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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 Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks,Respondent.

APPELLANT'S RESPONSE TO AMICIS BRIEF

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TABLE OF CONTENTS

Table of Authorities	ii
Background	1
Conclusion	12

TABLE OF AUTHORITIES

CASES

<i>Azar v. City of Columbia</i> , 414 S.C. 307, 778 S.E.2d 315 (2015)	6-12
<i>Brown v. County of Horry</i> , 308 S.C. 180, 417 S.E.2d 565 (1992)	4
<i>Bryant v. State</i> , 384 S.C. 525, 683 S.E.2d 280 (2009)	8
<i>Burns v. Greenville Cnty. Council</i> , 433 S.C. 583, 861 S.E.2d 31 (2021)	4, 5, 7, 8, 12
<i>C.R. Campbell Constr. Co. v. City of Charleston</i> , 325 S.C. 235, 481 S.E.2d 437 (1997)	4, 8
<i>Catawba Indian Tribe of S.C. v. State</i> , 372 S.C. 519, 642 S.E.2d 751 (2007)	8
<i>Cerny v. Salter</i> , 311 S.C. 430, 429 S.E.2d 809 (1993)	9
<i>Greenville Cnty. Fair Ass'n v. Christenberry</i> , 198 S.C. 338, 17 S.E.2d 857 (1941)	9
<i>Foster v. Dep't of Highways & Pub. Transp.</i> , 306 S.C. 519, 413 S.E.2d 31 (1992)	9
<i>Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.</i> , 323 S.C. 532, 476 S.E.2d 481 (1996)	9
<i>McDuffie v. McDuffie</i> , 308 S.C. 401, 418 S.E.2d 331 (Ct. App. 1992).....	9
<i>Simmons v. Greenville Hospital System</i> , 355 S.C. 581, 586 S.E.2d 569 (2003)	5
<i>Steinke v. S.C. Dep't of Labor, Licensing, & Regulation</i> , 336 S.C. 373, 520 S.E.2d 142 (1999)	5
<i>United States Trust Co. v. New Jersey</i> , 431 U.S. 1, 23 (1977).....	9

Walterboro Community Hosp. v. Meacher,
392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2011).....8

STATUTES

S.C. Code Ann. § 5-31-670.....3, 4
S.C. Code Ann. § 6-1-300(6)3, 4, 5
S.C. Code Ann. § 6-1-330(B)3, 4, 7, 10

BACKGROUND

Appellant Snee Farm Lakes Homeowner's Association, Inc. ("Appellant")¹ and a certified class of nearly seven hundred commercial customers challenge Respondent The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks' ("Respondent") excessive base facility charges ("BFC"). Respondent² charges each commercial customer a monthly BFC according to each commercial customer's use *assumptions*. These use assumptions are quantified in Residential Equivalent Units ("REU")³ assigned by Respondent, at the impact fee payment stage, *prior to service inception*.⁴

Despite subsequently acquiring each customer's actual use records, Respondent never adjusts each commercial account's REU assignment to correspond to *actual* usage patterns – even where Respondent's use assumptions far exceed actual consumption.⁵ This practice has resulted in Appellant and the class paying excessive BFC for years and subsidizing other commercial customers whose REU are either accurately sized or undersized.

Under Respondent's policies, customers can reduce excessive BFC only if they uncover this complex overbilling issue⁶ and formally request an REU reduction. However, Respondent's policies provide that any REU reduction necessitates the loss of REU capacity purchased through impact fees prior to service inception. Respondent's General Manager testified this purchased capacity is an "asset" each customer owns.⁷ Respondent's expert testified at his deposition that Respondent's practices are unlike anything he had seen in his more than thirty-year career in the industry. (R. p. 995, lines 13-20). Respondent's own attorney questioned whether these practices were equitable. (R. pp. 528-539).⁸

¹ Appellant is a non-profit homeowners' association that owns, manages, and maintains the common elements articulated in its restrictive covenants. Appellant has a single water meter. The individual unit owners are neither separately metered nor MPW customers. The HOA is MPW's customer.

