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Leo A. Walker v. Brigham City, Peter C. Knudsen,
Beth W. Currister, David G. Hacking, Dee J.
Hammon, Robert B. Shelton and Mark A. Walker,
redevelopment Agency No. 1 and No 2., Michael T.
Cosgrove, and John or jane Does I though X of
Brigham City, : Brief of Appellee

Utah Supreme Court

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LEO A. WALKER,

Plaintiff/Appellant,

v.

BRIGHAM CITY, PETER C. KNUDSON,
BETH W. CURRISTER, DAVID G.
HACKING, DEE J. HAMMON,
ROBERT B. SHELTON and MARK A.
WALKER, REDEVELOPMENT AGENCY
NO. 1 OF BRIGHAM CITY,
REDEVELOPMENT AGENCY NO. 2 OF
BRIGHAM CITY, MICHAEL T.
COSGROVE, AND JOHN OR JANE DOES
I THROUGH X,

• • • • •

No. 910240

Attorneys for Defendants/Appellees
Brigham City

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JURISDICTION

Jurisdiction to hear this appeal is conferred Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Defendant/appellee Brigham City submits that the issues presented for review are as follows:

1. Whether the trial court correctly determined that the Brigham City Council's exercise of legislative discretion in setting electrical utility rates which generate revenues in excess of the cost of providing electrical utility services is valid and not so unreasonable as to be arbitrary or capricious or in violation of the legislative guidelines in Utah Code Ann. § 55-3-10.

2. Whether the trial court correctly ruled, based upon the undisputed facts, that Brigham City's utility service charges, in the form of rates for electrical power, are reasonable for the service provided as a matter of law.

3. Whether the trial court correctly concluded that a challenge to the validity of Brigham City's electrical utility rates by an individual resident who is a utility customer does not give rise to a claim of constitutional dimensions or otherwise establish the deprivation of a protected property interest in contravention of Art. I, § 22 of the Utah Constitution.

STANDARD OF APPELLATE REVIEW

In reviewing an order granting summary judgment, this court views the facts and inferences in the light most favorable to the non-moving party and gives no deference to the trial court's conclusions of law, reviewing them for correctness. Little America Hotel v. Salt lake City, 785 P.2d 1106, 1107 (Utah 1989); Sacramento Baseball Club, Inc. v. The Great N. Baseball Co., 786 P.2d 763, 767 (Utah 1987). This standard should be applied in reviewing all the above issues.

To the extent plaintiff/appellant Walker ("Walker") is arguing that his Motion For Summary Judgment was improperly denied, defendant/appellee Brigham City disagrees with his assertion that the facts relating to that motion must be "considered in a light most favorable to [Walker]." See Appellant's Brief, p. 1. Walker cannot have it both ways. He is the non-moving party only with respect to Brigham City's Motions For Partial Summary Judgment.

DETERMINATIVE STATUTES, ORDINANCES AND RULES

Utah Code Ann. § 55-3-10:

Rates for service to be reasonable and uniform -- May be revised.

Rates for services furnished by any project or service as described in Section 55-3-1 hereof shall be reasonable and uniform in respect to class at all times. They may be fixed precedent to the issuance of the bonds. Such rates shall be sufficient to provide for the payment of the interest upon and principal of all such bonds as and when the same become due and payable, to create a bond and interest sinking fund therefor, to provide for the payment of the expenses of

administration and operation and such expenses for the maintenance of the project or service, necessary to preserve the same in good repair and working order, to build up a reserve for depreciation, to build up a reserve for improvements, betterments and extensions other than those necessary to maintain the same in good repair and working order, and to pay the interest on and principal of any other bonds or obligations outstanding and issued in connection with the purchase, construction, repair or improvement of the project or service. Such rates may be fixed and revised from time to time so as to produce these amounts, and the governing body may covenant and agree in the ordinance or other legislative enactment authorizing the issuance of such bonds and on the fact of each bond at all times to maintain such rates for services furnished by the project or service as shall be sufficient to provide for the foregoing, but not in excess of a reasonable rate for the service rendered.

Utah Constitution Art. I, Section 22.:

[Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation.

STATEMENT OF THE CASE

Brigham City owns and operates various utilities providing services including water, waste treatment, refuse collection and electrical power to Brigham City residents and businesses. The City maintains a single utility fund combining these various services, but every individual consumer receives a bill itemizing the charges for each separate service, including electrical power, and the City separately accounts for the revenue derived from the different service charges.

Electrical utility service charges have historically generated revenues which exceed the expenditures necessary for the operation of the utility service. A portion of these

revenues has been transferred to the City's general fund following the publication of notice concerning the anticipated transfer in the utility billings sent to customers in compliance with state statutory requirements.

Plaintiff/appellant Leo Walker (hereinafter "Walker"), sued Brigham City asserting various claims relating to the process for setting the rates charged for electrical services, the City Council's management of utility funds and the general fund as well as various complaints about the City's financial relationship with its Redevelopment Agency. See Complaint, Record at 1 - 52. Claims 1 through 6 of plaintiff's Complaint were dismissed, pursuant to a Motion for Partial Summary Judgment, by Order dated May 31, 1989. See Order, Record at 582-84. (A copy is included in the Addendum hereto.) Claims 13, 14 and 15 had been previously dismissed by an Order dated November 4, 1987. See Record at 196-97.

On August 23, 1989, the Court granted a stipulated motion to bifurcate the Complaint. See Record at 600-01. Accordingly, claims 7 through 12 were bifurcated from the remaining claims, which involved the Brigham City Redevelopment Agency and various financial transactions in which it was engaged. It was agreed that the parties would proceed on Claims 7 through 12 and litigation on the remaining claims would be stayed.¹

¹ That determination was made prior to the decision and discussion of this court regarding Rule 54(b) of the Utah Rules of Civil Procedure in Kennecott Corp. v Utah State Tax

Claims 7 through 12 challenged the validity of Brigham City's procedure for setting charges for electrical power and its practice of transferring funds from the electrical fund to the general fund. The basis of Walker's challenge was that the revenues received by Brigham City for electrical utility services are greater than the costs of providing such service and are therefore "unreasonable."

Brigham City moved for summary judgment on the grounds that, as a matter of law: 1) the electrical service charges are reasonable for the service provided when compared with the rates charged to similarly situated customers of Utah Power & Light and other municipally-owned power systems in the State of Utah; 2) the process involved in setting rates and transferring funds from the utility fund to the general fund is pursuant to notice and discussion by the City Council in open and public meetings and is therefore fair and reasonable; and, 3) Walker's misplaced reliance on a rate of return analysis is not the proper measure of the reasonableness of electrical service charges and improperly requires the court to engage in rate setting which ignores the presumptive validity afforded such local governmental

Commission, 814 P.2d 1099 (Utah 1991). However, Walker's claims against the Redevelopment Agency of Brigham City and related parties are entirely separate and distinct and there is no "factual overlap" between the operative facts relating to those legal theories and the claims which are the subject of this appeal. See Complaint, Record at 1-52. In addition, a decision on the claims which are stayed and remain pending at the trial court level would not render moot or otherwise effect the issues in this appeal.

decisions and the limited scope of judicial review of such decisions. On March 27, 1991, the trial court entered its Memorandum Decision granting Brigham City's Motion For Summary Judgment. Record at (this document is not stamped, but it is between pp. 743 and 744 of the Record and included in the Addendum hereto). The Court's Order And Judgment was entered on April 22, 1991. Record at (this document is not stamped, but it is between pp. 752 and 753 of the Record and attached in the Addendum hereto).²

STATEMENT OF FACTS

Brigham City disputes the accuracy and materiality of many of the facts set forth in the "FACTS" statement of Walker's Brief on appeal.³ Walker, furthermore, now attempts to present to this

² The trial court's Order and Judgment of April 22, 1991, made an express determination that it was a final judgment for purposes of appeal as required by Rule 54(b) of the Utah Rules of Civil Procedure. See the discussion in Footnote 1 confirming that there is no factual overlap between the operative facts relating to the plaintiff's claims that are the subject of this appeal and the claims which were stayed and remain pending at the trial court level relating to the Brigham City Redevelopment Agency. In addition, the trial court had previously dismissed all claims against the individual defendants which are the subject of this appeal by order dated May 31, 1989 which was specifically incorporated into the April 22, 1991 Order and Judgment. (See Addendum). To the extent that Walker's appeal is directed toward any of these individual defendants, the arguments presented on behalf of Brigham City apply with equal force and effect to such individual defendants.

