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JUN 11 1998

Circuit/District Court for Lane County
Court Administrator
[Signature]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

CHARLES S. KOEHN,

Plaintiff,

vs.

CITY OF EUGENE

Defendant.

Case No. 16-97-07657 *(C)*

JUDGMENT ON
SUBMITTED CONTROVERSY

This matter having come before the court as a submitted controversy under ORCP 66 and the parties having provided the court with memoranda and the court having taken the matter under advisement now being prepared to rule.

IT IS NOW, THEREFORE, THE JUDGMENT OF THE COURT:

- (1) Eugene Water and Electric Board (EWEB) has the legal authority to grant funds to qualified low income housing projects through System Development Charge exemptions;
- (2) EWEB's resolution creating the System Development Charge is not discriminatory nor is it in violation of the Oregon Constitution;
- (3) EWEB's Board is not acting in a manner to raise or lend credit to a company or corporation in contravention of the Oregon Constitution.

Summary of Discussion

The submitted controversy in this matter is decided in favor of the defendant, Eugene Water & Electric Board (hereinafter "EWEB"). The defendant's use of excess revenue as a system development charge (hereinafter "SDC") funding source for qualified low-income housing projects is authorized under Oregon law. Specifically, this court finds that (1) EWEB has the legal authority to grant funds to qualified low-income housing projects, (2) the resolution and policy are not discriminatory or in violation of the Oregon Constitution, and (3) the defendant

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municipal board is not acting in a manner to raise for or lend credit to a company, corporation or association, in contravention of the Oregon Constitution. Each of these determinations is discussed in detail below.

Legal Authority of EWEB to Grant Funds

The Eugene Water & Electric Board ("EWEB") is created, defined and empowered under the Eugene Charter, section 44, whereby "[t]he board shall maintain and operate the water utility . . . of the City subject to the control by the council of extension of water service." The *revised* version of this charter contains a general grant of broad constitutional and legal powers to the city of Eugene concerning EWEB (emphasis added). While no provisions specifically address EWEB's right to adopt by resolution water utility system development charges, the current charter's broad grant of power does limit or prohibit only certain enumerated acts while otherwise permitting EWEB to exercise plenary power. The revised charter specifically states that "the city has all powers that the Constitution or laws of the United States or of this state expressly or impliedly grant or allow cities, as fully as if this charter specifically stated each of those powers." Eugene Charter section 4(2). Further, the revised charter contains a clause requiring that it be "liberally construed, to the end that the city have all powers necessary or convenient for the conduct of its affairs, including all powers that city may assume under state laws or the provision of the State Constitution regarding municipal home rule." Eugene Charter section 4(3). This Court finds that a contextual reading of subsections (2) and (3) in conjunction authorizes a set of implied powers necessary and convenient to maintain and operate the water utility, including adoption of the system development charges.

The court considers the revised city charter to be controlling and an accurate reflection of the present intent of the legislature. While the former Eugene charter specifically granted only those powers enumerated within the charter itself, the revised charter specifically provides a general grant of power with only limited enumerated reservation for the council's control of water extensions. Porter v. Tiffany, 11 Or App 542, 502 P2d 1385 (1972), heavily relied on by petitioner, is not controlling in this matter. In Porter, the opinion of the appellate court addressed the former charter provisions. As stated, these provisions were revised and superseded by the

current Eugene Charter adopted in 1976. In specifically revising the former Eugene Charter provisions providing for enumerated powers, the Oregon legislative assembly spoke directly to the issue of implied powers necessary to maintain and operate a water utility. Under the revised charter, EWEB is granted plenary authority over water and electric funds necessary for operations of its water utility. EC 2.195. The Porter opinion and its interpretation of the Eugene Charter were based upon the context of a completely different charter provision which has been revised and superseded by the current Eugene Charter.

Moreover, the Court finds the adoption of local Eugene Code (EC) section 2.195 to be an appropriate and persuasive reaffirmation of the broad plenary power granted by the legislature under the *revised* charter (emphasis added). Under Eugene Code 2.195, a duty is imposed upon EWEB to exercise "entire control of all the water and electric funds and disbursements thereof." EC 2.195. This explicit authorization by the legislature provides a clear edict of policy and parallels this court's finding that the revised charter includes a broad grant of power to EWEB.

Given this court's interpretation of EWEB's implied authority to operate the water utility, the adoption of SDC's for construction of a utility infrastructure is a valid extension of such power. This court finds that a logical inference of EWEB's broad plenary powers is that a municipality must have the powers "necessary and convenient" to perform its duties. Further, the Oregon Legislative Assembly has specifically authorized the adoption of SDC's under ORS 223.297. The use of revenues derived from SDC's has been restricted under ORS 223.302. However, that issue is not before this court. The question before this court is whether a municipality has the power to disburse general water rate revenues and exempt low-income housing projects from part or all of the SDC's. The legislative assembly was silent as to this issue. However, EWEB's annual allocation of surplus general water system rate revenues to offset all or a portion of the SDC fees for qualified low-income housing projects concerns only the use of profit or revenues. Oregon appellate law has clearly mandated that a city is permitted to use utility profits for valid public purposes. Kliks v. Dalles City, 216 Or 160, 179, 335 P2d 366 (1959). This court finds that assistance for the construction of qualified low-income housing constitutes a valid public purpose.

