

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable G. Thomas Cooper
The Honorable J. Ernest Kinard

Case No. 2011-CP-40-6705

JOSEPH S. AZAR, FRANK J. CUMBERLAND, JR.
AND MICHAEL A. LETTS, INDIVIDUALLY
AND AS CLASS REPRESENTATIVES, APPELLANTS;

v.

CITY OF COLUMBIA, RESPONDENT.

**INITIAL BRIEF
OF
RESPONDENT CITY OF COLUMBIA**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	6
STANDARD OF REVIEW.....	12
ARGUMENTS	13
I. APPELLANTS IMPROPERLY APPLY CASES DECIDED UNDER <i>BROWN V. HORRY COUNTY</i> IN THEIR ARGUMENTS CONSTRUING S.C. CODE ANN. § 6-1-330	15
II. TO THE EXTENT THAT APPELLANTS ARE ATTEMPTING TO ARGUE THAT THE CITY’S USE OF REVENUE DERIVED FROM WATER AND SEWER CHARGES FAILS TO COMPLY WITH <i>C.R. CAMPBELL</i> , SUCH ARGUMENT IS UNPRESERVED FOR APPELLATE REVIEW; SHOULD THIS COURT FIND OTHERWISE, THE CIRCUIT COURT CORRECTLY RULED THAT <i>C.R. CAMPBELL</i> DOES NOT APPLY TO THE FEES AT ISSUE HERE	17
III. THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY’S WATER AND SEWER CHARGES, OR AT LEAST NON-RESIDENT CHARGES, ARE NOT SUBJECT TO S.C. CODE ANN. § 6-1-330(B)	21
A. The City’s monthly water and sewer service rate structure was enacted prior to the Service Fee Statute	22
B. Revenue derived from Non-Resident monthly service charges is not subject to S.C. Code Ann. § 6-1-330(B).....	24
IV. TO THE EXTENT THIS COURT ADDRESSES WHETHER THE CITY’S CHALLENGED USES OF REVENUE DERIVED FROM MONTHLY WATER AND SEWER CHARGES VIOLATE THE SERVICE FEE STATUTE, THE CITY’S USE OF SUCH REVENUES IS LAWFUL.....	26
A. The City’s use of Utility revenues to fund a specific public information expense and to fund economic development activities is related to the provision of water and sewer service, and therefore, lawful under the Service Fee Statute	27

B.	The City’s use of a portion of its Utility profits to defray expenses of ordinary government operations does not violate the Service Fee Statute.....	33
V.	THE CIRCUIT COURT DID NOT VIOLATE APPELLANTS’ DUE PROCESS RIGHTS.....	40
VI.	THE CIRCUIT COURT DID NOT ERR IN DENYING CLASS CERTIFICATION	41
VII.	THE CIRCUIT COURT DID NOT ERR IN DISMISSING ON SUMMARY JUDGMENT MR. LETTS AND MR. AZAR FOR LACK OF STANDING BECAUSE NO FINAL ORDER HAD BEEN ENTERED FROM A PREVIOUS HEARING ON THE CITY’S RULE 12(B)(1) MOTION TO DISMISS FOR LACK OF STANDING	45
CONCLUSION	47

TABLE OF AUTHORITIES

CASES

Federal Cases

<i>FCC v. WJR, Goodwill Station, Inc.</i> , 337 U.S. 265 (1949)	41
<i>Broussard v. Meineke Disc. Muffler Shops</i> , 155 F.3d 331 (4 th Cir. 1998)	42, 44