³ One example of the inaccurate and misleading nature of Walker's "facts" is found in the commentary of ¶ 12 on page xi of Walker's Brief where he states that a comparison of the numbers he sets forth in ¶¶ 10 and 11 indicate that the electric utility charges to rate-payers were "almost double that which was necessary" to cover expenses.

court "facts" that were never actually presented to the trial court in connection with his opposition to Defendants' Motion For Summary Judgment. See Record at 669-70.

The following is an accurate statement of the undisputed material facts actually presented to the trial court in conjunction with Brigham City's Motion For Summary Judgment. None of the following facts were disputed by Walker with citation to supporting affidavits, deposition testimony or otherwise as provided in Rule 56, Utah R. Civ. P. See Record at 669-70.

1. Brigham City is a municipal corporation which owns and operates an electrical utility.

2. The City Council of Brigham City is the governing body of the City. (Utah Code Ann. § 10-3-105.)

3. Utility rates are set by the City Council of Brigham City pursuant to resolution of the City Council. (Complaint, ¶ 19, Rec. at 1.)

4. Brigham City utility customers are given notice of the annual City budget hearing where they may contest matters

As Walker has acknowledged, Brigham City owns and operates several utility services, including water, sewage, and electricity, and charges for those services are collected in a consolidated fund. Id. at ¶ 3. The surplus amounts set forth in ¶ 10 of Walker's Brief are surpluses in the consolidated utility fund. They are not, as Walker would now have this Court believe, attributable only to electricity charges. In contrast, the numbers set forth in ¶ 11 of Walker's Brief pertain only to electricity expenses. Consequently, Walker is comparing apples and oranges. The "simple comparison of paragraphs 10 and 11" Walker suggests is not possible and does not indicate that rate-payers were charged "almost double that necessary to provide the services..."

relating to electrical utility service charges. (Affidavit of Dennis Sheffield, Rec. at 652 - 54.)

5. Plaintiff is a resident of Brigham City, Utah and is regularly charged and has paid charges to Brigham City for utility services provided by the City. (Complaint, ¶ 1, Rec. at 1.)

6. Funds paid by utility customers are collected in the City's consolidated utility fund. (Affidavit of Dennis Sheffield, Rec. at 653.)

7. A portion of the funds collected in the City's consolidated utility fund is transferred to the City's general fund. (Complaint, ¶ 23, Rec. at 1.)

8. Brigham City utility users are given notice in advance of transfers from the utility fund, specifically the electrical fund, to the City's general fund. (Affidavit of Dennis Sheffield, Rec. at 653.)

9. The rate charged to Brigham City utility customers for electricity is lower than the rate charged to the average customer of Utah Power & Light. (Mark Stevens Deposition, p. 32; Rec. at 658.)

10. The rate paid by Brigham City utility customers for electrical services is lower than the average monthly bill paid by utility customers in municipalities which own and operate their own power systems. (Id.)

11. The rates charged to utility customers in Brigham City are lower than the average rates charged by municipalities whose property tax bases most nearly approximate Brigham City and which operate their own electrical utilities. (Id. at 660-661.)

ARGUMENT

POINT I

THE DECISION OF THE BRIGHAM CITY COUNCIL TO SET ELECTRICAL UTILITY RATES AT LEVELS THAT GENERATE REVENUES IN EXCESS OF THE COST OF PROVIDING ELECTRICAL UTILITY SERVICE IS A VALID EXERCISE OF LEGISLATIVE DISCRETION BY THE CITY COUNCIL AND SHOULD NOT BE DISTURBED BY THIS COURT UNLESS FOUND TO BE SO UNREASONABLE AS TO BE ARBITRARY AND CAPRICIOUS.

In essence, Walker is asking the judicial branch of government to intervene in the legislative and discretionary functions of the Brigham City Council and hold that Brigham City's legitimate decision-making process in setting electrical utility rates is invalid. This court, however, should not involve itself in the rate setting process, McQuillin, Municipal Corporations, § 35.37a, 3rd ed. 1983. While a limited form of judicial review may be appropriate as to whether the rate setting procedure is so unreasonable as to be considered arbitrary and capricious, courts may not engage in rate making since that would represent an unwarranted intrusion into a legislative function, McQuillin, Municipal Corporations, § 35.37a, 3rd ed. 1983.

Utah courts have historically given considerable deference to the actions of the governing body of municipalities for the

same or substantially similar public policy considerations. As this Court stated the proposition in Clayton v. Salt Lake City, 387 P.2d 93, 94 (Utah 1963):

Inherent in the nature of its duties and its presumed superior knowledge and expertise in performing them, the public authority must have a wide latitude in which to exercise its judgment as to the best means of accomplishing that objective. The court is reluctant to interfere with the administrative function and would do so only if facts were shown to indicate dishonesty, fraud, collusion or lack of good faith in performing the duty mentioned. That is not demonstrated here.

The same general policy was more recently iterated in Triangle Oil, Inc. v. North Salt Lake Corp., 609 P.2d. 1338 (Utah 1980):

It has been found to be wise and proper judicial policy to exercise its [the judiciary's] power with restraint, and not intrude into or interfere with the discretionary functions or policies of other departments of government. Accordingly, the courts generally will not so interfere with actions of a city council unless its action is outside of its authority or is so wholly discordant to reason and justice that its action must be deemed capricious and arbitrary and thus in violation of the complainants rights.

609 P.2d at 1340 (emphasis added).

Courts in other states which have specifically addressed municipal utility rates have recognized a presumption of validity in rates set by municipal ordinance. Plaintiffs challenging such rates bear a heavy burden in showing they are unreasonable. Inland Real Estate Corp. v. Village of Pallatine, 496 N.E.2d at 1002 (Ill. 1986).

In the instant case, Walker neither asserted nor provided any evidence to the trial court that Brigham City's utility rates resulted from dishonesty, fraud, or collusion. Likewise, Walker neither claimed nor provided any evidence at all that the rates were "wholly discordant with reason." With the required deference to the local government functions, the presumption of reasonableness clearly favors the position of Brigham City in this case. See Id.

Because Walker completely failed to provide any evidence of unreasonableness to the trial court, this presumption itself would have been sufficient to support a summary judgment in Brigham City's favor. Nonetheless, Brigham City provided the trial court with further evidence of the reasonableness of its rates in the form of deposition testimony and affidavits. (Rec. at 652-664.)

Brigham City's Memorandum in support of its Motion For Partial Summary Judgment presented evidence in the form of deposition testimony from Mark Stevens, a CPA, regarding charges for utility services. Stevens's testimony established that rates charged by Brigham City are lower than rates charged for similar service by Utah Power & Light Company and other municipally owned and operated utilities of similar size to Brigham City. Record at 658 -661.

