IN THE SUPREME COURT OF FLORIDA

TAMARON HOMEOWNERS ASSOCIATION, INC.

Petitioner,

v.

TAMARON UTILITIES, INC.,

Respondent.

APPEAL NO. 63626

2nd DCA Case Nos. 82-1594 and 82-1744

ON PETITION FOR CONSTITUTIONAL CERTIORARI
TO THE SUPREME COURT OF THE STATE OF FLORIDA
FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER, TAMARON HOMEOWNERS ASSOCIATION, INC.

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TABLE OF CONTENTS
AND
GROUNDS FOR JURISDICTION

TABLE OF CITATIONS

STATEMENT OF THE CASE

This case originated at the Board of County Commissioners, Sarasota County, (BOARD) when TAMARON UTILITIES, INC. (TAMARON) applied for a rate increase under the provisions of Sarasota County Ordinance 80-62. TAMARON was dissatisfied with the rate awarded, and took an appeal to the Circuit Court in and for Sarasota County. TAMARON HOMEOWNERS ASSOCIATION, INC. (HOMEOWNERS) was not at that time a party. On April 23, 1982, the Circuit Court entered an Order declaring unconstitutional that portion of Section 8(e) of Ordinance 80-62 which prohibited the inclusion within any rate awarded of a depreciation expense attributable to contributions in aid of construction (CIAC). On May 3rd, the HOMEOWNERS moved to intervene on the basis that they were the real parties in interest, and for a rehearing. The Circuit Court permitted intervention, following which the HOMEOWNERS obtained consideration of their Motion for a Rehearing.

On July 2, the Circuit Court denied the motion. The HOMEOWNERS then petitioned the Second DCA for certiorari and an order quashing the Circuit Court's holding that a mandatory exclusion of a depreciation expense on the amortization of contributed assets unconstitutionally deprived the Utility of its property. Thereafter, the BOARD similarly petitioned the Second DCA. The petitions were consolidated.

In an Opinion filed February 23, 1983, the Second District in a lengthy opinion, a copy of which is included in the Appendix attached hereto, ruled

> Section 8(e) of County Ordinance No. 80-62 clearly does not allow CIAC depreciation to be treated as an operating expense. Neither does the Ordinance permit consideration of CIAC depreciation in the rate base calculation. Our reading of the Ordinance leads us to the conclusion that it does not provide for the inclusion of CIAC depreciation in the rate base calculation by way of addback. If it did so, then we would be required to grant certiorari and quash the decision of the Circuit Court on this point. If it is improper to allow a utility to double-dip in its use of CIAC depreciation, it is equally improper to allow a regulatory body to completely prohibit or eliminate the use of CIAC depreciation in the ratemaking process.
>
> The Circuit Court struck only a portion of the Ordinance. We, however, conclude that that is not sufficient, and accordingly hold the entire Ordinance confiscatory and violative of the due process clauses of both the Florida and United States Constitutions. [emphasis added]

Both the HOMEOWNERS and the BOARD moved for a rehearing. In an Opinion filed April 6, 1983, the Court struck the second of the two paragraphs above, and replaced it with the following:

> The Circuit Court struck only certain words of Section 8(e) of the Ordinance. We, however, conclude that that is not sufficient and accordingly hold the entire Section 8(e) confiscatory and violative of the due process clauses of both the Florida and United States Constitutions and accordingly strike the entire section. [emphasis added]

STATEMENT OF THE FACTS

Ordinance 80-62 does, in fact, prohibit CIAC depreciation to be treated as an operating expense. The Ordinance also prohibits

CIAC from being included in the rate base. Service and maintenance expenses associated with the contributed assets are covered by the expenses allowed TAMARON by the BOARD.

On October 24, 1981, the BOARD adopted Resolution 81-344 (hereafter, the Rate Order), which adjusted the rates and charges of TAMARON by authorizing it to increase its sewer rate. In so doing, the BOARD refused to include within the rate awarded to the Utility $23,530.00 claimed by the Utility as an annual "expense" attributable to depreciation of contributed assets.

GROUNDS FOR CONSTITUTIONAL CONSTRUCTION JURISDICTION

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY CONSTRUED THE REQUIREMENTS OF THE DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA, AS IT RULED A UTILITY IS DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW WHEN THE RATE MAY NOT INCLUDE CIAC DEPRECIATION AS AN OPERATING EXPENSE, AND ALSO PROHIBITS THE INCLUSION OF CIAC IN THE RATE BASE.