State Cases

<i>16 Jade St., LLC v. R. Design Constr. Co., LLC</i> 398 S.C. 338, 728 S.E.2d 448 (2012)	33, 35
<i>Abba Equip., Inc. v. Thomason</i> , 335 S.C. 477, 517 S.E.2d 235 (Ct. App. 1999)	33
<i>Ancrum v. Camden Water, Light & Ice Co.</i> , 82 S.C. 284, 64 S.E. 151 (1909)	28
<i>Babb v. Green</i> , 222 S.C. 534, 73 S.E.2d 699 (1952)	28
<i>Bean v. S.C. Cent. R.R. Co.</i> , 392 S.C. 532, 709 S.E.2d 99 (Ct. App. 2011)	8, 27, 32
<i>Beaufort County v. S.C. State Election Comm'n</i> , 395 S.C. 366, 718 S.E.2d 432 (2011)	37
<i>BellSouth Telecommunications v. City of Orangeburg</i> , 337 S.C. 35, 522 S.E.2d 804 (1999)	19
<i>Brailsford v. Brailsford</i> , 380 S.C. 443, 669 S.E.2d 342 (Ct. App. 2008)	46
<i>Brockbank v. Best Capital Corp.</i> , 341 S.C. 372, 534 S.E.2d 688 (2000)	12
<i>Brown v. Horry County</i> , 308 S.C. 180, 417 S.E.2d 565 (1992)	15, 16, 18, 19, 20
<i>Brown v. Pearson</i> , 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997)	41
<i>Calcaterra v. City of Columbia</i> , 315 S.C. 196, 432 S.E.2d 498 (1993)	33
<i>Childs v. City of Columbia</i> , 87 S.C. 566, 70 S.E. 296 (1911)	21, 37
<i>Cox v. Bates</i> , 237 S.C. 198, 116 S.E.2d 828 (1960)	34
<i>C.R. Campbell Constr. Co. v. City of Charleston</i> , 325 S.C. 235, 481 S.E.2d 437 (1997)	3, 5, 14, 15, 16, 17, 18, 19, 20, 21, 23
<i>David v. McLeod Reg. Med. Ctr.</i> , 367 S.C. 242, 626 S.E.2d 1 (2006)	12
<i>Edwards v. State Law Enforcement Div.</i> , 395 S.C. 571, 720 S.E.2d 462 (2011)	23
<i>F.B.R. Investors v. County of Charleston</i> , 303 S.C. 524, 402 S.E.2d 189 (Ct. App. 1991)	32

<i>First Sav. Bank v. McLean</i> , 314 S.C. 361, 444 S.E.2d 513 (1994)	17
<i>First Union Nat'l Bank v. Hitman</i> , 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991)	46
<i>Ford v. State Ethics Comm'n</i> , 344 S.C. 642, 545 S.E.2d 821 (2001)	46
<i>Ford v. Georgetown County Water & Sewer District</i> , 341 S.C. 10, 532 S.E.2d 873 (2000)	15, 20
<i>Gardner v. S.C. Dep't of Revenue</i> , 353 S.C. 1, 577 S.E.2d 190 (2003)	42
<i>Green v. City of Rock Hill</i> , 149 S.C. 234, 147 S.E. 346 (1929)	13, 14, 18, 25, 28, 33, 34, 37
<i>Harbit v. City of Charleston</i> , 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009)	41
<i>Harris v. Anderson County Sheriff's Office</i> , 381 S.C. 357, 673 S.E.2d 423 (2009)	16, 17
<i>Herron v. Century BMW</i> , 395 S.C. 461, 719 S.E.2d 640 (2011)	17
<i>Hilton Head Resort Four Seasons Ctr. Hor. Prop. Regime v. Resort Inv. Corp.</i> , 311 S.C. 394, 429 S.E.2d 459 (Ct. App. 1993)	46
<i>Hodges v. Rainey</i> , 341 S.C. 79, 533 S.E.2d 578 (2000)	37
<i>Kinard v. Moore</i> , 220 S.C. 376, 68 S.E.2d 321 (1951)	24
<i>J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority</i> , 336 S.C. 162, 519 S.E.2d 561 (1999)	15, 20
<i>Lister v. NationsBank of Delaware, N.A.</i> , 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997)	18
<i>Lomax v. Greenville</i> , 225 S.C. 289, 82 S.E.2d 191 (1954)	20-21
<i>Nelson v. Piggly Wiggly Central, Inc.</i> , 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010)	12
<i>Parker v. Bates</i> , 216 S.C. 52, 56 S.E.2d 723 (1949)	34
<i>Peeples v. South Carolina Power Co.</i> , 166 S.C. 150, 164 S.E. 605 (1932)	25-26
<i>Sauner v. Public Serv. Auth.</i> , 354 S.C. 397, 581 S.E.2d 161 (2003)	41
<i>Simons v. City Council of Charleston</i> , 181 S.C. 353, 187 S.E. 545 (1936)	13, 18, 25, 33, 34
<i>Sloan v. City of Conway</i> , 347 S.C. 324, 555 S.E.2d 684 (2001)	21, 24, 34
<i>Smith v. Pearson</i> , 210 S.C. 524, 43 S.E.2d 479 (1947)	32
<i>Sossamon v. Greater Gaffney Metro Utilities Area</i> , 236 S.C. 173, 113 S.E.2d 534 (1960)	13-14, 25, 33, 34, 36