Walker provided the trial court with no evidence at all to refute Brigham City's evidence of the reasonableness of its

utility rates. Walker merely attempted, as he does again on appeal, to equate "unreasonableness" with any revenue exceeding operating costs. In his Brief, the only supporting evidence Walker cites is the deposition testimony of an accountant to the effect that Brigham City's utility revenues have exceeded costs and that Mr. Walker's payments are "in excess of a pro rata rate for the cost to Brigham City of services rendered to Mr. Walker." Walker Brief, pp. 18-19. As discussed above, whether revenues exceed costs is essentially irrelevant. The only issue properly presented to the trial court on summary judgment was the reasonableness of the rates.

"In evaluating whether the evidence reveals a genuine issue of material fact ..., [the court] must take into consideration the eventual standard of proof, at trial on the merits, of each element of ... [the] claim." Weber v. Springville City, 725 P.2d 1360 (Utah 1986); Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Utah App. 1987). Brigham City presented evidence of the reasonableness of the utility rates and that evidence was never controverted with competent evidence by Walker.

The undisputed evidence before the trial court was that Brigham City's utility rates are reasonable compared to the rates charged by other comparable utilities, both regulated and unregulated. Based on that conclusion, the trial court properly deferred to the exercise of legislative discretion by the Brigham City Council and refrained from involving itself in the rate

setting process for all of the public policy reasons more fully discussed above. Where no material issues of fact regarding the reasonableness of Brigham City's utility rates were presented to the trial court, summary judgment for defendants was mandatory.

POINT II

BRIGHAM CITY'S RATES FOR ELECTRICAL UTILITY SERVICE CHARGES ARE REASONABLE FOR THE SERVICE PROVIDED AS A MATTER OF LAW.

A municipality which owns and operates a public utility is exercising its business powers and may conduct the activity in a manner which promises the greatest benefit to the City. The process of setting rates for utility services by a municipality is a legislative act and authority for the act is vested in the governing body of the municipality. McQuillin, Municipal Corporations, § 35.37, 3rd ed. 1983. Unless the municipality's exercise of discretion is in bad faith or ultra vires, courts should not interfere with the reasonable legislative decision making process of the City Council. McQuillin, Municipal Corporations, § 35.27, 3rd ed. 1983; Triangle Oil, Inc. v. North Salt Lake Corp., 609 P.2d 1338, 1340 (Utah 1980); Enterprise, Inc. v. Nampa City, 536 P.2d 729 (Idaho 1975).

A. Brigham City is authorized to charge reasonable rates.

Brigham City's authority to own and operate its utility works is established by Utah Code Ann. § 55-3-1 et seq. Section 55-3-10 addresses the topic of the rates Brigham City may charge for these services:

Rates for service to be reasonable and uniform - May be revised.

Rates for services furnished by any project or service as described in Section 55-3-1 hereof shall be reasonable and uniform in respect to class at all times. They may be fixed precedent to the issuance of the bonds. Such rates shall be sufficient to provide for the payment of the interest upon and principal of all such bonds as and when the same become due and payable, to create a bond and interest sinking fund therefor, to provide for the payment of the expenses of administration and operation and such expenses for the maintenance of the project or service, necessary to preserve the same in good repair and working order, to build up a reserve for depreciation, to build up a reserve for improvements, betterments and extensions other than those necessary to maintain the same in good repair and working order, and to pay the interest on and principal of any other bonds or obligations outstanding and issued in connection with the purchase, construction, repair or improvement of the project or service. Such rates may be fixed and revised from time to time so as to produce these amounts, and the governing body may covenant and agree in the ordinance or other legislative enactment authorizing the issuance of such bonds and on the face of each bond at all times to maintain such rates for services furnished by the project or service as shall be sufficient to provide for the foregoing, but not in excess of a reasonable rate for the services rendered.

This provision clearly provides that the service rates "shall be sufficient" to cover the costs and expenses specifically enumerated. The only limit § 55-3-10 places on rates is they not exceed a "reasonable rate for the service rendered."

In his Brief, Walker argues, without authority, that § 55-3-10 provides that the charges may not exceed amounts sufficient to cover the enumerated expenses. Walker Brief, pp. 2-4. Clearly, if this had been the legislature's intent, it would have included language to that effect and all references to "reasonable rate

for the service" would have been eliminated. The very title of the provision makes this abundantly clear: "Rates for service to be reasonable and uniform - may be revised."

There appears to be no case law in this state directly interpreting the "reasonableness" provisions of Utah Code Ann. § 55-3-10, which is not surprising given the relatively clear language of the statute. It is, however, well recognized in other jurisdictions that in setting utility rates, municipalities are not restricted to charging rates based solely on the costs of providing such services.

For example, in Hansen v. City of San Buenaventura, 729 P.2d 186, 192 (Cal. 1986), the California Supreme Court found that an entity of local government could charge and collect fees for services, such as a municipal utility system, and use the net proceeds of such enterprises "for the benefit of its own general fund." The California Court further noted that "parks, playgrounds, public utilities, and other facilities in aid of the health and welfare of the community . . . may be operated for profit." [Emphasis in original]. Finally, the California Court held that "it is for the local governing body to determine precise rates and whether the system should be subsidized or profitable."

Similarly, in Chocolay Charter Township v. City of Marquette, 358 N.W.2d 636, 638 (Mich. 1984) the Michigan Court of Appeals recognized, "A municipality is not required to furnish

utility services at cost, but may charge a rate which will yield a profit." See also, Inland real Estate Corp. v. Village of Pallatine, 496 N.E.2d 998, 1002 (Ill. 1986); Killian v. City of Paris, 241 S.W.2d 524, 527 (Tenn. 1951); and City of Corning v. Iowa/Nebraska Light & Power Co., 282 N.W. 791, 799 (Iowa 1938). McQuillin, a recognized authority in the area of municipal law, agrees with this position: "A city is entitled to a reasonable profit and may even use that profit for other valid municipal purposes." McQuillin, Municipal Corporations, § 35.37c, 3rd ed. 1988.

B. Fees for electrical utility services may permissibly generate revenues which exceed the cost of providing such services.

Under Point III of his Brief, Walker makes the convoluted argument that utility charges are not taxes, but rather fees, and because municipalities may raise revenues only through taxes, Brigham City is not permitted to raise revenues through utility charges. Walker's simplistic argument fails to recognize that there are essentially two distinct types of fees. These are: 1) licensing or permit fees for regulatory processes, and 2) fees for specific services. He mistakenly bases his argument completely on cases discussing licensing fees and regulatory measures. None of these cases supports his position.

Walker first cites Mountain States Telephone v. Salt Lake County, 702 P.2d 113 (Utah 1985), where the only issue considered

by the court was whether the county could levy a utility license tax as a condition to the granting of a franchise for the use of public rights of way. As Walker notes in his Brief, the court quoted City of Chicago Heights v. Public Service Co., 97 N.E.2d 807 (Ill. 1951), in which an Illinois court "struck down an ordinance which imposed license fees greatly in excess of the reasonable cost of regulating the use of city streets." Mountain States, 702 P.2d at 118. Thus the court focused on the reasonable relationship between licensing revenues and the cost of regulation. Id.

