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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Case No. 2018-CP-10-02764

Appellate Case No. 2021-001395

Snee Farm Lakes Homeowner's Association, Inc.,
individually and on behalf of those similarly situated ....Appellant,

v.

The Commissioners of Public Works for the Town of Mount Pleasant
d/b/a Mount Pleasant Waterworks .... Respondent.

AMICUS CURIAE BRIEF OF
MUNICIPAL ASSOCIATION OF SOUTH CAROLINA

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TABLE OF CONTENTS

STATEMENT OF IDENTITY OF THE AMICUS 1

STATEMENT OF INTEREST OF THE AMICUS 1

STATEMENT OF THE CASE AND OF THE FACTS 4

SUMMARY OF ARGUMENT 4

ARGUMENT 6

- I. The *Azar* decision does not precedentially answer the question of whether S.C. Code Ann. § 6-1-330 applies to water utility charges. 6
- II. The plain language of S.C. Code Ann. § 6-1-330 is permissive and does not deny to local governments the authority to use separate statutory authorizations to collect fees or charges. 7
- III. S.C. Code Ann. § 6-1-330 is both more general and more recent than the statutes authorizing water utility charges, but contains no suggestion that the General Assembly intended to amend or repeal those more specific and preexisting laws. 12
- IV. The General Assembly adopted S.C. Code Ann. § 6-1-330 specifically to address a question arising under the Home Rule Act, not to amend or repeal other statutory grants of authority. 16
  - A. Background and Development of Home Rule 17
  - B. The South Carolina Courts' Interpretation of Fiscal Home Rule 18
  - C. The General Assembly's Response: Act 138 of 1997 23
- V. The General Assembly has legislatively overruled the *Burns* case, thereby undermining Appellant's challenge to the Commission's water utility charges. 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Azar v. City of Columbia, 414 S.C. 307, 778 S.E.2d 315 (2015) .... passim
Brown v. Cnty. of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992) .... passim
Burns v. Greenville Cnty. Council, 433 S.C. 583, 861 S.E.2d 31 (2021) .... passim
C.R. Campbell Const. Co. v. City of Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997).. passim
Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911) 14, 15
Creswick v. Univ. of S.C., 434 S.C. 77, 862 S.E.2d 706 (2021) 16
Denman v. City of Columbia, 387 S.C. 131, 691 S.E.2d 465 (2010) 13
Doyle v. Rosen, 229 S.C. 67, 91 S.E.2d 887 (1956) 14
Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) 8, 9
Home Builders Ass'n of S.C. v. State, No. 2020-000612, 2021 WL 914200 (S.C. Mar. 10, 2021) 12
Hospitality Ass'n of S.C., Inc. v. Cnty. of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995) 21, 22, 24, 25
Mikell v. Cnty. of Charleston, 386 S.C. 153, 687 S.E.2d 326 (2009) 12
S.C. Pub. Int. Found. v. Greenville Cnty., 401 S.C. 377, 737 S.E.2d 502 (Ct. App. 2013) 7
Simons v. City Council of Charleston, 181 S.C. 353, 187 S.E. 545 (1936) 14
Sloan v. City of Conway, 347 S.C. 324, 555 S.E.2d 684 (2001) 15
Sossamon v. Greater Gaffney Metro. Utils. Area, 236 S.C. 173, 113 S.E.2d 534 (1960) 14
Williams v. Town of Hilton Head Island, 311 S.C. 417, 429 S.E.2d 802 (1993) .... passim

Statutes

1975 Act No. 283 .... 2, 5, 17, 18
1994 Act No. 497 20
1997 Act No. 138 .... passim
2009 Act No. 75 25
2022 Act No. 236 .... 5, 8, 26, 27
S.C. Code Ann. § 4-8-40 9
S.C. Code Ann. § 4-9-25 21
S.C. Code Ann. § 4-9-30 .... passim
S.C. Code Ann. § 5-7-30 .... passim
S.C. Code Ann. § 5-7-60 14
S.C. Code Ann. § 5-31-250 .... 10, 13
S.C. Code Ann. § 5-31-670 .... 4, 7, 13
S.C. Code Ann. § 5-37-30 3
S.C. Code Ann. § 6-1-70 .... 20, 21, 23
S.C. Code Ann. § 6-1-300 .... passim
S.C. Code Ann. § 6-1-310 24
S.C. Code Ann. § 6-1-320 24
S.C. Code Ann. § 6-1-330 .... passim
S.C. Code Ann. §§ 6-1-500 *et seq.* 3

S.C. Code Ann. §§ 6-1-700 *et seq*. 3
S.C. Code Ann. §§ 6-1-910 *et seq*. 3
S.C. Code Ann. § 6-1-930 11, 12
S.C. Code Ann. § 6-11-1230 3
S.C. Code Ann. § 12-49-85 9
S.C. Code Ann. §§ 48-14-10 *et seq*. 25
S.C. Code Ann. § 48-14-120 3, 25, 26

Other Authorities

2 MCQUILLIN MUN. CORP. § 4:11 (3d ed.) 17
Clayton P. Gillette, *Fiscal Home Rule*, 86 DENVER U. L. REV. 1241, 1245 (2009) 18

Rules

Rule 204(b), SCACR 6

Constitutional Provisions

S.C. Const. art. VIII, § 7 17
S.C. Const. art. VIII, § 9 17
S.C. Const. art. VIII, § 16 1
S.C. Const. art. X, § 4 19
S.C. Const. art. X, § 6 20

STATEMENT OF IDENTITY OF THE AMICUS

The Municipal Association of South Carolina (the "Association") is a nonpartisan, nonprofit association of South Carolina's incorporated cities and towns. All 271 municipalities in South Carolina are members of the Association. The Association provides services and programs directly to its member municipalities and represents the collective interests of municipalities throughout the State.

