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IN THE SUPREME COURT OF FLORIDA

SARASOTA COUNTY, a political subdivision of the State of Florida, Petitioner, v. TAMARON UTILITIES, INC., Respondent.	)	Case No. 63,646

PETITION FOR
WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER:

STATEMENT OF THE CASE AND OF THE FACTS

TAMARON UTILITIES, INC. (hereinafter "TAMARON") is a franchised public utility doing business in Sarasota County and is subject to regulation by the Board of County Commissioners. On May 18, 1981, TAMARON applied to the Board of County Commissioners for a rate adjustment. After a duly advertised public hearing on the matter, the Board adopted Resolution 81-344 on November 24, 1981, making such adjustments as were found to be required. Sarasota County Ordinance 80-62 was the controlling ordinance at the time. The Board refused to authorize the inclusion in the adjusted rates of some $23,500 of depreciation on contributed property claimed by TAMARON as an operating expense. In so refusing, the Board followed the express requirements of Ordinance 80-62, Section 8(e), which provides in pertinent part as follows:

> The Board shall fix and determine a rate which allows for reimbursement of operating costs including depreciation on all properties, excluding contributed properties, and a fair and reasonable net return on the original cost of a system incurred by the person first dedicating it to public service, which shall not include contributions in aid of construction or customer contributions.

TAMARON sought review of the rate order by the Circuit Court, which after accepting briefs and hearing argument, entered a final order declaring a portion of Section 8(e) of Ordinance 80-62 unconstitutional on grounds of due process and equal protection violations of both the Florida and the

federal constitutions. The Circuit Court quashed Resolution 81-344 and remanded the matter to the Board. Certain affected individuals and a homeowners' association intervened and a rehearing was sought. The Circuit Court denied the motion for rehearing by order entered on July 2, 1982. SARASOTA COUNTY, the homeowners, and the affected individuals sought review in the Second District Court of Appeal, which rendered an opinion (as modified) reversing the Circuit Court's order as to procedural due process violations, but affirming and expanding on that order regarding substantive due process violations. The modified opinion was filed April 6, 1983. On May 6, 1983 a brief on jurisdiction was filed by SARASOTA COUNTY with the Supreme Court. On October 10, 1983 the Supreme Court entered an order accepting jurisdiction. This brief on the merits is filed pursuant to that order.

TAMARON is a "zero rate base" utility. Virtually its entire plant is made up of contributed property acquired from its parent corporation, the developer of the Tamaron subdivision. A portion of the plant was paid for out of connection fees collected from homeowners who bought building lots in the development. The rate base calculation, even after allowing for working capital, results in a negative number. Because TAMARON had no net investment in its plant, there was no rate base upon which to earn a return, and because

Ordinance 80-62 did not permit depreciation on contributed property as an operating expense, TAMARON found itself in the no-profit posture of recovering revenues only sufficient to cover cash outlay.

The $23,500 TAMARON claimed as an operating expense based on depreciation of contributed property was a bookkeeping account only, designated as a "Reserve Contingency Account" and had no restrictions on it. The Board took the position that if TAMARON was going to try to collect depreciation on contributed property as an operating expense, then those funds should be restricted to replacing depreciated property at the end of its useful life.

TAMARON's own evidence and argument before the Board showed that TAMARON did not intend to use the funds in such a manner. TAMARON's attorney, John Meshad, argued to the Board that the proposed reserve fund would eliminate the problem of TAMARON's shortage of funds for unexpected repairs - not a proper use for a depreciation reserve (Transcript of November 3, 1981 hearing before the Board, page 32.) Mr. Meshad went on to say:

> There needs to be the availability of funds to meet losses in contingencies that are not known at this time; and there needs to be some incentive for the developer or the shareholders of the company for pledging their financial integrity, their financial statements, their assets, to borrow money so that these replacements and repairs, these subsidies can occur. (Transcript 11/3/81, page 33; emphasis supplied.)

There was no competent substantial evidence to support an award of these funds as a "Reserve Contingency Account" and Ordinance 80-62 prohibited their inclusion as depreciation on contributed property. Therefore, the Board did not approve the requested rates.