Another case relied upon by Walker is Consolidated Coal Co. v. Emery County, 702 P.2d 121 (Utah 1985). Consolidated Coal concerns the validity of an Emery County business license ordinance. The court expressly held that Utah counties are not permitted "to raise revenues through licensing except insofar as such revenue is necessary to (and therefore proportionate to the cost of) regulation of the licensed entities." The court found that the ordinance in question was invalid because it had "little, if any, regulatory purpose or effect." 702 P.2d at 127. Thus, as in Mountain States, the court discussed only the reasonable relation between licensing revenues and the cost of regulation.

Walker also cites Lafferty v. Payson City, 642 P.2d 376 (Utah 1982), Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981), and Call v. City of West Jordan, 614 p.2d

1257 (Utah 1980). All three of these cases involve ordinances requiring impact or connection fees from a builder as a prerequisite to final approval of the builder's plat or building permit. Again, the ordinances in question were regulatory measures.

Brigham City recognizes that these cases cited by Walker support the proposition that local governmental regulatory fees are required under state law to be reasonably related to the costs of regulation. This case, however, involves only fees for specific services - the same services which, in some communities, are provided by investor-owned utility companies. Brigham City's charges are not imposed as a prerequisite of any city certification or regulatory action or as payment for future services or costs. They are rather contractual service charges for services which plaintiff voluntarily used. As discussed above, the only restriction is that the fees be at a "reasonable rate for the services rendered." Utah Code Ann. § 55-3-10.

Walker has not cited a single case which states that fees for specific, nonregulatory, services cannot exceed the cost of providing those services. The courts should not intrude into this decision making process unless there is a showing, by competent evidence, that the rates charged are without any rational basis or are otherwise so unreasonable as to be completely arbitrary and capricious.

The undisputed evidence on the limited question of "reasonableness" in this case demonstrates that Brigham City's rates are not unreasonable, as more fully set forth under Point I, supra, and the trial Court properly declined to substitute its judgment for that of the Brigham City Council. Accordingly, Walker's challenge to the wisdom of this exercise of the legislative body's discretion was properly dismissed as a matter of law.

POINT III

THE PLAINTIFF HAS NO PROTECTED PROPERTY INTEREST OR CONSTITUTIONAL BASIS TO CHALLENGE THE RATES CHARGED FOR UTILITY SERVICES BY BRIGHAM CITY.

Walker alleges, in conclusory fashion, that the electrical utility rates charged by Brigham City somehow violate the takings clause of the Utah Constitution. He fails, however, to identify any protected or recognized property interest sufficient to invoke the protection of either constitutional provision.

Article I, § 22 of the Utah Constitution provides, "Private property shall not be taken or damaged for public use without just compensation." Before being entitled to recover under this provision, Walker must identify "some protectible property interest." Colman v. Utah State Land Bd., 795 P.2d 622, 625 (Utah 1990).

It is difficult to ascertain the nature of the protected interest Walker is claiming in this case. While continued utility service has been recognized as a protected property

interest, which may not be terminated except for cause and after reasonable notice, Walker has failed to show that any such protected property interest is involved in this case. Walker can only recover for the taking of property to the extent that property exists and to the extent that he has legal rights in that property. Id. at 626.

As Walker has acknowledged (Walker Brief, p. 4), the Utah Supreme Court has taken the position of the majority of states that charges imposed by municipalities upon their residents for utility services are not considered taxes or assessments, but rather charges for services. Ponderosa One Ltd. Partnership v. Salt Lake City Suburban Sanitary Dist., 738 P.2d 635, 637 (Utah 1987) (citing Home Builders Ass'n of Greater Salt Lake v. Provo City, 503 P.2d 451 (Utah 1972) and Murray City v. Bd. of Education, 396 P.2d 628 (Utah 1964)).

Walker has chosen to avail himself of the utility services provided by the City. With respect to these services, his relationship with the City is contractual. There is no element of deprivation in this case, only one of contract. Walker has received the benefits of utility services from the city and the cost of those services was properly determined by elected City officials. Under these circumstances there can be no deprivation of property within the meaning of the Utah Constitution, Art. I, § 22. Cf. Carson v. Brockton Sewerage Comm'n, 182 U.S. 398 (1901).

In his Brief, Walker takes language out of context from various cases and, without explanation, alleges that the same language applies to this case. It does not.

Of the six cases Walker cites in support of his "takings" claim, four again involve fees for permits - not services.⁴ Walker Brief, pp. 13-15 (citing Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980); Home Builders Ass'n of Greater Kansas City v. Kansas City, 555 S.W.2d 832, 835 (Mo. 1977); Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866 (Utah 1971); City of Chicago Heights v. Western Union Telegraph Co., 94 N.E.2d 306 (Ill. 1950)). Call concerned a developer's challenge to a city ordinance requiring subdividers to dedicate 7% of proposed subdivision land to the city or pay that value in cash to be used for flood control and/or park and recreation facilities. 614 P.2d 1257. The Court simply held that, to prevail on their takings claim, plaintiffs would have to "show that the dedication required of them had no reasonable relationship to the needs ... created by their subdivision." Id. at 1259. The court went on to say that the benefit for which the dedication would pay need not be solely to the particular subdivision, but only that there be some demonstrable benefit to it. Id.

Even if Brigham City's charges for utility service were analogous to the dedication requirement on subdividers addressed

⁴ See discussion regarding distinction between fees for services and fees for permits, supra pp. 16-18.

in Call, there is no question that Walker has received some demonstrable benefit. It is undisputed that Walker received utility service from Brigham City.

Weber Basin concerned an action brought by an association of builders challenging an ordinance increasing building permit fees. The question considered by the Court was:

whether the ordinance, in its practical operation, results in an unjust discrimination by imposing a greater burden of the cost of city government on one class of persons as compared to another, without any proper basis for such differentiation and classification.

487 P.2d at 868. The question of a taking under Art. I, § 22 of the Utah Constitution was not even addressed. Weber Basin, thus, has no bearing on the instant case. Even if Walker were complaining of unjust discrimination, there is no evidence that Walker's utility bills are any different from those of any other similarly situated resident of Brigham City.

The remaining two cases are also easily legally and factually distinguished from the instant case. In Conoco, Inc. v. Louisiana Public Service Comm'n, 520 So.2d 404 (La. 1988), the Louisiana Supreme Court considered only whether a contract between Conoco and Enterprise Pipeline was impaired by a tariff imposed by the Public service Commission and whether an impairment would violate the proscription against impairment of contracts in the Louisiana Constitution. The case did not involve recognition of Walker's proposition that there is some sort of protected property or constitutional interest in low

utility rates. In State of North Carolina, ex rel Utilities Comm'n v. Edminsten, 263 S.E.2d 583 (N.C. 1980) the North Carolina Court discussed the public service commission's responsibility to set rates for utilities as low as permissible without violating the utility company's constitutional rights to a fair return. None of these cases recognizes that a consumer has a constitutionally protectible property interest in rates paid for utility services, particularly where the service is owned and operated by a municipality, like Brigham City.

There are very limited circumstances in which courts may consider claims of this nature, such as the termination of electrical utility services without notice and hearing. Otherwise, they traditionally involve claims of confiscatory taking from the utility because rates for investor-owned utilities are arbitrarily set at such a low level as to destroy a protected property interest by not allowing a reasonable rate of return.

An example of such a case which addresses utility rates in the context of a claim for unconstitutional taking is Duquesne Light Company v. Barasch, 109 S. Ct. 609 (1989). In Duquesne, the court found that the federal constitution protects utilities from being limited to a charge for their property which is so low and therefore so "unjust" as to be confiscatory. "A rate is too low if it is 'so unjust' as to destroy the value of [the property] for all the purposes for which it was acquired, and in

so doing practically deprive[s] the owner of property without due process of law." Obviously, Duquesne gives no support to Walker's argument.