Under Article VIII, Section 16 of the South Carolina Constitution, municipalities have the right to construct, acquire, and operate public utility systems. There are approximately 190 municipal water utility systems and approximately 100 municipal sewer utility systems within the State of South Carolina. Municipal utility systems serve a substantial portion of the people, businesses, and institutions of the State, both inside and outside of municipalities, and drive economic activity throughout our State. In its role as advocate for and counsellor to municipalities, the Association has a substantial interest in the ownership and operation of municipal utilities.

STATEMENT OF INTEREST OF THE AMICUS

The threshold legal issue in this case is whether S.C. Code Ann. § 6-1-330, which authorizes local governments "to charge and collect a service or user fee," applies to water utility charges.

The Honorable R. Markley Dennis, Jr., in his Order Granting Defendant's Motion for Summary Judgment below, concluded that S.C. Code Ann. § 6-1-330 was "not applicable to the facts in this case" (emphasis added) because that section, as

interpreted by *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015), "relate[s] to the way the funds collected are 'spent,' not the rate structure or method of collection." (Order Granting Summary Judgment, pp.9-10). Respondent Commissioners of Public Works for the Town of Mount Pleasant (the "Commission"), in its initial brief on appeal, "assume[s] that a BFC charge is a service fee or user fee, and S.C. Code Ann. § 6-1-300(6) and 6-1-330(B) apply." (Respondent's Initial Brief, p.24). But the Commission "does not agree that the BFC is in fact a user fee," (Respondent's Initial Brief, p.24 n.12) (emphasis added). Instead, in moving for summary judgment below, the Commission advanced the narrower argument that even if S.C. Code Ann. § 6-1-330 applies generally to water utility charges, it does not control the specific question of water utility rate design.

The Association contests the application of S.C. Code Ann. § 6-1-330 to water utility charges. In its view, S.C. Code Ann. § 6-1-330 applies only to fees and charges imposed under the Home Rule Act,[1] such as "uniform service charges" authorized under S.C. Code Ann. §§ 4-9-30(5) and 5-7-30. When State law specifically authorizes a local fee or charge outside of the Home Rule Act, S.C. Code Ann. § 6-1-330 is simply irrelevant. With respect to the dispute in this case over water utility charges, the application of S.C. Code Ann. § 6-1-330 would materially, adversely affect local governments that own and operate water utilities.

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[1] *See* 1975 Act No. 283, discussed in detail *infra*. In addressing the initial questions of statutory construction, this brief assumes a basic familiarity with the 1973 constitutional and 1975 statutory adoption of Home Rule. In Section IV of the Argument, however, this brief situates S.C. Code Ann. § 6-1-330 in its historical context and provides an overview of the Home Rule Act.

Worse, a precedential determination that S.C. Code Ann. § 6-1-330 applies to water utility charges would implicate a host of other local fees and charges that are authorized outside of the Home Rule Act. For example, local governments operate other types of utilities, including sewer, electricity, and natural gas, which have their own engineering practices for rate design. Applying S.C. Code Ann. § 6-1-330 here would mean that it applies there as well. More fundamentally, State law specifically authorizes local fees and taxes in many contexts including, without limitation, accommodations taxes (S.C. Code Ann. §§ 6-1-500 *et seq.*), hospitality taxes (S.C. Code Ann. §§ 6-1-700 *et seq.*), development impact fees (S.C. Code Ann. §§ 6-1-910 *et seq.*), sewer front-foot assessments (S.C. Code Ann. § 6-11-1230), municipal improvement district assessments (S.C. Code Ann. § 5-37-30), and stormwater utility fees (S.C. Code Ann. § 48-14-120(C)). The logic of applying S.C. Code Ann. § 6-1-330 to water utility charges would strongly suggest that it applies to such separately authorized local fees and taxes as well.

In short, the question of whether S.C. Code Ann. § 6-1-330 applies to water utility charges is one of considerable statewide importance. The Association submits this brief to draw the Court's attention to the importance of the issue. In the Association's view, this Court should either (1) definitively rule that S.C. Code Ann. § 6-1-330 does not apply to water utility charges at all, or (2) affirm on the narrower basis adopted by the trial court and argued by the Commission on appeal. In no event should this Court, despite any concessions, admissions, or assumptions by the

parties, precedentially determine that S.C. Code Ann. § 6-1-330 applies to water utility charges.

STATEMENT OF THE CASE AND OF THE FACTS

The Association adopts the Statement of the Case and Counter Statement of the Facts in the Initial Brief of the Commission.

SUMMARY OF ARGUMENT

The decision in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015), does not foreclose the question of whether S.C. Code Ann. § 6-1-330 applies to water utility charges. In that case, the City of Columbia admitted that it did. The Court's decision in *Azar* is therefore not precedential.

Turning to the merits, the plain language of S.C. Code Ann. § 6-1-330 does not apply to water utility charges. Instead, the statute affirmatively authorizes a local government to charge and collect a "service or user fee," which is entirely distinct from the separate authorization to provide water utility service for reasonable compensation in S.C. Code Ann. § 5-31-670.

Moreover, S.C. Code Ann. § 6-1-330 is a general and subsequently enacted provision when contrasted to specific and preexisting statutory authorizations to adopt reasonable water utility charges. There is no indication that the General Assembly intended S.C. Code Ann. § 6-1-330 to repeal or amend the prior and more specific authorizations to adopt water utility charges. Therefore, given maxims of statutory construction that favor the specific law over the general and that disfavor implied repeal, S.C. Code Ann. § 6-1-330 does not apply to water utility charges.