The Opinion of the Second District speaks for itself. In so ruling, the Second District Court has declared unconstitutional that section of Ordinance 80-82 which authorizes the Board of County Commissioners of Sarasota County to regulate rates and charges of water and sewer utilities in Sarasota County.

GROUNDS FOR CONFLICT JURISDICTION

I. THE DISTRICT COURT'S HOLDING THAT AN ORDINANCE WHICH PROHIBITS THE INCLUSION OF CIAC IN THE RATE BASE, AND ALSO PROHIBITS A DEPRECIATION EXPENSE ATTRIBUTABLE TO CIAC PROPERTY, EXPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT IN THAT IT DEPARTS FROM THE "END RESULTS" DOCTRINE ADOPTED BY THIS COURT.

Without having evaluated the rate set by the Board of County Commissioners for TAMARON, the Second DCA held it to be unconstitutional *per se* to exclude CIAC from the rate base, and simultaneously to prohibit the utility from collecting a depreciation expense attributable to CIAC amortization. The Court held that those prohibitions, operating together, produce a confiscatory rate.

That holding expressly conflicts with this Court's ruling in Jacksonville Gas Corp. v. Florida R.R. & Public Utilities Commission, 50 So.2d 887 (Fla. 1951). In the Jacksonville Gas Corp. case, the petitioner utility asked this Court to strike the rate awarded because the regulatory commission there involved refused to calculate the rate base at "present value." The Court rejected the petitioner utility's claim that it was being deprived unconstitutionally of its property, or that Florida was irretrievably committed to the present value process as distinct from "actual cost" valuation method. The Court stated

> It was the Commission's view that it should be "free to follow such method . . . as [it] may choose so long as the end results are rates which are just and reasonable." (emphasis added) This thought . . . may have been prompted by the decision in Federal Power Commission v. Hope [64 S.Ct. 281, 88 L.Ed. 333] because the author of it [the Commission opinion] had the idea that the "end result" could not be condemned and that "'fair value' is the end product of the process of ratemaking, not the starting point, as the Circuit Court of Appeals held." [320 U.S. 591, 64 S.Ct. 287] At first we were disposed to criticize such reasoning because we thought one could not evaluate a conclusion without examining the course followed in reaching it; in other words, the product of .07X could not be judged properly without isolating and defining "X." But upon further study, we became convinced that the "end result" is to be weighed in terms of justice and reasonableness, having consideration for all circumstances that in the sphere of finances affect and influence investments of this sort. This so-called "end result" is made fluctuant by the variance in percentage and the flexibility of justice and reasonableness.

The Second DCA, in declaring Section 8(e) of the Ordinance unconstitutional on the grounds it did, produces a substantial departure from the "end results" doctrine, the doctrine by which deprivation of property questions in utility ratemaking cases are

to be judged. The Supreme Court in Jacksonville Gas Corp. explicitly held that a Court upon judicial review may not isolate a factor within the ratemaking formula, or judge that isolated factor against constitutional standards. The Supreme Court mandated that the constitutionality of the rate awarded a utility be judged solely by whether the end result produces for the utility sufficient revenues to assure it a reasonable return on its investment. By isolating the treatment Sarasota County affords CIAC assets, the Second District has departed from that well-tested rule and begun the process of judging isolated factors without regard for or otherwise passing judgment on whether the end result unconstitutionally deprives the utility of property. TAMARON has not argued and the Court below did not conclude or find that the revenue was insufficient to produce the constitutionally required result. The Second DCA held any rate adopted under §8(e), without regard to the end result, is confiscatory as a matter of law.

II. THE DISTRICT COURT'S DECLARATION THAT A PROHIBITION CONTAINED IN A UTILITY REGULATORY ORDINANCE BARRING A UTILITY FROM COLLECTING A CIAC DEPRECIATION EXPENSE, AND EXCLUDING CIAC FROM THE RATE BASE AS UNCONSTITUTIONAL, EXPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The Second District's ruling in Tamaron conflicts with Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla. 1972); State v. Hawkins, In Re: Petition of Holiday Lake Water System, Inc., 364 So.2d 723 (Fla. 1978) and State v. Florida Public

Service Commission, 399 So.2d 9 (Fla. 1st DCA 1981)

Westwood Lake, supra, involved a petition to this Court from the Third DCA which affirmed the ruling of the Circuit Court that the provision of the Metropolitan County Code governing valuation of utility property was constitutional. The Supreme Court granted certiorari and remanded the matter for an evidentiary hearing to determine whether the ordinance's application to the Westwood Lake Utility resulted in rates which were confiscatory. The Court addressed the CIAC issue directly.