Walker's claim against Brigham City is that the City's charges for utility services are too high. This claim is simply not of constitutional magnitude.

CONCLUSION

Walker fails to set forth any claim or theory which would justify a further review by this Court of the legitimate exercise of legislative discretion by the Brigham City Council and the wisdom and judgment involved in their decisions regarding rates charged for electrical utility services and the transfer of any surpluses to the general fund. The process used by Brigham City to fix rates by resolution of the City Council and its practice of conducting public budget hearings, sending notice of transfers from the electrical fund to the general fund and the normal elective process for the City Council provide the plaintiff with abundant due process and fairness. In fact, this subject was specifically raised as a campaign issue in recent Brigham City municipal elections.

In effect, any analogy to the role of the Public Service Commission in regulating rates of investor-owned utilities is not applicable because the "rate payers" and "owners" are essentially the same group, consisting of the residents, property owners and voters of Brigham City.

This is not the appropriate forum in which to question the wisdom of the exercise of legislative discretion on the part of the Brigham City Council. Walker's "remedy," if he has one, is through persuasion of his elected representatives in public hearings and meetings in which rates are established for electrical utility services and transfers of any surpluses to the general fund are approved or a resort to the ballot box in future elections of Brigham City officials. As one court noted in a similar context in Silver v. City of Los Angeles, 366 P.2d 651, 653 (Ca. 1962): *Thomas J. York*

Under such circumstances, they are answerable to the electorate, but not the courts, if they were mistaken or wanting in business acumen.

For all the reasons set forth above, Walker's Appeal should be dismissed and the Summary Judgment of the trial court affirmed.

DATED this 26 day of October, 1992.

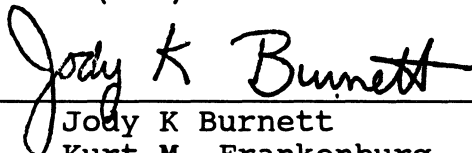
By WILLIAMS & HUNT
Jody K. Burnett
Jody K. Burnett
Kurt M. Frankenburg
Attorneys for defendants/Appellees

#15763

CERTIFICATE OF SERVICE

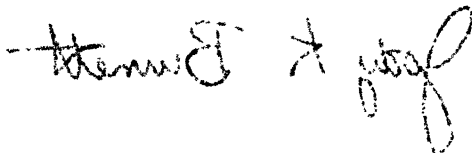
I hereby certify that on the 26 day of October, 1992, four (4) true and correct copies of the foregoing Appellee's Brief were served by mail, postage prepaid, to plaintiff/appellant's attorney, addressed as follows:

Robert R. Wallace
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
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Salt Lake City, UT 84110-2970
Telephone: (801) 363-7611



Jody K Burnett
Kurt M. Frankenburg
Attorneys for Defendant/Appellee

#15763



ADDENDUM

Apr 11 11 47 AM '91

CRAIG L. BARLOW (A0213)
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Attorneys for Defendants Brigham
City Corporation and Co-Counsel
for Brigham City Redevelopment
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Telephone: (801) 521-9000

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR BOX ELDER COUNTY, STATE OF UTAH

LEO A. WALKER,

Plaintiff,

vs.

ORDER AND JUDGMENT

BRIGHAM CITY, PETER C.
KNUDSON, BETH W. CURRISTER,
DAVID G. HACKING, DEE J.
HAMMON, ROBERT B. SHELTON and
MARK A. WALKER, REDEVELOPMENT
AGENCY NO. 1 OF BRIGHAM CITY,
REDEVELOPMENT AGENCY NO. 2 OF
BRIGHAM CITY, MICHAEL T.
COSGROVE, and JOHN OR JANE
DOES I THROUGH X,

Civil No. 870030069

Defendants.

Defendants filed a Motion for Partial Summary Judgment. Both parties submitted memoranda and the Court heard oral argument on February 25, 1991. The Court has considered the memoranda submitted by counsel, the arguments of counsel, affidavits and other evidence presented with the memoranda. The Court has also reviewed its prior Memorandum Decision (issued August 11, 1988, and

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Date 5/2/91 Roll No. 87

Case No. 870030069-79

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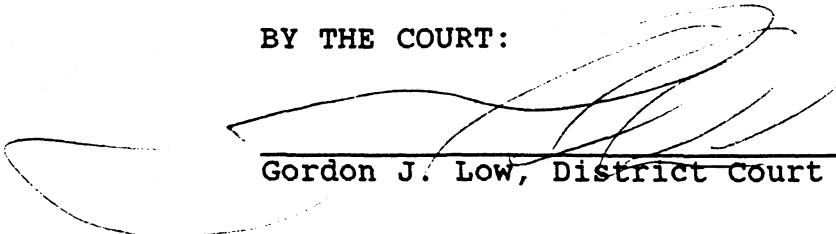
modified April 12, 1989) granting defendants' Motion for Partial Summary Judgment on Claims One through Six and denying plaintiff's Motion for Partial Summary Judgment and the memoranda submitted by the parties in conjunction with that decision. Being fully advised, the Court issued a Memorandum Decision, dated March 27, 1991, granting defendants' Motion for Partial Summary Judgment. The Court now enters this Order and Judgment granting defendants' Motion for Partial Summary Judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' Motion for Partial Summary Judgment on Claims Seven through Twelve is granted. On those claims there are no disputes of material fact and defendants are entitled to judgment as a matter of law. The Court adopts and incorporates by reference its Memorandum Decision dated March 27, 1991. This case has been bifurcated on stipulation of the parties and Order of the Court. The Court expressly determines, pursuant to Rule 54(b), Utah Rules of Civil Procedure, that there is no just reason for delay, and, accordingly, this Order and the Court's prior Order dated May 31, 1989, expressly constitute final judgment for the defendants on Claims One through Twelve. Further proceedings on the remaining claims, which have been bifurcated, are stayed, pending appeal and resolution of the Court's decision granting summary judgment on Claims One through Twelve. Parties to bear their own costs and attorney's fees.

Plaintiff is advised that he has thirty (30) days from the date of entry of this Order to appeal.

DATED this 27th day of April, 1991.

BY THE COURT:



Gordon J. Low, District Court Judge

APPROVED AS TO FORM:



Robert R. Wallace
Attorney for Plaintiff

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IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF BOX ELDER
STATE OF UTAH

LEO A. WALKER,

Plaintiff

vs.

BRIGHAM CITY, PETER C.
KNUDSON, BETH W. GURRISTER,
DAVID G. HACKING, DEE J.
HAMMON, ROBERT B. SHELTON, and
MARK A. WALKER, REDEVELOPMENT
AGENCY NO. 1 OF BRIGHAM CITY,
REDEVELOPMENT AGENCY NO. 2 OF
BRIGHAM CITY: MICHAEL T.
COSGROVE, and JOHN OR JANE
DOES I THROUGH X,

Defendants

MEMORANDUM DECISION

CASE NO. 870030069

THIS MATTER is before the Court upon the Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure.

The Plaintiff bases his claim partially on the allegation that the action by the city of charging rates, which he argues are unreasonably high, is among other things an unconstitutional taking. For reasons set forth in the Defendant's Memorandum and Reply Memorandum this Court agrees that the issue here does not necessarily rise to the level of constitutional magnitude.

The city does not argue that the Plaintiff may challenge the rate making process, or more specifically the rate levels, and agrees that this Court has the power to review the rate making process to determine if it is free from arbitrary and capricious exercise of power and that rates are reasonable for

Case No. 870030069-76A

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the service provided.

