

1
2 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR COOS COUNTY
3

4 ROB TAYLOR,

5 Plaintiff,

6 v.

7 CITY OF BANDON, an Oregon Municipal
8 Corporation,

9 Defendant.

Case No. 19CV28149

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

ORAL ARGUMENT REQUESTED

10 **UTCR 5.050 REQUIREMENTS**

11 Plaintiff estimates that 45 minutes will be required for oral argument. Official
12 court reporting services are requested.

13 **MOTION FOR SUMMARY JUDGMENT**

14 Pursuant to ORCP 47, Plaintiff moves the Court for an order granting summary
15 judgment in favor of Plaintiff because there is no genuine issue as to any material fact
16 and because Plaintiff is entitled to judgment on all his claims as a matter of law. In
17 support of this motion, Plaintiff relies on the provisions of ORCP 47, the pleadings and
18 files in this action, the Exhibits attached to the Declaration of William H. Sherlock, and
19 the points and authorities below.

20 **POINTS AND AUTHORITIES**

21 **A. *Summary Judgment***

22 Summary judgment is appropriate if "the pleadings, depositions, affidavits,
23 declarations and admissions on file show that there is no genuine issue as to any material
24 fact and that the moving party is entitled to prevail as a matter of law." ORCP 47C. No
25 genuine issue of material fact exists if, when all inferences are viewed in a light most
26 favorable to the adverse party, "no objectively reasonable juror could return a verdict for

1 authority to establish and regulate only the following fees:

2 (a) Planning Application Fees

3 (b) Engineering Review Fees

4 (c) Document Fees

5 (d) Gorse Abatement Fees

6 (e) City Facility Rental Fees

7 (f) City Equipment Rental Fees

8 (g) City Project Fees

9 (h) Public Works Permit Fees

10 None of the foregoing fee classifications relate to or address water or sewer fees or
11 rate schedules. The only provisions of the Charter that do are found in the above Sections
12 46-48. Notwithstanding these governing provisions, on June 3, 2019, the city council for
13 the City of Bandon met for their monthly city council meeting wherein the Council agreed
14 and voted to increase the rates charged for water and wastewater utility services,
15 according to Resolution No. 19-08 Amending the Water Rate Schedule, and
16 Resolution 19-09 Amending the Wastewater Utility Rate Schedule, *See* Declaration of
17 William H. Sherlock, *Exhibits 1 and 2*. The increased rates went into effect on July 1, 2019.
18 *Id.*

19 **C. ARGUMENT**

20 The three very specific sections in the Bandon City Charter quoted above expressly
21 prohibit the City from increasing the utility rates for water and wastewater without consent of the
22 voters. In its Answer, Defendant does not contest the existence or interpretation of these Charter
23 prohibitions on rate increases absent voter consent, but rather launches a collateral attack on them
24 as “unconstitutional infringements on administrative matters and not proper matters for an
25 initiative, as it relates to rates, and therefore should be so declared.”
26

1 The City’s position, however, is meritless for the following reasons. First,
2 “A city's charter is, in effect, the city constitution. Any city ordinance, rule, or regulation
3 in conflict with its provisions is void. [citing] *Harder v. City of Springfield*, 192 Or 676, 683, 236
4 P2d 432 (1951); *Joplin v. Ten Brook*, 124 Or 36, 38-39 (1928). Ordinances that conflict with the
5 city charter must be declared void. *Portland Police Assn. v. Civil Service Board of Portland*, 292
6 Or 433, 440 (1982).