Finally, the statutory construction argument assumes its full force when one places S.C. Code Ann. § 6-1-330 in its proper historical context. The General Assembly specifically authorized municipalities to adopt reasonable water utility charges while South Carolina was still a Dillon's Rule state. In 1973 South Carolina became a Home Rule state, and in 1975 the General Assembly adopted the Home Rule Act, 1975 Act No. 283. That Act, among other things, authorized counties and municipalities to impose "uniform service charges." *See* S.C. Code Ann. §§ 4-9-30(5) and 5-7-30. This new and additional fiscal authority led to a series of cases exploring its reach, to which the General Assembly reacted in 1997 by adopting a comprehensive act clarifying and curtailing local fiscal authority under Home Rule. *See* 1997 Act No. 138. This Act included the provision now codified at S.C. Code Ann. § 6-1-330. Because the General Assembly enacted 1997 Act No. 138 entirely in response to court decisions addressing fiscal Home Rule, and because that Act addressed only such fiscal Home Rule issues, the portion of the Act now codified at S.C. Code Ann. § 6-1-330 should not be read to reach beyond the Home Rule context.

In any event, Appellant's argument depends in large part on the result in *Burns v. Greenville Cnty. Council*, 433 S.C. 583, 861 S.E.2d 31 (2021), holding that a user fee must benefit the payer in some manner different from the benefit to the general public. The General Assembly legislatively overruled this holding effective June 22, 2022, in 2022 Act No. 236. To the extent that Appellant relies on *Burns*, then, that reliance is misplaced.

ARGUMENT

I. The *Azar* decision does not precedentially answer the question of whether S.C. Code Ann. § 6-1-330 applies to water utility charges.

In *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015), the South Carolina Supreme Court applied S.C. Code Ann. § 6-1-330 to the City of Columbia's water and sewer utility charges. The Court did not, however, analyze the issue *de novo*. Instead, the Court noted only that "[t]he City admits the monies at issue fall within the definition of 'service or user fee' as the term is statutorily defined." *Azar*, 414 S.C. at 310, 778 S.E.2d at 317 (emphasis added). The Association was not aware of or involved in the *Azar* case prior to the Court's decision; the case was certified directly from the trial court to the Court under Rule 204(b), SCACR. Immediately upon learning of the *Azar* decision, the Association filed an *amicus* brief supporting a motion for reconsideration and vigorously contested the application of S.C. Code Ann. § 6-1-330 to water and sewer utility charges.

The City of Columbia's admission in *Azar* should not and does not bind the Association and its other 270 members. As noted above, the question of whether S.C. Code Ann. § 6-1-330 applies to water utility charges is of considerable statewide importance. This threshold question deserves serious consideration, rather than a simple admission by a single litigant.

Moreover, recognizing the proper reach of S.C. Code Ann. § 6-1-330 would not disturb the substantive result of *Azar*. The core holdings of that case – that there must be nexus between water and sewer utility charges and the use of their proceeds, and that municipalities may transfer only surplus revenues from a utility enterprise

fund – are supported by the statutes specifically applicable to water and sewer utility charges and by relevant caselaw.[2] In any event, *Azar* is res judicata with respect to the City of Columbia. "A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action." *S.C. Pub. Int. Found. v. Greenville Cnty.*, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (*quoting Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 190 n.1 (Ct. App. 1984)). Whatever happens in this case, then, it will not disturb *Azar* as it applies to the City of Columbia.

II. The plain language of S.C. Code Ann. § 6-1-330 is permissive and does not deny to local governments the authority to use separate statutory authorizations to collect fees or charges.

This case turns on the interpretation of two statutes. The first, S.C. Code Ann. § 5-31-670 (referred to herein as the "Water Charge Statute"), provides that "[a]ny city or town or special service district may . . . furnish water to persons for reasonable compensation . . . ."[3] The second, S.C. Code Ann. § 6-1-330 (referred to herein, together with the definitional section quoted immediately below, as the "User Fee Statute"),

[2] It is beyond the scope of this brief to explain in detail why the substantive outcome of *Azar* would likely have been the same under the law and cases specifically applicable to water and sewer utilities as it was under S.C. Code Ann. § 6-1-330. Suffice it to say that the requirement that utility rates be "reasonable," *see, e.g.*, S.C. Code Ann. § 5-31-670, includes an assumption that utility rate design must be based on the overall costs of operating the utility. Utility rate design that allows excess transfers to the general fund, or that funds only inadequate maintenance of the utility system, may well be unreasonable.

[3] As discussed in detail *infra*, other statutes authorize the Commission to charge for water service. But the primary authorization, sufficient standing alone to justify the Commission's water utility charges, is S.C. Code Ann. § 5-31-670.

provides that "[a] local governing body ... is authorized to charge and collect a service or user fee." The definitional section provides:

> "Service or user fee" means a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee. "Service or user fee" also includes "uniform service charges."[4]

S.C. Code Ann. § 6-1-300(6) (emphasis added). As discussed further below in Section IV, the term "uniform service charges" refers to the Home Rule Act. *See* S.C. Code Ann. § 4-9-30(5) (counties may "assess property and levy ad valorem property taxes and uniform service charges"); S.C. Code Ann. § 5-7-30 (municipalities may "levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments, and establish uniform service charges relating to them").

This Court is therefore asked to harmonize the Water Charge Statute and the User Fee Statute. "The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." *Hodges v. Rainey*, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000). Here, two basic alternatives exist. One may read the User Fee Statute to mean what it says: It authorizes a local government to charge "service or user fees" and imposes rules for fees imposed pursuant to that authorization. In this reading, the Water Charge Statute and the User Fee Statute are separate authorizations, and a local government may impose a lawful charge under either of them. Or, one may read

[4] 2022 Act No. 236, effective June 22, 2022, amended this definition in response to the decision in *Burns v. Greenville Cnty. Council*, 433 S.C. 583, 861 S.E.2d 31 (2021). Except as addressed in Part V, *infra*, this amendment is not relevant to the Association's argument that the User Fee Statute does not apply to water utility charges in any event.

the statute as Appellant argue: The User Fee Statute somehow invalidates all local charges, regardless of the statutory authorization for such charges, that do not fit within the User Fee Statute's definition of "service or user fees."

