



One Corporate Commons
100 West Commons Boulevard
Suite 415
New Castle, DE 19720
302-757-7800
www.tarabicosgrosso.com

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Directors of the Board of Public Works of the City of Lewes

FROM: Michael J. Hoffman, Esquire
Thomas F. Driscoll III, Esquire

DATE: July 17, 2017

RE: Authority of the Board of Public Works of the City of Lewes
and Appropriateness of Pre-Annexation Agreement

QUESTIONS PRESENTED

1. What is the General Assembly's intended division of responsibilities between the City of Lewes (the "City") and the Board of Public Works of the City of Lewes (the "BPW") with respect to the provision of utility services?
2. Can the City compel the BPW to refuse utility service to properties located within the BPW's Service Area but outside of the City of Lewes municipal limits unless the properties are parties to a Pre-Annexation Agreement?

SUMMARY

The General Assembly, through the BPW Charter (as defined below), has expressly divided responsibilities between the City and the BPW with respect to the provision of utility service in the City and surrounding areas. Subject to a few enumerated grants of authority to the City, the BPW is an independent body, overseen by an independently elected board of directors, responsible for supervising and controlling the City of Lewes utility system.

Consequently, the City cannot compel the BPW to refuse utility service to properties located within the BPW's service area but outside of the City of Lewes municipal limits. In

addition, even if the City had such authority, a policy conditioning utility service upon an agreement to annex property into the City of Lewes is likely unenforceable.

BACKGROUND

On June 19, 1969, the General Assembly replaced and consolidated historic versions of past City charters and enacted a new Charter reincorporating the City of Lewes (as amended, the “City Charter”).¹ On April 9, 2009, the General Assembly replaced and consolidated historic versions of past BPW charters and enacted a new BPW Charter reincorporating the Board of Public Works of the City of Lewes (as amended, the “BPW Charter”).² The City Charter and the BPW Charter, as amended, are the operative charters governing the authority, duties, and responsibilities of the City and the BPW.

The BPW is administered by a Board of Directors (the “Governing Board”), composed of five (5) Directors and an ex-officio person appointed by the Mayor of the City of Lewes.³ The Directors are independently elected by United States citizens that are at least 18 years of age and residents of the City, nonresident freeholders and leaseholders, or BPW customers.⁴

Similarly, the City of Lewes Mayor and City Council are elected officials.⁵ Voters for these positions include:

[E]very person, male or female, who shall have attained the age of eighteen (18) years on the date of the Annual Municipal Election and who shall be a citizen of the United States and a citizen of The City of Lewes shall have one (1) vote, provided, that he or she is registered on the Books of Registered Voters of The City of Lewes. For the purposes of this Section, a citizen of The City of Lewes shall be deemed to include any person who is a qualified voter of the State of Delaware, and is a bona fide resident of the City of Lewes.⁶

While substantially similar, City officials and BPW officials are not elected by identical constituencies. The BPW Charter grants the right to vote to a broader section of individuals than the City Charter.

¹ See 57 Del. Laws. c. 170 (1969).

² See 77 Del. Laws. c. 10 (2009). The BPW was originally incorporated by the General Assembly 1901 through An Act To Authorize the Commissioners of Lewes to Appoint a Board of Public Works for the Town of Lewes Which Shall Establish, Control And Regulate an Electric Light Plant, Water Works And a Sewer System For Said Town; Prescribing the Powers and Duties of Said Board of Public Works and Providing For The Election Of Their Successors. 22 Del. Laws. c. 196 (1901). That enabling act was amended and supplemented several times over the next century prior to the enactment of the 2009 Charter.

³ BPW Charter, § 2.1.

⁴ BPW Charter, § 2.6.

⁵ See City Charter § 7(b).

⁶ City Charter, § 7(d).