7 There are two limited exceptions that allow the city to pass ordinances that
8 contradict its charter under certain proscribed circumstances. One is when the city
9 declares a legitimate emergency in accordance with the charter and city code provisions
10 that provide the criteria for determining whether an emergency exists. *Greenberg v. Lee*,
11 196 Or 157 (1952). In the present situation, although Resolutions No. 19-08 and 19-09
12 alluded to an emergency finding by the Bandon Utility Commission, the city council did
13 not declare an emergency (nor did the ordinances take immediate effect). But even if the
14 city had made such a declaration, it would have violated the State Constitution’s
15 prohibitions against attaching emergency clauses to tax or rate increases. Specifically,
16 and as explained in *Advance Resorts of Am., Inc. v. City of Wheeler*, 141 Or App 166, 175–
17 76, 917 P2d 61, 66–67 (1996):

18 “[T]he primary purpose and effect of the adoption in 1912 of Article IX, § 1a, was
19 to make all tax measures subject to referendum and * * * this was accomplished by
20 forbidding the Oregon legislature from declaring an emergency in the enactment of
21 such legislation. The result, in our judgment, is the same as if the Oregon
22 Constitution included a provision expressly stating that all tax measures enacted by
23 the legislature are subject to referendum.

24 “For the same reasons, we also conclude that at the time of the subsequent
25 County Home Rule Amendment in 1958, the ‘referendum powers reserved to the
26 people’ by the Oregon Constitution included then, and still include, the power of
27 the referendum of all tax measures enacted by the Oregon legislature and that
28 this referendum power could not then, and cannot now, be defeated by the
29 declaration by the Oregon legislature of an emergency in the enactment of tax
30 legislation.

1 "It follows, in our best judgment, that by the adoption in 1958 of Article VI, § 10
2 (the County Home Rule Amendment), the same 'referendum powers' are
3 'reserved to the legal voters of every [home-rule] county relative to * * *
4 legislation passed by [such] counties'; that the purpose and effect of Article VI, §
5 10, was to reserve to county voters with respect to county tax legislation the same
6 'referendum powers' previously reserved to state voters with respect to state tax
7 legislation; that this includes county legislation imposing new taxes; and that a
8 home-rule county may not defeat the exercise of such 'referendum powers' by the
9 declaration of an emergency in the enactment of such legislation. In other words,
10 Article IX, § 1a, as we view it, is not merely a restriction upon the power of the
11 Oregon legislature, but is a part of the 'referendum powers' reserved to the voters
12 of Oregon." [quoting *Multnomah Co. v. Mittleman*, 24 Or App 237, 551–52, 545 P2d
13 622 (1975)]

14 * * * *

15 The source of the referendum power at issue in this case—relating to the voters of
16 cities, as opposed to home rule counties—is Article IV, section 1(5), adopted in
17 1968. That article provides that the initiative and referendum powers reserved by
18 the people generally under Article IV, sections 1(2) and 1(3) "are further reserved
19 to the qualified voters of each municipality and district as to all local, special and
20 municipal legislation of every character in or for their municipality or district." In
21 the light of *Mittleman*, there can be no question but that the restrictions of Article
22 IX, section 1a, apply to the referendum powers reserved to the voters of cities and
23 other municipalities.

24 *Advance Resorts of Am.*, 141 Or App at 177, 917 P2d 61, 67 (1996). Accordingly, defendant has
25 not and cannot avail itself of the emergency clause exception to justify violating the city Charter
26 in this case.

The only other exception whereby an ordinance can usurp a city charter's cap on utility
rates is if the cap contradicts state law. *Stadelman v. City of Bandon*, 173 Or App 106, 114
(2001). The issue is thus whether Sections 46-48 of Bandon's City Charter violate state law,
allowing the city council to pass Resolutions No. 19-08 and 19-09 without consent of the voters.
ORS 287A.325(1) states that "It is a matter of statewide concern that certain covenants made by
public bodies regarding a pledge of revenues to secure bonds not be impaired by *subsequent*
initiative or referendum measures." (Emphasis added). Subsection (3) of the statute further
states that "An elector-approved initiative or referendum measure that *purports to change*
ordinances or resolutions affecting rates . . . has no force or effect if giving force and effect to the
change would impair existing covenants." (Emphasis added).

