No. 09-CV-894

In the

District of Columbia Court of Appeals

EUCLID STREET LLC,

Plaintiff-Appellant,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Defendant-Appellee.

On Appeal from the Superior Court of the District of Columbia, Civil Division No. 2008 CA 6780B (Hon. Brian F. Holeman, Judge)

REPLY BRIEF FOR APPELLANT

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ARGUMENT

Appellant Euclid Street LLC ("Euclid Street"), through counsel, here replies to the brief of Appellee District of Columbia Water and Sewer Authority ("WASA").

I. WASA Has Waived Its Arguments By Failing To Comply With The Briefing Requirements Of D.C. App. Rule 28

The rules of this Court require that each party support its "contentions and the reasons for them, with citations to [the] parts of the record on which [it] relies." *See,* D.C. App. Rules 28(a) and 28(b). Instead of abiding by the Rule, WASA filed a twenty-page dense factual brief supported by virtually no citations to the record. Worse yet is the large number of WASA's factual assertions that are flat-out wrong or misleading. WASA has thereby placed an unnecessary burden on this Court.

WASA has waived all of its arguments by these briefing failures. *See, e.g., United States v. Stalnaker,* 571 F.3d 428 (5th Cir. 2009) (holding that the defendant's failure to support her assertions by citations to the record constituted waiver for failure to adequately brief).

II. WASA Waived Its Exhaustion And Jurisdiction Arguments By Failing To Assert Them In The Trial Court

In its motion to dismiss, WASA asserted two arguments: (1) "The statutory authority to file a continuing lien against real property based on delinquent water and sewer charges applies even if the tenants of the property are billed for water

and sewer charges;" and (2) "Plaintiff's claims for just compensation under the Takings Clause of the Fifth Amendment should be dismissed."[1] Apx. B at 4, 7.

But in this forum, WASA asserts two new arguments that allegedly justified the trial court's dismissal of the case: (1) that Euclid Street failed to exhaust its administrative remedies before bringing this action and (2) that the case is actually a "petition for review of an agency decision" and therefore should have been filed in the Court of Appeals rather than the Superior Court. WASA Br. at 6.

It is too late in the day for WASA to make these arguments. WASA has failed to heed the well-established rule that this Court will normally not consider an issue not raised first in the trial court. *See, Nelson v. United States*, 649 A.2d 301, 308 (D.C. 1994). WASA knows this. *See, District of Columbia Water and Sewer Auth. v. Delon Hampton & Associates,* 851 A.2d 410, 416 (D.C. 2004) (holding that an argument that the trial court should have referred claims by WASA to the Contract Appeals Board for an administrative adjudication could not be raised for the first time on appeal because the contention was not presented to the trial court.).

WASA has not given the Court any reason to abandon this time-honored rule. The Court should not consider WASA's arguments.

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[1] Euclid Street abandons its Takings Clause claim.

III. Assuming *Arguendo* That The Court Considers WASA's Contentions, WASA Fares No Better On The Merits.

A. *De novo* Review Applies To All Issues.

WASA urges that an agency's interpretation of its governing statutes and regulations should be given "great deference." WASA Br. at 6. WASA's argument is fatally flawed for this reason: The WASA hearing officer, charged with the responsibility of interpreting the statute and implementing regulations at issue here, refused to do so. *See,* text at pages 6-7, *infra*. In short, the Court cannot defer to an interpretation of the law that WASA refuses to make. Thus, the Court's consideration of all issues on appeal is *de novo*.

B. WASA's Exhaustion And Jurisdiction Contentions Lack Merit.

WASA launches its untimely exhaustion argument with this assertion:

> This Appeal concerns a dispute as to whether WASA properly billed an owner of real property for delinquent water and sewer charges. WASA's regulations provide an administrative forum to resolve such disputes, affording the customer - in this instance, the owner - with the opportunity to appeal the validity of the bill (Title 21 DCMR § 410).

WASA Br. at 6.

This assertion is the distortion of truth that WASA has pressed throughout this litigation. This case has nothing to do with the "validity of the bills." The only "bill validity" disputes which WASA's "administrative forum" can adjudicate are those that concern "water, sewer or groundwater sewer service charge[s]". DCMR § 21-410.1(a). This case has nothing to do with determining whether

WASA's bills accurately reflect the amount of water a tenant used but failed to pay for. Rather, this action seeks a declaratory judgment that Euclid Street cannot be compelled to pay its tenants' water charges. The dollar amount of the charges is not at issue.

WASA has always known that its "adjudicative process" does not provide a forum for deciding Euclid Street's claims or issuing the declaratory relief it seeks. Indeed, WASA's position here is entirely at odds with the WASA hearing officer's decision in this case. *See,* text at pages 6-7, *infra*. WASA has cleaved to this wrongheaded argument throughout the litigation.