² Respondent is a municipal water and sewer utility established pursuant to a Town of Mount Pleasant, South Carolina ordinance and state law.

³ Respondent calculates a customer's monthly BFCs based on the number of REU assigned to its account. REU are a unit of measure equal to 300 gallons per day or 9,000 gallons per month. (R. pp. 509-514).

⁴ The customer pays Respondent "impact fees" based on the number of REU assigned based on its proposed use. Respondent defines "impact fees" as follows:

Impact fees are charges assessed against new development to recover part of the capital costs of expanding the water and wastewater infrastructure to serve them. Considered as a capital-recovery charge, impact fees allow recovery of the capital costs of developing the new service directly from the customers who will benefit from the service. proportionate share of each customer's infrastructure demands on the system.

(R. pp. 307-308).

As Respondent's rate consultant put it, "the impact fees are what a customer pays to 'reserve' their rights to capacity in the system." (R. pp. 432-434).

⁵ Appellant has presented evidence that the "unused REU" mentioned above constitute an incredible 40% of the total commercial REU in Respondent's system. Stated another way, almost half of the capacity Respondent charges customers for is unused and therefore not related to the provision of any service or individualized benefit to customers paying BFCs based on admittedly "unused REU." (R. p. 346, lines 5-24; R. p. 347, lines 6-10; R. pp. 323-324).

⁶ Respondent first notified Appellant and other customers paying excessive BFC in 2018. (R. p. 354-357). The lawsuit was filed on June 1, 2018 after Respondent indicated a refusal to refund Appellant the excessive BFC previously paid.

⁷ Clay Duffie, Respondent's longtime General Manager, testified at his deposition as follows: "Well, the capacity, . . . is assigned to the property, so it is an asset that is assigned to the property." (R. p. 617, lines 20-22).

⁸ In an e-mail from Respondent's counsel James Atkinson "Chip" Bruorton to Respondent's General Manager Clay Duffie about proposed revisions to the REU adjustment policies, Mr. Bruorton aptly questioned: "Did we not conclude that because the customer would have already paid impact fees on the original number of REUs that a capacity reservation fee or back payment for REUs was not equitable?"

In challenging these excessive BFC, Appellant argues South Carolina law requires Respondent to set fees based on each customer's actual use and the cost of servicing each customer – not outdated, inaccurate use assumptions. This requires, under Respondent's system, periodically adjusting or "right sizing" each account's REU assignment to ensure each customer pays a fair BFC. Appellant's expert Brian Mantz testified in his deposition that it would be "very easy" for Respondent to periodically right size commercial customers' accounts. (R. p. 1011, line 17-25; R. p. 1013, lines 3-6). Appellant further maintains it should not be required to forfeit capacity assets it previously purchased through impact fees to be charged a fair BFC. This policy places Appellant in a precarious dilemma: either continue to pay excessive BFC or forfeit capacity assets.

In its thirty-one page *amicus curiae* brief, the Municipal Association of South Carolina ("MASC") offers not a single word in support of Respondent's BFC policies on the merits. Instead, the MASC asks this Court to reject Appellant's argument that Respondent's BFC are subject to any meaningful judicial review under South Carolina's service and user fee statutes, namely, S.C. Code Ann. § 6-1-300(6) and § 6-1-330(B) (collectively, the "Fee Statutes"). The MASC argues Respondent need only comply with S.C. Code Ann. § 5-31-670 (the "Water Charge Statute"), that is, unless Respondent "elects" to be subject to the more restrictive Fee Statutes. Appellant strongly disagrees. A brief background on these statutory frameworks follows.

The Water Charge Statute – adopted in 1935 – requires only that a municipal utility’s fees be “reasonable.” S.C. Code Ann. 5-31-670 (“Any city or town or special service district may ... furnish water to persons for reasonable compensation ...”). The Fee Statutes – adopted in 1997 – impose more specific, but by no means overly burdensome, nexus requirements governing both how fees must be calculated and spent. S.C. Code Ann. § 6-1-300(6) (“‘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.”); S.C. Code Ann. § 6-1-330(B) (“The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid.”).