1 This language has been interpreted to invalidate caps on rates insofar as the *subsequent*
2 caps and reductions prevent public bodies from paying back *third parties* under *existing* loan
3 agreements. *Id.* In *Stadelman*, the City of Bandon entered into a loan agreement in 1992 with the
4 Department of Environmental Quality (DEQ) to finance a wastewater treatment plant. *Id.*, at 109.
5 In 1995, Bandon’s City Charter was amended to add Sections 47-49 (now Sections 46-48) that
6 reduced the sewage and water rates back to the rates in 1994, and prevented the raising of water
7 and sewer rates absent the consent of the voters. *Id.* at 109-10. The same defendant, City of
8 Bandon, argued that the same Charter provisions in question in the present case were preempted
9 “only insofar as they do or have been applied to impair *this* loan agreement.” *Id.* at 113. The
10 Oregon Court of Appeals agreed, finding that the Charter sections were preempted by ORS
11 288.594(1) because the reduction of the rates would “impair existing covenants’ like those in the
12 loan agreement.” *Id.* at 113-14. The court found that the state wanted public bodies to be able to
13 perform contracts they had *already* entered into and the city could not do so in this particular
14 instance. *Id.* ORS 287A.325 has supplanted ORS 288.594 and 288.517 but carries the same
15 policy to nullify a *subsequent* local charter amendment or ordinance that hinders the performance
16 of existing contracts.

17 Here, the preemption exception does not apply because there is no contract or covenant
18 binding the city and requiring the raising of rates to pay the indebtedness, nor was there an
19 existing covenant that would be impaired by the Charter provisions. Instead, the city council
20 passed Resolutions No. 19-08 and 19-09, which raised water rates without the consent of the
21 voters, directly in violation of Sections 46-48 of the City Charter, provisions that have been in
22 place for over twenty years. The present case is readily distinguished from the issue in *Stadelman*
23 where the rate reduction Charter provisions were enacted *after* the DEQ contract and loan
24 payback obligations were already in place. Again, in this case it is undisputed that there are no
25 existing contracts or bond obligations with third parties that are hampered by the provisions of the
26 Charter. The reason for the rate increases was due to the local utility commission’s and city

1 council's joint failure to anticipate demand relative to supply, to properly assess the state of
2 infrastructure, and to educate the local citizens as to why and how much rates would have to
3 increase through the local referendum process.

4 In sum, the Charter provisions against raising rate covenants were in effect well before the
5 city council passing Resolutions No. 19-08 and 19-09, and there is no state law or policy that is
6 violated through the enforcement of Sections 46-48 of Bandon's City Charter. The City Charter
7 cannot be preempted under these undisputed facts. Accordingly, the city council must abide by
8 the "constitution" of the city. Because the city council failed to enact the ordinances increasing
9 sewage and water rates with the consent of the voters Resolutions No. 19-08 and 19-09 must be
10 declared void as the ordinances directly conflict with Bandon's City Charter, and any monies paid
11 by rate payers in excess of what the Charter provisions call for must be refunded.

12 **D. CONCLUSION**

13 For the foregoing reasons, the court should grant Plaintiff's claims for relief and declare
14 that the City Council of Bandon's increase in the rates for water and wastewater
15 utilities as set forth in Resolutions 19-08 and 19-09 occurred without the consent of the voters are
16 therefore void as a matter of law.

17 DATED this 25th day of October, 2019

18 HUTCHINSON COX

19
20
21 By:


22 William H. Sherlock, OSB #903816
23 Email: lsherlock@eugenelaw.com
24 Of Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

I certify that on October 25, 2019, I served or caused to be served a true and complete copy of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** on the party or parties listed below as follows:

- Via the Court's E-filing System
- Via First-Class Mail, Postage Prepaid
- Via Email
- Via Personal Delivery
- Via Facsimile

Frederick J. Carleton
P. O. Box 38
Bandon, OR 97421
Of Attorneys for Defendant

HUTCHINSON COX

By: 
William H. Sherlock, OSB #903816
Email: lsherlock@eugenelaw.com
Of Attorneys for Plaintiff

1
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3

4 ROB TAYLOR,

5 Plaintiff,

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9 Defendant.