In 2006, Euclid Street filed a declaratory judgment action identical to the instant one in Superior Court ("*Euclid Street I*" Super. Ct. Civ. No. 2006 CA 7755). Thereafter, WASA filed a motion to dismiss, relying on DCMR § 24-410. WASA averred that Euclid Street had failed to exhaust its administrative remedies before filing suit.[2] The trial court agreed and dismissed Euclid Street's lawsuit

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[2] WASA made this argument:

> A customer must follow the regulations to challenge a water and sewer bill. Plaintiff has failed to comply with the administrative procedures established in Title 21. See, 21 DCMR §§402-410. In failing to pursue administrative avenues, Plaintiff has failed to exhaust the administrative remedies available to it prior to commencing an action in this Court. Accordingly, Plaintiff's Complaint must be dismissed.

WASA Motion to Dismiss in *Euclid Street I*, at 7.

"due to Plaintiff's failure to exhaust administrative remedies." (Rechin, J. Mar. 13, 2007) (Apx. C).

Euclid Street appealed ("*Euclid Street I Appeal*" D.C. App. No. 07 CV 293). Euclid Street also sought to cure the exhaustion problem by asking WASA (*via* a letter dated June 11, 2007) to convene an administrative hearing to decide its claims. WASA Br. Apx. B at 2.

On June 27, 2007, a mediation conference was convened in the *Euclid Street I Appeal.* The procedural posture of Euclid Street's claims then was not at all satisfying. This is because the exhaustion question was the only matter before the Court of Appeals. The underlying merits of Euclid Street's claims were not before this Court because the trial court had not considered them before dismissing the case. Thus, whatever the outcome of the appeal, Euclid Street would essentially be back to square one.

At the mediation conference, the parties reached the following agreement that allowed the appeal to be dismissed: Euclid Street agreed to pay the delinquent water charges and WASA promised to "remove all of the liens against the property at 1460 Euclid Street within 14 days of payment [of the water bills]." WASA Br. Apx. B at 2. Euclid Street agreed to "withdraw [its] request for administrative remedies by letter dated June 11, 2007" and to refrain from "fil[ing] any judicial action to challenge any and all existing liens or balances against [the building] as

of May 25, 2007." *Id*. at 2. However, Euclid Street did not relinquish its right to challenge WASA's policy of demanding its payment of delinquent tenant water charges incurred after May 25, 2007. *Id*.

Not surprisingly, after May 25, 2007, Euclid Street tenants once again failed to pay their water bills and WASA once again demanded that Euclid Street pay the delinquent charges. (Compl. at ¶ ¶ 18, 20-24, A 5-7.)

Euclid Street refused and WASA placed new liens on Euclid Street's building. *Id*. For Euclid Street, it was "like *deja-vu* all over again." (Yogi Berra, *circa* 1960.)

Undeterred, Euclid Street, on October 22, 2007, served WASA with an Administrative Hearing Petition to determine "whether [Euclid Street] could be held responsible to pay the bills of individual tenants in the building after WASA installed individual meters." (A 10.)

On February 5, 2008, Hearing Officer Margaret L. Hines convened the hearing and issued her decision four months later. (A 10.) Of particular relevance are the following passages from the decision:

> After more than an hour of testimony, it became clear that this hearing was not about the accuracy of the bills, but rather about the method that WASA chose to try to collect unpaid bills. I believe the resolution of such a dispute is well beyond the powers given to hearing officers by WASA's regulations.

> Chapter 4 of 21 DCMR gives the right to WASA customers to "contest any water bill... rendered for the premises" by following the procedures in the chapter. While this is fairly broadly stated, the following sections of regulations make clear that, in the case of a "protest" of a bill, what may be challenged is the accuracy or validity of the bill.
>
> The investigation that WASA must perform is directed toward checking the meter and meter readings, examining billing computations, and checking the premises for leaks. (See 21 DCMR 403.1) The adjustment of the bill which may occur after investigation and determination of its validity is described in terms of "the correct charges" (See 21 DCMR 405).
>
> Nowhere in the scheme of regulations relating to the challenge of a bill or the description of the hearing that may follow, is there a reference to a protest of WASA's billing policy or practices, or any reference to a challenge to WASA's authority to collect bills by placing a lien against the property of a customer.
>
> The administrative hearing itself is described as having the purpose to provide the customer with the opportunity to appeal the decision of the "validity" of a bill (See 21 DCMR 410). I do not believe this encompasses a challenge to WASA's policies or the particular practices it adopts to collect bills.

(A 10.)

Accordingly, Hearing Officer Hines dismissed the appeal because "[t]he issues raised by the customer in this case are well beyond the limitations for the hearings, and beyond my authority to address." (A 12.)

Having exhausted the non-existent WASA administrative remedies, Euclid Street filed the instant case whose allegations are identical to those made in *Euclid Street I*. Thereafter, WASA filed a motion to dismiss the complaint which

challenged the underlying legal merit of Euclid Street's claims. (Apx. B.) The trial court granted the motion; this appeal followed. (A 13, 15.)

In this Court, WASA makes these unfounded arguments:

> Euclid Street did pursue an administrative appeal of the validity of the WASA bills for water usage at the Property after May 25, 2007. A hearing was held on February 5, 2008, and the decision of the hearing officer dismissing the challenge to the WASA invoices was issued on June 10, 2008.
>
> * * *
>
> If Euclid Street had successfully pursued an administrative remedy and demonstrated that WASA failed to follow its own procedures in notifying the owner of the delinquent accounts, the hearing officer may have determined that Euclid Street does not owe WASA, and that WASA is required to remove the liens from the Property. Instead, Euclid Street did not challenge the bills at issue and therefore waived any right to challenge...