<i>Southeast Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.</i> , 387 S.C. 508, 693 S.E.2d 33 (Ct. App. 2010)	12
<i>State v. Covert</i> , 368 S.C. 188, 628 S.E.2d 482 (Ct. App. 2006)	16-17
<i>State v. Dunbar</i> , 356 S.C. 138, 587 S.E.2d 691 (2003)	17
<i>Sunset Cay, LLC v. City of Folly Beach</i> , 357 S.C. 414, 593 S.E.2d 462 (2004)	36
<i>Thompson v. County of Horry</i> , 294 S.C. 81, 362 S.E.2d 646 (Ct. App. 1987)	27, 35
<i>Tucker v. S.C. Dep't of Highways & Pub. Transp.</i> , 314 S.C. 131, 442 S.E.2d 171 (1994)	32
<i>Waller v. Seabrook Island Property Owners Ass'n</i> , 300 S.C. 465, 388 S.E.2d 799 (1990)	13, 42, 44
<i>Welling v. Clinton Newberry Natural Gas Auth.</i> , 221 S.C. 417, 71 S.E.2d 7 (1952)	34
<i>Werts v. Feagle</i> , 83 S.C. 128, 65 S.E. 226 (1909)	37
<i>Woodard v. Westvaco Corp.</i> , 319 S.C. 240, 460 S.E.2d 392 (1995)	45

CONSTITUTION, STATUTES, ACTS AND RULES

S.C. Const. art. VIII, § 16	6, 36
S.C. Const. art. VIII, § 17	14, 34
S.C. Code Ann. § 5-7-30.....	20, 21
S.C. Code Ann. § 5-7-60.....	21, 37
S.C. Code Ann. § 5-31-670.....	37
S.C. Code Ann. § 5-31-1710.....	21
S.C. Code Ann. § 5-31-1910.....	21, 37
S.C. Code Ann. § 6-1-300.....	22
S.C. Code Ann. § 6-1-330.....	2, 3, 5, 14, 15, 17, 21, 23, 24, 25, 26, 27, 28, 29, 30, 35
S.C. Code Ann. § 6-17-30.....	37
S.C. Code Ann. § 6-17-180.....	38
S.C. Code Ann. § 6-21-190.....	37
S.C. Code Ann. § 6-21-340.....	37
S.C. Code Ann. § 6-21-390.....	38
S.C. Code Ann. § 6-21-440.....	38, 39
S.C. Code Ann. § 6-21-570.....	38
1971 S.C. Acts 474	44
1997 S.C. Acts 138	24, 35
Rule 12(b)(1), SCRCPP	passim
Rule 23(a), SCRCPP	41, 42, 44
Rule 58(a), SCRCPP	45, 46
Rule 61, SCRCPP.....	41
Rule 208(b)(1)(B), SCACR	17