The question before this court involves the legality of municipalities, such as EWEB, to make expenditures for a valid "public purpose." Porter does not address any statutory

prohibition barring EWEB from disbursing excess revenue for a public purpose, but rather provides merely whether a campaign expenditure in a political election is a valid "public purpose." This question is not before the court. The Oregon Constitution, Art. XI, s. 9 does not act as a general prohibition to the EWEB SDC program. It is clearly established that assisting development of low-income housing is a legislatively acknowledged public purpose. The Oregon Constitution only prohibits spending of public funds for *other than public purposes*. (Emphasis added.) This court finds the continued growth of the water utility system and attempts to include low-income residents does constitute a valid public purpose. In Kliks, the Oregon Court of Appeals found that municipal utility profits may be ear-marked for a valid public purpose. Kliks, 216 Or at 179. Given that low-income persons and families may otherwise be unable to obtain adequate housing accommodations, the development of EWEB's SDC program does, in this court's view, constitute a valid public purpose.

The Oregon legislative assembly has statutorily addressed the public policy concerns of providing low-income housing under ORS 456.550(3) and 456.350(1)b. The legislative housing policy states in ORS 456.550 that it is:

“(3) a valid public purpose to provide for the construction . . . of housing for such persons and families who would otherwise be unable to obtain adequate dwelling accommodations which they could afford. . . .”

Given the clear mandates from the legislature, programs that provide aid for or contribute to the construction and development of low-income housing fall under the ambit of lawful empowerment of a public body. Because ORS 456.315 defines "state public body" as "any city, town, county, municipality, commission, district, authority, other subdivision or public body of the state. . .," the Eugene Water and Electric Board is acting lawfully as a public body and for a valid public purpose.

Currently, there are no statutory prohibitions barring EWEB from disbursing excess revenue for a public purpose. This court finds that a municipal utility has the plenary power and authorization to disburse excess revenue when done in a manner to further a legitimate public purpose. The SDC exemption program before this court does properly support a public purpose because the system development charge assistance is an effective way to aid and cooperate in the construction of low-income housing and to facilitate the provision of water services to additional

customers. Further, the SDC program exemptions for developers of low-income housing does not create or present any additional burdens to the existing utility system. The SDC payment for low-income housing system connections may derive from surplus revenue *only if*: (1) individuals applying for exemptions are deemed qualified; (2) that qualified applicants apply for assistance and (3) only if surplus revenues are available. The third edict of this SDC program is of critical import to this court. The fact that safeguard provisions exist allowing fund availability only if surplus funds exist after EWEB meets its operating and maintenance expenses negates any question as to burdens placed on the operation of the utility system. Moreover, those qualified for the program may still have to pay all or remit part of the SDC back to EWEB. The court therefore finds that no burden to the public operating funds or the utility infrastructure is presented.

Policy of Nondiscrimination

EWEB's water SDC policy is not discriminatory and does not violate either the state or federal constitutions. The water SDC policy of redistributing portions of funds to low-income housing inhabitants in the form of system development cost offset exemptions is not a discriminatory practice nor does it constitute a "taking" under federal or state constitutional law.

The Oregon Constitution, Art. I, s. 20, provides that "private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation;" The U.S. Constitution Amendment XIV applying the Fifth Amendment to the states, similarly mandates that "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Additionally, the Oregon Constitution, Art. I, s. 20 states, "no law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." In this case, there is no discriminatory practice in violation of the state and federal constitutions because (1) the SDC benefits do not favor a single class of citizens and (2) the policy does not constitute a "taking" of ratepayer funds under constitutional law.

Individuals who develop and inhabit low-income housing do not constitute a class which may be identified by immutable personal or social characteristics which are constitutionally protected. Defendant EWEB properly asserts that Oregon courts reject "class legislation"

challenges where the law leaves it open to anyone to bring himself or herself within the ambit of a favored class. State v. Clark, 291 Or 231, 630 P2d 810, 816 (1981). The EWEB SDC program before this court is open to anyone seeking to qualify for low income housing SDC assistance and does not violate the rights of a constitutionally protected class of persons.

It has been clearly established under Oregon law that municipal utility operations and rate making schemes are constrained by the principal of "non-discrimination" between similarly situated customers. Kliks, 216 Or at 335. The SDC program in question, however, meets the presumptive test that differentiation in rate structures is made upon a rational distinction existing between customers. Id. 216 Or 177.