WASA Br. at 7, 10.

The decision of WASA's hearing officer makes it abundantly clear that Euclid Street's claim had *nothing* to due with a "challenge to … WASA invoices."[3] Hearing Officer Hines did not mince her words: "this hearing [is] not about the accuracy of the bills, but rather about the method that WASA chose to try to collect unpaid bills" (emphasis supplied). Why does WASA continue to press an argument it knows is baseless?

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[3] Contrary to WASA's argument at page 9 of its brief, by the time of the administrative hearing, Euclid Street had already decided to abandon its notice claims. WASA Br. at 9. This is why Euclid Street did not assert the claims at the hearing, in its opposition to WASA's motion to dismiss or in the instant appeal.

Next, on the question of this Court's jurisdiction to hear this appeal, WASA shamelessly avers that "[t]o the extent Euclid Street did not agree with the decision of the hearing officer, Euclid Street was required to file a timely appeal with this Court. *See,* D.C. Ct. App. R. 15(b)." Exactly what decision of the hearing officer was Euclid Street supposed to appeal? Does WASA honestly believe that Euclid Street should have appealed the hearing officer's decision that WASA lacked the statutory authority to adjudicate Euclid Street's claims? If there was error in its hearing officer's decision, it was WASA's appeal to take, not Euclid Street's. In short, this action was properly commenced in Superior Court and is therefore ripe for this Court's review.

C. When Properly Applied, WASA's Governing Statute And Regulations Mandate That Euclid Street's Liability To WASA Ended Once The Tenants Assumed Financial Responsibility For Their Water Bills.

In its opening brief, Euclid Street has addressed and rebutted the statutory interpretation urged by WASA at pages 11-15 of its brief. *See,* Euclid Street Br. at 5-9. The key point in all of this that WASA fails to see is it that where, as here, there is a conflict between general and specific terms in a statute,[4] the more specific provision prevails. *See, Howard v. Riggs National Bank*, 432 A.2d 701, 709 (D.C. 1981) citing *District of Columbia v. Linda Pollin Memorial Housing*

[4] The use of the term "statute" here is intended to encompass WASA's governing statute and implementing regulations.

Corp., 313 A.2d 579, 583 (D.C. 1973); *FTC v. Manager, Retail Credit Co.,* 169 U.S. App. D.C. 271, 276, 515 F.2d 988, 993 (1975).

Here, the general terms of D.C. Code §§ 34-2407.02 conflict with the specific terms of DCMR §§ 21-428. The former authorizes WASA to place a continuing lien against the "building [of an owner who] fails to pay District water and sanitary sewer service charges" while the latter mandates that, in the unique circumstance where WASA agrees to individually meter an apartment building and the tenants assume complete "financial responsibility" for the building's water charges, the tenants, not the owner, are required to pay any delinquent charges (emphasis supplied). Thus, when properly construed, WASA's governing statute and regulations mandate that Euclid Street's liability to WASA ended once its tenants assumed financial responsibility for their water bills. This conclusion is particularly apt since (to the undersigned's knowledge) 1460 Euclid Street, N.W. is the only individually metered apartment building in the District.

D. The Doctrine Of Equitable Estoppel Applies to WASA.

WASA urges that the doctrine of equitable estoppel does not apply to it because the doctrine does not apply to government entities. WASA Br. at 15. It is true that the doctrine's reach does not extend so far as to embrace the sovereign that created it. *See, e.g*., *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (holding that the doctrine of equitable estoppel does not apply to government

officials in the exercise of a sovereign function); *Filor v. United States,* 9 Wall. 45, 49, 19 L.Ed. 549 (1869) (holding that estoppel could not be asserted against a sovereign).

But WASA is not a sovereign entity and it is not a part of the local government entity, the District of Columbia. Rather, WASA is a "separate corporate body distinct from the District of Columbia."[5] *See, Delon Hampton*, 851 A.2d at 416-17; *Dingwall v. District of Columbia Water & Sewer Auth.,* 800 A.2d 686 (D.C. 2002) (*en banc*).

"The doctrine of equitable estoppel is a judicial remedy by which a party may be precluded, by its own acts or omissions, from asserting a right to which it otherwise would have been entitled." *Conner Brothers Const. Co., Inc. v. United States*, 65 Fed. Cl. 657, 692 (2005). WASA cannot escape equity's power to put an end to WASA's odious habit of allowing tenant water bills to pile up knowing full well that Euclid Street is (as a matter of law) powerless to cut the water off, and then demand that Euclid Street pay the bills. (Compl. at ¶ ¶ 19-22, A 6-7.)

