

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Joseph S. Azar, Frank J. Cumberland, Jr.,
and Michael A. Letts, Individually and as
Class Representatives,

Plaintiffs,

vs.

City of Columbia,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No. 2011-CP-40-6705

RECEIVED

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SC Court of Appeals

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

JANETTE W. McBRIDE
C.C.P. & O.S.

2013 SEP 26 AM 10 43

RICHLAND COUNTY
FILED

In this action, Plaintiffs challenge Defendant City of Columbia's ("City") use of revenues derived from monthly water and sewer charges. Specifically, Plaintiffs claim that the City's expenditures of water and sewer revenue to fund its economic development activities, as well as transfers of water and sewer revenue to its general fund, constitute: 1) a breach of the water and sewer service contract between Plaintiffs and the City; 2) an invalid fee under *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992), as applied to municipalities in *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 236 481 S.E.2d 437, 438 (1997), thereby constituting an unconstitutional collection thereof; and 3) a violation of S.C. Code Ann. § 6-1-330. Both parties moved for summary judgment, and a hearing was held on August 5, 2013. At the Court's request, Motions were reargued on September 13, 2013. Having reviewed the motions, memoranda, affidavits, and other material presented to the Court, and having heard the arguments of counsel, I grant the City's Motion for Summary Judgment and deny Plaintiffs' Motion for Summary Judgment, as more fully discussed below.

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FINDINGS OF FACT

The City owns and operates a water and sewer utility that serves the Midlands region. The City provides water and sewer to customers who voluntarily enter into contracts with the City whereby customers pay for water and sewer actually consumed. Plaintiff Azar does not pay water and sewer charges to the City, and has no contract for water and sewer service with the City. Plaintiff Cumberland resides within the City of Columbia and is a residential water and sewer customer as manifested by a service contract with the City of Columbia, and pays the City for this service. Plaintiff Letts resides outside of the City's corporate limits, is also a residential water and sewer customer by virtue of a service contract with the City, and pays the City for this service. As of June 28, 2012, the City provided water to 137,066 customers and provided sewer to 69,910 customers. The City's water and sewer rates, along with other fees and income, generate approximately \$110 million dollars per year in gross revenue. Most years, the utility generates a profit.

The City of Columbia manages the fiscal operations of its water and sewer utility in a proprietary manner. The City collects its water and sewer charges, fees and other income, and deposits them into a segregated enterprise fund. An enterprise fund is used to account for business operations, whereas a governmental fund is used to account for government services. From this enterprise fund, the City expends monies for operation, maintenance, improvements, and administration of its utility, as well as for debt service for revenue bonds secured by water and sewer charges issued for capital replacements or improvements to its system.

By an ordinance enacted by the City Council in 1895, the City established "rates of water rents" for provision of water from its waterworks to those who made application for connection to the City's water utility (hereinafter referred to as "Water Rate Ordinance"). Since 1895, the

City's Water Rate Ordinance has remained in force and effect. In 1970, the City enacted an ordinance establishing a sewer rate structure (hereinafter referred to as "Sewer Rate Ordinance"). Since 1970, the City's Sewer Rate Ordinance has remained in force and effect. The City has amended both its Water Rate Ordinance and its Sewer Rate Ordinance numerous times. The City's amendments to its water and sewer rates operate to revise its existing rate structure established in 1895 and 1970, respectively.

If a person wishes to receive water and sewer from the City, he or she submits an application for a water service contract to the City. The City provides water and sewer to its customers according to the terms set forth by this contract ("Service Contract"). The Service Contract states that:

The undersigned hereby applies to the City of Columbia for a water/sewer supply, to be furnished through a meter, for which service the undersigned agrees to pay a monthly rate and minimum charge (whether the minimum volume of water is used or not) as may be established by the City of Columbia in accordance with its ordinances. It is understood and agreed that the applicant will comply with all rate schedules, rules, regulations and ordinances (Section 5-4012) of the City of Columbia in connection with this service; that the City reserves the right at any time without notice to interrupt water service for maintenance, repairs or extensions without any liability to the undersigned or owner of such premises for damages resulting therefrom; that the undersigned will not receive water from any part of the City water system without a valid permit from the City Engineer or without an in-service meter and that unpaid charges for water service shall be posted against the undersigned applicant's Security Deposit.

The City's water service rate consists of a monthly base charge for the first 300 cubic feet of water consumed that varies according to meter size and whether the customer resides within the City limits ("Resident") or outside City limits ("Non-Resident"). Customers are then charged for additional water consumption as determined by customer category. Similarly, the City has established a base sewer rate for Resident customers and Non-Resident customers; with an additional charge for each 100 cubic feet of wastewater consumed.

Most of the City's water and sewer revenue is derived from Non-Resident customers, as shown in the table below:

Fiscal Year	Non-Resident Charges	Resident Charges
2008/2009	\$64.1 million dollars	\$32 million dollars
2009/2010	\$66 million dollars	\$33.1 million dollars
2010/2011	\$65.7 million dollars	\$33.5 million dollars

During the past three fiscal years, water and sewer rates were increased in a manner consistent with a water rate study prepared by the engineering, consulting and construction company Black & Veatch ("Black & Veatch Study") recommending rate and fee revisions over a five-year period ending June 30, 2011. The Black & Veatch Study based its analysis on the City's projected costs and other factors. It included a return on investment built into the City's water and sewer rates. The Black & Veatch Study also factored into the proposed rates a projection of capital improvements over five years totaling approximately \$350 million dollars.¹

Pursuant to its authority to issue revenue bonds to fund construction, improvement and repair of its water and sewer utility,² the City has pledged its water and sewer revenues to secure bonds issued to pay for water and sewer maintenance, construction, and improvement. See S.C. Code Ann. § 6-21-340. Water and sewer rates must be sufficient to provide for the payment of the interest on and the principal of all such bonds, a bond and interest redemption fund, the payment of the expenses of administration, operation and maintenance of the system "as necessary to preserve it in good repair and working order," to build up a reserve for depreciation

¹ Water and sewer infrastructure is extremely expensive. Every fiscal year, the City prepares and approves a capital improvement plan for water and sewer construction, repair and maintenance projects. The City completed all of the capital improvement projects contained in the Black & Veatch Study within five years.

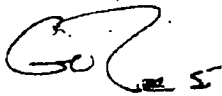
² Under Title 6, municipalities are authorized to issue revenue bonds for the acquisition, construction, improvement, enlargement, and repair of its water and sewer utility. S.C. Code Ann. § 6-21-190; S.C. Code Ann. § 6-17-30.

of the existing system, and to build up a reserve for improvements, betterments and extensions to the existing system. S.C. Code Ann. § 6-21-390; S.C. Code Ann. § 6-21-440; S.C. Code Ann. § 6-17-180(3). Any surplus funds remaining after application of revenues to payments of principal and interest, operation and maintenance, and reserves for depreciation and improvements "shall be disposed of by the [City] as it may determine from time to time to be for the best interest of the [City]." S.C. Code Ann. § 6-21-440.