Case No. 19CV28149

**DECLARATION OF WILLIAM H.
SHERLOCK IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**


10 I, William H. Sherlock, do hereby declare as follows:

- 11 1. I am the attorney of record for Plaintiff.
- 12 2. Attached hereto as Exhibit 1 is a true and accurate copy of Resolution No.
13 19-08, of the Mayor and City Council of the City of Bandon.
- 14 3. Attached hereto as Exhibit 2 is a true and accurate copy of Resolution No.
15 19-09, of the Mayor and City Council of the City of Bandon.

16 *Pursuant to ORCP 1 E, I hereby declare that the above statement is true to the best*
17 *of my knowledge and belief, and I understand it is made for use as evidence in court and is subject*
18 *to penalty for perjury.*

19 DATED this 25th day of October, 2019

20 HUTCHINSON COX

21 By: 
22 William H. Sherlock, OSB #903816
23 Email: lsherlock@eugenelaw.com
24 Of Attorneys for Plaintiff
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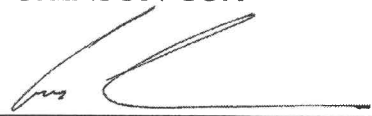
CERTIFICATE OF SERVICE

I certify that on October 25, 2019, I served or caused to be served a true and complete copy of the foregoing **DECLARATION OF WILLIAM H. SHERLOCK IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** on the party or parties listed below as follows:

- Via the Court's E-filing System
- Via First-Class Mail, Postage Prepaid
- Via Email
- Via Personal Delivery
- Via Facsimile

Frederick J. Carleton
P. O. Box 38
Bandon, OR 97421
Of Attorneys for Defendant

HUTCHINSON COX

By: 
William H. Sherlock, OSB #903816
Email: lsherlock@eugenelaw.com
Of Attorneys for Plaintiff

RESOLUTION NO. 1908

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY
OF BANDON, OREGON, AMENDING THE WATER RATE SCHEDULE.

WHEREAS, the City Council has determined that retail water rates must be increased by twenty-one percent {21%} to provide adequate revenue funds for FY 2019-2020 maintenance and operation expenses of the water utility; and

WHEREAS, the Mayor and City Council have determined that the new water rates should become effective for all water utility customers beginning July 1, 2019.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and City Council that the charges for water rate shall be in accordance with the "City of Bandon Water Utility Rates" schedule, dated "July 1, 2019," which is attached hereto and incorporated herein by reference; and

BE IT FURTHER RESOLVED that these water rates shall be effective for all water customers, beginning July 1, 2019; and

BE IT FURTHER RESOLVED that all previous water rates in conflict herewith are hereby repealed, and all other water service fees and policies shall remain as existing.

ADOPTED by the City Council of the City of Bandon, this 3^d day of June, 2019.

Mary Schamehorn, Mayor

Attest

Denise Russell, City Recorder

**CITY OF BANDON
WATER UTILITY RATES
1-Jul-19**

WA 01 Residential, inside city	1st2000Gal	\$28.44 \$1.57
WA 02 Commercial/Industrial, Inside city	1st 2000 Gal	\$40.54 \$1.57
WA 03 Residential, outside city	1st 2000 Gal	\$38.88 \$2.63
WA 04 Commercial/Industrial, outside city	1st 2000 Gal	\$50.98 \$2.63
WA 05 Additional unit rate-inside city-attached/detached residence (Duplex, triplex, etc.), apartment		\$7.91
WA 06 Additional unit rate-inside city, mobile home park, boat slip, berth, or dock space		\$3.96
WA 07 Additional unit rate-inside city-RV park, motel, bed & breakfast		\$1.22
WA 08 Additional unit rate-outside city-attached/detached residence {duplex, triplex, etc.), apartment		\$11.85
WA 09 Additional unit rate-outside city-motel, bed & breakfast, RV Park		\$2.03
WA 10 Additional unit rate-inside city-commercial business, commercial office building, Industry, common food service facility, common laundry facility		\$7.91
WA 11 Additional unit rate-outside city-commercial business, commercial office building, industry, common food service facility, common laundry facility		\$11.85
WA 12 Additional unit rate-inside city-health/elderly care facility		\$3.51
WA 13 Additional unit rate-outside city-health/elderly care facility		\$5.86
WA 14 Outside City Water Bond		\$20.18
WA 15 2006 Clarifier & UV System Bonds		\$5.99
WA S8 City use only--no charge		\$0.00
WA 59 City use only-charge-Inside/outside city	1st2000Gal	\$11.64 \$1.39
-----Water hauling-inside city use	1st 2000Gal	\$16.34 \$1.57
-----Water hauling-outside city use	1st 2000 Gal	\$26.78 \$2.63