The question answers itself. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. The plain language of the User Fee Statute is permissive. Its opening sentence provides that a local government "is authorized to charge and collect a service or user fee." S.C. Code Ann. § 6-1-330(A) (emphasis added). On its face this is a separate and additional grant of authority. Furthermore, the User Fee Statute makes only one cross-reference to another statutory authorization, and does so definitionally. It applies to "service or user fees;" S.C. Code Ann. § 6-1-300(6) defines this term to include "uniform service charges," a clear reference to the specific Home Rule authorizations in S.C. Code Ann. §§ 4-9-30(5) and 5-7-30. Apart from the Home Rule Act for counties, S.C. Code Ann. § 4-9-30(5), the Home Rule Act for municipalities, S.C. Code Ann. § 5-7-30, and the User Fee Statute itself, the South Carolina Code of Laws is virtually silent on the issue of "service or user fees" and "uniform service charges."[5]

[5] State statutory law makes two other stray references to "uniform service charges." First, the statute governing uncollectible property taxes provides that "taxes, uniform service charges, assessments, penalties, costs of collection, and any other amounts billed on the tax notice" applicable to "derelict mobile homes" may be waived in certain cases. S.C. Code Ann. § 12-49-85(D) (emphasis added). Second, the chapter on consolidation of political subdivisions provides that the study required for consolidation may provide for the ability of the consolidated political subdivision to levy taxes, and that "[a]s used in this item the term 'taxes' includes uniform service charges based on services provided ..." S.C. Code Ann. § 4-8-40(8) (emphasis added). Neither reference is relevant to this case.

Against this plain reading, Appellant advances an illogical argument. It claims that the Commission's water utility charges do not fit within the definition of "service or user fees" in S.C. Code Ann. § 6-1-300(6), but nonetheless remain subject to the User Fee Statute. Appellant's Initial Brief, pp.17-18. This argument turns the definitional section of the User Fee Statute on its head. The correct reading is instead that, if the water utility charges do "benefit[] the payer in some manner different from the members of the general public not paying the fee," S.C. Code Ann. § 6-1-300(6), then the Commission would be authorized to impose them under and subject to the User Fee Statute. If instead these water utility charges do not benefit the payer in a manner different from the general public – and Appellant's entire case turns on its argument that they do not – then the User Fee Statute by its own terms does not apply. To be sure, this would mean that the Commission could not fund its water utility service by way of a "service or user fee" under the User Fee Statute. But the Commission need not rely on that statute to impose its water utility charges. Instead, the Commission imposes and collects its water utility charges pursuant to the separate authorizations in the Water Charge Statute and in S.C. Code Ann. § 5-31-250 (commissioners of public works "may supply and furnish water ... and may require payment of such rates, tolls and charges as it may establish for the use of water").

Seen in this light, Appellant's argument collapses upon itself. That is, Appellant argues in the same breath that the Commission's water utility charges (1) are "service or user fees" as that term is used in the User Fee Statute, but (2) do not

fit within the definition of "service or use fees" in the User Fee Statute. From these two premises, Appellant concludes that the Commission's water utility charges are illegal under the User Fee Statute. But surely it can be seen that this conclusion does not follow from the premises. Indeed, the two premises are contradictory. How can it be that the Commission's water utility charges are simultaneously subject to S.C. Code Ann. § 6-1-330 but outside the definition in S.C. Code Ann. § 6-1-300(6)?

Worse, if endorsed by this Court, Appellant's illogical argument would infect other contexts. To take a single example, State law authorizes local governments to impose development impact fees to offset the public costs attributable to new development. S.C. Code Ann. § 6-1-930. A developer could well argue that development impact fees do not benefit the payer in some manner different from the members of the general public. After all, the general public inarguably benefits from the roads, public safety buildings, parks, libraries, schools, and other public facilities that may be funded with development impact fees. Then, applying Appellant's logic, this same developer could argue that development impact fees are illegal under S.C. Code Ann. § 6-1-330 because they do not fit within the definition in S.C. Code Ann. § 6-1-300(6).

The recent case of *Burns v. Greenville Cnty. Council*, 433 S.C. 583, 861 S.E.2d 31 (2021), illustrates the appropriate scope of the User Fee Statute. In that case, Greenville County imposed both a road user fee and a telecommunications fee. It had no statutory authorization to do so other than the Home Rule power to charge "uniform service charges" under S.C. Code Ann. §§ 4-9-30(5) and 6-1-330. In such a

case, not fitting within the definition of "service or user fee" in the User Fee Statute has real consequences. Because the only authorization to charge the fees arose from S.C. Code Ann. §§ 4-9-30(5) and 6-1-330, if the fees were not "service or user fees" under S.C. Code Ann. § 6-1-300(6), then the County could not charge them. As noted above, however, had Greenville County instead imposed a development impact fee, it would have based its authority to do so on S.C. Code Ann. § 6-1-930,[6] and it would have been obliged to follow the procedures in the South Carolina Development Impact Fee Act, not the more general provisions of the User Fee Statute. In other words, because the User Fee Statute is permissive, Greenville County would not have needed its authorization to impose the development impact fee.

III. S.C. Code Ann. § 6-1-330 is both more general and more recent than the statutes authorizing water utility charges, but contains no suggestion that the General Assembly intended to amend or repeal those more specific and preexisting laws.

Even if the plain language of the User Fee Statute did not answer the question, the rules of statutory construction would. Two such rules of construction apply. First, when two statutes address the same issue, one in a general and the other in a more specific manner, the more specific statute controls. *See, e.g., Mikell v. Cnty. of Charleston*, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009). Second, "[s]pecific statutes are not to be considered repealed by a later general statute unless there is a direct reference to the earlier statute or the intent of the legislature to do so is explicitly

[6] Although the decision is unreported, the South Carolina Supreme Court recently proved as much. In *Home Builders Ass'n of S.C. v. State*, No. 2020-000612, 2021 WL 914200 (S.C. Mar. 10, 2021), the plaintiff challenged a York County development impact fee on numerous constitutional and statutory grounds – but not based on the application of S.C. Code Ann. § 6-1-330, which quite simply was irrelevant. The County did not need the authorization of S.C. Code § 6-1-330 to charge the fee.

implied." *See, e.g., Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 469 (2010). Interpreting the User Fee Statute, then, implicates both the generality and the effective date of that provision.