The South Carolina Supreme Court has also established the following test (the “Brown Factors”) for determining whether a government charge is a tax or a valid fee:

Under *Brown*, a fee is valid as a uniform service charge if (1) the revenue generated is used to the benefit of the payers, even if the general public also benefits (2) the revenue generated is used only for the specific improvement contemplated (3) the revenue generated by the fee does not exceed the cost of the improvement and (4) the fee is uniformly imposed on all the payers.

C.R. Campbell Constr. Co. v. City of Charleston, 325 S.C. 235, 237, 481 S.E.2d 437, 438 (1997) (citing *Brown v. County of Horry*, 308 S.C. 180, 184-86, 417 S.E.2d 565, 567-68 (1992)). While *Brown* and *C.R. Campbell* predate the enactment of the Fee Statutes, the Supreme Court has indicated that local government fees must still comply with the Brown Factors. *Burns v. Greenville Cnty. Council*, 433 S.C. 583, 587, 681 S.E.2d 31, 33 (2021) (holding that local fees “arguably must

meet the requirements we set forth in *Brown* but certainly must meet the requirements the General Assembly set forth in subsection 6-1-300(6).”⁹

The Honorable R. Markley Dennis, Jr.’s Order Granting Respondent’s Motion for Summary Judgment (the “Order”), which is the subject of this appeal, applies the Water Charge Statute and partially applies the Fee Statutes to Respondent’s BFC practices. As to the former, the Order erroneously concludes Respondent’s BFC practices are reasonable, as a matter of law, citing legislative deference. As to the later, the Order states that the Fee Statutes only “relate to the way the funds collected are ‘spent,’ not the rate structure or method of collection.” (R. pp. 32-33). Since Appellant’s claims go to how Respondent’s BFC are calculated and imposed – not spent – the Fee Statutes do not apply, according to the Order.

⁹ The MASC argues *Burns* was “legislatively overruled” by Act 236 (2022). While arguably the “road maintenance fees” struck down in *Burns* are now prospectively lawful, Act 236 did not repeal the Fee Statutes. Instead, it amended the Fee Statutes by legislatively adopting the Brown Factors. This included liberalizing the special benefit requirement. Prior to Act 236, S.C. Code Ann. § 6-1-300(6) required fees to “benefit[] the payer **in some manner different** from the members of the general public not paying the fee.” (Emphasis added). Section 6-1-300(6), as amended by Act 236, now allows fee “revenue generated [to be] used to the benefit of the payers, **even if the general public also benefits.**” (Emphasis added).

Section 2(E) of Act 236 purports to apply these amendments retroactively “to any service or fee imposed after December 31, 1996.” However, such retroactivity language cannot be read to “legislatively overrule” *Burns* as it pertains to Appellant’s claims, because Appellant’s claims accrued long before Act 236 was enacted. *Simmons v. Greenville Hospital System*, 355 S.C. 581, 588, 586 S.E.2d 569, 572 (2003) (holding that legislative amendments only apply “to those claims that arose or accrued after the effective date of the reenactments”); *Steinke v. S.C. Dep’t of Labor, Licensing, & Regulation*, 336 S.C. 373, 402, 520 S.E.2d 142, 157 (1999) (“Subject to constitutional limitations, the legislature has plenary power to amend a statute. However, a judicial [interpretation] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retroactively.”). Indeed, Appellant’s lawsuit was filed more than four (4) years prior to Act 236’s effective date, and the instant appeal was pending at the time Act 236 was adopted.

Finally, Act 236 contains no language that supports the MASC’s primary argument that municipal water and sewer fees are not subject to the Fee Statutes, even as amended. Specifically, nothing in Act 236 disturbs the Court’s observation in *Burns* that “[a]fter 1997, therefore, when a local government imposes a charge it contends is not a tax, the charge arguably must meet the requirements we set forth in *Brown* but certainly must meet the requirements the General Assembly set forth in subsection 6-1-300(6).” 433 S.C. at 587, 681 S.E.2d at 33. Therefore, *Burns* continues to support Appellant’s position that Respondent’s BFC must comply with the Fee Statutes.