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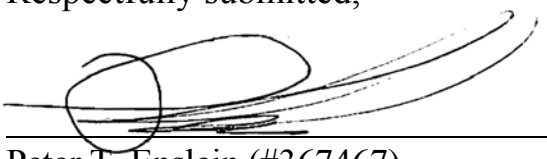
[5] One can fairly argue that the federal government is the District's sovereign. This is because "the District of Columbia [is] a unique federal enclave over which Congress has entire control for every purpose of government." *Northern Pipeline Const. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 75 (1982) (citation and internal quotation marks omitted). "Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative." *Id.* at 76.

CONCLUSION

For the foregoing reasons, and those set out in Euclid Street's opening brief, the trial court's dismissal of this action should be reversed.

Respectfully submitted,



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REPLY APPENDIX

REPLY APPENDIX

A. Text of statutes and regulations

DC Code § 34-2407.01. Discontinuance of water service for failure to pay water charges.

(a) The Mayor of the District of Columbia is authorized to provide for the collection of water charges, in advance or otherwise, from the owner or occupant of any building, establishment, or other place furnished water or water service by the District, and to shut off the water supply to any such building, establishment, or other place upon failure of the owner or occupant thereof to pay such water charges within 30 days from the date of rendition of the bill therefor. Such authority to shut off the water supply may be exercised by the Mayor regardless of any change in ownership or occupancy of such building, establishment, or other place. When the water supply to any such building, establishment, or other place has been shut off for failure to pay such water charges, whether the water supply to such building, establishment, or other place was shut off before or after May 18, 1954, the Mayor shall not again supply such building, establishment, or other place with water until all arrears of water charges, together with penalties and the costs actually incurred in shutting off and restoring the water supply, are paid.

(b) If the water supply to any property has been shut off for failure to pay District water and sanitary sewer service charges, and later restored without the express authorization of the Mayor, the Mayor shall impose a fine in an amount not less than 20% of the delinquent charges or more than $100, whichever is greater, upon the owner or occupant of the property, unless the Mayor determines that the owner or occupant did not restore or solicit a person to restore the water.

DC Code § 34-2407.02. Lien for water charges.

(a)(1) Except as provided in subsections (c) and (d) of this section, if an owner of real property fails to pay District water and sanitary sewer service charges in full accordance with § 34-2407.01, for all bills rendered which remain unsatisfied for 60 days or more the Mayor may file a certificate of delinquency with the Recorder of Deeds.

(2) Upon filing, the certificate of delinquency shall constitute a continuing lien against the real property and show the amount of unpaid charges for District water and sanitary sewer services. The continuing lien shall be for the current full amount of the unpaid water and sanitary sewer service charges, penalties, interest, and administrative costs.

(3) The Mayor may enforce the lien if any water and sanitary sewer service

charges remain unpaid for more than 180 days from the date the bill is rendered or for more than 15 days after a final decision of an appeal challenging the bill, whichever is later in the same manner that real property tax liens are enforced pursuant to Chapter 13 and Subchapter IV of Chapter 13A of Title 47.

(4) The real property may be sold for the unpaid water and sanitary sewer charges, penalties, interest and administrative costs at a tax sale in accordance with the provisions for the sale of property for delinquent real property taxes pursuant to Chapter 13 of Title 47.

(5) If any real property sold for unpaid water and sanitary sewer service charges is not redeemed by the owner within 180 days from the date of sale, including payment of 2% interest for each month until the property is redeemed, the Mayor shall furnish a deed to the purchaser or holder of the certificate of sale in accordance with § 47-1304.

(6) Proceeds from the sale that represent unpaid water charges shall be credited to the Water and Sewer Enterprise Fund of the District of Columbia as established by § 47-375(g).

(b) A lien for water and sanitary sewer charges shall have priority over any other lien, except a lien for District taxes. The lien for water and sanitary sewer service charges shall remain in effect until the charges set forth in the certificate and any accrued additional charges, interest, penalties, and administrative costs are paid in full. Upon final payment of any delinquent charges, penalties, interest, and administrative costs, the Mayor shall file promptly a certificate of satisfaction with the Recorder of Deeds.

(c) The Mayor may defer or forgive, in whole or in part, any water and sanitary sewer service charges due the District for any qualified real property pursuant to § 6-1503.

DCMR § 21-410.1 The purpose of hearings held under this section is to provide the petitioner with an opportunity to appeal the decision of the General Manager pertaining to:

(a) The validity of any water, sewer or groundwater sewer service charge;

(b) The practicability determination made pursuant to section 207 of chapter 2 regarding metering of groundwater flows;

(c) A practicability determination made pursuant to section 5403 of chapter 54 regarding the installation of backflow preventers [sic] to prevent cross connections;

(d) An imminent threat determination made pursuant to section 5405 of chapter 54; and

(e) A denial, suspension, or revocation of a certificate to test backflow preventers pursuant to section 5408 of chapter 54.

DCMR § 21-428 Opportunity for a Tenant to Receive Service In Own Name

DCMR § 21-428.1 WASA may permit the tenant(s) to receive the bills in their own name, when the owner or agent of the rental property fails to pay the delinquent account in full and it is determined to be practicable.

DCMR § 21-428.2 At least ten (10) working days prior to terminating water and sewer services to the premises, WASA shall send a notice to the tenant(s) in accordance with § 425.2.