In 1993, the City enacted a revenue bond ordinance ("Bond Ordinance") which authorized the issuance of water and sewer revenue bonds with the bond payments paid solely from net water and sewer revenues remaining after payment for operation and maintenance of the system was made. In subsequent years, including the time period relevant to this case, the City enacted revenue bond ordinances that supplemented the 1993 ordinance to authorize additional bond issuances. Pursuant to § 6.7 of the City's Bond Ordinance, after fulfilling its obligation to pay for operation and maintenance of the system, to pay principal and interest on outstanding bonds, and to fund various reserve funds, the Council may apply the net water and sewer revenues as Council determines from time to time "to be in the best interest of the City."

Also in 1993, the City Council adopted a resolution establishing a policy regarding use of net water and sewer revenues to offset the cost of general government operations ("Resolution").³ The Resolution provided limitations on the circumstances and amount that the City could transfer from its water and sewer enterprise fund to its general fund. The Resolution prohibited transfer of water and sewer revenues if such transfer would impair the City's ability to: 1) operate and maintain the utility in a "sound and businesslike manner," 2) satisfy the covenants of its Bond Ordinance, 3) maintain all financial and capital reserves at their required

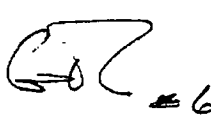
³ In 2013, the City repealed the Resolution and enacted in its place a new policy. The 2013 Resolution, enacted over a year after this litigation was commenced, is not at issue.



levels, and 4) maintain the capacity to fund capital improvements without unduly relying on bond issuances. *Id.* Additionally, the Resolution prohibited transfer of surplus revenues in amounts that would result in uncompetitive rate increases, or reduction in creditworthiness in the City's general obligation bonds. *Id.* Lastly, the Resolution limited any transfer to no more than 50% of net earnings of the utility or one-twelfth of the City's total general fund expenditures, whichever is less. *Id.*

Adequate water supply is an important economic development tool. The City's utility attracts businesses to the Midlands region. New businesses locating in the region help grow the City's water and sewer customer base. The City has used monies from its water and sewer enterprise fund to pay for all or part of the costs of its economic development department, economic development special projects, office of business opportunities, and four development corporations. The City expended \$814,543.70 in fiscal year 2008/2009, \$774,879.02 in fiscal year 2009/2010, and \$772,267.33 in fiscal year 2010/2011 from its water and sewer enterprise fund for its economic development department. The City expended \$624,267.29 in fiscal year 2008/2009, \$590,857.11 in fiscal year 2009/2010, and \$585,936.77 in fiscal year 2010/2011 from its water and sewer enterprise fund for its economic development special projects. The City expended \$393,934.55 in fiscal year 2008/2009, \$297,179.54 in fiscal year 2009/2010, and \$210,663.51 in fiscal year 2010/2011 to fund its office of business opportunities. Collectively, the City expended \$1,053,522.00 in fiscal year 2008/2009, \$1,154,478.00 in fiscal year 2009/2010, and \$1,047,242.42 in fiscal year 2010/2011 to fund its four development corporations.

Additionally, the City has transferred up to \$4.5 million dollars of the utility's net revenues annually to its general fund to defray the costs of ordinary municipal services. If the



City did not transfer the entire \$4.5 million dollars to its general fund on an annual basis, City residents' property tax bills would increase by nine to ten mils. Transfer of some portion of water and sewer revenues from a city's water and sewer utility to its general fund is a common practice in South Carolina.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCF. "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). A grant of summary judgment is "completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg. Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). This case involves questions of law, with no genuine issue of material fact in dispute.

CONCLUSIONS OF LAW

In their Second Amended Complaint, Plaintiffs assert that the City's use of water and sewer charges for purposes other than operation, maintenance and improvement of its water and sewer systems amount to: 1) a breach of implied or express contract; 2) an invalid uniform service fee under *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992) and applied to municipalities in *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), thereby constituting an unconstitutional collection thereof; and 3) an invalid user or service fee under S.C. Code Ann. § 6-1-330 ("Service Fee Statute"). Plaintiffs' Motion for Summary Judgment, corresponding Memorandum of Law, and oral argument before this Court.

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addressed only the second and third arguments described above. Defendant's Motion for Summary Judgment, corresponding Memorandum of Law, and oral argument before this Court addressed all of Plaintiffs' claims raised in its Second Amended Complaint, as well as its argument that Plaintiffs Azar and Letts lack standing to bring their claims.⁴

1. STANDING OF PLAINTIFFS AZAR AND LETTS

"Standing to sue is a fundamental requirement in instituting an action." *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007). "Standing may be acquired "through the rubric of constitutional standing" or "under the 'public importance' exception." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337 (2008). Each Plaintiff bears the burden of establishing that he has standing to bring each cause of action asserted in their Complaint. *See Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000) (deciding issue of whether plaintiff had standing to challenge certain sections of an ordinance); *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 28, 416 S.E.2d 641, 645 (1992) (examining whether plaintiffs had standing to bring a particular cause of action). "To establish constitutional standing, a plaintiff must first show he has suffered an "injury in fact - an invasion of a legally protected interest which is (a) concrete and

⁴ The Defendant previously moved to dismiss, pursuant to Rule 12(b)(1), SCRPC, all of Plaintiffs Azar and Letts' claims for lack of standing, and Plaintiff Cumberland's contract claim for lack of standing. During a hearing held on June 5, 2012, the trial judge orally denied this motion, indicating that the public importance exception applied. However, a written order was never entered. "No order is final until it is written and entered." *First Union Nat'l Bank v. Hitman*, 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991), citing to Rule 58(a), SCRPC. Subsequent to this hearing, the South Carolina Supreme Court decided *Freemanile v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012), which held that the purpose and spirit of public importance exception is not consistent with claims for monetary relief. The Plaintiffs in this case seek an injunction requiring the City to refund monies allegedly spent unlawfully and place this money in a common fund. As part of its Motion for Summary Judgment, Defendant reasserted its standing arguments concerning Messrs. Azar and Letts, but withdrew its argument that Mr. Cumberland lacked standing to bring his contract claim.

particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Freemantle v. Preston*, 398 S.C. 186, 192-193, 728 S.E.2d 40, 43 (2012).

a. Mr. Azar

The City asserts that Mr. Azar lacks standing to bring any of his causes of action because he does not pay water and sewer fees to the City, is under no contract with the City, and has no property or personal interest at stake in this action. I agree.

Mr. Azar is not a water and sewer customer of the City. He has no water and sewer account in his name. He has no contract with the City for provision of water and sewer service. Mr. Azar does not pay water and sewer fees to the City of Columbia. *Compare Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992) (plaintiffs paid road maintenance fee). Under these facts, Mr. Azar lacks standing to bring any of his causes of action. *See Freemantle v. Preston*, 398 S.C. 186, 192-193, 728 S.E.2d 40, 43 (2012) (“To establish constitutional standing, a plaintiff must first show he has suffered an “injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”).

b. Mr. Letts

Plaintiff Letts lives outside the corporate limits of the City of Columbia. He has executed a Service Contract with the City of Columbia for water and sewer service. However, the fact that Mr. Letts has a contractual relationship with the City does not end the inquiry. The Service Contract must evidence a protected interest in how the City uses its water and sewer revenue that has been injured by the City’s actions. The Service Contract with the City does not contain any express term or condition that addresses how the City must use collected revenues from water and sewer charges.