Appellant disagrees Respondent's BFC practices are reasonable, based on the ample evidence to the contrary in the record and particularly under the summary judgment standard of review. Appellant also takes issue with the Order's narrow interpretation of the Fee Statutes, arguing they, along with the Brown Factors, govern how fees are calculated and assessed – not just how they are spent, as the Order concluded.

Appellant argues Respondent's BFC must be calculated according to actual use – not erroneous and outdated use assumptions – especially when the actual use data is so readily available to the utility.

Again, the MASC does not defend Respondent's BFC practices on the merits. It does not even mount an attempt. Instead, the MASC asks this Court to refrain from confirming that municipal water and sewer rates are governed by the Fee Statutes. According to the MASC, Respondent is subject only to the near century old Water Charge Statute and its "reasonableness" standard unless, that is, the utility "elects" to be subject to the more stringent Fee Statutes.

The Court should reject the MASC's argument because it is squarely at odds with *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015), which held municipal water and sewer charges are subject to the Fee Statutes. Allowing municipal utilities to choose the statutory framework governing their fees would circumvent meaningful judicial oversight, subvert the will of the General Assembly, and sanction the "slush fund" practices deemed unlawful by the Supreme Court in *Azar*.

Appellant respectfully requests that in reversing the Order, this Court confirm that the Fee Statutes and the Brown Factors govern Respondent's BFC practices. This will ensure that, on

remand, Respondent’s practices will be analyzed under the correct legal framework.¹⁰

I. Municipal water and sewer charges, including Respondent’s BFC, must comply with the Fee Statutes under *Azar*.

Azar involved a challenge to the City of Columbia’s longstanding practice of transferring water and sewer utility revenue to its general fund for economic development and other non-utility purposes. The case was decided on the Fee Statutes. Specifically, the Court held S.C. Code Ann. § 6-1-330(B) precluded such transfers. *Azar*, 414 S.C. at 317, 778 S.E.2d at 318 (“[T]he law requires some nexus between the City’s provision of water and sewer services and the underlying purpose of each expenditure or transfer of water and sewer funds. **Simply put, the statutes do not allow these revenues to be treated as a slush fund.**”) (emphasis added).

The Water Charge Statute is not mentioned anywhere in *Azar*. Moreover, there is no suggestion in *Azar* that municipal utilities have the “option” to impose fees under either the Water Charge Statute or the Fee Statutes, as the MASC now claims.¹¹

Azar is the only reported decision applying the Fee Statutes in the municipal water and sewer context, and it is dispositive of the issue raised by the MASC. However, *Burns v. Greenville Cnty. Council* further supports Appellant’s contention that all local non-tax revenue streams must comply with the Fee Statutes. 433 S.C. at 587, 681 S.E.2d at 33 (holding that after 1997, local non-tax revenue generating measures must comply with the Fee Statutes).¹² Respondent does not

¹⁰ The MASC suggests this Court could either reverse or affirm the circuit court on narrow grounds and not reach the Fee Statutes question. Appellant contends that analyzing the Fee Statutes question is fundamentally necessary to the resolution of this appeal. Both the Water Statutes and the Fee Statutes govern Respondent’s BFC.

¹¹ If the MASC’s argument is accepted, other utilities could avoid the holding in *Azar* by simply declaring their water and sewer fees are imposed pursuant to the far less restrictive Water Charge Statute. This would produce an absurd result and sanction a simplistic and semantic end run around *Azar*.

¹² This language in *Burns* is at odds with the MASC’s suggestion that only those “catch all fees” imposed under the Home Rule Act are subject to the Fee Statutes.

contend its BFC as a tax. It is clearly a “charge.” Therefore, under *Burns* it must comply with the Fee Statutes.