DCMR § 21-428.3 Once it is determined that the tenants will be billed directly for water and sewer charges, WASA will read the meter on service at the affected address and render a final bill to the owner or the agent for the owner.

DCMR § 21-428.4 If water and sewer charges incurred by the tenant(s) remain unpaid for more than thirty (30) days after the rendering of a bill for the charges, penalties and interest shall be applied to the tenant's outstanding charges, and water and sewer services may be terminated.

DCMR § 21-428.5 If water and sewer service charges billed directly to the tenant or tenants are unpaid and result in the termination of services, the tenant or tenants shall be required to pay all delinquent charges, penalties, interest and fees incurred during the period they received bills.

DCMR § 21-428.6 If service has been terminated due to a delinquent tenant account, services shall not be restored until all charges, penalties, interest and fees for the property are paid in full.

DCMR § 21-429. Special Provisions Governing Master-Metered Apartment Buildings

DCMR § 21-429.1 This section shall apply to all master-metered water and sewer accounts in residential rental apartment buildings billed directly to the owner, agent, lessor, or manager of the premises (hereinafter referred to as "owner").

DCMR § 21-429.2 WASA shall provide the tenants with the opportunity to assume prospective financial responsibility for the water and sewer services pursuant to the provisions of §§ 428 and 430.

DCMR § 21-430 Determination of Practicability

DCMR § 21-430.1 WASA may decide to continue water and sewer service to any mastermetered residential, rental apartment building despite the nonpayment of a delinquent account by the owner, if the General Manager determines that it is practicable for the tenants to assume prospective financial responsibility for water and sewer services by receiving the service in their own names, either individually or collectively, on the same terms as any other customer and without any liability for the amount due while service was billed directly to the owner.

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

EUCLID STREET, LLC,	)	
	)	
Plaintiff,	)	**Case No. 08 CA 0006780 B**
	)	**Judge Brian F. Holeman**
v.	)	**Next Event: Initial Conference**
	)	**January 9, 2009**
DISTRICT OF COLUMBIA	)	
WATER AND SEWER AUTHORITY,	)	
	)	
Defendant.	)	

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT

Defendant, District of Columbia Water and Sewer Authority ("WASA"), by and through its undersigned counsel, respectfully moves this Court to dismiss Plaintiff's Complaint for Declaratory Judgment (hereinafter, "Complaint") with prejudice based on the failure to state a claim upon which relief may be granted.

According to Plaintiff's Complaint, Plaintiff owns the property located at 1460 Euclid Street, N.W., Washington, D.C. (hereinafter, "the property"). This is a multiple unit apartment building. WASA supplies water and sewer services to the property. Plaintiff's Complaint seeks declaratory relief, including a finding that it is not liable for the water and sewer invoices relating to the property. Under District of Columbia law, the Mayor may file a certificate of delinquency "if an owner of real property fails to pay District water and sanitary sewer service charges." 34 D.C. Code 2407.02(a)(1) (2001 Ed.). Upon filing, the certificate of delinquency shall constitute a continuing lien against the real property. 34 D.C. Code 2407.02(a)(2). The power to obtain and enforce liens for the failure to pay overdue water and sewer charges was transferred to WASA. 34 D.C. Code 2202.19(b) (2001 Ed.). Plaintiff's Complaint asserts that the tenants have

B

assumed responsibility for the water and sewer charges. However, even if this Court were to assume the truth of this allegation, the law does not provide for an exception to WASA's authority to file a continuing lien against real property when the tenants have assumed responsibility for the water and sewer charges. Plaintiff, as the owner of the property, remains liable for the water and sewer charges.

Plaintiff has also sued under 42 U.S.C. § 1983 for just compensation under the Takings Clause of the Fifth Amendment to the United States Constitution. This claim, based on Plaintiff's assertion that the owner of the property is not liable for water and sewer charges of the individually metered units, should be dismissed because the owner is liable and WASA may look to the property to satisfy the debt. Moreover, WASA's filing of the liens does not constitute a taking of property without just compensation. WASA has not taken possession of the property and the Plaintiff continues to enjoy the economic benefits associated with owning the property.

Wherefore, WASA respectfully requests that Plaintiff's Complaint for Declaratory Judgment be dismissed with prejudice.

Respectfully submitted,

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/s/ Nat Polito

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Date: November 4, 2008

CERTIFICATE OF GOOD FAITH

Counsel for Plaintiff declined to consent to the relief sought by this Motion.

/s/ Nat Polito
Nat N. Polito

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2008, a copy of the foregoing Motion, Memorandum of Points and Authorities and proposed Order was served electronically, via CaseFileXpress, to:

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1738 Wisconsin Avenue, NW
Washington, D.C. 20007
Counsel for Plaintiff

/s/ Nat Polito
Nat N. Polito

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

EUCLID STREET, LLC,	)	
	)	
Plaintiff,	)	**Case No. 08 CA 0006780 B**
	)	**Judge Brian F. Holeman**
v.	)	**Next Event: Initial Conference**
	)	**January 9, 2009**
DISTRICT OF COLUMBIA	)	
WATER AND SEWER AUTHORITY,	)	
	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT

Defendant District of Columbia Water and Sewer Authority ("WASA"), in support of its Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment ("Complaint") states:

I. Argument

A. The Statutory Authority to File a Continuing Lien Against Real Property Based on Delinquent Water and Sewer Charges Applies Even if the Tenants of the Property are Billed for Water and Sewer Charges.