OTHER AUTHORITIES

56 AM JUR 2D *Motions, Rules, and Orders* § 32.....41
AM JUR 2D *Municipal Corp, Counties, Other Political Subdivision* § 51534
MCQUILLIN, *Municipal Corporations*, § 35:5934
Op. Att’y Gen., 1968 S.C. A.G. LEXIS 158 (Jan. 23, 1968)34
Op. Att’y Gen., 1962 S.C. A.G. LEXIS 530 (May 4, 1962)34
Op. Att’y Gen., 1989 S.C. A.G. LEXIS 168 (July 17, 1989)21
Op. Att’y Gen., 2012 S.C. A.G. LEXIS 79 (Aug. 23, 2012)26
Black’s Law Dictionary, Pocket Edition (5th ed. 1979)34

STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE APPELLANTS INAPPROPRIATELY RELY ON THE TEST SET FORTH IN *C.R. CAMPBELL CONSTRUCTION CO. V. CITY OF CHARLESTON* TO CONSTRUE S.C. CODE ANN. § 6-1-330?
- II. WHETHER APPELLANT ABANDONED APPELLATE REVIEW OF THE CIRCUIT COURT'S RULING THAT *C.R. CAMPBELL* DOES NOT APPLY TO THE FACTS PRESENTED; OR IN THE ALTERNATIVE, THAT *C.R. CAMPBELL* DOES NOT APPLY TO THE FACTS OF THIS CASE?
- III. WHETHER THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY'S WATER AND SEWER CHARGES, OR AT LEAST CHARGES PAID BY NON-RESIDENT CUSTOMERS, ARE NOT SUBJECT TO S.C. CODE ANN. § 6-1-330?
- IV. IN THE ALTERNATIVE, WHETHER THE CIRCUIT COURT CORRECTLY RULED THAT RESPONDENT'S USE OF WATER AND SEWER REVENUES FOR ECONOMIC DEVELOPMENT AND PUBLIC INFORMATION PURPOSES DOES NOT VIOLATE S.C. CODE ANN. § 6-1-330(B)?
- V. IN THE ALTERNATIVE, WHETHER THE CIRCUIT COURT CORRECTLY RULED THAT RESPONDENT'S TRANSFER OF \$4.5 MILLION DOLLARS PER YEAR IN PROFIT FROM ITS WATER AND SEWER ENTERPRISE FUND TO ITS GENERAL FUND DOES NOT VIOLATE S.C. CODE ANN. § 6-1-330(B)?
- VI. WHETHER THE CIRCUIT COURT VIOLATED APPELLANTS' DUE PROCESS RIGHTS WHEN, AT THE SUGGESTION OF THE COURT DURING A HEARING ON THE MATTER OF CLASS CERTIFICATION, THE PARTIES SUBMITTED PROPOSED ORDERS IN LIEU OF ORAL ARGUMENT?
- VII. WHETHER APPELLANTS FAILED TO MEET THE ADEQUACY REQUIREMENT OF RULE 23(A), SCRCP?
- VIII. WHETHER THE CIRCUIT COURT PROPERLY RULED ON THE CITY'S ARGUMENT THAT PLAINTIFFS AZAR AND LETTS LACK STANDING TO BRING THEIR CLAIMS AGAINST THE CITY, WHEN A PRIOR HEARING BEFORE ANOTHER CIRCUIT COURT JUDGE YIELDED NO WRITTEN AND ENTERED ORDER?