In this case, the Court finds that a rational basis does exist for the public assistance program. Under Oregon State Homebuilders Assoc., the court's review of EWEB's resolution is limited to differences upon which a classification may be predicated and must have a reasonable relationship to the purpose for which the classification is made. Oregon State Homebuilders Assoc. v. City of Tigard, 43 Or App 791, 604 P2d 886, 890 (1979). EWEB must show that making SDC assistance available only to those constructing low income housing has a "rational basis to the plans/purposes for according benefits" to developers. Nicoll v. City of Eugene, 52 Or App 379, 384, 628 P2d 1213 (1981). The financial assistance to developers of public housing is an immediate benefit to low-income families who are provided affordable housing. Further, the water distribution system is expanded which benefits the public as a whole. This court finds that the SDC exemptions are not discriminatory and passes constitutional muster because a rational basis does exist between providing affordable housing and the limited SDC offset exemptions.

Further, EWEB's SDC exemption policy does not constitute a "taking" under state or federal constitutional law. It is clearly acknowledged that no private property or services may be taken without just compensation or for nonpublic purposes. Oregon Constitution, Art. I, s. 18. The funding source for the low income housing SDC program is derived from excess revenues generated after the payment of ordinary operating expenses and debts. The EWEB program does not take ratepayers funds for all citizens and redistribute those funds to a select few low-income housing developers. Rather, the excess revenue is used. In a commercial setting, the rates paid by consumers are a fair charge for the services rendered by EWEB and no exaction is made from their payments which would equate a "taking" under constitutional law. EWEB is permitted to

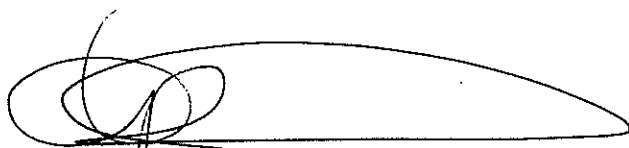
operate the utility for profit and may choose to spend profits, after payment of debts and setting aside reserves, in any manner authorized by law. Kliks, 216 Or 160, 165; ORS 225.020. The court believes that the SDC program itself does not constitute a "taking" based on prior Oregon decisional law holding that municipality program benefits do not constitute a taking. Nicoll, 52 Or App 379, 385.

Prohibition on Raising Money or Lending Credit

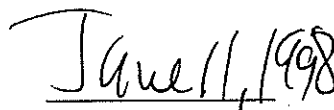
The Court finds that the surplus utility revenue generated by EWEB does not violate the Oregon Constitution's prohibition on municipal bodies becoming stockholders or furnishing money or credit to private corporations or associations. Oregon law clearly states that this prohibition is for the express purpose that public funds not be expended for anything other than a public purpose. Carruthers v. Port of Astoria, 249 Or 329, 438 P2d 725, 727 (1958). The drafter's of the Oregon Constitution clear concern was avoidance of direct liability to the public body and recourse to the general fund based on a municipality's action. The SDC funding at issue herein is a dedicated and identified pool of profits that has been set out as a separate "special fund" derived solely from the availability of excess revenues generated by EWEB. A separate "special" fund, is in accordance with the Oregon Constitution, and does not place tax revenue at risk from EWEB's SDC program. As previously noted, the use of such SDC funds is predicated on the availability of excess revenue. There is no recourse to the general fund nor is there any direct liability incurred on the part of this municipality. It should further be noted that provided there is no risk to the public fund, a municipal utility is free to use surplus sales revenues to extend loans or money grants to associations, corporations and joint companies. 41 Op Atty Gen 238, (1980). This program does not act as a guarantor of payment of the SDC, but rather merely creates a "special fund" out of surplus revenues.

Moreover, the constitutional prohibition does not apply to the EWEB resolution because the funding at issue herein is a separate and identified "special fund." Oregon law provides that an agreement limiting liability of a municipality solely to the "special fund" of the project revenues does not implicate general tax dollars and therefore does not violate Section 9, Article XI of the Oregon Constitution. DeFazio v. WPPSS, 296 Or 550, 679 P2d 1316 (1984). The underlying

concern upon which this constitutional provision was based involves an attempt by the state to prevent the investment of public funds in private enterprise. Miles v. City of Eugene, 252 Or 528, 451 P2d 59, 63 (1969). This court concludes that EWEB resolution does not obligate general funds nor does it place the public credit behind private ventures. It is clear that when a municipality engages in public services or activities that generate revenues other than taxes, the Oregon courts have allowed government to commit those revenues to financing its own projects or to support desired private projects. DeFazio, 679 P2d at 1336.

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by 'W. Leonard'. The signature is written over a horizontal line.

Kip W. Leonard, Circuit Judge

A handwritten date in black ink, 'June 11, 1998', written over a horizontal line.

Date