

**In the Matter of the Arbitration between
the Village of Goshen and the Town of Goshen
Re: Wastewater Treatment Charges
[Reference: Orange County Supreme Court Index No. 2010/7448
Village of Goshen v. Town of Goshen, et al.]**

DECISION

**Motion by Village to bar arbitrator from reviewing Village Board's
legislative determination of "need" for new waste water treatment plant**

Overview

The Village incurred some \$30,000,000 in long-term debt in order to finance construction of a new wastewater treatment plant to replace an older and smaller facility. The old plant serviced the Village as well as two residential subdivisions (Sewer Districts 1 and 2) in the Town of Goshen.

The sewer rents levied on these Districts have been based on a formula set forth in decades-old, written agreements entered into between these two municipalities. A major component in that formula is the debt service attributed to the original treatment plant and if "needed" the debt service for an "expanded or updated" facility.

After the annual cost of the debt service for the new facility was factored into the sewer rent formula, it is alleged that the sewer rents for at least some of the residents of the Town's two Districts rose as much as four or five times the previous year's assessment. The Town immediately took issue with what it

believed had been the new formula's inclusion of several millions of dollars expended by the Village for removal of an old landfill adjacent to the sewer plant site. In response, the Town withheld part of the sewer rents from the Village. In addition, the Town now appears ready to contend that a new plant was not "needed," or at least not one the size and/or capacity and/or quality selected by the Village.

Not unexpectedly, the Village rejected the Town's contentions. Attempts at negotiations proved fruitless, and, as more fully set forth below, after the Village sued the Town, the Town by Notice invoked the binding arbitration clause set forth in the agreements.

Several pre-hearing conferences were held between the undersigned arbitrator and counsel for the respective parties. The objective was to identify and limit the issues in the dispute as well as to attempt to fashion a stipulation as to relevant facts and pre-mark undisputed documentary evidence. However, in response to indications from the Town that it would focus much of its argument on the wisdom of the Village's "legislative decision" finding the "need" to construct this particular new sewer plant, the issue at the heart of the parties' dispute, the Village challenged the authority of an arbitrator, indeed any Court, to review that decision and certain matters related thereto. In turn, the Town contended that the Village had waived the right to raise this argument.

The arbitrator directed the parties to brief their respective positions, and this matter proceeded as if the Village had moved to dismiss the Town's contentions in this regard pursuant to CPLR 3211(a)(2) [lack of subject matter jurisdiction].

Summary of Arguments

In its Memorandum of Law and extensive (Reply) Memo, the Village contends that the doctrine of "separation of powers" precludes the Courts and therefore an arbitrator from reviewing "legislative decisions" such as those related to the Village Board's decision to construct the new sewer plant. Therefore the Village argues that, because there is a strong "public policy" against a Court reviewing "legislative determinations," the Town is precluded from offering and the arbitrator from considering in this proceeding that decision and related matters. The Village also questions whether the Town has standing to raise certain arguments, such as denial of due process and equal protection on behalf of District residents.

The Town argues that the Village waived the right to rely upon the bar of separation of powers or any public policy theory by not raising those defenses before the Court when it opposed the Town's motion to compel arbitration.

Background

The Village's underlying Orange County Supreme Court complaint sets forth a straight-forward, factual basis for judgment of \$192,150.03 against the

Town for the latter's breach of two contracts. That sum represents unpaid balances due from the Town for waste treatment services provided in 2008 and 2009 by the Village's sewer treatment plant for processing the wastewater from the Town's Hambletonian Park (Sewer District #1) and Arcadia Hills (Sewer District #2) subdivisions.

The Town appeared in that action and this proceeding on behalf of the Sewer Districts since the latter lack the capacity to sue or be sued (see *Andrews, Pusateri, Brant, Shoemaker & Roberson, P.C. v. Niagra County Sewer District No. 1, et al* 71 AD3d 1374,1375).

In lieu of answering the Village's Complaint, the Town moved in the Village's Orange County Supreme Court action pursuant of CPLR 7503(a) for a stay of the Village's contract action and for an order compelling the Village to arbitrate. Both the 1980 (District #1) and 1985 (District #2) contracts between these municipalities contained a provision authorizing either party to submit *"any dispute or question of interpretation" to binding arbitration*. The Village opposed the Town's application to the Court only on the ground that, since each contract specifically named the Commissioner of the Department of Health of the County of Orange as the sole arbitrator and since the Commissioner declined to so act,¹ the arbitration provision was no longer

¹ The Commissioner indicated by letter of March 10, 2010 that she "must respectfully decline to involve myself in contractual disputes between the Town and Village, some of which involve legal issues which may be more appropriately resolved by an attorney or experienced mediator or arbitrator."

viable. The Village now argues that it raised no other objection in the Court because the Town until that time had not formally objected to its “legislative determination” that there had been a “need” to build a “new plant.”