The Order cites *Azar* and correctly acknowledges the Fee Statutes govern Respondent. However, the Order erroneously concludes the Fee Statutes only “relate to the way the funds collected are ‘spent,’ not the rate structure or method of collection.” (R. pp. 32-33). Appellant challenges this narrow and incomplete reading of the Fee Statutes.¹³

The MASC disagrees with the Order’s conclusion that the Fee Statutes are applicable *at all* to municipal utility fees. The MASC attempts to dismiss and limit *Azar* merely because the City of Columbia appears to have conceded its charges are subject to the Fee Statutes. Therefore, the MASC argues *Azar* is not precedential and its holding is limited to the City of Columbia and the specific facts of that case.

However, the City of Columbia’s concession (that its fees are subject to the Fee Statutes) is clearly one of law – *not fact* – because the issue deals with statutory interpretation and application. See *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (“As this case involves statutory interpretation, we are presented with a question of law.”); *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (“The issue of interpretation of a statute is a question of law for the court.”). Stipulations of law are not binding on the courts –

¹³ Appellant disagrees the Fee Statutes and Brown Factors only govern how fee revenue is spent. Water and sewer rates must also be calculated and assessed based on the actual cost of providing service to the payor. S.C. Code Ann. § 6-1-300(6) (requiring fees to be structured so they “benefit[] the payer in some manner different from the members of the general public not paying the fee”); *C.R. Campbell Const. Co., Inc. v. City of Charleston*, 325 S.C. 235, 237, 481 S.E.2d 437, 438 (1997) (citing the Brown Factors that require, among other things, the fee revenue not exceed the cost of providing the service to the payor). Appellant argues the excessive BFC charged by Respondent exceed the cost of providing service and are not calculated in a manner consistent with providing an individualized service or benefit. Rather, the rates are established based on outdated and erroneous use assumptions belied by actual use data, which Respondent has always possessed.

especially the South Carolina Supreme Court. *See Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 487, 709 S.E.2d 71, 75 (Ct. App. 2011) (citing *Greenville Cnty. Fair Ass'n v. Christenberry*, 198 S.C. 338, 345, 17 S.E.2d 857, 859 (1941) (holding that a “stipulation as to the law” is generally not binding upon the courts); *McDuffie v. McDuffie*, 308 S.C. 401, 409-10, 418 S.E.2d 331, 336 (Ct. App. 1992) (holding that stipulations involving questions of law are not binding on the court)).

If the South Carolina Supreme Court thought that municipal water and sewer charges were not subject to the Fee Statutes, *Azar* could have been decided differently. Put another way, the City of Columbia’s stipulation of law did not somehow bind the Supreme Court’s hands and force it to decide the case under the Fee Statutes.

The MASC suggests in a passing footnote that the outcome in *Azar* would have been the same had the Water Charge Statute alone governed. (Amicus Curiae Brief, p. 7, fn. 2). This is highly doubtful. The Water Charge Statute establishes a mere reasonableness test. Courts are extremely deferential to legislative determinations of reasonableness. *Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.*, 323 S.C. 532, 544, 476 S.E.2d 481, 488 (1996) (“When a state acts to impair a purely private contract, ‘courts properly defer to legislative judgments as to the necessity and reasonableness of a particular measure.’”) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977)); *Cerny v. Salter*, 311 S.C. 430, 432, 429 S.E.2d 809, 811 (1993) (“In determining whether a statute violates equal protection, this Court accords ‘great deference to a legislatively created classification, and the classification will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it.’”) (quoting *Foster v. Dep’t of Highways & Pub. Transp.*, 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992)).

In *Azar*, the City of Columbia was not without a rationale to support its challenged fund transfers. Specifically, “City Manager Steven A. Gantt ... testified that the ‘overriding goal’ of the City's economic development expenditures was ‘to bring new businesses within the [C]ity limits so that they can and do indeed become water and sewer customers.’” *Azar*, 414 S.C. at 313, 778 S.E.2d at 318. If only the Water Charge Statute governed, a reviewing court would be required to grant tremendous deference to the City’s stated justification for the “reasonableness” of the practice.