Plaintiffs assert that the Service Fee Statute is either incorporated or implied as a term in the Service Contract. There is no language in the contract that could be construed as incorporating the Service Fee Statute. See *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 394 S.C. 300, 307-08, 715 S.E.2d 655, 659 (Ct. App. 2011) (“To incorporate the terms of extrinsic material, the contract must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract”). Nor is there any reason for this Court to hold that the Service Fee Statute is an implied term of the Service Contract. See *Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 101, 311 S.E.2d 91, 94 (Ct. App. 1984) (“Implied terms are not favored in the law” unless “necessary to effectuate the intention of the parties”). Mr. Letts lacks standing to bring a breach of contract claim when the contract at issue affords him no protected interest in how the City uses its water and sewer revenues.⁵

Moreover, other than any rights acquired by contract, a Non-Resident water and sewer customer has no rights against the city. *Childs v. City of Columbia*, 87 S.C. 566, 571, 70 S.E. 296, 298 (1911); see also *Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 686 (2001); *Calcaterra v. City of Columbia*, 315 S.C. 196, 198, 432 S.E.2d 498, 499 (1993); see also S.C. Code Ann. § 5-31-1910. Non-Residents do not enjoy any statutory rights unless the statute expressly applies to Non-Residents. *Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 687 (2001). In *Sloan*, the court rejected the plaintiff's contention that the requirement of reasonable water and sewer charges found in S.C. Code Ann. § 5-31-670 applied to non-resident customers. 347 S.C. 324, 330, 555 S.E.2d 684, 687 (2001). The statute referred to water and sewer charges in a generic sense with no distinction between resident and non-resident

⁵ For the same reason, Mr. Letts lacks standing to assert a taking of property without just compensation and a violation of due process. See section 5 of this Order, *infra*.

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customers. *Id.* The court held that it did not apply to non-resident charges because the statute did not specifically refer to non-residents. *Id.* Likewise, the Service Fee Statute makes no mention of charges to non-residents. Mr. Letts lacks standing to bring his claim under the Service Fee Statute.

As for Mr. Letts' claim under the *Brown* line of cases, the *Brown* test addresses whether a uniform service charge, as authorized under S.C. Code Ann. § 5-7-30, is valid. *C.R. Campbell Const. Co. Inc. v. City of Charleston*, 325 S.C. 235, 236, 481 S.E.2d 437, 438 (1997). Pursuant to S.C. Code Ann. § 5-7-30, a municipality is empowered to exercise police power; however, such power "shall not extend the effect of the laws of the municipality beyond its corporate boundaries." Thus, S.C. Code Ann. § 5-7-30 does not govern charges to customers who reside outside of the City's corporate limits.

The operative statute applicable to Non-Residents is S.C. Code Ann. § 5-7-60, which authorizes cities to "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 with any individual" If the City chooses to provide water and sewer service to Non-Residents, it is obligated "to sell its surplus water for the sole benefit of the city at the highest price obtainable." *Childs*, at 571, 298 (emphasis added). Absent any sort of contract provision, a municipality is not limited as to how revenues derived from non-resident water rates may be expended. 2008 S.C. AG LEXIS 117 (Aug. 18, 2008) (opining that municipalities are not limited in how revenues collected from non-residents are used). It follows that *Brown* and its progeny do not apply to charges for water and sewer service to Non-Resident customers. See 1989 S.C. A.G. LEXIS 168, * 7 (July 17, 1989) (opining that "uniform service fee" under S.C. Code Ann. § 5-7-30 not applicable to non-resident

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utility rates). Thus, Mr. Letts lacks standing to challenge the City's use of its water and sewer revenues under *Brown*.

c. The Public Importance Exception

The City contends that Mr. Azar and Mr. Letts fail to meet the test for the "public importance" exception to constitutional standing requirements. I agree.

The South Carolina Supreme Court has recognized a "public importance" exception to constitutional standing requirements. *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). Standing may be conferred "when an issue is of such public importance as to require its resolution for future guidance." *Id.* Not every legislative or executive action rises to the level of importance great enough to confer standing. *Id.* at 199, 341. The issue presented must be significant and "of wide concern." *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Additionally, "... the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." *ATC South*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). The issue presented must be of a public nature, not some mere private interest. *Id.*

A claim that the City has breached the terms of a private contract for water and sewer service is not public in nature. *See Sloan v. Greenville County*, 356 S.C. 531, 545, 590 S.E.2d 338, 346 (Ct. App. 2003) (finding that the "public importance" exception applied because the plaintiff was bringing his claims "not as a private individual seeking redress under the terms of a particular contract," but "to prevent the County from awarding future public works contracts in the manner employed in the present case.") Mr. Azar and Mr. Letts are bringing a breach of contract claim as private individuals seeking redress under the terms of an express contract. The "public importance" exception has no application to a breach of contract claim.

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In determining whether the “public importance” exception applies, the court must engage in a “cautious balancing” of competing interests. *ATC South*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). In *Sloan v. Sanford*, the South Carolina Supreme Court explained this balancing process as follows:

An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits. *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

Messrs. Azar and Letts’ remaining claims fall outside of the “public importance” exception. The “public importance” exception has been recognized only where the relief sought is purely injunctive or declaratory. *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012). In this case, Plaintiffs seek more than an injunction preventing future unlawful action, or a declaration that such action is unlawful. They are asking this Court for an order requiring the City to recover monies that have already been budgeted, allocated, and spent over the past three years, and to direct the City to use this money solely for improvements to its wastewater system. This relief is far more expansive than any case where the “public importance” exception was granted. Therefore, Plaintiffs have postured themselves in a manner where the exception does not apply.

In *Freemantle v. Preston*, the South Carolina Supreme Court frowned upon the plaintiff’s invocation of the “public importance” exception when he asked for monetary relief. 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012). The Court emphasized that the “nexus between the public importance exception and the need for future guidance from the Court is invariably linked to a need for and entitlement to injunctive relief.” *Id.* “That Appellant sought monetary damages for

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himself in his common law causes of action, while claiming to represent the taxpayers ..., directly conflicts with the purpose and spirit of the public importance exception.” *Id.* Here, the Plaintiffs seek injunctive relief, yet the relief sought is an order directing the City to refund allegedly misspent monies. That the Plaintiffs ask this Court not to refund the monies directly to the fee payers, but to place this refunded money in a common fund, does not transform Plaintiffs’ claims into a matter of public interest.