By Decision/Order dated October 18, 2010, the Hon. Elaine Slobod, J.S.C., concluded that the contracts did not make the Commissioner indispensable to the Town’s right to compel arbitration. Therefore, the parties were directed to agree upon a replacement arbitrator. (See CPLR 7504)

In initial documents exchanged between these municipalities, the Town alleged only that it was questioning the “accuracy and correctness of the Village’s invoices” (Arbitration Demand of 9/10/10). In addition, on March 27, 2009, when it returned only partial payments (approximately 72.8%) to the Village for both Districts’ 2008 bills, the Town indicated on each of two vouchers that:

This charge is in review—We are withholding \$41,844.65 [for District #1’s and \$59,046.74 for District #2’s 2008 bills] until the review is complete, at which time more adjustments may be made.

On February 11, 2010 the Town made part payment of approximately 76.5% of the Village’s 2009 invoices (less 2008 balances and penalty) by withholding \$32,309.60 for District #1 and \$41,480.86 for District #2.

By letter to the Village’s mayor on February 12, 2010 the Town’s Supervisor referenced a “disagreement...as to how [the 2008 and 2009] sewer

charges are calculated..." and recommended arbitration. Since discussions between the municipalities were not productive, on July 12, 2010 the Village commenced the aforementioned breach of contract action.

For more than a quarter century there apparently had been no problems of any moment between the Village and the Town with respect to the Districts' payments for utilization of the Village's sewer plant. Each year the Town, which has no municipal sewer plant of its own, would collect quarterly sewer rents from the 163 current residential parcels serviced in Hambletonian Park and 264 residential parcels in Arcadia Hills. The amount was based on a yearly estimate provided by the Village which used the following formula set forth in paragraph 1 of the 1980 and 1985 agreements:

1(a)...The total flow measured by the District meter for a 12 month period, being the Village fiscal year divided by total flow into the Village sewage treatment plant times the total costs of the operation, maintenance, debt service attributable to the Village treatment plant as presently existing or may be needed to be expanded or upgraded during the term of this contract, administration and related costs of the Village treatment plant as presently existing or as may be needed to be expanded or upgraded during the term of this contract, less any paid contributions toward operation and maintenance or capital expenditures at the plant received from any government entity to be credited during the Village fiscal year when received plus a 10% surcharge.

(b) In the event the Village undertakes any capital improvement project to the sewer facility the Town shall only be responsible for its share of costs pursuant to the formula established in paragraph 4(a)...[emphasis provided--Note: paragraph (b) appears only in the contract with Arcadia Hills.]

A problem arose only after the Village Board, which in 2003 had decided to construct an entirely new wastewater treatment plant, inserted the debt service costs for this new facility in the above formula to calculate the District's

2008 and 2009 sewer charges. It appears that the Village Board opted to finance the construction of this new facility by long-term financing to be paid for solely from sewer rents.² The end result of this financing decision and the focus of the unfortunate acrimony between these two municipal boards is that the sewer rents for some of the District residents allegedly have increased four- or five-fold. [The arbitrator notes that newspaper coverage of recent Village public meetings report that the quarterly sewer rents for Village residents have risen from \$70 to \$170.]

As indicated, the Town has contended in preliminary conferences, then in a detailed opening statement in this proceeding made by its Supervisor on March 22, 2011, followed up by its attorney's pre-arbitration Memorandum of Law, that a new facility of the quality and/or size and/or capacity which the Village constructed was "not needed." The Town in its opening presentations and memo also questioned whether significant unrelated expenses which were at best only incidentally connected to the new facility, and perhaps unnecessarily incurred in the first instance, had also been folded into the debt service component and thus passed on to the Districts. It also appears that the Town is prepared to argue (Bloomfield, T35) that since the contract only allows for passing on the costs for "debt service attributable to...needed" *expansions or upgrades*, the Village had absolutely no right under the contracts to include

² At one time the preferred method of retiring such debt according to the State Comptroller was a combination of sewer rents and special benefit assessments (see Op. State Compt. 325 [1958]).

any debt service expenses for a new facility. As indicated, the Village's reply to the Town's arguments and the reason for this motion and decision, is that the Village Board's 2003 through 2007 decisions in this regard were legislative in nature and therefore not subject to review by a Court or arbitrator.

Waiver

An argument might be made that the Village could have deduced the Town's specific arguments (lack of need, no obligation for cost of "new" facility, etc.) from the aforementioned Notice of Claim, voucher comments, as well as from written and personal exchanges with Town officials. The Town therefore suggests that by not addressing these issues in the Court proceeding, the Village forfeited its right to make the subject motion. However, such argument is beside the point because the Village has also raised defenses based on strong public policy issues, primarily the "separation of powers" doctrine. Such Constitutionally related issues go to the very jurisdiction of this forum. They are always viable and cannot be deemed to have been waived. (*Sec Port Jefferson Station Teacher's Ass'n v. Brookhave-Comsewogue Union Free School Dist.* 45 NY2d 898-899).

Therefore, the general rule that a party waives any objection to the arbitrator's power unless it was raised in the application before the Court does not apply (*Matter of Silverman [Benmor Coats]* 61 NY2d 299, 309; see Practice