RESOLUTION NO. 19-09

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF BANDON, OREGON, AMENDING THE WASTEWATER RATE SCHEDULE.

WHEREAS, the City Council has determined that retail water rates must be increased by twenty-eight percent (28%) to provide adequate revenue funds for FY 2019-2020 maintenance and operation expenses of the wastewater utility; and

WHEREAS, the Mayor and City Council have determined that the new water rates should become effective for all wastewater utility customers beginning July 1, 2019.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and City Council that the charges for water rate shall be in accordance with the "City of Bandon Wastewater Utility Rates" schedule, dated "July 1, 2019," which is attached hereto and incorporated herein by reference; and

BE IT FURTHER RESOLVED that these water rates shall be effective for all wastewater customers, beginning July 1, 2019; and

BE IT FURTHER RESOLVED that all previous water rates in conflict herewith are hereby repealed, and all other wastewater service fees and policies shall remain as existing.

ADOPTED by the City Council of the City of Bandon, this 3rd day of June, 2019.

Mary Schamehorn, Mayor

Attest:

Denise Russell, City Recorder

CITY OF BANDON
WASTEWATER UTILITY RATES
1-Jul-19

SW 01 Residential, inside city	1st 2000 Gal	\$29.08
	Winter (11)	\$4.81
	Summer (6)	\$3.14
SW 02 Commercial/Industrial, inside city	1st 2000 Gal	\$29.08
		\$4.81
SW 03 Residential, outside city	1st 2000 Gal	\$45.85
	Winter (11)	\$7.21
	Summer (6)	\$4.70
SW 04 Commercial/Industrial, outside city	1st 2000 Gal	\$45.85
		\$7.21
SW 05 Residential fixed--No water, inside city		\$58.11
SW 06 Residential fixed--No water, outside city		\$80.64
SW 07 Additional unit rate-inside city-attached/detached residence (per unit in a Duplex, Triplex, etc.), apartment (per rental unit to which the tenant has key access, and which has a bathroom(s) and full cooking facilities; plus per washer in a common laundry facility), commercial business (per unit, attached <i>or</i> detached, operating as an independent business), commercial office building (per office or suite of offices operating as an independent business), boat slip, berth, or dock space (per space, when utilized as a residence), common food service facility (per kitchen when functioning as a common food preparation facility for another use), common laundry facility (per facility when functioning as common laundry facility for another use, except as otherwise specified), industry (per unit, attached or detached)		\$11.94
SW 08 Additional unit rate-Inside city-mobile home park (plus per washer in a common laundry facility)		\$11.94
SW 09 Additional unit rate-inside city-motel, bed & breakfast (plus per washer in a common laundry facility)		\$5.88
SW 10 Additional unit rate-inside city-RV park [per space, plus per washer in a common laundry facility.		\$7.51
SW 11 Additional unit rate-inside city-health/elderly care facility (per rental unit to which the tenant has key access, and which has a Bathroom and minimal, or no, cooking facilities)		\$9.70
SW 20 Special strength customer-inside city (restaurant, laundromat, special)	1st 2000 Gal	\$19.42
		\$5.81
SW 68 City use only - no charge		\$0.00
SW 69 City use only--Charge--inside/outside city	1st 2000 Gal	\$29.08
		\$4.81