STATEMENT OF THE CASE

Appellants' causes of action pertain to the City's alleged violation of municipal finance law. On October 10, 2011, Joseph S. Azar, individually and as a class representative, commenced this action against Respondent City of Columbia seeking a non-jury trial. (Compl. (October 10, 2011)). Two days later, an Amended Complaint was filed, adding Frank J. Cumberland as another Plaintiff, individually and as a class representative. (Am. Compl. (Oct. 13, 2011)). On November 14, 2011, the City filed its Answer to the Amended Complaint denying all claims, and filed a Motion to Dismiss Messrs. Azar and Cumberland from the Amended Complaint pursuant to Rule 12(b)(1) for lack of standing. (Answer (Nov. 14, 2011)); (Def. Mot. to Dismiss (Nov. 14, 2011)). On January 17, 2012, a Second Amended Complaint was filed adding Michael A. Letts as another Plaintiff, individually and as a class representative, and making additional allegations of fact in an effort to avoid dismissal for lack of standing. (Second Am. Compl. (Jan. 17, 2012)). The City filed its Answer to this Second Amended Complaint on February 21, 2012, denying all claims. (Answer to Second Am. Compl. (Feb. 21, 2014)).

The Plaintiffs challenged the City of Columbia's use of revenue derived from monthly charges for water and sewer service for purposes other than maintaining and improving the infrastructure of the City of Columbia's water and sewer utility ("Utility") on several grounds.

First, Plaintiffs sought, individually and on behalf of a class, an injunction requiring the City of Columbia to return all the money to its water and sewer enterprise fund that it took from the water and sewer enterprise fund for other purposes allegedly in violation of S.C. Code Ann. § 6-1-330, and to refrain from continuing to collect and use water and sewer

fees for any purpose other than operation and capital improvements of the Utility. (Second Amended Complaint, ¶¶ 38-40, and ¶ B). Second, Plaintiffs alleged that the City's use of water and sewer revenues for purposes other than operation, maintenance and improvement of its Utility constituted a breach of contract, and sought, individually and on behalf of a class, a refund of all water and sewer fees collected by the City for the past three years, to be returned to the City's water and sewer enterprise fund. (Second Amended Complaint, ¶¶ 47-51, and ¶ C). Third, Plaintiffs alleged, individually and on behalf of a class, that the City's use of water and sewer revenues for purposes other than operation, maintenance and improvement of its Utility amounted to "unconstitutional collection" in that such practice violated S.C. Code Ann. § 6-1-330 and *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), and requested a common fund of all fees collected by the City for the past three years, to be returned to the City's water and sewer enterprise fund. (Second Am. Compl., ¶¶ 56-58 and ¶ D). Lastly, Plaintiffs alleged, individually and on behalf of a class, that the City's transfer of \$4.5 million dollars from its water and sewer enterprise fund to its general fund constituted an unconstitutional tax, and requested an order creating a common fund of all water and sewer revenues used for other purposes, to be returned to the City's water and sewer enterprise fund. (Second Am. Compl., ¶¶ 61-68 and ¶ E). Essentially, Plaintiffs demand that the City pay an amount totaling approximately \$22 million dollars into a common fund, from which the City would be ordered to spend for maintenance and improvement of its Utility along with any attorney's fees awarded.¹

¹ (See H'rg Tr., p. 12, line 11 – p. 13, line 9 (Aug. 5, 2013)) (Appellants' counsel stating that they seek the return of \$4.5 million transferred to the general fund over the past three years, plus the City's expenditures from its water and sewer enterprise fund for its economic development activities). $\$4,500,000 \times 3 = \$13,500,000.00$. The City's total economic development expenditures over the three fiscal years at issue here amount to $\$8,319,768.00$. $\$13,500,000.00 + \$8,319,768.00 = \$21,819,768.00$. In their briefs and oral argument, Appellants mistakenly state that the City's economic development expenditures total approximately \$2.3 million per year. (See H'rg Tr. p. 13, lines 3-9 (Aug. 5, 2013)); (H'rg Tr., p. 37, line 23 – p. 39, line 18 (Sept.