Pursuant to the BPW Charter, the BPW is “authorized to continue, subject to the jurisdiction, authority and responsibilities provided by [the] Charter, to establish, to control and to regulate Utility Systems comprised of an electric generation, transmission, and distribution system; water works and distribution system; wastewater collection, treatment facility, and sewer system; storm water drainage system; and other future additional systems and utilities which may be established for the City of Lewes.”⁷ In sum, the BPW is the entity specifically charged with providing utility services, such as electricity, water, wastewater, and stormwater drainage services, for the City of Lewes.⁸

The BPW Charter defines “Service Area” as “the corporate limits of the City of Lewes, the territory beyond such limits authorized in [the] Charter, and any franchised service area.”⁹ Related, the BPW Charter further provides:

The BPW is hereby authorized and permitted to supply utility services of any utility system to those properties which are located within two (2) miles of the corporate limits of the City as presently constituted or hereafter extended under such terms and conditions as the Board shall deem proper. The Board is hereby authorized and permitted to enact and adopt such rules and regulations as the said Board may deem proper in order to supply said utility services.¹⁰

On March 27, 2007, the BPW adopted Resolution No. 07-002, titled “A Resolution of the Board of Public Works of the City of Lewes to Establish a Procedure for Application for Utility Services for Areas Beyond the Limits of the City of Lewes.” Resolution No. 07-002 established a procedure which required the owner of property located outside of the City limits desirous of BPW-provided utility services to execute an agreement under which, *inter alia*, said owner would provide the City with a power of attorney allowing the City to vote on behalf of the owner in any future election regarding annexation of the owner’s property (the “Pre-Annexation Agreement”).

On December 4, 2013, the BPW adopted Resolution No. 13-004 titled “A Resolution of the Board of Public Works of the City of Lewes, Delaware to Amend the Procedure for Application for Utility Services for Areas Beyond the Limits of the City of Lewes.” Resolution No. 13-004 modified the procedure established by Resolution No. 07-002, but otherwise reinforced the Pre-Annexation Agreement policy.¹¹

The BPW is currently evaluating whether it should abandon the policy outlined in Resolutions No 07-002 and No. 13-004. The City, however, has signaled its intent to direct the BPW to abide by these Resolutions. This memorandum evaluates both the validity of the City’s

⁷ BPW Charter, Preamble

⁸ BPW Charter, Preamble.

⁹ BPW Charter, § 1(6)

¹⁰ BPW Charter, § 4.20.

¹¹ Resolution No. 13-004.

claimed authority to direct the BPW to continue the policy outlined in the Pre-Annexation Resolutions, as well as the enforceability of the Pre-Annexation Agreement.

DISCUSSION

I. THE BPW IS THE ENTITY EXPRESSLY AUTHORIZED TO SUPERVISE AND CONTROL UTILITIES AND MAKE DECISIONS REGARDING PROVISION OF UTILITY SERVICES

a. Evident in the Plain Language of the BPW Charter is that the BPW Is Responsible for Making Decisions Regarding the Utilities, Not the City

The plain language of the BPW Charter clearly establishes that the BPW is an independent body, governed by an independently elected Governing Board charged with supervising and controlling the utilities.¹² As an entity empowered by a Charter enacted by the General Assembly, it is well settled that the scope of the BPW's authority is rooted in an express legislative grant or the fair and necessary implication of the expressly granted legislative authority.¹³ Regarding the BPW's express legislative grant over the City's utilities, the BPW Charter could not be any clearer:

The BPW shall have the supervision and control of all the utility systems, and private sanitary sewerage, storm water drainage, water, and electric systems, as established or to be established within the Service Area, and may alter, condemn, repair or remove the same, and may cause new facilities for the utility systems to be made and opened. The BPW may cause any such utility systems to be laid, **in its sound discretion**, anywhere within the Service Area . . . in such manner and under such terms **as the BPW deems proper** and of such material **as the BPW may deem proper**¹⁴

¹² The City cites to multiple iterations of the BPW Charter in the Memorandum which it has provided to the BPW, but the operative language is that which exists in the 2009 Charter, as amended. *See* BPW Charter, § 9.1 (“This Charter shall operate to amend, revise and consolidate an Act, entitled: An Act To Authorize the Commissioners of Lewes to Appoint a Board of Public Works for the Town of Lewes Which Shall Establish, Control And Regulate an Electric Light Plant, Water Works And a Sewer System For Said Town; Prescribing the Powers and Duties of Said Board of Public Works and Providing For The Election Of Their Successors’ [sic] being Chapter 196, Volume 22, Laws of Delaware, and the various amendments and supplements thereto, and to repeal all such parts of said Act and its amendments and supplements as are manifestly inconsistent with the provisions of this Charter.”); *see also State ex rel. Middletown v. Peeverly*, 125 A. 421, 424 (Del. 1924) (“The enactment of a general system of government complete in itself, or the revision of a previous statute or statutes, covering the entire subject of such prior enactments, and the consolidation thereof, especially with new provisions, in a single act complete in itself, is regarded as evidence of the legislative intent and purpose to substitute the latter for the former, and consequently is a repeal thereof.”)(quoting *Husbands v. Talley*, 47 A. 1009, 1013 (Del. Super Ct. 1901). To the extent that some prior version of the BPW Charter included language inconsistent with the 2009 BPW Charter, as amended, then such prior language was repealed by the General Assembly.

