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City of Rincon v. Couch, 623 S.E.2d 754 (Ga. Ct. App. 2005)

## GEORGIA

**City of Rincon v. Couch, 623 S.E.2d 754 (Ga. Ct. App. 2005)** (holding that an administrative law judge did not err in granting summary determination in favor of an administrative agency's denial of a city's groundwater withdrawal permit).

In 2001, the Environmental Protection Division of the Georgia Department of Natural Resources ("EPD") found that the City of Rincon was withdrawing in excess of its groundwater limit from the Upper Floridan Aquifer. In response, the EPD and the City entered into a consent order requiring the City to connect its existing water line to an Effingham County transmission main. In September 2003, the City applied for a second groundwater withdrawal permit, allowing it to withdraw additional groundwater from a new well it had drilled into the Lower Floridan Aquifer. The EPD denied the application on the basis that the City "failed to demonstrate a need or necessity for the new water withdrawal" given the consent order. In January 2004, the City challenged the EPD's denial of their application. An administrative law judge ("ALJ") granted a motion for summary determination on behalf of the EPD. The City appealed to the Superior Court of Fulton County, which affirmed the ALJ's decision. The City then applied for discretionary appeal with the Court of Appeals of Georgia.

The City claimed that the ALJ erred by not considering each of the ten factors set forth in Georgia's Ground-water Use Act ("GWUA"):

- (1) the number of persons using an aquifer and the object, extent, and necessity of their respective withdrawals or uses;
- (2) the nature and size of the aquifer;
- (3) the physical and chemical nature of any impairment of the aquifer adversely affecting its availability or fitness for other water uses, including public use;
- (4) the probable severity and duration of such impairment under foreseeable conditions;
- (5) the injury to public health, safety, or welfare which would result if such impairment were not prevented or abated;
- (6) the kinds of businesses or activities to which the various uses are related;
- (7) the importance and necessity of the uses . . . ;
- (8) diversion from or reduction of flows in other watercourses or aquifers;
- (9) a regional water development conservation and sustainable use plan, where applicable; and
- (10) any other relevant factors.

The court found that the City failed to prove that the EPD did not consider all of the factors and further noted that the EPD had no statutory requirement to issue findings of fact or conclusions of law demonstrating that it had considered all ten factors. The court pointed out that, absent statutory language to the contrary, Georgia law entitles an administrative agency to place more emphasis on one statutory factor than another. The court also noted that the EPD's emphasis on the

necessity of the groundwater withdrawal was in line with Georgia's policy of conserving its water resources as specified in the GWUA.

The City also claimed that the ALJ erred when it allowed the EPD to consider alternative water sources when reviewing groundwater withdrawal applications. The court held this contention contrary to the plain language of the GWUA. Although the City claimed that the EPD had a longstanding policy of allowing localities to decide what source of water best suits their needs, the court found no evidence to support the existence of such a policy. The City further contended that the ALJ's determination was in error because the City's proposed withdrawal would have no adverse effect on other users. The City claimed that the ALJ's determination would force the City to acquire additional water from more expensive sources, an outcome that is contrary to public policy. Moreover, the City claimed that the EPD should give it priority over other applicants because the water was for human consumption. The court disagreed, noting that the statutory factors set forth in the GWUA are what the EPD should consider and that the statutory scheme does not require the EPD to grant withdrawal permits to applicants presenting no adverse effects to other users. Further, the court pointed out that the consent order does not force the City to purchase water from Effingham County; rather it gives the City the option to make the purchase. Moreover, the court noted that even if the City's evaluation of costs were true, the EPD could weigh that expense against other public policy concerns. Regarding the City's contention that the EPD should give it priority, the court noted that human consumptive use priority considerations exist only in emergency periods of water shortage.

The City also argued that the consent agreement would not satisfy its water needs. In response, the court noted that the ALJ's determination showed that the consent order would fulfill the City's water needs for the foreseeable future without the need for further groundwater withdrawal. Moreover, the court found no legal error in the ALJ's determination that no genuine issue of material fact remained as to the City's current and projected water needs. The City further argued that the EPD abused its discretion when it allegedly encouraged the City to install an additional well but then denied its application to use it. The court responded that nothing in the administrative record showed that any EPD employee promised the City that the EPD would grant its withdrawal permit upon completion of its well. The City also claimed that the ALJ erred in retroactively applying an EPD interim strategy regarding Lower Floridan Aquifer withdrawals. The court was unpersuaded and noted that the ALJ had not predicated its legal analysis on that strategy but rather on the statutory framework of the GWUA.

Finally, the City contended that the ALJ's determination was unconstitutional because it deprived the City of due process of law, equal protection of the laws, and it constituted a taking of property without

just compensation. The court did not agree, finding that although an ALJ lacks the authority to hear the claim, parties must plead constitutional claims in the administrative court. Because the City failed to raise these issues, it waived its ability to raise them on appeal. Regarding the wrongful taking claim, the court noted that the City did not present any factual or legal arguments as to why the denial of its application constituted an unlawful taking without just compensation. The court affirmed the ALJ's grant of summary determination in favor of the EPD.

*William S. Hoebel, III*

## IDAHO

### **Chisholm v. Idaho Dep't of Water Res., 125 P.3d 515 (Idaho 2005)**

(holding that owners of property near a proposed dairy failed to prove that Department of Water Resources hearing officer improperly considered the "local public interest" in granting water rights transfer to dairy).

In order to expand its operations, K&W Dairy ("K&W") filed an application with the Idaho Department of Water Resources ("IDWR") for a transfer of water rights to meet the needs of a proposed new dairy, and to flush waste from its parlor and alleys. Over property owners Bill Chisholm and Lee Halper's ("property owners") protests, an IDWR hearing officer held a hearing taking evidence on a range of issues including odor control measures, and issued a preliminary order approving K&W's application. The property owners sought review of the IDWR decision, arguing that because of odors from the proposed dairy, the water rights transfer did not comport with the local public interest standard codified in the controlling Iowa statute. On appeal to the Supreme Court of Idaho, the property owners asserted that K&W's failure to present any evidence that the dairy would not add to the existing odor problem constituted a violation of the public interest standard. IDWR and K&W maintained that the findings of fact were supported by substantial and competent evidence and should be affirmed.

The controlling Idaho statute required the IDWR director to examine all the evidence and to approve the change in whole, in part, or conditionally, if the change was consistent with the conservation of water resources in the state and was in the local public interest. The Idaho Code defined the local public interest as "the affairs of the people in the area directly affected by the proposed use." The court determined that by adopting the general phrase "local public interest," the legislature intended to include any locally important factor impacted by the proposed appropriations.