On March 27, 2012, Plaintiffs moved for class certification to include all of the City of Columbia's water customers during the three years prior to filing of the Complaint. (Pl. Mot. for Class Certification (March 27, 2012)). On May 17, 2012, the City filed an Amended Motion to Dismiss pursuant to Rule 12(b)(1) to include arguments that Plaintiff Letts lacked standing. (Def. Am. Motion (May 17, 2012)). The parties filed memoranda in support or opposition to their respective motions.

Both motions were heard on June 5, 2012 before The Honorable J. Ernest Kinard. Judge Kinard heard oral argument on the City's 12(b)(1) Motion to Dismiss, and verbally denied this Motion. (H'rg Tr., pp. 3-21 (June 5, 2012)). The court did not request either party to prepare an order, and both parties expected that Judge Kinard would enter a short order of denial. However, no written order concerning Defendant's Motion to Dismiss was ever entered in spite of Defendant's attempt to elicit an order from the court.

Turning to the Plaintiff's Motion for Class Certification, Judge Kinard offered to hear the Parties' arguments, but recommended as a better approach that the Parties submit proposed orders on the issue for his consideration. (H'rg Tr. p. 22, line 24 – p. 25, line 24 (June 5, 2012)).² Both Parties submitted proposed orders addressing class certification. On June 26, 2012, Judge Kinard entered a written order denying Plaintiffs' Motion for Class Certification. On July 5, 2012, Plaintiffs filed a Motion to Reconsider the circuit court's denial of class certification. After hearing arguments on September 13, 2012, Judge Kinard denied Plaintiffs' Motion. (Order Denying Plaintiffs' Motion to Reconsider (Sept. 20, 2012)).

13, 2013)). The correct amounts expended for economic development purposes, as attested by the City's current Finance Director, are as follows: \$2,922,446.99 in FY 2008/2009, \$2,844,127.67 in FY 2009/2010, and \$2,716,110.03 in FY 2010/2011.

²Note that the Court Reporter erred in identifying counsel. Where the transcript on the cited pages states that Mr. Lydon, counsel for the City, was speaking, Mr. Lee, counsel for Plaintiffs, was actually speaking.

After extensive discovery, the City moved for summary judgment on all causes of action on August 14, 2012. In this motion for summary judgment, the City raised again its argument that Plaintiffs Azar and Letts lacked standing to bring their asserted causes of action. On September 18, 2012, Plaintiffs filed a motion for summary judgment on the issues of whether the City's use of water and sewer revenues violated S.C. Code Ann. § 6-1-330 and *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997). About this same time, a Suggestion in Bankruptcy was filed on behalf of a plaintiff in this case on September 7, 2012, which erroneously stayed the case or otherwise caused the case to be deemed inactive. The case was revived after a status conference was held with the Chief Administrative Judge on May 8, 2013.

The Parties' motions for summary judgment were heard on August 5, 2013 before The Honorable G. Thomas Cooper. Following review of proposed orders, Judge Cooper scheduled *sua sponte* another hearing to ask further questions and allow additional argument. Following this second hearing on September 13, 2013, the court, on September 26, 2013, granted the City's Motion for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment. On October 14, 2013, Plaintiffs moved for reconsideration. Plaintiffs' motion was denied by an order received on December 6, 2013. Plaintiffs now appeal the circuit court's ruling on summary judgment, as well as the circuit court's denial of their motion for class action certification.

STATEMENT OF THE FACTS

Pursuant to a specific grant of authority to municipalities under the South Carolina Constitution, the City of Columbia has owned and operated a water and/or sewer utility for over a century. *See* (Moore Aff. ¶ 4, ¶ 7); S.C. Const. art. VIII, § 16. The City's water and sewer utility's physical plant consists of approximately 1,053 miles of sewer lines, a sewer treatment plant, 67 sewer pump stations, two water treatment plants, and approximately 1,966 miles of water mains. (Def. Appx. 12: CITY-0002277 at 2411); (Gantt Dep. p. 56, lines 5-6). As of June 28, 2012, the City provided water to 137,066 customers and provided sewer to 69,910 customers. (Adams Dep. p. 4, lines 14-25). Most of the City's customers reside outside of the City's corporate limits. (Adams Dep. Exh. 5).

