

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-000398

10/21/2013

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

SULPHUR SPRINGS VALLEY ELECTRIC
COOPERATIVE INC

MICHAEL G GALLOWAY

v.

ARIZONA STATE DEPARTMENT OF
REVENUE, et al.

KENNETH J LOVE

**UNDER ADVISEMENT RULING
SCHEDULING CONFERENCE VACATED**

The Court took Defendants' Motion for Summary Judgment under advisement following oral argument on August 26, 2013. Upon further consideration, the Court finds as follows.

The Court believes *Graham County v. Graham County Elec. Co-Op., Inc.*, 109 Ariz. 468 (1973), to be controlling. Absent a change in the underlying statutes, which Plaintiff has not pointed to, this Court, and indeed the Court of Appeals, must follow Supreme Court precedent. If the principle laid down in *Graham County* is to be changed, it is the Supreme Court that must make the change.

In *Graham County*, the Supreme Court held that, when the taxpayer is a non-profit corporation setting its rates with the deliberate intention of not making a profit, the capitalization of income method is "fundamentally wrong" and is not to be used. *Id.* at 471. *Graham County* is consistent with the somewhat more recent *Recreation Centers of Sun City, Inc. v. Maricopa County*, 162 Ariz. 281 (1989), in which the Supreme Court stated more broadly that restrictions limiting profitability for the benefit of a class of users – here, Plaintiff's customers – are not to be considered in determining full cash value. *Id.* at 290. (To the extent that *County of Pima v.*

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-000398

10/21/2013

TRICO Elec. Co-Op., 15 Ariz.App. 517 (1971), held otherwise, it is plainly no longer good law, having been superseded by a higher court.) The Court may have perceived at oral argument an acceptance by Plaintiff that Mr. Green used the capitalization of income method, understanding it to be consistent with USPAP and evidently being unaware that its use was contrary to Arizona case law. In the briefing, Plaintiff attempts to distinguish between actual income and earning capacity. This, however, is a distinction without a difference, for the earning capacity of Plaintiff's property, under current ownership, is constrained by Plaintiff's intention of not making a profit. The same mistake is made in Mr. Green's alternative calculation of earning capacity under hypothetical investor ownership: he assumes that, because the Corporation Commission, which regulates rates, would likely be disinclined to permit a rate increase, the for-profit owner would in reality be a non-profit owner despite its intention (actually making less than Plaintiff, due to its higher cost of capital). This exercise in what-if does not change the fact that the income and earning capacity of the property is determined by Plaintiff's non-profit character.

Based on the foregoing, as well as the arguments made by the Defendants in their briefs and oral argument,

IT IS ORDERED granting Defendants' Motion for Summary Judgment filed May 7, 2013.

IT IS FURTHER ORDERED directing Defendants to lodge a form of judgment and file any Application and Affidavit for Attorney's Fees and Statement of Taxable Costs (if applicable) by November 20, 2013.

IT IS FURTHER ORDERED vacating the trial scheduling conference set January 9, 2014 in this division.