S.C. Code Ann. § 6-1-330 generically applies to "service or user fees" as defined in S.C. Code Ann. § 6-1-300(6). That definition, in turn, refers to "uniform service charges," which is the term used in the Home Rule Act. *See* S.C. Code Ann. §§ 4-9-30(5) (counties) and S.C. Code Ann. § 5-7-30 (municipalities). It does not, however, directly or indirectly refer to any other authorization for local fees and charges.

On the other hand, South Carolina statutory law speaks <u>directly</u> to utility charges in specific statutes enacted prior to 1997, the year in which the User Fee Statute was enacted. For, example, State law provides that "[a]ny city or town or special service district may ... <u>furnish water to persons for reasonable compensation</u>." S.C. Code Ann. 5-31-670 (emphasis added).[7] This statute applies to all local utilities, whether they are governed by a commission of public works or not. For local utilities governed by a commission of public works, like the Commission in this case, additional authorizations apply. A commission of public works may "may supply and furnish water to citizens of the city or town and also electric, gas or other light and <u>may require payment of such rates, tolls and charges as it may establish</u> for the use of water and light." S.C. Code Ann. § 5-31-250 (emphasis added).[8]

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[7] This section was first adopted in 1935, see 1935 Act No. 2, and was last amended in 1964, see 1964 Act No. 939.
[8] This provision has been in effect since 1896, and was last amended in 1960.

Moreover, prior to the enactment of the User Fee Statute, the South Carolina courts had provided nearly a century of guidance on utility charges. In general, the courts endorsed the theory that a municipal utility system is an income-producing asset that is owned by the residents of the municipality. *See Simons v. City Council of Charleston*, 181 S.C. 353, 187 S.E. 545, 547 (1936) ("A municipality may charge a rate that will yield a fair profit, just the same as a private corporation. The fact that it makes a profit does not show that the rate is unreasonable."); *Doyle v. Rosen*, 229 S.C. 67, 71, 91 S.E.2d 887, 889 (1956) (finding that utility services may be combined and that the revenues of one utility service may fund expenses of another); *Sossamon v. Greater Gaffney Metro. Utils. Area*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960) ("a city waterworks system has been characterized as of a commercial nature"). These cases have uniformly rejected Appellant's reasoning that the rates charged for a given utility service must necessarily bear a direct relationship to the costs of operating and maintaining the utility system for the benefit of any given customer.

The caselaw is particularly clear for utilities that have nonresident customers, as does the Commission.[9] For example, in *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911), the plaintiff nonresident of the City argued that the City lacked the

[9] The cases applicable to rates for nonresident customers depend on the fact that service to nonresident customers is by contract. *See, e.g.*, S.C. Code Ann. § 5-7-60 ("Any municipality may perform any of its functions, furnish any of its services, except services of police officers, and make charges therefor and may participate in the financing thereof in areas outside the corporate limits of such municipality by contract ...."). These cases are not directly relevant, insofar as Appellant is a resident customer. But these cases *do* demonstrate the irrationality of applying the User Fee Statute (which makes no distinction between in-town and out-of-town service or user fees) to utility service generally – virtually all municipal utilities in the State have at least some nonresident customers. Are we to conclude that, despite the complete silence of the User Fee Statute on the residency issue, it is to be read to apply only to a subset of utility customers?

right to charge "exorbitant, discriminatory and unreasonable" rates to its nonresident customers. The Court disagreed, reasoning that:

> … the duty to sell the excess of its water supply did not import an obligation to make a contract with any particular person at a reasonable price, but on the contrary did import an obligation to sell its surplus water for the sole benefit of the city at the highest price obtainable: it was a duty not owed to outsiders, but exclusively to inhabitants and taxpayers of the city.

Childs,70 S.E. at 298. The duty owed to the "inhabitants and taxpayers of the city" is clearly to maximize the revenues reasonably generated by the utility system to lessen the burden on such taxpayers. *See Sloan v. City of Conway*, 347 S.C. 324, 331 n.10, 555 S.E.2d 684, 687 n.10 (2001) ("raising revenue to meet increasing municipal needs is a legitimate governmental goal and selling water at higher rates to customers who do not pay taxes is rationally related to that goal").

In short, the State statutes and cases on utility charges are more specific than the User Fee Statute. The former apply directly to utility charges, while the latter applies only to generic "service or user fees." And as indicated in the Commission's Initial Brief, utility rate design is a complex undertaking that is usually delegated to experts with industry experience. Respondent's Initial Brief, pp. 6-9. It would make no sense to subject these specific laws and this complex process to a generic statute like S.C. Code Ann. § 6-1-330.

Moreover, the statutory authorizations for water utility charges cited herein and in these cases were effective prior to the adoption not only of the User Fee Statute, but also of Home Rule itself. Applying the User Fee Statute to water utility charges would both repeal or amend these statutes and overrule these cases, by mere

implication. What evidence is there to support such repeal and overruling? Act 138 of 1997, which included the provision now codified in the User Fee Statute, simply did not consider water utility charges. Instead, that Act confined itself to questions of local fiscal authority under Home Rule. Finally, in the 25 years since the adoption of the User Fee Statute, the South Carolina courts have never applied it to any charges other than those arising under the Home Rule power to impose "uniform service charges" – with the sole exception of the *Azar* case, in which the City of Columbia admitted the issue. Neither the User Fee Statute standing alone nor the act in which it was contained support any argument that the General Assembly intended to repeal the water utility service statutes by implication.