Azar hinged on the application of the Fee Statutes, which place explicit restrictions on how revenue is spent. S.C. Code Ann. § 6-1-330(B) (“The revenue derived from a service or user fee imposed to finance the provision of public services *must be used to pay costs related to the provision of the service or program for which the fee was paid.*”) (emphasis added). This specific statutory authority gave the South Carolina Supreme Court clear, express legal footing to strike down the City of Columbia’s “slush fund” practices. Under a mere reasonableness standard, the Court would have been forced to engage in a far more deferential level of review. Among other things, the Court would have had to accept, at face value, how the disputed fund transfers had some tangential benefit to the utility. For those reasons, the City of Columbia’s “slush fund” practices would likely have survived legal challenge if, as the MASC argues, the Water Charge Statute alone applied to municipal water and sewer charges.

The instant case vividly demonstrates how, in practice, the Water Charge Statute provides essentially no meaningful judicial oversight of municipal water and sewer charges. Judge Dennis was clearly troubled by Respondent’s BFC practices; however, he concluded the Water Charge

Statute's "reasonableness" standard provided no basis for critiquing Respondent's practices.¹⁴ As case in point, during the hearing on Respondent's Motion for Summary Judgment, Judge Dennis remarked as follows:

And, Mr. Appel, **I don't argue with one thing you have said. I agree with all of that, they could have done a lot of things, but they didn't.** And the problem that I see you have, from my standpoint is, that's what the legislature said. Now, they can be unelected. You can run for that, just as you ran. You know, you can run for the body and say, Look, we need to change this, this is totally wrong. Let's vote on this.

But the Court doesn't come in and say, No, no, folks, you elected persons, you can't do that. You need to find a better system, because this isn't fair to certain people here.

I hear you. I just – my question is, **How do I have the authority to tell an elected board this is what you – you have to use a different method. That's my – that's my concern.**

(R. p. 965, line 19 – p. 966, line 9). (Emphasis added).

I understand you've got some legitimate concerns for people that – to me, if I happened to be one of those persons, I'd probably be a little upset about it, too. I wouldn't want to be paying for everybody else.

But the bottom line is: Get somebody that these people – I assume all of these people vote in the elections, don't they?

(R. p. 967, lines 17-24). (Emphasis added). The Order reflects this sentiment and demonstrates how the Water Charge Statute provides essentially no meaningful judicial review of municipal water and sewer charges.

This hands-off judicial review is the outcome the MASC wants this Court to accept. If the Water Charge Statute – not the Fee Statutes – govern municipal water and sewer charges,

¹⁴ Appellant contends in this appeal that Respondent's BFC practices must be analyzed under the Fee Statutes and Brown Factors. Judge Dennis erred by applying only the Water Charge Statute's reasonableness standard.

municipalities will, as a practical matter, have *carte blanche* to set charges and employ revenue however they deem fit without any meaningful judicial review. This is the result specifically rejected by the Supreme Court in *Azar*.

Regardless, there is no need for hypotheticals and speculation. There is no need to review the legislative history behind the Home Rule Act, as the MASC suggests. The law is clear. *Azar* confirms Appellant's argument that the Fee Statutes govern Respondent's BFC. It would be nonsensical for the City of Columbia to be held to a different standard than the Town of Mount Pleasant. *Burns* reinforces this view by confirming all local non-tax revenue streams must comply with the Fee Statutes. Therefore, the MASC's contention that only the Water Charge Statute applies must be rejected. The Fee Statutes also apply, and this point of law is of utmost significance in the instant appeal.

CONCLUSION

Appellant respectfully requests this Court reverse and remand the Order. In so doing, the Court should decline the MASC's request to avoid confirming the Fee Statutes and Brown Factors govern Respondent's BFC policies. *Azar* clearly stands for the proposition that municipal water and sewer fees are subject to the Fee Statutes.

Respectfully submitted,

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