Plaintiff admits that it is the owner of the property located at 1460 Euclid Street, N.W., Washington, D.C. (hereinafter, "the property"). (Compl. ¶ 3.) However, Plaintiff asserts that it is not liable for overdue water and sewer charges because, pursuant to Section 429.2 of the District of Columbia Municipal Regulations, "[o]n or about March 8, 2000, WASA was advised, in writing, that the tenants of 1460 Euclid Street ("tenants") wanted to be billed directly for water and sewer charges and asked that their apartments be individually metered to enable such billing." (Compl. ¶ 13.) Plaintiff subsequently installed the individual meters and WASA commenced billing the tenants for water and sewer charges. Based on these facts, Plaintiff

concludes that the owner of the real property is no longer liable for water and sewer charges and that the statutory authority to place a lien against the property for overdue water charges has been waived. Plaintiff is incorrect; there is no basis in law or fact for the conclusion that the statutory authority to place a lien against the property is not available to WASA in this case.

In the event of overdue water and sanitary sewer charges that remain unsatisfied for 60 days or more, the Mayor is entitled to file a continuing lien against the real property. Section 34-2407.02(a) states:

> (1) Except as provided in subsections (c) and (d) of this section, if an owner of real property fails to pay District water and sanitary sewer service charges in full accordance with Section 34-2401.01, for all bills rendered which remain unsatisfied for 60 days or more the Mayor may file a certificate of delinquency with the Recorder of Deeds.
>
> (2) Upon the filing, the certificate of delinquency shall constitute a continuing lien against the real property and show the amount of unpaid charges for District water and sewer services. The continuing lien shall be for the current full amount of the unpaid water and sanitary sewer service charges, penalties, interest, and administrative costs.

34 D.C. Code 2407.02(a)(1)(2)(2001 Ed.). Section 34-2110, titled Additional Charge for Overdue Bills, Enforcement of Lien, in pertinent part, provides:

> … in order to encourage the prompt payment of the sanitary sewer service charge imposed by this subchapter … the Mayor of the District of Columbia is authorized … to have and enforce a continuing lien for such charge upon the land and any improvements thereon furnished such sanitary sewer service, in the same manner and to the same extent as if §§ 34-2407.01, 34-2407.02, 34-2407.03, and 34-2413.10 were set forth in this subchapter, and such sections shall be deemed to be applicable in every particular to the sanitary sewer service charge imposed by this subchapter….

34 D.C. Code 2110(a) (2001 Ed.). Section 34-2202.19(b) transfers to WASA "the **power to obtain and enforce liens** for the failure to pay any charge, fee, assessment or levy authorized or

required by § 34-2202.16 in accordance with §§ 34-2407.02 and 34-2110." 34 D.C. Code 2202.19(b) (2001 Ed.)(emphasis added).

Section 427.1 of the District of Columbia municipal regulations tracks the statute and provides that when bills for water and sewer charges are more than sixty (60) days overdue, "WASA shall provide the **owner** of record with a written notice of intent to file a lien." 21 DCMR 427.1 (emphasis added). Section 427.2(c) states that a "certificate of delinquency shall constitute a lien against the real property." 21 DCMR 427.2(c). The municipal regulations provide for the sale of the property at tax sale. However, the regulations provide that single family homes that are owner occupied, shall not be sold at tax sale for delinquent water and sewer charges, but a lien shall be attached to the real property until the outstanding balance is paid in full. 21 DCMR 427.5.

The municipal regulations provide that WASA "may permit the tenant(s) to receive the bills in their own name, when the owner or agent of the rental property fails to pay the delinquent account in full and it is determined to be practicable." 21 DCMR 428.1. Even if the tenants are billed directly, the owner's liability is not waived. There is no such exception in the regulations to the filing of a certificate of delinquency which constitutes a continuing lien for past due water and sewer charges.

The "opportunity for a tenant to receive service in own name" does not end the liability of the owner but is simply a convenience for the tenant and the owner. If the bill is in the tenant's name, the tenant may pay his/her own water bill even if the owner fails to pay the bill. This will avoid any interruption in service to the occupant/tenant of the property based on non-payment by the owner. Section 428.1 grants the tenant the opportunity to control his/her own receipt of water services.

Plaintiff misconstrues Section 429.2 as excusing an owner from liability. Paragraph 12 of Plaintiff's Complaint states that the regulation "requires WASA to provide tenants of master-metered residential apartment buildings with the opportunity to assume **full** financial responsibility for the water and sewer services provided to them." (Compl. ¶ 12 (emphasis added).) Significantly, Section 429.2 does not use the word, "full." The regulations should not be interpreted to waive WASA's authority to look to the owner of property for payment of delinquent water and sewer charges when the bills are put in the tenant's name.