IV. The General Assembly adopted S.C. Code Ann. § 6-1-330 specifically to address a question arising under the Home Rule Act, not to amend or repeal other statutory grants of authority.

Although the plain reading and statutory construction arguments above are sufficient to defeat Appellant's claim, these arguments assume their full force only when one views the User Fee Statute in its historical context. The General Assembly enacted 1997 Act No. 138, which included the User Fee Statute, in response to a specific question arising under Home Rule and a series of related court decisions. "The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly." *Creswick v. Univ. of S.C.*, 434 S.C. 77, 81, 862 S.E.2d 706, 708 (2021). In the case of the User Fee Statute, ascertaining the intent of the General Assembly requires an understanding of the historical context in which this law was adopted.

A. Background and Development of Home Rule

Until 1973, South Carolina was a Dillon's Rule state. This rule provides that a municipality has only the following powers: "(1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient, but indispensable." 2 MCQUILLIN MUN. CORP. § 4:11 (3d ed.). In short, Dillon's Rule means that municipalities have only such powers as are given to them by the State.

In 1967, however, an appointed constitutional study commission recommended that South Carolina adopt a form of Home Rule. In contrast to Dillon's Rule, Home Rule provides generally that local governments have all appropriate powers unless the State has denied such powers to them. In 1972, the General Assembly proposed and the voters approved the constitutional changes necessary to authorize Home Rule, primarily in new Article VIII of the South Carolina Constitution. Two specific provisions, now found in S.C. Const. art. VIII, § 7 and § 9, direct the General Assembly to provide for county and municipal governance only by general law. Acting to implement this direction, in 1975 the General Assembly adopted the so-called "Home Rule Act," 1975 Act No. 283. Insofar as is relevant to this case, the Home Rule Act included the provision now codified as S.C. Code Ann. § 5-7-30, which allows municipalities to levy "uniform service charges" and to enact regulations and ordinances that appear to it to be "necessary and proper" for the general welfare and

convenience of the municipality, "or for preserving health, peace, order, and good government." 1975 Act No. 283, Part II, § 5; S.C. Code Ann. § 5-7-30.

B. The South Carolina Courts' Interpretation of Fiscal Home Rule

Simply adopting Home Rule does not answer every question about local authority. "Home rule, which too frequently is used as a generic term to characterize the capacity of local governments to initiate legislation without the prior approval of the state legislature, means very different things in different jurisdictions." Clayton P. Gillette, *Fiscal Home Rule*, 86 DENVER U. L. REV. 1241, 1245 (2009). In fact, the local form of Home Rule in any given state evolves over time by court decisions and legislative responses in individual, difficult cases. In South Carolina, as elsewhere, an especially difficult question has been fiscal home rule: Do local governments have the authority to impose their own taxes and fees? The South Carolina Supreme Court engaged this question in several notable cases, which engagement led directly to the adoption of 1997 Act No. 138.

In the first case, the South Carolina Supreme Court ruled that a local road maintenance fee was a permissible fee rather than an impermissible tax. *Brown v. Cnty. of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992). The County adopted the fee in question by a series of budget ordinances, each of which contained substantially the same provision: "A road maintenance fee of $15.00 on each motorized vehicle licensed in Horry County is scheduled to be included on motor vehicle tax notices with the proceeds going into the County General Fund and being specifically used for maintenance and improvement of the county road system." *Brown*, 308 S.C. at 181–

82, 417 S.E.2d at 566. The Court did not explain why the fee would be invalid if it were a tax, but the parties appear to have assumed that Home Rule stopped short of authorizing a local government to impose its own taxes. Moreover, because the fee applied to personal property but was not based on value, had it been a tax it would have violated Article X, Section 4 of the South Carolina Constitution ("The General Assembly shall provide for the assessment of all property for taxation .... All taxes shall be levied on that assessment."). The Court decided, however, that the road maintenance fee was a valid "uniform service charge" that the County could charge under S.C. Code Ann. § 4-9-30(5)(a). In doing so, the Court articulated the criteria to distinguish taxes from fees, which criteria were later refined into a familiar four-part test. *See C.R. Campbell Const. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997); *Burns v. Greenville Cnty. Council*, 433 S.C. 583, 861 S.E.2d 31 (2021). Under *Brown*, then, a local government may impose a "uniform service charge" under the Home Rule Act if it complies with this four-part test.[10]

In the second case, the South Carolina Supreme Court upheld a local real estate transfer fee. *Williams v. Town of Hilton Head Island*, 311 S.C. 417, 429 S.E.2d 802 (1993). In 1983, the Town of Hilton Head Island imposed a fee on real estate transfers, payable at the time of closing. Rather than applying the *Brown* test to determine if the charge was a tax or a fee, the Court concluded that Home Rule itself allowed the Town to impose the charge:

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[10] The *Brown* case was, for a time, substantially modified by *Burns v. Greenville Cnty. Council*, 433 S.C. 583, 861 S.E.2d 31 (2021) (holding that S.C. Code § 6-1-330 legislatively amended the *Brown* four-part test), but that result is not relevant to the argument here. *Burns* matters in this case only to the extent that S.C. Code § 6-1-330 applies to water utility charges; the argument here is that it does not.

> This Court concludes that by enacting the Home Rule Act, S.C. Code Ann. § 5–7–10, et seq. (1976), the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5–7–30, bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state.

Williams, 311 S.C. at 422, 429 S.E.2d at 805. In short, because State law did not forbid the Town from imposing the charge, it could do so, whether it was a tax or a fee under *Brown*.

The result in *Williams* led to a complicated series of maneuvers by the General Assembly and the affected local governments. First, in the 1994 Appropriations Act, the General Assembly adopted S.C. Code Ann. § 6-1-70, which then provided: "The governing body of each county and municipality which enacts and collects any fee which is charged on the transfer of real estate shall ... remit to the State Treasurer an amount equal to the amount of real estate transfer fees collected ...." 1994 Act No. 497, Part II, Section 132A7. Litigation over the validity of this provision ensued.