¹³ *Simon v. Seaford*, 197 A. 681, 685 (Del. Ch. 1938).

¹⁴ BPW Charter, § 4.1 (emphasis added).

Regarding the interplay between the City and the BPW, the Charter is also very clear. Indeed, the General Assembly has expressly identified those limited areas where consultation with the City is required. For example, *inter alia*, Section 2.1 authorizes the Mayor of the City of Lewes to appoint one ex-officio person to the Board, Section 2.2.5 requires approval from the Mayor and City Council to fill a Board vacancy, Section 4.3 obligates the BPW to pay to the City two percent (2%) to five percent (5%) of monthly revenues in lieu of franchise fees, and under Section 4.14, the BPW must obtain prior consent from the Mayor and City Council before borrowing money and issuing bonds. Where the General Assembly intended to grant the Mayor and City Council authority relative to the BPW, it did so expressly within the BPW Charter.

Conversely, the BPW Charter is rife with authority bestowed on the BPW for which City approval, permission or consultation is not required, be it expressly or implicitly. Some examples of these sections include, but are not limited to, the following:

Section 3- Organizational responsibilities and actions required to be taken by the Board

Section 4.1- The BPW shall have supervision and control of all utility systems in the Service Area.

Section 4.2- BPW in its discretion may be sole provider or act in conjunction with other utilities and shall have the power to enter into contracts in its name.

Section 4.4- BPW shall make rules regulating utility systems and the tapping of systems.

Section 4.5- BPW authorized and empowered to do all things necessary for construction.

Section 4.10- The BPW may enact and adopt such rules and regulations as the BPW deems proper in order to supply utilities or regulate the connection and/or access of public utility services or facilities by owners or lessees of abutting properties.

Section 4.11- The BPW shall fix rates, assessments, and fees for utility systems.

Section 4.20- The BPW is authorized to enact and adopt such rules and regulations to supply utility services outside the City limits.

Of particular relevance to the instant question are Sections 4.1 (quoted above), 4.11, and 4.20. Section 4.11 provides as follows:

The BPW may enact and adopt such rules and regulations **as the BPW deems proper** in order to supply utilities or regulate the connection and/or access of

public utility services or facilities by owners or lessees of abutting properties. Such rules and regulations as shall be adopted in conformity with the provisions of this Charter shall be printed and kept in the office of the BPW for distribution to persons or corporations that make application to connect with, lay or repair any public or private utility system as aforesaid.¹⁵ (Emphasis added).

And Section 4.20 authorizes the BPW to offer services within two miles of the City limits or “extended under such terms and conditions as the Board shall deem proper.” (Emphasis added).

Quite simply, the language of the BPW Charter is plain and unambiguous – the BPW is the entity with discretion over the City’s utility system and its own rules and regulations in managing that utility system.

b. The Legislative Intent Behind the BPW Charter Supports the Conclusion that the BPW is Independent of the City’s Authority, Except Where Noted

The legislative intent behind the BPW Charter is also clear. As noted above, where the General Assembly has deemed it appropriate to grant the City narrow authority over the BPW, it has done so clearly and unambiguously. Thus, applying the canons of statutory interpretation and giving effect to the entirety of the Act, it is reasonable to conclude that had the General Assembly intended to grant discretion and control over the utility system to the City, or even to afford co-discretion and co-control, it would have done so expressly.¹⁶ It did not.

Conversely, the General Assembly did take such an approach with respect to the New Castle Municipal Service Commission, which, like the BPW, operates utilities, but for the City of New Castle. For example, Section 8 of the Charter for the New Castle Municipal Service Commission (the “NC Charter”) specifically provides that the New Castle Municipal Service Commission is “intended to be merely a separate agency of the City.”¹⁷ Additionally, the NC Charter also provides explicit authority for the City of New Castle to appoint and remove commissioners, and does not provide for the independent election of Commission officials.¹⁸ Similar language or intent does not exist within the BPW Charter.