Further, by demanding that the City deposit millions of dollars in a common fund and dictating that the money should then be used specifically for utility improvements as opposed to other equally important uses, Plaintiffs are in effect seeking to impose their own personal views on how the City’s utility ought to be managed, and in the process, significantly disrupt the City’s financial condition. Plaintiffs have no inherent right to direct municipal affairs. *Ancrum v. Camden Water, Light & Ice Co.*, 82 S.C. 284, 293, 64 S.E. 151, 154 (1909). Plaintiffs want this court to exercise its power in a manner that goes well beyond a determination of whether the City’s actions are lawful. What Plaintiffs seek impermissibly intrudes upon the City’s legislative discretion. *See Sanders v. County Commissioners*, 7 S.C. 359, 363-364, 1876 S.C. LEXIS 52 (1876) (holding that a court cannot exercise the discretion of a legislative body). This sort of overreaching diminishes any justification for casting Plaintiffs’ claims as a public issue of great importance. *See ATC South*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008) (holding that plaintiff failed to meet public importance exception because it was “a disgruntled competitor, nothing more.”).

Moreover, the City no longer disputes Mr. Cumberland’s standing to bring all claims. Consequently, the claims against the City are not lost by the dismissal of Messrs. Azar and Letts from this case. *See ATC South, Inc.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008) (“... the

matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.”). Messrs. Azar and Letts are dismissed from this case, leaving Mr. Cumberland as the sole Plaintiff.

2. BREACH OF CONTRACT

The City argues that the Plaintiff has, as a matter of law, failed to establish that the City breached its Service Contract by spending water and sewer revenues in the manner that it does. I agree. Nothing in Mr. Cumberland’s contract with the City contains any sort of express condition that restricts the City’s use of collected revenues from water and sewer charges in any manner whatsoever. There is no language in the contract that could be construed as incorporating the Service Fee Statute or the *Brown* test. See *Stevens Aviation, Inc. v. DynCorp Int’l LLC*, 394 S.C. 300, 307-08, 715 S.E.2d 655, 659 (Ct. App. 2011) (“To incorporate the terms of extrinsic material, the contract must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract”). Nor is there any reason for this Court to hold that the Service Fee Statute or *Brown* is an implied term of the contract. See *Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 101, 311 S.E.2d 91, 94 (Ct. App. 1984) (“Implied terms are not favored in the law,” and recognized only “when necessary to effectuate the intention of the parties.”). Without any such express or implied term in the Service Contract, Plaintiff cannot establish that a breach of the Service Contract occurred.⁶

⁶ What is more, Mr. Cumberland cannot successfully argue that the Service Fee Statute creates a contractual right in and of itself. There is a well-established presumption in South Carolina that “statutes do not create contractual rights.” *Ahrens v. South Carolina Police Officers Retirement Sys.*, 392 S.C. 340, 349, 709 S.E.2d 54, 58 (2011). The only way the Legislature can create contractual rights in a statute is “through the express language of the statute.” *Id.* at 349, 59. The statute must include unambiguous language that demonstrates legislative intent to create a binding contract. *Layman v. South Carolina*, 368 S.C. 631, 639, 630 S.E.2d 265, 269 (2006). The Service Fee Statute does not use terms indicative of a contract. Compare *Layman*, 368 S.C. at 639-642, 630 S.E.2d at 269-271. Thus, Mr. Cumberland cannot rely on the Service Fee Statute itself to create a contract that was allegedly breached by the City.

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3. VALID FEE OR ILLEGAL TAX

Plaintiff argues that *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992), as applied to municipalities in *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 236 481 S.E.2d 437, 438 (1997) is applicable to the City's water and sewer charges and that the City's water and sewer charges violate this test. Consequently, the City's water and sewer charges are allegedly an illegal tax. The City argues that its water and sewer charges are a valid fee and not a tax, and further, that the *Brown* test is inapplicable to the City's water and sewer service charges.

A fee is a charge in exchange for a particular service that benefits the person paying it in a manner not shared by the general public, whereas taxes are imposed on all property for the maintenance of government. *Robinson v. Richland County Council*, 293 S.C. 27, 33, 358 S.E.2d 392, 396 (1987); *Casey v. Richland County Council*, 282 S.C. 387, 390, 320 S.E.2d 443, 444 (1984). Here, Plaintiff has entered into a contract with the City to receive water and sewer supply delivered through the City's water and sewer infrastructure. In return for this access to and use of City property and consumption of water supply, he pays a monthly base rate for up to 300 gallons of water used and an additional rate based upon actual consumption beyond 300 gallons per month. For sewer, he also pays a base rate and an additional rate based upon cubic feet of wastewater created. In other words, Plaintiff has a *quid pro quo* arrangement with the City where he receives the benefit of water and sewer in exchange for monetary payment. Thus, the City's water and sewer rates clearly constitute a lawful fee.

Plaintiff does not dispute that he has a contractual arrangement with the City in which he pays a monthly charge in return for consumption of water and collection of wastewater. His dispute lies in how the City uses its water and sewer revenues. Plaintiff argues that the City

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cannot spend monies from its water and sewer enterprise fund in the manner that it does, and turns to *Brown v. Horry County* as a means to control the City's expenditures. 308 S.C. 180, 417 S.E.2d 565 (1992).

The City argues that the *Brown* test does not apply to municipal water and sewer charges. I agree. In *Brown*, the plaintiff challenged a road maintenance fee imposed upon owners of motor vehicles in Horry County. 308 S.C. 180, 417 S.E.2d 565, 566 (1992). The revenues derived from the fee were dedicated to improving the County road system. *Id.* at 182, 566. At issue in *Brown* was whether Horry County's road maintenance fee was a uniform service charge or a tax. *Id.* The court crafted the following test to determine if the particular road maintenance fee was a valid uniform service charge and not a tax:

(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, 236 481 S.E.2d 437, 438 (1997) citing to *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992).

Brown is inapplicable for several reasons.

First, *Brown* and its progeny concern situations where the benefit derived from paying the fee was not immediately or directly received by the fee payer.⁷ Thus, the central issue in *Brown* was whether the payer of the charge received a benefit from the proceeds of the charge. *Brown*,

⁷ This test has been applied in challenges to the imposition of a real estate transfer fee, a road maintenance fee, a solid waste assessment, and a sewer impact fee. See, e.g., *Ford v. Georgetown County Water & Sewer District*, 341 S.C. 10, 532 S.E.2d 873 (2000) (sewer impact fee imposed to pay for capital improvements to sewer system); *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*, 336 S.C. 162, 519 S.E.2d 561 (1999) (sewer impact fee imposed to pay for sewer improvements); *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997) (real estate transfer fee imposed to fund acquisition, improvement, operation and maintenance of parks and public recreational facilities); *Fairway Ford v. County of Greenville*, 324 S.C. 84, 476 S.E.2d 490 (1996) (motor vehicle license plate fee imposed to fund road improvements); *Skyscraper Corp. v. County of Newberry*, 323 S.C. 412, 475 S.E.2d 764 (1996) (solid waste disposal fee imposed to pay for garbage disposal); *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992) (revenues of road maintenance fee to be used for maintenance and improvement of the county road system).

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308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992). Nowhere in these cases did the *Brown* test apply to a *quid pro quo* exchange in the receipt of a commodity for payment of a monthly service charge. The benefit Plaintiff receives under his contractual arrangement is not in how the City expends the revenue derived from water and sewer fees. The benefit is in the immediate delivery of water and sewer service when Plaintiff turns on the faucet within his residence. In such a situation, it is unnecessary to apply the *Brown* test.