The two approaches are directly related. The Court has the power to review either the rates or the rate setting procedure where the rates are so unreasonable as to be the result of arbitrary and capricious action. Caution obviously has to be exercised in order not to intrude in an unwarranted fashion on the legislative function, nor to make the Court a rate making body.

This Court observed at the hearing, that if the legislature wanted to limit the municipality's power to charge rates in excess of those necessary to cover the costs, etc., it could readily have done so. The Legislature did provide that the rates charged are to be sufficient to provide for payment of the interest and principle, to create funds, pay for administration and operation, maintenance, depreciation reserve, impropriety, etc. It neither specifically allowed or precluded profit - over and above that necessary for the above mentioned purposes.

It is apparent from the language that the Legislature envisioned the municipality charging enough to provide the service in order that the service be not dependent on taxes or other revenues to support the same. What the statute however does not say is that, "such rates shall only be sufficient to provide such payments, etc.". Had it done so, the Plaintiff's argument would be easier to approach.

Moreover, both parties appear to agree that the municipality may, though not specifically authorized by the statute or prohibited therefrom, charge enough for a reasonable profit to be realized. The statute neither mentions nor

defines "reasonable profit", but does mention rather "reasonable rates", specifically, "reasonable rate for the service rendered". The issue then before us on this Motion for Summary Judgment is whether there are facts in dispute as to the allegation that Brigham City officials acted arbitrarily or capriciously in setting the rates for utility services and or are the rates unreasonably high.

Defendant would separate the actual consideration of the rates from the rate setting process. This Court is not so sure that that can be done. If the rates are unreasonably high then it may follow the process or acts of the Brigham City officials would therefore have to be likewise unreasonable, arbitrary or capricious. The task of the Court it seems then, is first to define "reasonable rates" by finding the legal standards to apply, then examine the rates charged to determine their reasonableness.

The parties introduced affidavits and portions of transcripts of depositions stating that the rates charged by Brigham City are related to those charged by investor owned utilities and utilities owned and operated by municipalities of a similar size. Plaintiffs Affidavit states that, among other things, the rates charged are higher than needed for payment and maintenance as provided by the statute and that the excess funds are transferred to a general fund used for other public purposes.

Though the Defendants argue that this is not the appropriate forum in which to question the wisdom of the legislative discretion on the part of the Brigham City council, the Defendant does admit that if in fact the Brigham City

council acted arbitrarily or unreasonably in establishing these rates or if the rates are unreasonably high then review by this review is proper.

No allegations are made or supported for the purpose of this Motion that the city's procedure of establishing the rates is improper, that it failed to comply with the statutory provisions or municipal ordinance in establishing the rates except that the rates are higher than needed to provide for the cost of production as envisioned by the statute and that the rates were established with the intent of producing a surplus to be transferred to the general fund. The actual procedure with which the city undertook to set the rates, other than above stated, is not challenged. (There was some argument by the Plaintiff that historically the city did not comply with the statutory requirements, but since this action is for injunctive relief that issue is not particularly material for this Motion for Summary Judgment.)

The Defendant has argued that reasonableness is a matter of fact and this Court stated earlier in a Memorandum Decision issued on August 11, 1988, that facts are necessary to determine whether the rates being charged are excessive or unreasonable. For cited authorities the Plaintiff has argued that in the Ventura case (Hansen vs. the City of San-Buenaventura, 729 P.2d 186 California 1986) involved only a 3% return on the rates wherein this case there is a 30% rate of return. Defendant has cited Triangle Oil, Inc. vs. North Salt Lake Corporation, 609 P.2d 1338 (1980) for the principle that the Court should exercise its powers of review only if it is shown that the exercise of municipal power is, "so wholly

discordant to reason and justice that its actions must be deemed capricious and arbitrary and thus in violation of the complainant's rights".

The problem lies in discussing rates of return as opposed to rates for services rendered. The statute does not preclude any certain rate of return or profit, what it does require is a reasonable rate for the service rendered. The question then is not one of percentage of profit; i.e., rate of return but rate charged for the value of the service rendered. That is what the Court suggested in the August 11, 1988, Memorandum Decision, that fees may not be in excess of the value of the service provided. The city is not precluded by that statute from obtaining a certain rate of return, even a high rate of return or profit, but it is precluded from charging a rate not reasonable for than the value of the service rendered. This is likely so because the city is the only provider of that service. If the city charged rates greatly in excess of the value of the service rendered, and since it is the only provider in Brigham City by state law, then that rate would be unreasonable and violative of the statute.

Contrary then to the Plaintiff's argument it would appear that the determination of the value of the service rendered must take into comparison the rates charged for similar services provided to other consumers. That would necessarily require an analysis of the rates charged by other municipal providers and by other non-municipal providers. The cost of producing the power by each individual provider is not the bench mark against which the rate charged is compared, but rather it is the value of the product provided or service

rendered.

Value is generally determined by what the consumer is willing to pay. Economics dictate that the higher the rate charged perhaps the less the consumer is willing to buy and the lower the rate charged the more the consumer is willing to buy. However, because the Plaintiff and other individuals in his position are a "captive consumer" it seems to this Court that the amount other consumers are paying here and elsewhere is a better criteria for determining reasonableness than the costs of production as the best analysis of the value of the service rendered. The term "reasonable", as used in the statute should be defined by comparison. Stated another way the city then is not restricted to a cost basis analysis to determine its reasonable rates, but the reasonable rates are to be determined by the value of the service rendered. The only way to reasonably determine the value of that service rendered is to compare like services and rates.

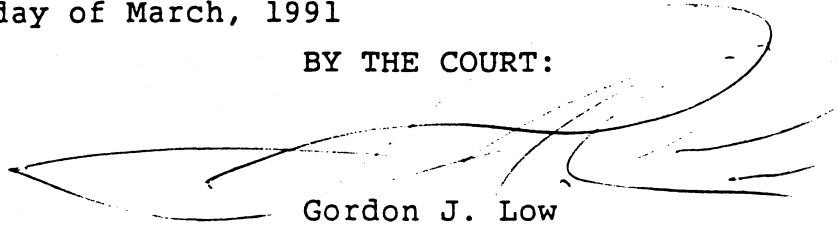
If the city were selling its power for substantially higher rates than like services provided by other providers or if the city were selling its power for rates considerably lower than sufficient to provide for maintenance of the costs as required by statute then the Plaintiff's argument would be well taken. But the uncontested fact that the city is charging rates reasonably comparable to those charged by other providers, even though higher than they need to in order to cover costs, does not demonstrate that the rates are unreasonably high or that the city acted unreasonably in exercise of its legislative power. If the city government wants to charge less than what it is charging now, but still sufficient to cover the costs, it

Walker vs. Brigham City
#870030069
Page 7

may do so under the statute but that is a legislative function to be controlled by the City Council and is an area in which the Court should not intervene. Defendant's Motion for Summary Judgment is therefore granted. Counsel for the Defendant is directed to prepare a formal Order in conformance herewith.

Dated the 27th day of March, 1991

BY THE COURT:

A handwritten signature in dark ink, appearing to read 'Gordon J. Low', is written over a horizontal line. The signature is stylized with a large, sweeping loop on the right side.