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"). (Moore Aff. ¶ 4). Since 1895, the City's Water Rate Ordinance has remained in force and effect. (*Id.* at ¶ 5). In 1970, the City enacted an ordinance establishing a sewer rate structure (hereinafter referred to as "Sewer Rate Ordinance"). (*Id.* at ¶ 8). Since 1970, the City's Sewer Rate Ordinance has remained in force and effect. (*Id.* at ¶ 9). The City has amended its Water Rate Ordinance and Sewer Rate Ordinance numerous times. (*Id.* at ¶ 6 and ¶ 10). The City's amendments to its water and sewer rates operate to revise its existing rate structure established in 1895 and 1970, respectively. (*Id.* at ¶ 11).

If a person or business wishes to receive water and sewer from the City, he or she submits an application for a water service contract to the City. (*See* Def. Appx. 14: CITY-0003969; (Def. Appx. 15: CITY-0003970); (Def. Appx. 24: CITY-0005409). The City

provides water and sewer to its customers according to the terms set forth by this contract.

Id. The 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. *Id.*

The City's water and sewer customers pay a monthly service charge in return for receipt of water and sewer service. 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 or outside City limits. (*See* Def. Appx. 11: CITY-0000108 – CITY-0000109). Customers are then charged for additional water consumption as determined by customer category. (*Id.*) Similarly, the City has established a base sewer rate for customers residing within the City limits ("Resident") and without City limits ("Non-Resident"), with an additional charge for each 100 cubic feet of wastewater consumed. (*Id.*) Because most of the City's water and sewer customers are Non-Residents and Non-Resident water and sewer charges are higher than charges applicable to Residents, most of the City's water and sewer revenue is derived from Non-Resident customers, as shown in the table below:³

³ (Palen Aff. ¶ 9 and ¶ 11).

Fiscal Year	Non-Resident Charges	Resident Charges
2008/2009	\$64,100,000.00	\$32,000,000.00
2009/2010	\$66,000,000.00	\$33,100,000.00
2010/2011	\$65,700,000.00	\$33,500,000.00

In accordance with Generally Accepted Accounting Principles applicable to local governments, the City of Columbia manages its water and sewer utility in a propriety capacity. (Caughman Dep. p. 14, lines 2-10); (Ellis Dep. p. 13, line 16 – p. 14, line 21); (Def. Appx. 12: CITY-0002277 at 2299). The City collects its water and sewer charges and deposits them into a segregated enterprise fund.⁴ (*Id.* at CITY-0002299). An enterprise fund is used to account for business operations, whereas a governmental fund is used to account for government services. (Ellis Dep. p. 13, lines 16-21).

From this enterprise fund, the City expends monies for administration, operation, maintenance, and improvements of its Utility. (Palen Aff. ¶ 13 and ¶ 14). In fiscal year 2008/2009, the Utility's net revenue from all of its income sources, without deductions to account for depreciation, was approximately \$51 million dollars. (Def. Appx. 28: CITY-0008481 at 8612). In fiscal year 2009/2010, the Utility's net revenue from all of its income sources, without deductions to account for depreciation, was approximately \$37 million dollars. (*Id.*) In fiscal year 2010/2011, the Utility's net revenue from all of its income