The South Carolina Supreme Court made this distinction in *BellSouth Telecommunications v. City of Orangeburg*, in which BellSouth challenged a franchise fee as an illegal tax. 337 S.C. 35, 522 S.E.2d 804 (1999). The franchise fee was imposed in exchange for BellSouth's use of the City's streets for placement of telecommunications equipment. The court held that in situations "where the benefit to the payer derives not from the municipality's use of the revenue but is a benefit given directly and solely to the [payer] in exchange for the fee," the *Brown* test is irrelevant. *BellSouth*, at 39-40, 806. Likewise, Plaintiff receives the direct benefit of access to and use of water and sewer infrastructure in exchange for a monthly fee based upon his actual consumption of such service; therefore, *Brown* is irrelevant.

Moreover, it is well settled that a monthly water or sewer charge is defined by our courts not as a tax or assessment, but rather, as a rent or charge for services rendered, collected merely as compensation by those who choose to receive and use the water. *Ruggles v. Padgett*, 240 S.C. 494, 510, 126 S.E.2d 553, 561 (1962); *Simons v. City Council of Charleston*, 181 S.C. 353, 358, 187 S.E. 545, 547 (1936); *Green v. City of Rock Hill*, 149 S.C. 234, 264, 147 S.E. 346; 357 (1929). Under the specific statutory authority of S.C. Code § 5-31-610, S.C. Code Ann. § 5-31-20, and S.C. Code Ann. § 5-31-810, the City of Columbia operates its water and sewer utility as a business enterprise like any other utility. *Sossamon v. Greater Gaffney Metro Utilities Area*,

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236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960); *Simons*, 181 S.C. 353, 357, 187 S.E. 545, 546 (1936); *Green*, 149 S.C. 234, 264, 147 S.E. 346, 356-57 (1929). A municipality may charge a utility rate that will yield a reasonable profit, just the same as any other utility. *Mims v. Edgefield County Water & Sewer Authority*, 278 S.C. 554, 556, 299 S.E.2d 484, 486 (1983); *Sossamon*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960); *Simons*, 181 S.C. 353, 357, 187 S.E. 545, 546 (1936); 64 AM JUR 2D *Public Utilities* § 133. The only limitation on water and sewer rates is found in in S.C. Code Ann. § 5-31-670, which requires municipal water and sewer charges to be reasonable.⁸ A municipal utility rate that generates more revenue than is needed to operate the system is not unreasonable. *Simons*, at 357, 546. So long as the City's water and sewer rates are reasonable, the court will not interfere with the City's discretion in how it uses its water and sewer revenues. *Id.* at 547.

The fact that the City realizes a profit from its utility and transfers a portion of its net revenues to its general fund does not make its water and sewer charges a tax. The Ohio Supreme Court's analysis is particularly instructive:

The rate charged in excess of cost is not a tax or in the nature of a tax, regardless of how the fund derived therefrom is ultimately used. A municipality, acting in a proprietary capacity, cannot impose taxes. While thus engaged, it is engaged in business but not in the business of government. A municipality may impose and collect taxes only when acting as an arm or agency of the state, but when engaged in business, it does not so act. A tax is a tribute levied for the support of government. A rate charged for a public utility service or product is not a tax, but a price at which and for which the public utility service or product, is sold and the excess charged over and above cost, as a profit, enters into and becomes a part of the price. Payment of a tax is an obligation imposed. Payment of a price for a utility product or service furnished by a municipality is voluntarily assumed. *Niles v. Union Ice Corp.*, 133 Ohio St. 169, 182-83, 12 N.E.2d 483, 489 (1938).

⁸ This rule of reasonableness is consistent with common and statutory law governing public utilities. "It is well recognized that a public utility is entitled to a reasonable compensation in return for the service that it furnishes and that it may exact reasonable charges in accordance with the service provided or the rates established therefor." 64 AM JUR 2D *Public Utilities* § 38.

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“Since the rate charged is not a tax in its inception, ultimate use of surplus funds derived therefrom for the support of municipal government will not convert it into taxes or cause it to assume the nature of taxes.” *Id.*; see also *Cox v. Bates*, 237 S.C. 198, 215 (1960) (“where a surplus remains after payment of appropriations, it may be appropriated to other purposes.”); *Simons*, 181 SC 353, 357 (1936) (stating that a municipal utility that generates more revenue than cost of operation is not unreasonable); AM JUR 2D *Municipal Corp, Counties, Other Political Subdivision* § 515 (“Net revenue derived from a municipally owned utility belongs to the municipality and may be used for any municipal purpose.”); McQuillin, MUNICIPAL CORPORATIONS, § 35:59 (“A city is entitled to a reasonable profit and it may even use that profit for other valid municipal uses.”). The City’s water and sewer rates are not a tax.

Plaintiff asks this Court to ignore well-settled law establishing the City’s right to a profit by insisting that its profit be used entirely for some undetermined expense of the utility, even though the City Council has, in its discretion as a legislative body and as a proprietary owner, adopted operating budgets and capital improvement plans that already provide for its utility. “Profit” is defined as “excess of revenues over expenditures” or “gain.” BLACK’S LAW DICTIONARY (5th ed. 1979). Plaintiff seeks to extinguish the City’s right to charge a reasonable water and sewer rate pursuant to S.C. Code Ann. § 5-31-670. See S.C. Const. art. VIII, § 7 (“all laws concerning local government shall be liberally construed in their favor.”). A reasonable water and sewer rate includes a fair profit. *Mims*, 278 S.C. 554, 556, 299 S.E.2d 484, 486 (1983); *Sossamon*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960); *Simons*, 181 S.C. 353, 357, 187 S.E. 545, 546 (1936); 64 AM JUR 2D *Public Utilities* § 133. The City, in its discretion, has chosen to reinvest most of its profits back into its utility, but it also has decided to appropriate \$4.5 million dollars of its profits to offset the costs of general government operations and thereby

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avoid raising property taxes. This the City may lawfully do. See *Green v. City of Rock Hill*, 149 S.C. 234, 262, 147 S.E.2d 346, 356 (1929) (stating that municipality, in operating and maintaining its property, “has discretion in the choice of means and methods”); *McKinney v. Greenville*, 262 S.C. 227, 247, 203 S.E.2d 680, 690 (1974) (“... courts will not interfere with legislatively declared policy and legislatively approved functions of government unless the judicial mind is convinced that action by the legislative body is without reasonable relation to the public interest or welfare and is beyond the scope of legitimate government activity”).

Even if *Brown* did apply to water and sewer charges, the City’s Non-Resident water and sewer charges nonetheless fall outside of the ambit of *Brown*. As discussed above, *Brown* concerns uniform service fees chargeable within a city’s corporate limits. See S.C. Code Ann. § 5-7-30 (authorizing uniform service fees within a municipality’s corporate limits). The City’s revenue generated from Non-Resident charges totaled approximately \$64.1 million dollars in FY 2008/2009, \$66 million dollars in FY 2009/2010, and \$65.7 million dollars in FY 2010/2011. The City’s accounting practices are consistent with generally accepted accounting principles pertaining to local governments, but do not provide a means to ascertain whether Non-Resident or Resident revenues were used for the expenditures challenged by the Plaintiff. Therefore, Plaintiff cannot show that the City’s use of revenues he challenges is derived from Resident water and sewer customers. Without this showing, Plaintiff’s challenge is unavailing. The amount of revenue generated by Non-Resident customers more than covers the expenditures Plaintiff complains of.