ARGUMENT

A DULY ENACTED COUNTY ORDINANCE DOES NOT DEPRIVE A FRANCHISED PUBLIC UTILITY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW MERELY BECAUSE CONTRIBUTED PROPERTY IS EXCLUDED FROM THE UTILITY'S RATE BASE AND DEPRECIATION ON CONTRIBUTED PROPERTY IS NOT ALLOWED AS A RECOVERABLE OPERATING EXPENSE.

The issue presented in this certiorari action is whether either the United States Constitution or the Florida Constitution requires a court to invalidate a duly adopted county ordinance which sets forth the criteria and methodology to be used in determining fair and reasonable utility rates, based on that ordinance's exclusion of contributed property from operating expenses recoverable through rates paid. Unless a constitutional provision mades it mandatory that an administrative rate making body allow depreciation on contributed property as an operating expense, or in the alternative, allow contributed property to be included in rate base, the lower courts departed from the essential requirements of law by declaring Section 8(e) of Sarasota County Ordinance 80-62 unconstitutional.

A duly adopted ordinance of a local legislative body comes before the courts with a strong presumption of validity. Miami Beach v. Texas Co., 194 So. 368 (Fla.1940). When an appellate court has occasion to pass upon the validity of a statute or ordinance after a trial court has found it to

be unconstitutional, the statute or ordinance is still favored with a presumption of validity. Re Estate of Caldwell, 247 So.2d 1 (Fla.1971). A party challenging the constitutional validity of a duly enacted ordinance has the heavy burden of proving beyond a reasonable doubt that the ordinance is positively and certainly opposed to some constitutional provision. Lipe v. Miami, 141 So.2d 738 (Fla.1962); Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d 522 (Fla.1973).

In the instant case, the lower courts erred in declaring Section 8(e) of Sarasota County Ordinance 80-62 unconstitutional, and improperly invaded the legitimate legislative authority of the Board of County Commissioners of Sarasota County.

The ruling of the Circuit Court was that both the federal and the Florida constitutions mandate that the Board of County Commissioners include in TAMARON's annual operating expenses claimed for rate making purposes an amount equal to the annual depreciation on all of the utility's property, including contributed property in which the utility has no investment of its own. The Court ruled that such was required under the Due Process Clause and the Equal Protection Clause of both constitutions. The opinion of the Second District Court of Appeal was that it is improper for a regulatory body to completely eliminate or prohibit the use of contributed property depreciation in the rate making process, stating that either depreciation of

contributed property must be allowed as an operating expense or an "add-back" of contributed property depreciation must go into the rate base calculation.

A utility is entitled to earn a fair and reasonable rate of return on its net investment or rate base and to recover its legitimate operating expenses, including taxes. Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla.1972). TAMARON conceded that it had no remaining rate base upon which to earn a return and the issuer before the lower court was whether depreciation on contributed property in which TAMARON had no investment must be allowed as an operating expense in order to avoid confiscation of TAMARON's property without due process of law. Only if the Due Process Clause or the Equal Protection Clause of one or both constitutions make it mandatory that depreciation on contributed property be allowed as an operating expense under any and all circumstances can the lower courts' rulings stand. If any factual circumstance can be conceived in which such allowance is not mandatory, then at worst there has been an unconstituional application of the ordinance in TAMARON's case on the facts. Since the lower courts made no finding of unconstitutional application, those orders would have to be quashed and the matter remanded for further consideration if that point is in question. It is the position of SARASOTA COUNTY that there was no unconstitutional application of the ordinance.

TAMARON relied upon three cases for the proposition that Ordinance 80-62 deprived the utility of its property without due process of law by not allowing depreciation on contributed property as an operating expense: Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla.1972); State v. Hawkins, 364 So.2d 723 (Fla.1978); Southeastern Development & Utility Company, Inc. v. Board of County Commissioners of Sarasota County, 398 So.2d 882 (Fla.1981). These three cases were adopted by the Circuit Court as the basis for its order declaring the ordinance unconstitutional per se. The Second District Court of Appeal apparently also relied in part on these cases. These cases are not authority for the position taken by TAMARON nor do they provide legal precedent for the orders of the courts.

Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla.1972) does not stand for the proposition that depreciation on contributed property must be included in the operating expenses of a utility in order to avoid a confiscatory taking of the utility's property. The case dealt with the exclusion of depreciation on contributed property from rate base, not from operating expenses. The actual holding of the case, as it pertained to depreciation on contributed property, was that the ordinance in question was unconstitutionally applied on the facts in that case, not that it was unconstitutional per se. In this instant action the Circuit Court made no ruling that

there was an unconstitutional application of Ordinance 80-62 to TAMARON and made no finding of fact that would support such a ruling. Therefore, Westwood Lake provides no authority for the rulings of the lower courts.

State v. Hawkins, 364 So.2d 723 (Fla.1978) did not address the issue of depreciation on contributed property as an operating expense, but rather dealt with the question of whether depreciation on contributed property should be included in rate base. The Florida Supreme Court specifically stated that the Public Service Commission's practice at that time of allowing depreciation on contributed property as an operating expense was not at issue in the case. 364 So.2d 723, at 724. Therefore, State v. Hawkins is not authority for the position advocated by TAMARON or for the rulings of the lower courts in this instant case. As a matter of fact, the practice of the Public Service Commission in allowing depreciation on contributed property as an operating expense has been changed since State v. Hawkins by the Florida legislature to specificially exclude depreciation on contributed property as an operating expense. Section 367.081(2), Florida Statutes (1981), provides in pertinent part:

> .....the commission shall not allow the inclusion of contributions-in-aid-of-construction in the rate base of any utility during a rate proceeding; and accumulated depreciation on such contributions shall not be used to reduce the rate base, nor shall depreciation on such contributed assets be considered

a cost of providing utility service. (Emphasis added.)

Even though the statutes governing the procedures used by the Public Service Commission do not apply to Sarasota County, the legislatively mandated practice of the Public Service Commission is persuasive authority that the same position adopted by Sarasota County in Ordinance 80-62 is constitutionally valid as being a legislative policy decision made well within the sound discretion of the Board of County Commissioners when the ordinance was adopted.

Southeastern Development & Utility Company, Inc. v. Board of County Commissioners of Sarasota County, 398 So.2d 882 (Fla. 2d DCA 1981) is not authority for the position advocated by TAMARON or for the rulings of the lower courts in this instant action. That opinion did not deal with the ordinance in question, but rather with its predecessor, Sarasota County Ordinance 72-64, which allowed the inclusion of depreciation on contributed property as an operating expense in the same fashion as did Section 367.081(2), Florida Statutes (1977), followed by the Public Service Commission in State v. Hawkins, 364 So.2d 723 (Fla.1978). In the same way the Florida legislature changed Section 367.081(2) of the 1977 Florida Statutes, the Board of County Commissioners of Sarasota County changed Ordinance 72-64 by adopting Ordinance 80-62, eliminating depreciation on contributed property as an operating expense recoverable by

utilities from rates paid. TAMARON's rate application was made under Ordinance 80-62, therefore, Southeastern Development & Utility Company, Inc. v. Board of County Commissioners of Sarasota County is neither pertinent nor controlling authority.

After the Second District Court of Appeal remanded Southeastern Development to the Circuit Court, the resulting order of the Circuit Court was appealed in Southeastern Development & Utilities Company, Inc. v. Hawkshead Homeowner Association, Inc., 413 So.2d 155 (Fla. 2d DCA 1982). In affirming the order of the Circuit Court implementing its earlier decision, the District Court of Appeal recapped its ruling in that case, stating that under Ordinance 72-64, which allowed depreciation on contributed property as an operating expense, the utility must place the revenues collected based on such an allowance in a reserve account, the mechanics of which must be acceptable to the Board of County Commissioners.

None of the cases relied upon by TAMARON or cited by the lower courts as establishing a substantive due process violation actually support that contention. No cases have been found that do support TAMARON's contention. The utility's theory could only have been accepted upon a showing by TAMARON that it had some protectable property interest in the revenues to be collected as depreciation on the contributed property, plus a showing that it had been deprived of that property interest

unlawfully.