Meanwhile, on January 1, 1994, the City of Charleston imposed a real estate transfer fee that was substantially identical to the transfer fee in Hilton Head Island. A construction company sued the City, arguing that the fee was a tax under *Brown* and therefore illegal – not, apparently, because the City had no authority to impose a tax, but because the charge was not uniform and therefore violated S.C. Const. art. X, § 6. *See C.R. Campbell Const. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d

437 (1997). This time, the Court reached the *Brown* issue and concluded that the real estate transfer charge was a fee rather than a tax:

> All of the revenue generated by the transfer fee is used solely for acquiring, improving, operating, and maintaining parks and public recreational facilities. In enacting the ordinance, City Council made a specific finding that parks and recreational facilities add to the value of real estate within the City. This finding is supported by evidence in the record that property values are in fact enhanced by such amenities. Finally, it is undisputed City spends more on parks and recreational facilities than the amount generated by the transfer fee.

C.R. Campbell Const. Co., 325 S.C. at 235, 481 S.E.2d at 437–38. The case was decided on February 10, 1997; at this point, the validity of S.C. Code Ann. § 6-1-70 (requiring that local real estate transfer fees be remitted to the State Treasurer) was still in dispute.

In the final relevant case, in 1993 the Town of Hilton Head Island, the City of Charleston, and Charleston County each imposed local hospitality and/or accommodations taxes. The statewide association representing the hospitality industry and other parties sued, alleging that the taxes were invalid. *See Hospitality Ass'n of S.C., Inc. v. Cnty. of Charleston*, 320 S.C. 219, 464 S.E.2d 113 (1995). As in the *Williams* case, the Court upheld the taxes without considering the *Brown* fee-or-tax test. Instead, the Court concluded that the general power for counties to act "respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them," S.C. Code Ann. § 4-9-25, and for municipalities to act "respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace,

order, and good government in it," S.C. Code Ann. § 5-7-30, standing alone, authorized the tax. Justice Finney, recognizing the import of the decision, wrote a spirited dissent:

> These ordinances were enacted by the defendant local governments pursuant to their statutory authority to impose uniform service charges under S.C. Code Ann. § 4–9–30(5)(a) (county statute) and § 5–7–30 (municipal statute) (1986 and Supp. 1994), and the plaintiffs challenge the lawfulness of these service charges. The majority never addresses this issue, but instead decides this case on grounds never contemplated by the parties. In so doing, they reinterpret certain Home Rule statutes to effectuate a wholesale transfer of the taxing power from the General Assembly to local government. Under the majority's decision today, each political subdivision is free to impose virtually any tax which it wishes, from income tax to sales tax to excise tax.

Hospitality Ass'n, 320 S.C. at 231, 464 S.E.2d at 120 (Finney, J., dissenting) (emphasis added). Furthermore, recognizing that *Williams* (the Hilton Head real estate transfer fee case) indirectly led to the decision in *Hospitality Ass'n*, Justice Finney noted that he would overrule *Williams* – even though he was the author of that prior decision. *Id.*, 320 S.C. at 231 n.4, 464 S.E.2d at 122 n.4 (1995).[11]

In summary, the decisions in *Brown*, *Williams*, *C.R. Campbell*, and *Hospitality Ass'n* interpreted Home Rule to afford almost complete local fiscal autonomy. By February 10, 1997 (the date of the *C.R. Campbell* decision), under applicable court decisions, local governments could: (a) charge uniform service charges under S.C. Code Ann. §§ 4-9-30(5) and 5-7-30, subject only to the *Brown* test; (b) charge local real

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[11] Justice Finney explained his prior reasoning in *Williams* by noting that, in his view, the fiscal powers of counties and municipalities applied only to "real and personal property." *See Hospitality Ass'n*, 320 S.C. 231-34, 464 S.E.2d at 121-22 (1995) (Finney, J., dissenting). Almost certainly, then, Justice Finney would have continued to find the real estate transfer fees in *Williams* valid, whether they be taxes or fees, because they related to real property. The accommodations and hospitality taxes in *Hospitality Ass'n*, however, were in effect sales taxes. This explains why Justice Finney listed "income tax to sales tax to excise tax" in the quote above, but not property taxes. It appears that, even in his more limited reading of Home Rule, local governments could impose local property taxes.

estate transfer fees under *C.R. Campbell*; (c) charge local property taxes, subject only to the constitutional requirements of a single assessment and uniformity; and (d) charge local income, sales, or excises taxes under *Hospitality Ass'n*, including without limitation hospitality and accommodations taxes.

C. The General Assembly's Response: Act 138 of 1997

The General Assembly responded swiftly. On February 25, 1997 – a mere two weeks after the *C.R. Campbell* decision – the Senate introduced Bill S.409, which comprehensively addressed local fiscal autonomy. By June 9, 1997, the General Assembly ratified the bill, and on June 13, the Governor signed it, bearing Act Number 138. In its final form, 1997 Act No. 138 included the following provisions:

1. A prohibition on "any fee or tax of any nature or description on the transfer of real property unless the General Assembly has expressly authorized by general law the imposition of the fee or tax," 1997 Act No. 138, sec. 5A, legislatively overruling *Williams* and *C.R. Campbell*. The Act did contain a grandfathering clause for any real estate transfer fee enacted prior to January 1, 1991, which protected the fee in Hilton Head Island, but not the one in the City of Charleston. This provision is now codified at S.C. Code Ann. § 6-1-70.
2. A provision that "[a] local governing body may not impose a new tax after December 31, 1996, unless specifically authorized by the General Assembly," 1997 Act No. 138, sec. 7, legislatively overruling the reasoning

of *Hospitality Ass'n* with respect to local income, sales, and excise taxes. This provision is now codified at S.C. Code Ann. § 6-1-310.

