IN THE SUPREME COURT OF FLORIDA

SARASOTA COUNTY, a political subdivision of the State of Florida; and TAMARON HOME-OWNERS ASSOCIATION, INC.,

Petitioners,

Vs.

TAMARON UTILITIES, UNC.,

Respondent.

_____/

Case No. 63,~~626~~ 46

Lower Court Case Nos. 82-1594 and 82-1744

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF IN OPPOSTION OF JURISDICTION

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Authorities Cited

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent accepts Petitioners' statements of the case and facts. Fla. R. App. P. 9.210(c).

PRELIMINARY STATEMENT

The Petitioners have urged the court to exercise its discretionary jurisdiction to review the Second DCA's opinion of Sarasota County v. Tamron Utilities, Inc., ___So.2d___(Fla. 2d DCA 1983)[8 Fla. Law Wkly p. 642, modified at 8 Fla. Law Wkly p. 1006]. Petitioners' request is made in accordance with Art. V. § 3(b)(3), Fla. Const. (1980 Rev.), alleging that the District Court's opinion both expressly construes a provision of the state and federal constitution, and expressly conflicts with prior opinions of this court and other district courts of appeal on the same question of law.

Although the District Court's opinion does construe a provision of the state and federal constitutions, the lower court's opinion does not expressly, directly, indirectly, or otherwise conflict with prior opinions of this court or other district courts of appeal.

In spite of the constitutional construction, Respondent suggests this court need not exercise its discretionary review powers to review Sarasota County v. Tamron Utilities. The following is submitted in support of Respondent's request that the court should decline review in this matter.

I

JURISDICTION UNDER CONSTITUTIONAL CONSTRUCTION

The Petitioners submit, and Respondent concedes, that the Second DCA's opinion of Sarasota County v. Tamron Utilities expressly construes a provision of the state and federal constitutions. Accordingly, the court has jurisdiction under Art. V § 3 (b)(3), Fla. Const. (1980 Rev.); and Fla. R. App. P. 9.030 (a)(2)(A)(ii).

I I

JURISDICTION BASED ON EXPRESS AND DIRECT CONFLICT WITH OTHER DISTRICT COURTS OF APPEAL OR THE SUPREME COURT ON THE SAME QUESTION OF LAW

Petitioner has said that the District Court's opinion both expressly and directly conflicts with prior opinions of this court and other district courts of appeal on the same question of law. Pursuant to Art. V § 3 (b)(3), Fla. Const. (1980 Rev.), this court may review decisions of a district court of appeal that expressly and directly conflict with prior opinions of this court and/or opinions of other district courts of appeal. However, the District Court's opinion of Sarasota County v. Tamron Utilities expresses no conflict with prior decision of any court.

In Jenkins v. State, 385 So.2d 1356 (Fla. 1980)(ENGLAND, C.J. specially concurring; ADKINS, J., dissenting with opinion), the

court looked to Webster's Third New International Dictionary, for a definition of the word "expressly", as listed in Art. V, § 3, (b)(3), supra, and determined that "[t]he dictionary definitions of the term 'express' include: 'to represent in words'; 'to give expression to'. 'Expressly' is defined: 'in an express manner'". Jenkins, 385 So.2d at 1356. Under Jenkins the District Court's opinion does not expressly conflict with prior decisions of any court.

The "End Result" Doctrine

Petitioners have alleged that the lower court's decision expressly and directly conflicts with the "end result" doctrine as first enunciated by this court in Jacksonville Gas Corp. v. Florida R.R. & Public Utilities Commission, 50 So.2d 887 (Fla. 1951). In Jacksonville Gas Corp., the court approved the so-called "end result" as an acceptable standard by which to view rate making decisions. In that case the court also noted that "it isn't the purpose of this court to fix the rates [in utility cases], but only to review what has been done by bodies thus empowered to determine whether they have gone so far astray as to violate the statute or to run afoul of the guarantees of the Constitution." Id. at p. 891(emphasis added).

In the later case of City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968), this court once again recognized the limitations of the applicability of the "end result" doctrine when it stated "[t]he 'end result' was never intended to justify improper or erroneous methods or factors in the rate making process.

Petitioners submit that the District Court rejected the "end result" doctrine. That is not the case. Rather, the District Court correctly considered and applied the Jacksonville Gas Corp., and City of Miami, cases, to the facts in this cause. See p.9, of the District Court's opinion. Because of the fundamental unfairness and patent constitutional infringment of Section 8(e) in County Ordinance No. 80-62, the District Court looked to Shevin v. Yarborough, 274 So.2d 505 (Fla. 1973), wherein this court, in speaking of the "end result" doctrine said:

> [T]his Court will not give effect to the "end result" doctrine to justify improper or erroneous methods or to discourage use of proper yardsticks in determining rate base.

Id., 274 So.2d at 508. See also United Tel. Co. v. Mayo, 345 So.2d 648, 654 (Fla. 1977); & City of Miami, supra. Accordingly, the District Court correctly applied the "end result" doctrine in light of the above cases and holding that unconstitutional methods of rate making cannot be excused or ignored by applications of the "end result" doctrine.

