

FILED

DEC -9 2019

Coos Co.  
Circuit Court



**CIRCUIT COURT OF OREGON**

**Fifteenth Judicial District**

December 9, 2019

**Coos County Courthouse  
Coquille, Oregon 97423  
(541) 396-4117**

**MARTIN E. STONE**  
Judge

William H. Sherlock  
Attorney at Law  
PO Box 10886  
Eugene, OR 97440

Frederick J. Carleton  
Attorney at Law  
PO Box 38  
Bandon, OR 97411

Re: Taylor v. City of Bandon; Coos Circuit Court No. 19CV28149

Counsel:

This case came before the court for argument on November 29, 2019 on plaintiff's motion for summary judgment. The court took the matter under advisement to again review the pleadings and filings and consider the well briefed argument of counsel.

For the reasons discussed below, the court will grant summary judgment in favor of plaintiff. There are no genuine issues of material fact and on this record plaintiff is entitled to judgment as a matter of law.

The facts of this case are straight forward and not in dispute:

1. Defendant City of Bandon is governed by its Charter.
2. In 1995, the voters of the City passed measures which added Sections 46-48 to the Charter. Those sections restrict water and sewer rate increases only to those approved by consent of the voters.
3. In June 2019 the City Council passed Resolutions 19.08 and 19.09 which increased rates for water and wastewater utilities. This was done without a vote of the citizens.
4. Plaintiff Taylor is a resident of the City and filed a complaint for declaratory relief asking the court to declare that the City Council cannot increase the rates for water and wastewater utilities without consent of the voters, and that Resolutions 19.08 and 19.09 are void.

5. The City's answer alleges as an affirmative defense that state law preempts Sections 46-48 of the Charter.

6. The City also argues that Sections 46-48 should not be given force or effect because to do so would impair existing contracts or debt covenants of the City.

### DISCUSSION

Plaintiff's argument is simple. Charter Sections 46-48, enacted in 1995, expressly restrict increases in water and sewer rates to those approved by consent of the voters. The City Council in 2019 voted to increase the rates for water and sewer services without seeking approval of the voters. Plaintiff argues that the Council action is void because the legislation (Resolutions 19-08 and 19-09) conflicts with the express language of the Charter.

The City argues, albeit secondarily, that state law preempts Sections 46-48 of the Charter. The City has not, however, identified a state or federal law that specifically requires the City to set or increase rates at a level necessary to cover operational costs of the utilities. In fact, at least one state statute recognizes that a city charter may restrict certain charges on water users:

"Unless prohibited by its Charter, a city may impose on the users of water a sewage charge which shall be billed and collected by the city. The proceeds of the sewage charge may be used for paying, in whole or in part, the cost of planning, constructing or operating a sewage disposal system." (emphasis added)

ORS 224.510(1).

The Court has reviewed the other state and federal laws cited by the City but does not find any express directive to adjust rates to meet increased costs of operation. ( See ORS 448.119 -.285 ; ORS 454.225; ORS 454.010(5); ORS 468B.050; ORS 224.510(2) ). In short, there is no statute identified on this record that preempts Sections 46-48 of the Charter.

The City's stronger argument is that Sections 46-48 impair contractual obligations the City is required to meet in its operation of the utility plants. The City points to Stadelman v. City of Bandon, 173 Or App 106 (2001) in support of its argument. In Stadelman, the City had entered into a loan agreement with DEQ in 1992 to finance a wastewater treatment plant and agreed to set rates adequate to meet the payments due under the loan, i.e. a revenue secured loan. The City Charter was amended in 1995 by adding the sections that prevented the raising of rates without voter approval. The City argued that the then existing loan agreement with DEQ and

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certain existing statutes (ORS 468.439; ORS 288.594) preempted the Charter amendments. The Court of Appeals agreed, holding that the charter provisions affecting rates were not to be given any force or effect if to do so "would impair existing covenants like those in the loan agreement. Id at 114. (emphasis added)

Stadelman does not support the City's argument in the case at bar. Unlike that case which involved an existing loan agreement and express covenants to maintain revenue levels, there is nothing in this record that identifies a contract existing in 1995 that obligated the City to increase water or sewer rates to meet contract requirements. The City points to a National Pollutant Discharge Elimination System ( NPDES ) Waste Discharge Permit that sets forth general obligations regarding operation of a sewer plant, but nothing in that document contains a promise to adjust rates to meet expenses, such as the specific covenant and pledge of revenues in Stadelman. In fact the City acknowledges that the terms of the permit do not clearly require adjustment of revenue to equal operation and maintenance expenses of the utilities. See Defendant's Memorandum, page 6. Further, as plaintiff points out, the NPDES permit has been renewed every five years since 1995.

In summary, the preemption defense raised by the City is not supported on this record. There is no identified statute or law requiring the City to increase water and wastewater rates to meet operational expense, and no preexisting contract or loan obligation that is impaired by the express language of the Charter amendments. The Court understands the need of the City to properly fund operation and maintenance of water and wastewater utilities, however the Charter is clear that adjustment of rates requires the vote of the citizens. The Charter amendments were in effect before the Council passed the two Resolutions and the Council's act to increase rates without consent of the voters is void.

Mr Sherlock shall within 28 days file an order granting summary judgment for plaintiff and a General Judgment.

Sincerely,



Martin E Stone  
Circuit Court Judge