3. A limitation on the amount by which a local government may increase its property tax millage, 1997 Act No. 138, sec. 7, limiting the authority recognized in *Williams* and *Hospitality Ass'n* to charge local property taxes. This provision, which has been amended several times in the intervening years, is now codified at S.C. Code Ann. § 6-1-320.

4. The local accommodations and local hospitality tax statutes, 1997 Act No. 138, secs. 8 and 9, which preserved the substantive result of *Hospitality Ass'n* but subjected local accommodations and hospitality taxes to significant limitations on amount and purpose. These provisions are now codified at Title 6, Chapter 1, Article 5, and Title 6, Chapter 1, Article 7.

Most importantly, <u>the Act included the language now codified at S.C. Code Ann. § 6-1-330 relating to "service or user fees</u>." See 1997 Act No. 138, sec. 7.

Act 138 of 1997, then, was entirely addressed to local fiscal authority under Home Rule and a series of cases interpreting that authority. None of the provisions included in the Act purported to address other existing statutory authorizations for local fees, taxes, or charges. Indeed, the overriding theme of the Act is that local fiscal authority depends on specific statutory authorization. One specific statutory authorization, to impose "uniform service charges," is contained in S.C. Code Ann. §§ 4-9-30(5) and 5-7-30, and the User Fee Statute applies <u>exclusively</u> to that authorization. Other specific statutory authorizations – including the pre-Home Rule

authorization to charge "reasonable" compensation for water utility service – are simply not an issue in Act 138 generally or in the User Fee Statute specifically.[12]

As a final note, the General Assembly's understanding of the User Fee Statute reveals itself in a 2009 amendment. The Stormwater Management and Sediment Reduction Act, S.C. Code Ann. §§ 48-14-10 *et seq*. (the "Stormwater Act"), authorizes "local governments to establish a stormwater utility" and to fund the utility's activities "through the establishment of a fee system or tax assessment that must be reasonable and equitable." S.C. Code Ann. § 48-14-120(C). The Stormwater Act and its implementing regulations, however, contain substantive and procedural restrictions on the amount and use of the "fee system or tax assessment." Given the separate and freestanding authorization to impose "uniform service charges" in the Home Rule Act, some counties moved to fund stormwater activities under S.C. Code Ann. § 4-9-30(5) rather than under S.C. Code Ann. § 48-14-120(C). The General Assembly reacted by adopting 2009 Act No. 75, which amended the User Fee Statute to provide: "The governing body of a county may not impose a fee on agricultural lands, forestlands, or undeveloped lands for a stormwater, sediment, or erosion control program unless Chapter 14, Title 48 allows for the imposition of this fee on these lands." S.C. Code Ann. § 6-1-330(D). In doing so, the General Assembly clearly

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[12] One could legitimately ask: If the User Fee Statute applies only to fees and charges imposed under the Home Rule Act, why does it use the term "service or user fee," and define that term to include "uniform service charge," rather than simply using only the term "uniform service charge"? The answer is that in the *Hospitality Ass'n* case, the court held that local governments could charge the accommodations and hospitality taxes under the police power portion of the Home Rule Act. Thus, in the court's reading, the Home Rule Act contained two authorizations for local charges – "uniform service charges" and police power charges. By using the broader term "service or user fee" in S.C. Code § 6-1-330, the General Assembly limited both authorizations. But, critically, both authorizations (and thus the scope of S.C. Code § 6-1-330) are limited to the Home Rule Act.

understood that the "service or user fee" authorization in S.C. Code Ann. § 6-1-330 and the "fee system or tax assessment" in S.C. Code Ann. § 48-14-120(C) were separate authorizations, and that the User Fee Statute applied only if the county imposed the fee as a "uniform service charge" under S.C. Code § 4-9-30(5).

V. The General Assembly has legislatively overruled the *Burns* case, thereby undermining Appellant's challenge to the Commission's water utility charges.

Appellant's argument depends in significant part on the recent case of *Burns v. Greenville Cnty. Council*, 433 S.C. 583, 861 S.E.2d 31 (2021), in which the South Carolina Supreme Court invalidated Greenville County's road maintenance fee and telecommunications fee. In that case, the Court ruled that the User Fee Statute had amended the *Brown* four-part test for distinguishing a fee from a tax. In the Court's view, the User Fee Statute means that a fee must benefit the payer in some manner different from (and not merely greater than) the general public.

Effective June 22, 2022, the South Carolina General Assembly legislatively overruled *Burns* by amending S.C. Code Ann. § 6-1-300(6)(a) to provide that a service or user fee must "be used to the benefit of the payers, even if the general public also benefits." See 2022 Act No. 236, Sec. 2(A). This legislation restores the status quo prior to *Burns*, in which the courts would generally validate a local fee so long as the benefit to the payer was meaningfully greater than the benefit to others not paying the fee. Moreover, the Act specifically claims retroactive effect: "This SECTION takes effect upon approval by the Governor and applies retroactively to any service or fee

imposed after December 31, 1996." 2022 Act No. 236, Sec. 2(E). Therefore, to the extent that Appellant relies on *Burns*, this Court should disregard such reliance.

CONCLUSION

S.C. Code Ann. § 6-1-330 applies only to charges imposed by local governments pursuant to the Home Rule Act, specifically S.C. Code §§ 4-9-30(5) and 5-7-30. The plain text of S.C. Code Ann. § 6-1-330 is permissive, providing an additional authorization to impose local fees or charges. Moreover, S.C. Code Ann. § 6-1-330 is a general statute, adopted *after* the specific authorization to provide water utility service for reasonable compensation, and it in no way suggests an intention to repeal the earlier statutes by implication. Finally, when viewed in its historical context, S.C. Code Ann. § 6-1-330 was obviously intended to address the specific question of local fiscal authority under the Home Rule Act, and not to effect a wholesale repeal or amendment of other, specific statutory authorizations to impose local fees and taxes.

Respectfully Submitted,

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