Gordon J. Low
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, postage prepaid to the following:
Robert R. Wallace, Attorney at Law, 4 Triad Center STE 500, P.O. Box 2970, Salt Lake City, UT 84110, Jody K. Burnett and Craig L. Barlow, Attorneys at Law, 10 Exchange Place, 11th Flr., P.O. box 45000, Salt Lake City, UT 841110, Merrill G. Hansen and James I. Watts, Attorneys at Law, 1245 Brickyard Road Dr., STE 600, Salt Lake City, UT 84106 and Ben Hadfield and Jeff R. Thorne, Attorneys at Law, P.O. Box F, Brigham City, UT 84302.

DATED this 2nd day of April, 1991.


Marla Liljenquist
Deputy Clerk

JODY K BURNETT
CRAIG L. BARLOW
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY
STATE OF UTAH

LEO A. WALKER,

Plaintiff,

vs.

ORDER

BRIGHAM CITY CORPORATION,
PETER C. KNUDSON, BETH W.
GURRISTER, DAVID G. HACKING,
DEE J. HAMMON, ROBERT B.
SHELTON, and MARK A. WALKER,
REDEVELOPMENT AGENCY NO. 1
OF BRIGHAM CITY, REDEVELOPMENT
AGENCY NO. 2 OF BRIGHAM CITY,
MICHAEL T. COSGROVE, and
JOHN or JANE DOES I through
X,

Civil No. 870030069

Defendants.

On March 21, 1989 the parties, through counsel appeared before the Court for argument on several motions, including plaintiff's and defendants' Motions for Partial Summary Judgment. The plaintiff was represented by Robert R. Wallace and defendants were represented by Jeff Thorne, Merrill Hansen and Craig L. Barlow. The parties had submitted Memoranda in

Number 870030069-
FILED

support of their motions opposing the motions. On August 11, 1988 this Court issued a Memorandum Decision on both Motions for Partial Summary Judgment. The plaintiff had not submitted a memorandum in response to the defendants' motion at the time the Memorandum Decision was issued despite the fact that counsel for defendants had agreed that the plaintiff could have additional time to file a responsive memorandum. The Court allowed the plaintiff to submit a reply memorandum and has now reviewed all of the memoranda submitted as well as the Court's file of the entire matter and considered the arguments of counsel. Based on the Court's review and analysis its Memorandum Decision of August 11, 1988 granting defendants' Motion for Partial Summary Judgment on claims 1 through 6 of plaintiff's Amended Complaint remains the Court's decision in this case. The Court also grants the defendants Motion to Strike the Affidavit of Leo Walker submitted in support of plaintiff's Memorandum Opposing defendants' Motion for Partial Summary Judgment. The Court finds there are no disputes of material issues of fact and the defendants are entitled to summary judgment on claims 1 through 6 of the plaintiff's Amended Complaint. Therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants' Motion for Partial Summary Judgment is granted, with prejudice and plaintiff's Motion for Summary Judgment is denied, parties to bear their own costs.

DATED this 31ST day of May, 1989.

FIRST DISTRICT COURT:

By 

Judge Gordon J. Low

APPROVED AS TO FORM:

By 

Robert R. Wallace

Counsel for Plaintiff

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF BOX ELDER
STATE OF UTAH

LEO A. WALKER

Plaintiff

VS

BRIGHAM CITY UTAH

Defendant

)

)

)

)

)

MEMORANDUM DECISION

Civil No. 870030069

On the 11th day of August, 1988, this Court issued a Memorandum Decision on both parties Motion for Summary Judgment. The Plaintiff however was not given an opportunity to submit his reply memorandum to the Defendant's Motion.

This Court has now received that reply and also heard argument on the matter. After reviewing the entire matter, both in pleadings and in argument, the Court's earlier decision remains. The Plaintiff has not shown that he has been deprived of due process, procedural or substantive or that he is being deprived of equal protection of the laws.

In support of this argument, an affidavit was filed to which a Motion to Strike, as the affidavit applies to these matters is granted. The Memorandum Decision earlier issued in this case is affirmed (except for those provisions wherein there are obviously typographical errors.)

Counsel for the Defendant is directed to prepare a formal order in conformance herewith.

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Roll No. 922 Dated this 12th day of April, 1989.

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Roll No. 922

BY THE COURT

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Number 870030069

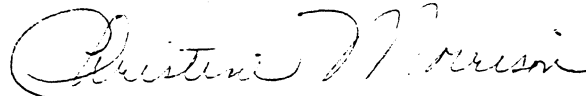
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Date 7/13/89 Roll No. 922

CERTIFICATE OF MAILING

I hereby certify that on this 12th day of April 1989, I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid too, Robert R. Wallace, Attorney for the Plaintiff, 4 Triad Center, Suite 500, P. O. Box 2970, Salt Lake City, Utah 84110 and to Craig Barlow & Jody K. Burnett, Attorney's for the Defendant, 10 Exchange Place #1100, Salt Lake City, Utah 84145, and to Jeff Thorne, Attorney for the Defendant, P. O. Box "F", 98 North Main, Brigham City, Utah 84302 and to Merrill G. Hansen, Attorney for the Defendant, 1245 Brickyard Plaza, #600, Salt Lake City, Utah 84106.

A handwritten signature in cursive script, reading "Christine Morrison".

Christine Morrison
Deputy Court Clerk

IN THE FIRST DISTRICT COURT OF BOX ELDER COUNTY,
STATE OF UTAH

LEO WALKER)
Plaintiff,)
) MEMORANDUM DECISION
VS.) FILE NO. 870030069
)
BRIGHAM CITY ET AL)
Defendants.)

In this matter Leo Walker has filed a motion for Summary Judgment, seeking therein a Declaratory Judgment, that the electrical utility fees charged by Brigham City, Corporation to its customers are excessive and unconstitutional and for an injunction enjoining Brigham City Corporation from collection of excess fees for utility services, an injunction preventing Brigham City from collecting the ^{purposed} \$2.00 per month additional fee for an electrical service and for attorney fees;

The relationship between the action for Summary Judgment and the specific causes of action in the complaint is unclear. The Plaintiff alleges the grounds for the motion are that the charges made by Brigham City for Utility Services are excessive and constitute a taking of Plaintiff's property without constitutional due process, therefore in violation of both Federal and State Constitutions and the excessive charges are violative of the Utah Code annotated, Section 55-3-3.

There appears to be no dispute that between the years 1983 and 1987, the Defendant, Brigham City collected funds in charges for utility services and transferred certain of those

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funds into the City's general fund. The funds collected were in excess of the sums of moneys required to operate the electrical services provided by the city. Further allegations are that during 1988 the City will transfer \$1,275,858.00 from the Utility Funds to the General Fund, that those funds represent monies in excess of expenses relating to the providing of electrical utility services. In addition thereto the City is proposing a \$2.00 per month electrical hook-up fee for all persons using utilities during 1988-89. Neither of the cases cited under section 1 of the Plaintiff's brief are directly on point but are argued to be applicable by inference or by implication.

It appears to the Court that one focal point of this issue is what is meant under Section 55-3-10 of the Utah Code annotated where in the City is authorized to charge rates for services provided but not in excess of those "reasonable for service rendered". Plaintiff argues that because the City charges more for its electrical service than it needed to meet the expense of providing this the service, it is therefore in excess of a "reasonable rate for the service rendered". No evidence or facts are supplied relative to what is a "reasonable rate for the service rendered". In other words though the City may be charging more for the service than it costs the City to provide the same, that may not be dispositive of the question of whether the charge is in excess of "reasonable rate for service rendered".