To support its position, the City appears to rely heavily on general language within the City Charters, past and present, referencing utility systems in the City and general borrowing

¹⁵ BPW Charter, § 4.11 (emphasis added).

¹⁶ *Keeler v. Harford Mut. Ins. Co.*, 672 A.2d 1012, 1016 (Del. 1996). *See e.g. Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999) (“The goal of statutory construction is to determine and give effect to legislative intent. If a statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls. If a statute is ambiguous, it should be construed in a way that will promote its apparent purpose and harmonize with other statutes.”).

¹⁷ 72 Del. Laws, c. 116.

¹⁸ *See* NC Charter, sections 1(b) and 9.

authority. Setting aside the well-settled canons of statutory interpretation, including concerning the legal impact of specific versus general language, the Delaware Supreme Court previously confronted a situation as to whether a subsequent Middletown Charter repealed prior acts that established a Board of Light and Water Commission.¹⁹ The Court noted:

A Statute creating a board of public works for cities of the first class and conferring powers on such board impliedly repeals so much of former statutes as confers the same powers upon the city councils. And generally an act vesting the control of a thing in one body or board is repealed by a subsequent act vesting the same control in another body or board.²⁰

In the case of the Lewes BPW, the clear legislative intent within the BPW Charter is to vest power, control, and discretion over the utility system in the BPW, not the City.

II. THE PRE-ANNEXATION AGREEMENT REQUIRED BY THE PRE-ANNEXATION RESOLUTIONS IS INAPPROPRIATE

While perhaps academically interesting, the extent of City authority over the BPW is not the critical question at issue regarding the Pre-Annexation Resolutions. To the contrary, the critical inquiry, and the inquiry that has prompted the BPW to reexamine the Pre-Annexation Agreement policy, is whether that policy is even tenable; our review suggests that it is not. At the very least, the BPW is concerned that adherence to the Pre-Annexation Agreement policy could undermine the BPW's compliance with its basic obligations as a utility provider under the law.

Interestingly, the Delaware Supreme Court confronted a similar issue over forty years ago. In *Levy Court of Kent County v. Dover*, the Court evaluated the enforceability of a 1969 agreement between the governments of Kent County and the City of Dover which created a buffer zone around Dover in anticipation of future growth of Dover's city limits, and in which the County agreed not to furnish sewer or water utilities and left such services up to future annexation.²¹ The Court found that this agreement was *ultra vires* and void, and that the County could not divest itself of its governmental obligations.²² In explaining its decision, the Court referenced "public policy and fairness" considerations, noting, "[t]o allow the City of Dover to make annexation the price which must be paid by County residents for sewer and water services makes a sham of the required annexation election."²³

Ultimately, as the BPW Charter makes clear, the BPW is charged with exercising its powers, responsibilities, and discretion in the best interest of its utility system, which includes an expanded Service Area, and its customers. The BPW is not charged with developing and

¹⁹ *State ex rel. Middletown v. Peverly*, 125 A. 421 (Del. 1924).

²⁰ *Id.* at 425 (quoting Lewis' *Southerland Statutory Construction*, Section 249).

²¹ *Levy Court of Kent County v. Dover*, 333 A.2d 161, 163 (Del. 1975).

²² *Id.*

²³ *Id.* at 164.

implementing policies relative to annexation of territory into the City of Lewes. Accordingly, the BPW is best served avoiding policy questions outside of its purview and instead maintaining its focus on an obligation to its voters and customers in exercising its duly authorized supervision, control, discretion, and authority over the provision of utility services.

CONCLUSION

For all the foregoing reasons, it is our conclusion that the General Assembly has divided the responsibilities between the City and the BPW in such a manner that decisions regarding the provision of utility services to new customers outside the City limits is within the BPW's discretion. Accordingly, the BPW is well within its lawful authority to abandon the Pre-Annexation Agreement policy. Moreover, while academically interesting, the question as to BPW authority is ultimately a red herring, as a policy requiring the use of Pre-Annexation Agreements is likely untenable.