Under Sections 428 through 430, a tenant or occupant of residential property is simply given the opportunity to have the bills put in the tenant's name. The tenant may then challenge the bills, pay the bills, and otherwise act as the owner with relation to WASA. Even though the tenant is named on the account, there is no basis to conclude that the regulations terminate the owner's liability for overdue water bills.

Based on the statute and regulations discussed herein, it cannot reasonably be concluded that WASA is barred from filing a lien against real property (i.e., the debt for delinquent water and sewer charges becomes unsecured) when the account is in the tenant's name. A tenant who is anticipating leaving a property that he does not own may be willing to forego payment of the water bill. If the tenant assumed "full financial responsibility," WASA would be left with an unsecured debt and a collection action against the tenant. This result would undermine D.C. Code sections 34-2407.02 and 34-2202.19(b), granting WASA the power to obtain and enforce liens when there is a delinquent water and sewer charge.

B. Plaintiff's Claims for Just Compensation Under the Takings Clause of the Fifth Amendment Should be Dismissed.

Plaintiff also sues under 42 U.S.C. § 1983 for just compensation under the Takings Clause of the Fifth Amendment. Plaintiff alleges that because the tenants have allegedly

assumed "full financial responsibility" for the water and sewer charges at the property, WASA's filing of liens against the property constitutes a taking without just compensation in violation of the United States Constitution. In short, Plaintiff is alleging that WASA is improperly attaching Plaintiff's property to pay debts owed by the tenants. For reasons previously discussed and incorporated herein, Plaintiff, the owner of the property, remains liable for the water and sewer charges even if the tenants are named on the accounts. Therefore, Plaintiff does not have a claim that WASA's filing of liens against the property constitutes a taking in violation of the Fifth Amendment.

Even assuming, *arguendo*, that WASA improperly put the liens on the property, Plaintiff would not be entitled to relief under the Takings Clause because Plaintiff continues to own and operate the residential apartment building located at 1460 Euclid Street, N.W. (Compl.¶ 3.) Notwithstanding the WASA liens, Plaintiff continues to receive the full economic benefits from the property and therefore there is no taking of property. *District Intown Props. Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 876-77 (D.C. Cir. 1999).

The Supreme Court has distinguished between two types of takings, a "physical taking" and a "regulatory taking." *See Brown v. Legal Found. of Washington*, 538 U.S. 216, 233 (2003) ("The text of the Fifth Amendment provides a basis for drawing a distinction between physical takings and regulatory takings."). The District of Columbia Court of Appeals summarized the law as follows:

> Where there has been a physical taking, or what is sometimes called a categorical taking or a *per se* taking, just compensation is required in accordance with "a clear rule." *Id.* ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner…") (*citing United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). In contrast, a regulatory taking, involving "regulations that prohibit a property owner from making certain uses of [his or] her private property," *id.*, "entails complex factual assessments of the purposes and economic effects of

> governmental actions," *id.* at 234, before ascertaining whether a regulation amounts to an unconstitutional taking requiring just compensation has occurred. *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-24, 152 L. Ed. 2d 517 (2002).

Morris v. District of Columbia, 857 A.2d 473, 491 (D.C. 2004). Here, there is no basis to allege that a physical taking or a regulatory taking has occurred. WASA has filed liens against the Plaintiff's property in order to facilitate the collection of a debt that the Plaintiff owes WASA for delinquent water and sewer charges. There is no argument that WASA has taken possession of the property. WASA has not foreclosed on the liens, acquired title or transferred the property.

Similarly, there has been no regulatory taking. Plaintiff continues to have full use and possession of the property. There is no argument that Plaintiff has been denied the ability to engage in any uses of the property as a result of the WASA liens. Likewise, the WASA liens have not affected the profitability of the property or Plaintiff's ability to earn a reasonable rate of return. *Morris*, 857 A.2d at 491 (*citing Brown v. Legal Found. of Washington*, 538 U.S. 216, 235-36 (2003) ("Whether such a taking requires payment of just compensation depends upon 'the property owner's loss rather than the government's gain.'").

In *District Intown Properties Limited Partnership* ("District Intown"), a property owner sued the District of Columbia because the District of Columbia had denied District Intown's request for construction permits. District Intown, like the Plaintiff in this matter, alleged that the District of Columbia's denial constituted a taking and sued under 42 U.S.C. § 1983 for just compensation under the Takings Clause of the Fifth Amendment. Notwithstanding District Intown's argument that the denial of the permits had rendered portions of the property valueless, The U.S. District Court found that there was no physical or regulatory taking stating:

> The Supreme Court has indicated that it will find a "categorical" or per se taking in two circumstances. The first circumstance includes regulations that result in

> "permanent physical occupation of property." This circumstance is not at issue in this case. The second circumstance includes regulations pursuant to which the government denies economically beneficial or productive use of property. This so-called "total taking" claim is at the heart of District Intown's complaint here.