The issue of a proper basis for depreciation has been addressed by the United States Supreme Court on several occasions. In 1930 that Court decided United Railways & Electric Co. v. West, 280 U.S. 234 (1930) and held that annual depreciation could not be limited to original cost of plant, but should rather be measured by replacement cost. Strong minority opinions by Justices Brandeis, Holmes, and Stone disagreed and Justice Brandeis wrote a lengthy opinion which explored the proper function of depreciation and its proper measure. 280 U.S. 234, at 255. The emphasis throughout the dissent, which was later adopted by the majority of the Court in Lindheimer v. Illinois Bell Telephone Company, 292 U.S. 150 (1933) and Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 590 (1944), was that depreciation should be calculated on the basis of the original cost to the utility of property that is depreciable.

Justice Brandeis quoted extensively from various sources of accounting and economic principles. A key quotation which summed up the concept of depreciation was from the United States Chamber of Commerce: "When the cost of an asset, less any salvage value, has been recovered, the process of depreciation stops, -- the consumer has paid for that particular item of service." 280 U.S. 234, at 266.

Applying the concepts embodied in Justice Brandeis' opinion to TAMARON's claim for depreciation on contributed property, it

is clear that the claim cannot be supported. Furthermore, TAMARON has no cost invested in the property it seeks to depreciate. TAMARON's customers should not be required to pay again for that property which they purchased in the first place as part of the price they paid to the developer (TAMARON's parent corporation) for their building sites. Rolling Oaks Utilities, Inc. v. Public Service Commission, 418 So.2d 356 (Fla. 1st DCA 1982).

The Brandeis minority opinion in United Railways was essentially adopted by the United States Supreme Court in Lindheimer v. Illinois Bell Telephone Company, 292 U.S. 150 (1933). In the opinion, Chief Justice Hughes analyzed the effect of having excessive amounts charged to operating expenses and credited to a depreciation reserve:

> ***But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plan and equipment upon which the utility expects a return. 292 U.S. 151, at 169.

This is exactly the effect that would have occurred had TAMARON been allowed by the Board to collect rates based on recovery of depreciation on contributed property as an operating expense. Not only would the customers have paid for utility property initially in their building lot prices, they would then pay for it again in their utility rates as depreciation,

and then pay TAMARON a return on the depreciation funds invested in new or replacement plant. TAMARON would also have had the use of the reserved depreciation funds and any income on such funds before they were invested in plant. If confiscation of property is truly the issue under TAMARON's proposed scheme, it is the rate payers whose property is in jeopardy -- not TAMARON's.

In 1941 the United States Supreme Court decided Federal Power Commission v. Natural Gas Pipeline Company of America, 315 U.S. 574, and held that there was no constitutional requirement that one who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it. 315 U.S. 574, at 593. The facts are distinguishable, but the economic principle is the same as the one at issue in this instant case.

The United States Supreme Court's 1944 decision in Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 590, specifically reversed the Court's position taken in United Railways and adopted the minority view in that case as expressed by Justice Brandeis. In doing so, the Court cited Natural Gas Pipeline and Lindheimer with approval. 320 U.S. 590, at 606.

No change in the federal courts' interpretation of the due process requirements regarding a utility's right to depreciation on contributed property as an operating expense

has occurred since 1944 when Hope was decided. There is no federal law in opposition to the principles discussed above, and the Florida Constitution does not require more than does the federal constitution in this respect. Sarasota County Ordinance 80-62, Section 8(e), complies with constitutional requirements and should be held valid.

The District Court of Appeal opinion failed to take into consideration the reasoning of these cases and apparently did not examine the exact financial effect of implementing the treatment of contributed property it found to be mandatory. An abbreviated analysis of these effects is set forth as follows:

Assume a hypothetical utility made up entirely of contributed property with a gross plant of $100; assume a useful life of 10 years for the plant; assume that a reasonable rate of return on rate base is 10%; assume that all other rate base and operating expense calculations are in proper order so the only variable is the treatment of CIAC; assume no reinvestment. First consider rate base treatment of CIAC, then consider treatment of CIAC depreciation as an operating expense.