4. THE SERVICE FEE STATUTE

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Plaintiff argues that the City's water and sewer charges violate S.C. Code Ann. § 6-1-330 ("Service Fee Statute"), which governs local fees. The Service Fee Statute defines "service or user fee" as "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," and "also includes 'uniform service charges.'" S.C. Code Ann. § 6-1-300. The Service Fee Statute states in relevant part:

(A) A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. A local governing body must provide public notice of any new service or user fee being considered and the governing body is required to hold a public hearing on any proposed new service or user fee prior to final adoption of any new service or user fee. Public comment must be received by the governing body prior to the final reading of the ordinance to adopt a new service or user fee. A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.

(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. If the revenue generated by a fee is five percent or more of the imposing entity's prior fiscal year's total budget, the proceeds of the fee must be kept in a separate and segregated fund from the general fund of the imposing governmental entity.

The City argues that the Service Fee Statute does not apply to its water and sewer charges. I agree.

The Service Fee Statute was enacted as part of Act 138 of the South Carolina General Assembly, 112th Session (1997-1998), with an effective date of July 1, 1997, except as otherwise provided. Subsection (A) of the Service Fee Statute provides that "a fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by

the enacting local governing body, notwithstanding the provisions of this section.” S.C. Code Ann. § 6-1-330(A). The statute has prospective effect only.⁹ *See, e.g., C.R. Campbell*, 325 S.C. 235, 481 S.E.2d 437, 438 fn. 2 (1997) (stating that law enacted after City’s enactment of real estate transfer fee does not apply).

In applying a statute, words must be given their plain and ordinary meaning without resort to a subtle or forced construction that would limit or expand the statute’s operation. *Harris v. Anderson County Sheriff’s Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). The word “adopt” is defined as “to accept, appropriate, choose, or select ... to make that one’s own (property or act) which was not so originally.” BLACK’S LAW DICTIONARY (5th ed. 1979). In other words, to “adopt” a fee is to establish a fee for the first time. The language of the Service Fee Statute reinforces this definition by referring to “adopt” or “adoption” of a “new service or user fee.” *See* S.C. Code Ann. 6-1-300(A) (“A local governing body must provide public notice of any new service or user fee” and “hold a public hearing prior to final adoption of any new service or user fee”).

The City’s Water and Sewer Rate Ordinances were adopted long before the effective date of the Service Fee Statute. The City first enacted its water rate ordinance in 1895 and a sewer rate ordinance in 1970. Each subsequent codification of the City’s ordinances contained the same or similar language explicitly stating that ordinances enacted prior to a particular codification “shall be considered as continuations thereof and not as new enactments.” § 1-3, Columbia City Code (1998). Further, the City’s 1998 codification states that the City Council’s

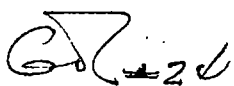
⁹ Even without this specific provision, “absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature.” *Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). “A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability.” *Id.* A statute is procedural in nature where it provides for a procedure in court or provides for a means to enforce a right. *Id.* S.C. Code Ann. § 6-1-330 does neither of these things; instead, it limits local governments’ exercise of police power, and imposes new obligations or duties upon local governments. When a statute impairs pre-existing rights, or imposes new obligations or duties, the statute has prospective effect. *Edwards*, at 579, 466.

enactment of the Code does not affect any existing ordinance “prescribing rates, charges and fees for city services.” § 1-11, Columbia City Code (1998). Thus, the City’s codification of its ordinances in 1998 does not amount to an adoption of water and sewer fees subject to the Service Fee Statute.

The City has amended its water and sewer rate ordinances on several occasions after the effective date of the Service Fee Statute. However, S.C. Code Ann. § 6-1-330 does not apply to amendments. Section 6-1-330(A) provides that fees “adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.” (emphasis added). No mention is made of amendments to a pre-existing ordinance that already established a fee. Plaintiff cannot read the word “amendment” into the statute. *See Kinard v. Moore*, 220 S.C. 376, 68 S.E.2d 321, ***14 (1951) (“The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy”). The legislature could have added the word “amend” or “amendment” to this section but chose not to do so.¹⁰ And the term “adopt” cannot be read to include amendments without eviscerating the Service Fee Statute’s grandfathering of fees adopted or imposed before December 31, 1996 until repealed.

The City’s amendments to its long-standing water and sewer rate ordinances are not subject to the limitations found in S.C. Code Ann. § 6-1-330(B). To hold otherwise would upset the stability and continuity of pre-existing fee structures that the legislature intended to preserve under subsection (A) of the Service Fee Statute. *See Sloan v. S.C. Bd. of Physical Therapy Exam’rs*, 370 S.C. 452, 468; 636 S.E.2d 598, 607 (2006) (“A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of

¹⁰ Within Act 138, compare S.C. Code Ann. § 6-1-330(B) with S.C. Code Ann. § 6-1-315, in which local governments are authorized to “impose a business license tax or increase the rate of a business license tax.” (emphasis added).



lawmakers”); *see also* S.C. Const. art. VIII, § 7 (“all laws concerning local government shall be liberally construed in their favor.”).

Even assuming that the City’s amendments to its Water Rate Ordinance and Sewer Rate Ordinance enacted in 2008, 2010 and 2011 would trigger the fee limitations in subsection (B) of the Service Fee Statute, subsection (B) does not, by its plain language, apply to water and sewer charges. S.C. Code Ann. § 6-1-300 defines “service or user fee” as “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,” and “also includes ‘uniform service charges.’” This definition of “service or user fee” is broad, and the City concedes that its water and sewer charges meet this statutory definition.

Nevertheless, subsection (B) narrows the applicability of its requirements to a “service or user fee imposed to finance the provision of public services.” The word “impose” is defined as to “establish as something to be obeyed or complied with; enforce.” *Collins English Dictionary - Complete & Unabridged 10th Edition* (HarperCollins Publishers 2013) (available at <http://dictionary.reference.com/browse/impose>). The word “public” is defined as “relating to, or concerning the people as a whole.” *Id.* at <http://dictionary.reference.com/browse/public>. Thus, subsection (B) applies to only a set fee that a person has no choice but to pay, for services that are public as opposed to private in nature. Most municipal fees fall under subsection (B), such as the road maintenance fees, solid waste fees, and sewer impact fees challenged in the *Brown* line of cases; however, the characteristics of water and sewer charges take such charges out of the reach of subsection (B).

