VLCT NEWS REPRINT
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LEGAL AND REGULATORY NOTES, OCTOBER 2012

U.S. District Court Affirms Constitutionality of Vermont's Uniform Water and Sewer Disconnect Statute

Last July, the U.S. District Court for the State of Vermont ruled in a case that received widespread media attention for the victory it purportedly garnered for tenants' rights, but which in reality gave tenants no more rights than they already had under State law. *Brown v. City of Barre, Vermont*, 2012 WL 2873664 (D. Vt.), which can be read at http://docs.justia.com/cases/federal/district-courts/vermont/vtdce/5:2010cv00081/18979/125/], involved two named plaintiffs, Brenda Brown and Earl Brooks. Ms. Brown rented an apartment in Barre City from her landlords Jeffrey and Mary Beth Tevis for $650, which included water. The Tevis's had a water account with the City, which included service to Ms. Brown and their other tenants. Mr. Tevis's account became delinquent in April 2009 and the City sent him a notice of delinquency on October 14, 2009. A repayment agreement was entered, but Mr. Tevis stopped making payments a few months later.

The other named plaintiff, Earl Brooks, rented an apartment at 37 Summer Street in Barre from Barrett Gregoire for $650, including water, and the City sent his water bills to Mr. Gregoire. Mr. Gregoire's account became delinquent on January 1, 2010. On May 12, 2010, Mr. Brooks received a notice from the City informing him that his water service would be disconnected the following day unless the $1,238.39 in arrears was paid. When Mr. Brooks contacted the City he was told that, in accordance with its ordinance, it could only deal with Mr. Gregoire, who subsequently entered into a payment plan and avoided disconnection of service.

The plaintiffs (Brown and Brooks) brought several claims against both the State and the City in U.S. District Court for violation of their civil rights under the U.S. Constitution. The first alleged that the State and City violated their procedural due process rights by failing to provide adequate notice before turning off their water and not providing an administrative appeal after it was turned off. The second alleged that the City's ordinance violated their substantive due process rights by requiring payment of their landlords' delinquencies to avoid losing water service. In their final claim, the plaintiffs alleged a violation of their rights to Equal Protection because both the City's ordinance and the State's Uniform Water and Sewer Disconnect Statute treat different classes of ratepayers (delinquent versus non-delinquent landlords and property owners versus tenants) differently. The City prevailed on its motions for summary judgment on the second and third claims: substantive due process (City's policy of treating delinquencies as a lien on the property to be paid by anyone prior to the restoration of service was not so "irrational" or "arbitrary" to constitute a "gross abuse of governmental authority") and Equal Protection (the City's policy decision to contract with only property owners for water service serves a legitimate government purpose). We'll focus on the first claim, the one it lost: violating plaintiffs' procedural due process rights.

The Due Process Clause of the Fourteenth Amendment reads, "nor shall any State deprive any person of life, liberty, or *property*, without due process of law ..." [Emphasis added.] Procedural due process requires notice and an opportunity to be heard prior to the deprivation of a protected property interest. For the plaintiffs to prevail on their procedural due process claim therefore they first had to show they had a constitutionally protected property interest in water service. "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." The plaintiffs claimed the source of their entitlement was contractual and/or emanated from State law. The Court rejected the plaintiffs' contractual argument, finding that they had no direct contractual relationship with the City, nor were they third-party beneficiaries of the contractual relationship that did exist between their landlords and the City. The Court did, however, agree that a statutory property interest existed in water service because State law reflects an intent to provide water service to all users regardless of their status as property owners or tenants. Additionally, it sets forth procedural safeguards to prevent erroneous deprivation of that interest.

Having determined that the plaintiffs established a protected property interest in water service, the Court next examined whether the State's Uniform Water and Sewer Disconnect Statute and, alternatively, the City's ordinance, practices, and policies afforded plaintiffs the minimum procedural protections required. This analysis involved weighing three factors: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest posed by the particular process used; and (3) the State's and City's interests, respectively. The State and City had the same interests: to collect payment for the service they provided. The plaintiffs' private interest in water service was found to be substantial because their interest was water, and water is a "necessity of daily living that is essential to health, well-being, safety, and sanitation." The risk of erroneous deprivation of that interest under the State's Disconnect Statute, however, was not. The Court examined whether an important governmental benefit was being terminated without first providing sufficient notice to the recipient of that benefit and enough time to protect that interest. The statutory uniform disconnect notice met these standards because it informed users of the reason(s) for terminating service, when it would occur, how it could be avoided, any statutory exemptions, when and where to appeal. Further, the notice provided two weeks' notice prior to disconnection..

In contrast, the City of Barre's Water and Sewer Ordinance directed that "the water department ... in furnishing water ... shall deal only with [the] owner of the premises." It also stated the City may withhold water from any person failing to comply with its provisions and that prior to disconnection of service the user must be given "not less than three (3) days['] notice." The Court found that three days wasn't enough time for tenants to protect their interests. If notice was given on a Friday, then tenants would have only one business day to avoid termination of service. The City's disconnection notice informed users of the amount in arrears that must be paid to restore service but contained no information concerning a right to appeal, a repayment plan, or the right to seek a medical exception. The Court also found that the City failed to provide notice to the occupant even when the occupant was not the "ratepayer," did not provide notice of a right to a hearing to either the tenant or owner, and neglected to provide notice of the statutory exceptions to disconnection. On balance, these interests did not interfere with the City's interest in collecting for services rendered, so the Court ultimately ruled on this claim that "(A)t a minimum, the City must therefore comply with Vermont's Disconnect Statute in order to satisfy the requirements of procedural due process."

Interestingly, the Court highlighted that the State's uniform notice, and not the usual accompanying opportunity for appeal, is all that must be provided to a tenant who is not also the ratepayer. Whereas the State's Uniform Water and Sewer Disconnect Notice is directed to the "customer" (see 24 V.S.A. § 5144), the statute governing the jurisdiction for appeals makes reference only to the "ratepayer." (The selectboard shall promptly and fairly hear any or all appeals by the ratepayer after notice to all interested parties .... 24 V.S.A. § 5147) The legislature's choice of words wasn't lost on the Court. "Assuming a tenant is not a 'ratepayer,' no appellate rights other than notice of the appeal are provided." What, after all, the Court reasoned, would a tenant do with a hearing? "A tenant is already aware that termination of water service is imminent and is aware of the medical exception pursuant to which water service may be restored. A hearing to remind the tenant of these facts would serve little purpose." The legislature already provided tenants with several avenues of redress: withholding rent, seeking injunctive relief, recovering damages, costs and attorney's fees, and terminating the rental agreement. Selectboards are not empowered to resolve landlord/tenant disputes. "Courts have held that provided an aggrieved party has the time and opportunity to pursue his or her claim in an available forum, due process is satisfied."

The message for Vermont's towns from this case is clear: Provide users of your water/sewer systems at least the same due process protections as the State's Uniform Water and Sewer Disconnect Statute. If you have your own ordinances and policies in place, you must review themfor compliance with State law. (See Title 24, Chapter 129 at http://www.leg.state.vt.us/statutes/sections.cfm?Title=24&Chapter=129) In situations where the customer and ratepayer are different, you should send notices to both and provide an opportunity to appeal to at least the ratepayer.

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