A. CIAC not allowed in rate base; no add-back.

In this scenario, the utility starts with $100 of gross plant in year number one and deducts $100 of CIAC. The result is zero rate base; 10% of zero rate base is a zero return on zero

investment. The same result obtains for each successive year.

B. CIAC allowed in rate base; no add-back.

In this scenario, the utility starts year number one with $100 of gross plant and incurs no deduction of CIAC. Subtracting the first year's depreciation from gross plant yields a rate base of $90 and a net return of $9 at 10%. Similar calculations for the next 9 years lead to a zero rate base in the tenth year and show a total return of $45 on zero investment.

C. CIAC not allowed in rate base; add-back allowed.

In this scenario, the utility starts with a zero rate base by deducting $100 of CIAC from $100 of gross plant and ends in year ten with a $100 rate base because of the add-back of 10% annual depreciation on CIAC. The total ten-year return is $55 on zero investment.

The only equitable result is obtained in Scenario A, wherein the utility is getting exactly what it paid for: zero return on zero investment. In Scenarios B and C, the utility is receiving a return on someone else's investment. The Board's refusal to allow such an inequitable result did not confiscate TAMARON's property without due process because TAMARON had no protectable interest in any such return.

If, instead of allowing some treatment of CIAC in rate base calculations, depreciation on CIAC was allowed as an operating expense, the same result obtains as with allowing an add-back except that the utility receives 10% depreciation

on its rate base (all CIAC) instead of a 10% return on plant, and the total revenue received by the utility is even higher: the full $100 value of the plant in which it had no investment, over the life of the plant.

The only possible justifications for depreciation of capital as an operating expense are (1) to recover investment over the life of the asset, or (2) to accumulate funds with which to replace depleted capital investments at the end of useful life. Since both of these accepted principles depend on the existence of invested capital and since TAMARON has no invested capital in its utility, its claim that Ordinance 80-62 deprives it of its property without due process is unsupportable. The record before the Board demonstrated that the requested revenues were not even committed to replacement of fully depreciated plant, but could be used for any purpose chosen by the utility.

The lower courts did not deal with the financial effects of court-ordered alternative to the provisions of Ordinance 80-62 and, therefore, did not apply the so-called "end-result" doctrine established in the federal courts and accepted in Florida in Jacksonville Gas Corp. v. Florida R.R. & Public Utilities Commission, 50 So.2d 887 (Fla.1951). When the District Court of Appeal failed to apply this doctrine, it resulted in a duly enacted rate making ordinance being declared unconstitutional on the basis of insufficient analysis of

the details of the rate making process. If this opinion is allowed to stand as written, it will result in unjustifiably increased rates to consumers and unearned profits to utilities in all Florida jurisdictions having similar ordinance provisions.

CONCLUSION

There is no federal or Florida constitutional mandate that a rate making ordinance allow a utility to collect revenues based on depreciation on contributed property in which it has no cost invested. Unless this Court is prepared to rule for the first time in Florida that the United States Constitution or the Florida Constitution mandates that a public utility be allowed to collect such revenue, the orders of the lower courts should be disposed of as follows:

1. The order of the Second District Court of Appeal, filed on February 23, 1983 and modified on April 6, 1983, should be reversed as to its holding that Section 8(e) of Sarasota County Ordinance 80-62 is unconstitutional; that order should be upheld as to its holding that quashed the portion of the Circuit Court's order finding violations of procedural due process and equal protection of the law.

2. The order of the Circuit Court dated April 23, 1982 should be quashed in its entirety.

Respectfully submitted,

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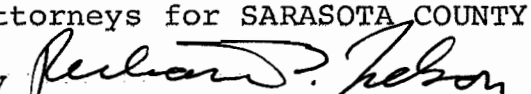
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to M. Joseph Lieb, Esq., 1900 Ringling Boulevard, Sarasota, Florida 33577 and Daniel Joy, Esq., 2055 Wood Street, Suite 200, Sarasota, Florida 33577 this 31st day of October, 1983.

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