinance unconstitutionally arbitrary. "[T]ime limitations are inevitably arbitrary to some extent." *Mohasco Corp v Silver*, 447 US 807, 818; 100 S Ct 2486; 65 L Ed 2d 532 (1980). Plaintiff has not demonstrated that "there is no room for a legitimate difference of opinion concerning reasonableness." *Kropf v Sterling Hts*, 391 Mich 139, 162; 215 NW2d 179 (1974) (internal quotation marks and citation omitted). The timeframe provided by the ordinance is tied to and consistent with defendant's billing cycle and evidences a rational relationship to the billing objectives. Because the time limitation for credits is "tied to a particularized legitimate purpose," it cannot be construed as arbitrary. *Rosario v Rockefeller*, 410 US 752, 762; 93 S Ct 1245; 36 L Ed 2d 1 (1973).

Plaintiff also argues that the ordinance is void for vagueness. In *Dep't of State v Michigan Ed Ass'n-NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002), this Court reviewed the three ways in which to challenge an ordinance on the basis that it is unconstitutionally vague:

"A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated."

Providing a further directive to trial courts, this Court stated:

To determine whether a statute is void for vagueness, a court should examine the entire text of the statute and give the words of the statute their ordinary meanings. Substantive due process requires standards in a statute to be "reasonably precise" in order to ensure that individuals are not held responsible by the state for conduct that they could not reasonably understand to be proscribed. Stated another way, "[t]o give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required. [*Id.* at 116-117 (citations and quotation marks omitted).]

In determining whether an ordinance is void for vagueness, courts should give the words of the ordinance their ordinary meaning while examining the entire text of the ordinance. *Id.* at 119; *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 51; 530 NW2d 99 (1995).

We conclude that the ordinance is sufficiently clear to withstand plaintiff's challenge. The ordinance provides for a "credit" to a consumer if the consumer requests a meter test and the testing indicates that the meter is "fast."² South Lyon Ordinance, § 94-60. The ordinance is clear in limiting the timeframe for a credit to "three months prior to the test." *Id.* Plaintiff insists that the ordinance is nonetheless vague, on the ground that it fails to address whether a credit is available when defendant tests a meter on its own initiative (rather than on a consumer's request) and the testing indicates that the meter "fast." We disagree. Even without a description of credits for tests initiated by defendant, the ordinance provides "fair notice of the conduct it regulates" and does not permit an "unstructured and unlimited discretion in determining whether the statute has been violated." *The Cadle Co v City of Kentwood*, 285 Mich App 240, 259; 776 NW2d 145 (2009), quoting *Dep't of State*, 251 Mich App at 116.

Plaintiff next contends that defendant's conduct in refusing to refund the entire overcharge constituted a taking without just compensation. Contrary to plaintiff's contention, "the imposition of an obligation to pay money does not constitute an unconstitutional taking of property." *Commonwealth Edison Co v United States*, 271 F3d 1327, 1339-1340 (CA Fed, 2001). Specifically, "[r]equiring money to be spent is not a taking of property." *Id.* at 1340 (citation omitted). Although distinctions have been drawn, "while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Id.* (Citation omitted).

As an alternative ground to challenge the ordinance, plaintiff contends that the overcharges violate certain statutory mandates that require utility rates be just and reasonable. In support, plaintiff cites MCL 123.141 and MCL 460.557, and related case law. MCL 123.141 governs the authority of a municipality to contract with other governmental entities for the sale of water. MCL 460.557 covers investigations of complaints and rate setting by electric utilities, providing in relevant part, "The rates of an electric utility shall be just and reasonable and a consumer shall not be charged more or less than other consumers are charged for like contemporaneous service rendered under similar circumstances and conditions." MCL 460.557(4).

Plaintiff's reliance on these statutes is mistaken, for two reasons. First, the statutes are inapplicable to this case. MCL 123.141 is pertinent only to the sale of water between municipalities, not between a utility and its consumers; MCL 460.557 pertains to rate setting for electric utilities. Second, plaintiff has never challenged the actual rate charged by defendant for its provision of water. Rather, the issue, as framed by plaintiff, is the propriety of a full refund

² A "fast" meter is defined in South Lyon Ordinance, § 94-59, entitled "Accuracy required," which states: "A meter shall be considered accurate if, when tested it registers not to exceed two percent more to two percent less than the actual quantity of water passing through it. If a meter registers in excess of two percent more than the actual quantity of water passing through it, it shall be considered 'fast' to that extent. If a meter registers in excess of two percent less than the actual quantity of water passing through it, it shall be considered 'slow' to that extent."

for overcharges exceeding the three-month limit. Neither the cited statutes nor the applicable cases support plaintiff's arguments.

On cross-appeal, defendant challenges the trial court's order requiring it to reimburse \$5,861.43 in late fees and penalties that plaintiff paid to defendant. Defendant first raised this issue in a motion for reconsideration. A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004). A trial court's ruling on a motion for reconsideration will be reversed only if the decision falls outside the range of principled outcomes. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008).

Plaintiff acknowledges that it did not directly challenge the late fee ordinance, which states:

No free service shall be furnished by the system to the city to any other person, firm, or corporation, public or private, or to any public agency or instrumentality. Charges for services furnished by the system shall be billed and collected not less often than on a quarterly (three months) cycle, as shall be determined by the city council by resolution. Such charges shall become due on the last business day of the month following the quarterly billing (January, April, July, and October). If such charges are not paid on or before said due date, then a penalty of ten percent shall be added. [South Lyon Ordinance, § 94-196.]

The trial court based its decision to deny reconsideration on defendant's admission that it routinely overcharged plaintiff over a two year period, and that "Plaintiff overpaid Defendant by some \$102,000—based on Defendant's error installing the wrong meter," and that the "late fees would likely never have been incurred if Defendant had installed the correct meter initially."

Because defendant raised this issue for the first time in its motion for reconsideration, defendant must establish an abuse of discretion by the trial court in denying the motion. *Woods*, 277 Mich App at 629. MCR 2.119(F)(3) states:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Defendant asserts that the trial court's denial of the motion for reconsideration was based on a wrongful or faulty legal analysis. Neither plaintiff nor defendant specifically challenged either the ordinance governing late fees or presented arguments pertaining to the propriety of late fees and whether such fees were subject to refund. Defendant was permitted to retain over \$100,000 in acknowledged overcharges remitted by plaintiff. The trial court's decision requiring a refund of late fees amounting to less than six percent of the monies defendant received is within the range of principled outcomes and does not comprise an abuse of discretion.

Affirmed.

/s/ Peter D. O'Connell

/s/ Pat M. Donofrio

/s/ Jane M. Beckering