As stated earlier, no one is commanded or required to purchase water and sewer from the City. *See Ruggles v. Padgett*, 240 S.C. 494, 510, 126 S.E.2d 553, 561 (1962) (holding that a

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water charge is a rent or charge for services rendered, collected merely as compensation by those who choose to receive and use the water). If a person wishes to receive water and sewer from the City, he or she submits an application for a water service contract to the City. The contract is voluntary. Moreover, a water and sewer customer is paying for access to the City's water and sewer system for water and sewer services actually consumed.¹¹ As a result, the amount of the fee paid by a water and sewer customer can be controlled by the customer. A pre-determined water and sewer charge is not unilaterally imposed on anyone.

Further, through a private contract with individual customers, the City sells a retail commodity. *Sossamon*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960); *Simons*, 181 S.C. 353, 357, 187 S.E. 545, 546 (1936); *Green*, 149 S.C. 234, 264, 147 S.E. 346, 356-57 (1929). "A contract has been defined as a private, voluntary, allocation by which two or more parties distribute specific entitlements and obligations." 17A AM. JUR. 2D *Contracts* § 1 (2004). Water and sewer service is a voluntary contractual sale entered for the benefit of the parties. See *Peebles v. South Carolina Power Co.*, 166 S.C. 150, 156, 164 S.E. 605, 607 (1932) ("... parties contract for their own benefit, and not for that of others not parties to the contract ..."). Subsection (B) of the Service Fee Statute applies to public services, not the sale of a commodity under the terms of a contract, utilizing the City's property, i.e., water and sewer infrastructure, to access such commodity. Under the facts of this case, subsection (B) of the Service Fee Statute does not apply to the City's water and sewer charges.

Nevertheless, if the Service Fee Statute did apply to monthly water and sewer charges generally, the Service Fee Statute does not apply to revenues derived from Non-Resident customers. *Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 687 (2001); see also

¹¹ Water and sewer charges are unique in comparison to most other municipal fees; however, the City has identified other charges similar in nature to its water and sewer charges, such as monthly or daily charges for access and use of the City's parking garages, and monthly or daily charges for access and use of the City's Drew Wellness Center.

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2012 S.C. AG LEXIS 79 (Aug. 23, 2012) (opining that the Service Fee Statute applies to fees imposed within the city limits, but not for fees imposed outside the city limits). The Service Fee Statute makes no mention of charges to Non-Residents. Consequently, the City may use its water and sewer revenues derived from Non-Resident water and sewer charges however it chooses, including those expenditures challenged by Plaintiff. Because the City's accounting practices do not provide a means to ascertain whether Non-Resident or Resident revenues were used for the expenditures challenged by Plaintiff, he cannot show that the City's use of revenues derived from Resident water and sewer customers violates S.C. Code Ann. § 6-1-330(B). The City's water and sewer revenues derived from Non-Resident charges more than cover the expenditures Plaintiff complains of.

Even if the City's use of water and sewer revenue to fund its economic development activities could be traced to revenues derived from fees paid by Resident customers, such expenditures are lawful under the Service Fee Statute.¹² Section 6-1-330(B) states that "the revenue generated 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 services or program for which the fee was paid." Plaintiff argues that the City can only spend water and sewer revenues for expenses "directly attributable to supply, treatment and distribution of water" and "collection, treatment and disposal of wastewater." Plaintiff takes an overly narrow view of how service fee proceeds must be used under the Service Fee Statute.

¹² Plaintiff also asserted in its Memorandum of Law and during oral argument that the City funds "community promotions," such as festivals, from its water and sewer enterprise fund. However, the former City Manager testified that the City has not funded community promotions from its water and sewer enterprise fund in the past three fiscal years, and Plaintiff did not bring forward any evidence to dispute his statement. Because the applicable statute of limitations is three years, any expenditure made by the City for community promotions beyond three years is not subject to judicial review. Similarly, Plaintiff makes a passing reference in his Memorandum of Law to the City using water and sewer funds to purchase a building, Washington Square, which mostly houses the utility's offices. The evidence shows that this purchase occurred prior to 2007, well past the three-year statute of limitations.

The key phrase at issue within Section 6-1-330(B) is its directive that “the revenue generated 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 services or program for which the fee was paid.” (emphasis added). According to its plain and ordinary meaning, the word “related” is commonly defined as “connected by reason of an established or discoverable relation,” with “relation” defined as an “aspect or quality (as resemblance) that connects two or more things or parts as being or belonging or working together or as being of the same kind.” See Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/related?show=0&t=1369940142> and <http://www.merriam-webster.com/dictionary/relation>. Because “all laws concerning local government shall be liberally construed in their favor,” a municipality’s determination of what expenses are related to the provision of water and sewer service should be given deference. S.C. Const. art. VIII, § 7.

The purpose of a municipal water and sewer utility “is as comprehensive as the public interests which the supply of water ... tends to promote.” *Green v. City of Rock Hill*, 149 S.C. 234, 264, 147 S.E. 346, 357 (1929). “The general purpose of a water supply is to promote the prosperity of a city.” *Id.*; *Ancrum v. Camden Water*, 82 S.C. 284, 295, 64 S.E. 151, 155 (1909); *Babb v. Green*, 222 S.C. 534, 73 S.E.2d 699 (1952). A water and sewer utility promotes prosperity “by lowering the rate of insurance, increasing the general sense of security, and therefore the general happiness, diminishing the risk of numbers of persons being thrown out of employment, and generally in giving steadiness and confidence to the life and the enterprises of a city.” *Green*, 149 S.C. at 264-65, 357. Another important function of a municipal water and sewer utility is to serve the needs of industry “upon which the prosperity of so many modern

urban communities vitally depends.” *Id.* Adequate water supply is an important economic development tool. The City’s utility attracts businesses to the Midlands region.

The undisputed evidence in this case shows that the City’s economic development office and economic development special project fund serves to promote economic development in the region. New businesses locating in the region help grow the City’s water and sewer customer base. Economic development special projects, such as the downtown business improvement district, works to enhance new development or redevelopment of Main Street. These economic development activities are related to the provision of water and sewer service, and therefore, the City’s expenditures from its water and sewer revenues to fund its economic development office and economic development special projects are lawful under the Service Fee Statute.

The undisputed evidence in this case shows that the City’s office of business opportunities builds the capacity of minority businesses being able to bid on and compete for utility construction projects. The former City Manager testified that coaching small businesses how to bid on water and sewer projects increases the number of bids received, which will strengthen the local economy and over time, lower the City’s construction costs. The City’s office of business opportunities is related to the provision of water and sewer service, and therefore, the City’s expenditures from its water and sewer revenues to fund this office are lawful under the Service Fee Statute.

The undisputed evidence in this case shows that the City’s four development corporations assist the City in promoting and improving the growth and development of business concerns through the strengthening of the economic and residential base of the community. The Columbia Development Corporation was instrumental in transforming a declining warehouse district into a successful entertainment district. The Eau Claire Development Corporation provides assistance

in the conservation and redevelopment of neighborhoods located in North Columbia. It developed commercial sites in the North Columbia area. The Columbia Housing Development Corporation assists the City in the development of housing and to promote growth in the residential base of the community. The TN Development Corporation promotes growth and develops opportunities for affordable rental housing. The former City Manager testified that these latter two corporations are important to economic development because the appearance of neighborhoods and affordable housing is a major driver when people look to relocate a business or to expand their business in the Columbia area. The City's development corporations are related to the provision of water and sewer service, and therefore, the City's expenditures from its water and sewer revenues to fund these corporations are lawful under the Service Fee Statute.