Moreover, the "end result" could never be used in the instant case with Section 8(e)'s application to rate setting proceedings. Section 8(e) prohibits the consideration of CIAC property in any form, either in add-back of CIAC depreciation into the rate base, or in CIAC depreciation as an operating expense. Under the working provisions of Section 8(e) the courts could never consider the "end result" with CIAC property figured into the utility rate. As such, Section 8(e), by its categorical exclusion of CIAC property

itself defeats the end result doctrine. In speaking of the end result standard this court has said:

> [T]he "end result" is to be weighed in terms of justness 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 variant in percentage and the flexibility of justness and reasonableness.

Jacksonville Gas Corp., supra, 50 So.2d at 892 (emphasis added). With Section 8(e)'s blanket ban of CIAC property in rate proceedings, the end result doctrine will never take into consideration all circumstances. The District Court correctly held that the end result system does not apply to the case at bar.

The Economic Result Argument

Petitioners attempt to suggest a theory entitled "economic result" which they contend is different and distinct from the "end result" theory previously argued in their petition. A review of Westwood Lake Inc. v. Dade County, 264 So.2d 7 (Fla. 1972) which is the case relied upon by Petitioners, shows, however, that these doctrines are actually the same.

In that case the utility charged that the County's exclusion of customer contributions from its rate base, was unconstitutional as applied to it. In Westwood Lake this Court properly concluded by specifically applying the "end result" doctrine as adopted in Jacksonville Gas that a review of the adequacy of the resulting rates was necessary for a determination of the issue in that case.

Westwood Lake did not involve a situation in which CIAC property was totally and categorically ignored, the ordinance

prohibited CIAC in the rate base. Therefore, that case is distinguishable from the present case wherein the District Court found that it was the Sarasota County ordinance's total exclusion of CIAC from both rate base and expense calculations which constituted a deprivation of property without due process.

Since the "end result" and "economic result" doctrines are actually the same the arguments contained previously in brief will not be repeated here.

It is important to note however that even in the Westwood case, where this court dealt only with the exclusion of CIAC property from the rate base, that this court recognized

> What if an entire utility were made up of such "contributions"? Then is it to be said that no part of the plant is to considered in the rate base? The utility would not long survive on such basis.

Id. 264 So.2d at 11.

Tamron is just such a utility. It is made up entirely of CIAC property and pursuant to the Sarasota County ordinance it would have a zero rate base and no allowable recoverable expense for depreciation of its property! These facts were before the court as evidenced by the petitions and responses submitted to that court.

There is no conflict between the Second DCA's opinion in this and any of the cases cited by Petitioners.

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PREVIOUS REVIEW IN THIS CASE

Review in this case has already been three-fold. Original

proceedings were held in the County Commissioners' Office and the same was an administrative hearing. The Circuit Court acting in its appellate capacity reviewed the administrative action. The Petitioners herein, SARASOTA COUNTY and the HOMEOWNERS, sought review of the Circuit Court's decision via certiorari in the Second District Court of Appeals, under this court's opinion of City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982). That case held that Petitioner's jurisdictional basis for review in the Second DCA limits review by that court to determining whether the circuit court (i) afforded procedural due process and (ii) applied the correct law. Id. at p. 626. Yet now the Petitioners explain that the District Court erred in failing to consider certain facts? Consideration of facts by a District Court is expressly disapproved in proceedings of this nature. Id.

Petitioners now seek their fourth hearing on the issues of this case. Respondent urges this court to delcine such review.

C O N C L U S I O N

While the Second District Court of Appeals' opinion of Sarasota County v. Tamron Utilities, Inc., does expressly construe a provision of the state and federal constitutions, it does not expressly or directly conflict with prior opinions of this court or other district courts of appeal.

Petitioners' contention that § 367.081(2), Fla. Stat. (1981) is at issue by the Second DCA's opinion in this case is totally without merit and is advanced only to confuse the issues before this court.

Section 367.081(2) was not put into issue in this case since it pertains solely to the Public Service Commission, whose rate setting procedures were not being challenged in this case since they do not apply to the facts in this case. Furthermore, a review of § 367.081(2), Fla. Stat., and the procedures followed by the PSC shows that its rate setting procedures do not totally exclude consideration of CIAC property in the rate making process, as does the subject ordinance.

This case has received adequate and full review in administrative and judicial levels.

WHEREFORE, based on the foregoing, the undersigned submits that the court should decline review in this case.

Submitted by,

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M. Joseph Lieb, Jr., Attorney for
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct ocpy of the foregoing has been mailed to DANIEL JOY, 2055 Wood St., Suite 200, Sarasota, FL 33577; and RICHARD E. NELSON, 2070 Ringling Blvd., Sarasota, FL 33577, on this 27th day of May, 1983.

M. Joseph Lieb, Jr.