> The gravaman of the complaint for declaratory decree was not whether the principle of "customer contributions" under the "investment" method of determining rates reviewed by the ordinance was unconstitutional vel non or per se. The utility apparently recognizes the constitutionality of the provision itself, as it must, for the authorities stoutly support it.

This Court cited Southern Gulf Utilities, Inc. v. Metropolitan Dade County Water & Sewer Board, 24 Fla.Supp. 60 (1964), Aff'd 180 So.2d 481 (Fla. 3rd DCA 1965); App. Dism'd, 188 So.2d 810 (Fla. 1966); Cert. Den. 192 So.2d 493 (Fla. 1966); and Florida Cities Water Company v. Board of County Commissioners, Hillsborough County, 244 So.2d 737 (Fla. 1971) This Court concluded that a rate or a regulatory ordinance could not be held constitutional or unconstitutional without first determining the economic result produced by the rate.

Similar issues were addressed in State v. Hawkins, (Holiday Lake) supra, where this Court held that the PSC exceeded its statutory authority in utilizing an accounting method to determine the rate base, where the statute prohibited CIAC from being

included in the rate base. Since that accounting procedure reintroduced CIAC property into the rate base, this Court struck down the rate award and, rather necessarily, sanctioned the constitutionality of the prohibition.

The First DCA in State v. Florida Public Service Commission, supra, also conflicts with Tamaron. While the central thrust of the case dealt with so-called double-dipping (permitting both CIAC depreciation expenses and the inclusion of CIAC in the rate base), the First DCA nevertheless expressly sanctioned the practice of disallowing CIAC depreciation as an operating expense. The Supreme Court and the various District Courts of Appeal, including the Second DCA, have at various times sanctioned the exclusions. See Florida Cities Water Company v. Board of County Commissioners, 334 So.2d 622 (Fla. 2nd DCA 1976)

In a very substantive way, these numerous utility rate cases deal increasingly with isolated aspects of the ratemaking process. The cases frequently involve the prohibited "factor approach" which taken singly or together expressly conflict with the "end results" test mandated in Jacksonville Gas and numerous U. S. Supreme Court cases. See Federal Power Commission v. Hope Natural Gas, supra.

CONCLUSION

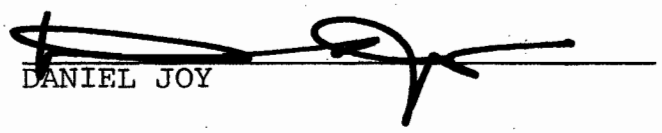
The basis for this Court accepting jurisdiction exists pursuant to Article V, Section 3(b)(3) both as to the provision which authorizes the review of any decision of a District Court which expressly construes a provision of the State or Federal Constitution, and as to the provision which authorizes review of a decision which expressly and directly conflicts with the decision of another District Court of Appeal or of the Supreme Court on the same question of law. This Court ought to accept jurisdiction because of the importance to the State in general, and to Sarasota in particular, and the significance of the issue of CIAC treatment in water and sewer ratemaking.

The Second District made its ruling, although the issue before it was whether the prohibition in Ordinance 80-62 to the collecting of CIAC depreciation expense was unconstitutional. The Second District answered this question in the negative. The issue of the constitutionality of §8(e) as it treats CIAC in its entirety was neither briefed by the parties or considered at the oral argument.

It is not only Sarasota County's ordinance which is at issue. Section 367.081(2) Florida Statutes, contains a provision identical in its treatment of CIAC as that included in the Sarasota County Ordinance. The integrity of the "end results" doctrine by which rates and regulations should be judicially

reviewed, and the inevitability of a constitutional challenge to the state statute in light of the Second DCA ruling in Tamaron, argues strongly that the Court in its discretion should hear and decide the constitutional issues presented in Tamaron Homeowners Association, Inc. v. Tamaron Utilities, Inc.

Respectfully submitted,



DANIEL JOY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished, by mail, to RICHARD E. NELSON, ESQUIRE, Nelson, Hesse, Cyril, Smith, Widman & Herb, 2070 Ringling Boulevard, Sarasota, Florida 33577, Attorney for Sarasota County, and to M. JOSEPH LIEB, JR., ESQUIRE, Syprett, Meshad, Resnick & Lieb, 1900 Ringling Boulevard, Sarasota, Florida 33577, Attorney for Tamaron Utilities, this 7th day of May, 1983.

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