Lastly, the Service Fee Statute does not prohibit the City's transfer of \$4.5 million dollars from its water and sewer enterprise fund to its general fund. "It is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). All statutes covering the same subject must be given effect, if it can be done by any reasonable construction. *Hodges v. Rainey*, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000); *Cullum Mechanical Constr., Inc. v. Charleston*, 272 S.C. 553, 557, 253 S.E.2d 106, 108 (1979). The City's statutory authority under the Revenue Bond Refinancing Act of 1937 and the Revenue Bond Act for Utilities found within Title 6 (collectively referred to as the "Revenue Bond Acts") must be read together in *pari materia* with the Service Fee Statute in order to determine whether the City's transfer is unlawful.

The plain language of the Service Fee Statute states that revenue derived from a service fee "must be used to pay costs related to the provision of the service or program for which the

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fee was paid.” Notably, this language does not expressly state that a local governing body cannot use any revenues left over for some other purpose after costs are met.¹³ Thus, at the outset, no clear conflict exists between the Service Fee Statute and the Revenue Bond Acts. The Service Fee Statute does not prevent the City from using any surplus water and sewer revenues for purposes other than the costs of the water and sewer system. See S.C. Const. art. VIII, § 7 (“all laws concerning local government shall be liberally construed in their favor”).

Under the Revenue Bond Acts, a municipality is authorized to issue revenue bonds for the acquisition, construction, improvement, enlargement, and repair of its water and sewer utility. S.C. Code Ann. § 6-21-190; S.C. Code Ann. § 6-17-30. Municipalities may pledge its water and sewer revenues to secure such bond issues. S.C. Code Ann. § 6-17-30; S.C. Code Ann. § 6-21-340. Any surplus funds remaining after application of revenues to payments of principal and interest, operation and maintenance, and reserves for depreciation and improvements “shall be disposed of by the [City] as it may determine from time to time to be for the best interest of the [City].” S.C. Code Ann. § 6-21-440. This statutory authority cannot be impaired, as evidenced by the legislature’s use of the word “shall” in conferring such power. This provision “shall be liberally construed.” S.C. Code Ann. § 6-21-570.

Reading the Service Fee Statute together with S.C. Code Ann. § 6-21-440, the City’s transfer of surplus water and sewer revenues from its water and sewer enterprise fund to its general fund is lawful. The City has outstanding revenue bonds and has, through its Bond Ordinance and Resolution, exercised its legislative authority to apply surplus water and sewer revenues “as Council determines from time to time to be in the best interest of the City.” S.C.

¹³ In contrast, other provisions within Act 138, which enacted the Service Fee Statute and other provisions relating to local government taxes and fees, used restrictive language. For example, under provisions authorizing a local accommodations tax and a local hospitality tax, the legislature directed that the revenue generated by these taxes “must be used exclusively for [certain specified] purposes.” Act 138, § 6-1-520 & § 6-1-730 (June 13, 1997) (emphasis added).

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Code Ann. § 6-21-440. Thus, under the facts of this case, the City is authorized to use surplus water and sewer revenues in a manner it believes to be best for the City, and the Service Fee Statute does not interfere with this discretion.

5. RESIDUAL CONSTITUTIONAL CLAIMS

Within his third cause of action alleging unconstitutional collection of water and sewer charges, Plaintiff asserts that the City's actions constitute a taking of property without just compensation, and a violation of due process and equal protection under the law. To the extent that these constitutional claims have not been disposed of by virtue of this Court's decision regarding whether the City's water and sewer charges violate *Brown* and the Service Fee Statute, these claims lack merit.¹⁴

Government action can affect no taking unless it has deprived an owner of a property interest. *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 283-284, 721 S.E.2d 423, 427 (2012); *Hardin v. S.C. DOT*, 371 S.C. 598, 609, 641 S.E.2d 437, 443 fn. 4 (2007). Likewise, to prove a denial of due process, a party must show that he was deprived of an interest in life, liberty or property. *Grimsley*, 396 S.C. 276, 283-284, 721 S.E.2d 423, 427 (2012); *Robert K. v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Because Plaintiff has not come forward with a valid property interest, he has failed to establish a takings claim¹⁵ or a due process claim. See *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 438, 661 S.E.2d 73, 79 (2008) ("Having found that section 9-1-1680 did not create a

¹⁴ Plaintiff, in his Memorandum of Law in Support of Summary Judgment, asserted in a conclusory fashion without citing any authority, that the City's transfer of \$4.5 million dollars to its general fund amounted to taxation without representation. Plaintiff's Second Amended Complaint alleges that the City's \$4.5 million dollar transfer constitutes an unconstitutional tax, without specifically mentioning the issue of taxation without representation. To the extent Plaintiff properly raised a claim of taxation without representation, it is denied. See *Hagley Homeowner's Ass'n. v. Hagley Water, Fire & Sewer District*, 326 S.C. 67, 75-76, 485 S.E.2d 92, 96 (1997) (denying claim of taxation without representation because "the imposition of a charge in exchange for a service does not constitute taxation for constitutional purposes.").

¹⁵ Furthermore, "it is beyond dispute that taxes and user fees are not takings." *Koontz v. St. John's River Water Management District*, 570 U.S. ___, 133 S. Ct. 2586, 2601 (2013).

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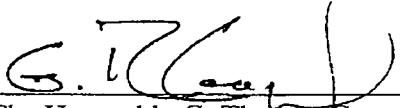
contract entitling Appellant to tax exemptions, we conclude that there are no property rights infringed upon by Act 189.”); *Hamilton v. Board of Trustees*, 282 S.C. 519, 525-526, 319 S.E.2d 717, 721 (Ct. App. 1984) (holding that no property interest in a contract existed where no contract term entitled plaintiff to future employment).

As for any equal protection claim, “if a classification is reasonably related to a proper legislative purpose and the members of each class are treated equally, any challenge under the equal protection clause fails.” *Skyscraper Corp. v. County of Newberry*, 323 S.C. 412, 417, 475 S.E.2d 764, 766 (1996). “Equal protection is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis.” *Id.* “In determining whether a statute violates equal protection, this Court accords great deference to a legislatively created classification; the classification will be upheld if it is not plainly arbitrary and there is any reasonable hypothesis to support it.” *Id.* “The party attacking an ordinance bears the burden of proving its unconstitutionality beyond reasonable doubt.” *Id.* Plaintiff has not identified what legislation has allegedly created a class or who comprises this class, nor has he alleged or explained how he has been injured by disparate treatment. Plaintiff has failed to meet his burden to establish an equal protection claim.

CONCLUSION

THEREFORE, it is ordered that Defendant’s Motion for Summary Judgment is **GRANTED** and Plaintiff’s Motion for Summary Judgment is **DENIED**.

AND IT IS SO ORDERED.


The Honorable G. Thomas Cooper
Circuit Court Judge

September 26, 2013