District Intown, 198 F.3d at 879. Relying on the Supreme Court's holdings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the U.S. Court of Appeals affirmed the decision of the lower court. Applying the analysis of *Lucas*, the District Intown court concluded that the owner could not establish that the property's "economic value was totally destroyed" as a result of the government action. *District Intown,* 198 F.3d at 882. The Court of Appeals reasoned that the owner must demonstrate that the property is "unprofitable to maintain" and that "a claimant must put forth striking evidence of economic effects to prevail…" *Id.* at 883. "District Intown had to produce evidence showing that its entire property… no longer provided a reasonable rate of return given the D.C. regulation." *Id.* at 884.

Here, there is no argument that WASA's actions constitute "a permanent physical occupation of property." Likewise, Plaintiff cannot establish - and there is no basis to conclude - that the WASA liens have totally destroyed the economic value of the property. The WASA liens do not have any impact on the profitability of the property, including the collection of rents. Although the WASA liens have given WASA an interest in the property to the extent of the unpaid water and sewer charges, Plaintiff is simply unable to demonstrate that the WASA liens have resulted in a taking of the property. Accordingly, Plaintiff's claims under 42 U.S.C. § 1983 for just compensation under the Takings Clause of the Fifth Amendment must be dismissed.

Conclusion

Plaintiff's Complaint asserts that Plaintiff, the owner of the property located at 1460 Euclid Street, N.W., is not liable for the water and sewer charges because the property is individually metered and the tenants have assumed "full financial responsibility." Plaintiff is incorrect. Under the statutes and regulations relating to the collection of delinquent water and sewer charges, the owner remains liable to WASA. WASA has the authority to collect this debt from the owner, including the filing of liens against the owner's property. There is no violation of the Takings Clause.

Accordingly, to the extent Plaintiff wishes to be removed from liability for overdue water and sewer charges both past and future, Plaintiff's Complaint must be dismissed. Likewise, Plaintiff is not entitled to an order directing WASA to remove all liens recorded against the property or an order enjoining WASA from recording any future liens against the property. As none of the relief Plaintiff seeks is available under law, Plaintiff's Complaint for Declaratory Judgment must be dismissed.

Respectfully submitted,

LAW OFFICES OF NAT N. POLITO, PC

/s/ Nat Polito

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Attorney for District of Columbia Water and Sewer Authority

Date: November 4, 2008

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

EUCLID STREET, LLC,	)	
	)	
Plaintiff,	)	**Case No. 08 CA 0006780 B**
	)	**Judge Brian F. Holeman**
v.	)	**Next Event: Initial Conference**
	)	**January 9, 2009**
DISTRICT OF COLUMBIA	)	
WATER AND SEWER AUTHORITY,	)	
	)	
Defendant.	)	

ORDER

Upon consideration of the District of Columbia Water and Sewer Authority's Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment and any Opposition thereto, and the record herein, it is by this Court, this _____ day of _____, 2008, ORDERED that the Motion be and hereby is GRANTED; and

It is further ORDERED that Plaintiff's Complaint For Declaratory Judgment is dismissed in its entirety WITH PREJUDICE.

_____
Judge Brian F. Holeman
Superior Court of the District of Columbia

Copies to:

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Washington, D.C. 20006

Peter T. Enslein, Esquire
1738 Wisconsin Avenue, N.W.
Washington, D.C. 20007

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

EUCLID STREET, LLC,

Plaintiff,

v.

Civil Action No. 2006 CA 007755 B
Judge Retchin
Calendar 14

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Defendant.

ORDER
(March13, 2007)

This matter is before the Court on Defendant District of Columbia Water and Sewer Authority's Motion to Dismiss Plaintiff's First Amended Complaint and Jury Demand, Plaintiff's Opposition, Defendant's Reply, and Plaintiff's Notice of Filing filed on February 20, 2007. Based on the foregoing filings, the Court **grants** the instant motion due to Plaintiff's failure to exhaust administrative remedies.

Wherefore, it is this 13th day of March, 2007, hereby

ORDERED that Defendant District of Columbia Water and Sewer Authority's Motion to Dismiss Plaintiff's First Amended Complaint and Jury Demand is **GRANTED**; it is further

ORDERED that Plaintiff's Amended Complaint for Declaratory Judgment and Jury Demand is **DISMISSED WITHOUT PREJUDICE**; and it is further

ORDERED that the Status Conference scheduled for March 23, 2007, is hereby **cancelled**.

CASE CLOSED.

Judith E. Retchin
Associate Judge

C

CERTIFICATE OF SERVICE

District of Columbia Court of Appeals
Nos. 09-CV-891 & 09-CV-1057
----------)
EUCLID STREET LLC,
Plaintiff-Appellant,
v.
DISTRICT OF COLUMBIA WATER
AND SEWER AUTHORITY,
Defendant-Appellee.
----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by LAW OFFICES OF PETER T. ENSLEIN, PC, Attorneys for Appellant, to print this document. I am an employee of Counsel Press.

On the **19th Day of February, 2010**, I served the within **REPLY BRIEF FOR APPELLANT** upon:

Nat N. Polito
Law Offices of Nat N. Polito, PC
1776 K Street, N.W.
Suite 200
Washington, DC 20006
(202) 463-0110

via Priority Mail.

Unless otherwise noted, 4 copies have been sent to the Court on the same date as above via hand delivery.

February 19, 2010