The Court is left unaware of the facts as to whether the Plaintiff is receiving his moneys worth or if the rate is "reasonable for the service" he is provided or even how and if that could be calculated. But it seems overly simplistic to conclude that since the City receives more than it expends related to electrical service that therefore its rate is "in

excess of a reasonable rate for the service rendered". It seems to the Court that far more information and facts are needed before Summary Judgment can be granted on that issue. The Defendant further argues since that this is not a class action, Plaintiff must therefore be able to show that the service charges he pays individually are unreasonable. Again those are further facts which are not supplied and are of which the Court is unaware at this juncture. Whether the Plaintiff's claim is cognizable under the Federal Statute cited in the complaint cannot at this time be determined.

The Plaintiff's second point essentially is that the charging by the City of excessive fees not reasonably related to the services being provided is a taking of property in violation of Plaintiff's constitutional rights. The threshold problem in this section of the Plaintiff's argument is the same as the first, that is this Court is without sufficient facts to determine whether the fees being charged are excessive fees, unreasonably related to the service provided.

The fees obviously are in excess of the cost of providing the service but they may not be in excess of the value of the service received. Further facts must be provided the Court on that issue. The Court distinguishes the case of Weber Basin Hombuilder Association vs. Roy City as there was apparently no showing by Roy City, that it had experienced a commensurate increase in the cost of running the building department, therefore justifying the increase from \$10.00 to \$112.00 in building permits. The builder was receiving no real benefit from the issuance of the building permit and therefore it was easily determined that the increase to \$112.00 was not reasonably related to the service provided. In this case however the Plaintiff is apparently receiving electrical service and the question is whether or not what he pays for it

is "reasonably related to the service provided". The defendant further argues in response to point 2, that the exact nature of the property right which the Plaintiff alleges that he is being denied must at the on-set be determined and that the Plaintiff has failed to identify the same.

Obviously if the Plaintiff refused to pay what he considers to be an excessive rate, that the utility service will be discontinued, therefore depriving him of a property right which can only be done so legally if in fact the charges are not excessive; otherwise the termination may be illegal and an unconstitutional taking. Before we get to that issue, the question of excess charges and the questions of the charges and their reasonableness and the relationship to the service rendered must be determined.

The Plaintiff's request therefore under point 2, for Summary Judgment is denied and the claim under point 3, for Attorney Fees is premature and therefore also denied.

The Defendants have moved this Court to strike the affidavit of the Plaintiff. Where the motions are denied, there is no need to rule on motion to strike.

The Defendants have filed motion for Partial Summary Judgment on several portions of the complaint.

With respect to all claims against individual defendants, they relate entirely to legislative functions, even setting the budget, determining rates and expenses allocable to the operation of the electrical and sewer facilities in State, are legislative in nature and are protected by an umbrella of immunity.

The first six claims of the plaintiff's complaint are Federal Civil Rights Claims. Remaining issues are brought under State law with respect to claim 1, of the plaintiffs

complaint, the same alleges that the City is involved in a Civil Rights violation against defendant by taking property without just compensation, violative of the fifth amendment of the United States Consitution. This Court specifically finds that that allegation does not state a Federal Civil Rights claim. In the denial of the Plaintiff's Summary Judgment, this Court pointed out that the Plaintiff has not shown that the rates charged are unreasonable, as reasonableness must be determined on more factors than just an expense/rate basis. It further assumed that the action is being brought under the Civil Rights Acts, section 1983 of the Civil Rights Act. But even if the allegation were true, that does not constitute a valid claim under that act. Rather the nature of alleged protected property interest of which the Plaintiff is being deprived is not articulated, though the defendant argues that the Plaintiff's relationship to the City is contractual and therefore it does not fall within the ambit of Constitutional protection. The Court does not necessarily agree that that is dispositive of the question as the services are far more than a contractual relationship. The City is the only agency able to provide such services. However if Plaintiff's complaint is based on the breach of the implied contract, through excessive charges, that ~~does~~^{may} constitute a Federal Claim.

The Court fully agrees with the defendant however in that in this case, the Court ~~or~~ should restrain itself from interfering with the exercise with legislative functions of the City, unless the City is out-side of its authority, its actions capricious, arbitrary, and or in violation of Plaintiff's Constitutional Rights.

With respect to claim two of the Plaintiff's complaint, the Plaintiff has failed to show how it is he is being

discriminated against and therefore being deprived of equal protection of the laws guaranteed by the United States and the Utah Constitution. Plaintiff here allege that the City has been involved in a violation of Plaintiff's procedural and substant^{ive} in due process rights. In support of the same the plaintiff has not shown that he has been deprived of other remedies available.

The claim under 1983 Civil Right Act cannot be substantiated by showing that the defendant has violated the State Statutes or State Constitutional law. The Plaintiff has argued that the Defendant has acted in violation of Utah Code Annotated above cited, but liability under the 1983 Civil Rights rests upon violations of the United States Constitution.

Plaintiff's claim 4, relative to denial of equal protection, is unsupported by any claim of discrimination ~~or~~ against a class to which the Plaintiff belongs. In fact no class to which he belongs is identified. Whether the law requires a showing of a purposeful discrimination or a specific intent on the behalf of the defendant, at this point is irrevelant. The Plaintiff has failed to show a denial of equal protection.

Under claim five and six of the Plaintiff's complaint, the Court fails to see where the Plaintiff has pled a violation of a constitutional law, or an application of the Federal or Constitutional Standards. Further more it seems clear the claims made in one through six may be articulated and sought through other remedial processes i.e. adequate State remedies to redress a property damage claim may exist. It seem there can be no deprivation of due process of law since the due process has not been accessed. Another avenue aside from the seeking of a 1983 Civil Rights Claim have not been

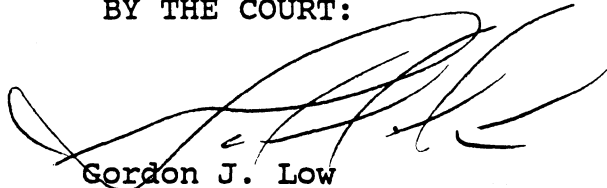
exhausted but here the Plaintiff has failed to show a deprivation of a Federal Constitutional protected Civil Right.

The reasons above stated the defendants motion for Summary Judgment with respect from claims one through six and all claims against individual defendants shall be dismissed and the Summary Judgment granted.

Counsel for the Defendant is directed to prepare a formal order.

Dated this 11th day of August, 1988.

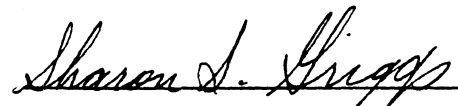
BY THE COURT:

A handwritten signature in black ink, appearing to read 'Gordon J. Low', is written over the printed name.

Gordon J. Low
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of August, 1988, I mailed, postage prepaid, a true and correct copy of the foregoing Memorandum Decision to Robert P. Wallace , 175 South West Temple, #650, Salt Lake City, Utah 84101 and Alan B. Asay, 5251 South Green Street, Murray, Utah 84123, attorneys for plaintiff and to Allan L Larson, 10 Exchange Place 11th Floor, P.O. Box 45000, Salt Lake City, Utah 84084, to Ann Swensen, 10 Exchange Place, 4th Floor, P.O. Box 45000, Salt Lake City, Utah 84145, to Jody K. Burnett, 10 Exchange Place 11th Floor, P.O. Box 45000, Salt Lake City, Utah 84145, to Stanley K. Stoll, 10 Exchange Place 11th Floor, P.O. Box 45000, Salt Lake City, Utah 84145, to Merrill G. Hansen, 1245 Brickyard Road, #600, Salt Lake City, Utah 84106 and to James I. Watts, 1245 Brickyard Road, #600, Salt Lake City, Utah 84106 attorneys for the defendants.


Senior Court Clerk