⁴ The City charges rates for customer consumption of water and sewer services on a monthly basis, as well as other miscellaneous fees such as a one-time fee, usually paid by developers, to tap into the sewer system. (*See* Ellis Dep. p. 47, line 25 – p. 50, line 13). Appellants only challenged the City's use of revenue derived from monthly water and sewer service charges, not the City's other miscellaneous utility fees, and thus, all of the City's financial data produced in this case pertains to monthly Utility charges. (*See* Pl. Second Am. Compl., pp. 1-2 and p. 5, ¶ 21) (referring to Plaintiffs as customers of the City's water and service with no mention of paying any other type of Utility fee, and identifying a City Ordinance amending monthly water and sewer rates as the fees that they challenge); (Pl. Memo Summary Judgment, pp. 2 and 8 (Aug. 1, 2013) (Appellants arguing that rate payers' monies cannot be used to fund anything other than the specific program for which it was paid (*emphasis added*)); (*See* Caughman Dep., p. 5, line 10 – p. 6, line 4); (Ellis Dep. p. 38, line 14 – p. 39, line 12; p. 47, line 25 – p. 50, line 13) (Appellants questioning deponents about monthly Utility charges). Lastly, the Summary Judgment Order clearly stated that the fees at issue were the City's monthly water and sewer charges and Plaintiffs did not, in their Motion to Reconsider, take any issue with the circuit court's characterization of the fees they were challenging; thus failing to preserve for appellate review any eleventh-hour attempt to challenge other fees. (Order Granting Summary Judgment, p. 1 (Sept. 26, 2013)); *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 554, 709 S.E.2d 99, 111 (Ct. App. 2011).

sources, without deductions to account for depreciation, was approximately \$31 million dollars. (*Id.*) From this net revenue, the City provides for debt service for revenue bonds secured by water and sewer charges issued for capital replacements or improvements to its system. (Palen Aff. ¶ 13 and ¶ 14); (Def. Appx. 28: CITY-0008481 at 8612). The City also maintains reserve funds as required by its revenue bond ordinance, as well as surplus revenue, or profit. (Gantt Dep. p. 62, line 4 – p. 64, line 4); (Def. Appx. 16: CITY-0004740 – CITY-0004783); (Caughman Dep. p. 15, lines 5-18) (Def. Appx. 28: CITY-0008481 at 8612).

In addition, during the past three fiscal years,⁵ the City allocated monies from its water and sewer enterprise fund to pay for all or part of the costs of City economic development functions: its economic development department, economic development special projects, office of business opportunities, and four development corporations.⁶ (Gantt Dep. p. 80, line 7 – p. 87, line 24). The City also allocated water and sewer revenues to fund the expenses of printing material that informed the public of the City's compliance with safe drinking water standards and how to help reduce sewer overflows. (Gantt Dep. p. 81, line 5 – p. 82, line 7). These expenditures are shown as follows:

⁵ Because the statute of limitations in this case is three years, the relevant fiscal years are FY 2008/2009, 2009/2010 and 2010/2011.

⁶ Appellants challenge an expenditure of \$70,000.00 for the City Center Partnership, also described as the Business Improvement District. Appellant's Brief, p. 11; (Def. Appx. 13: CITY-0003931); (Gantt Dep. p. 86, lines 10-14). This expenditure was paid from the Economic Development Special Project Fund. Further, Appellants challenge use of water and sewer revenues for "community promotions." Appellant's Brief, p. 11. However, during the three fiscal years at issue here, the City did not fund "community promotions" from water and sewer revenue. (Gantt Dep. p. 87, line 13 – p. 88, line 5). The City stopped funding community promotions from water and sewer revenues approximately seven years ago. (Def. Dep. Exh. 1).

Expenditures Challenged by Appellants⁷	FY 2008/2009	FY 2009/2010	FY 2010/2011
Economic Development Department ⁸	\$814,543.70	\$774,879.02	\$772,267.33
Economic Development Special Projects ⁹	\$624,267.29	\$590,857.11	\$585,936.77
Office of Business Opportunities ¹⁰	\$393,934.55	\$297,179.54	\$210,663.51
Development Corporations ¹¹	\$1,053,522.00	\$1,154,478.00	\$1,047,242.42
Public Relations ¹²	\$36,199.45	\$26,734.00	¹³ 0
Total Per Fiscal Year	\$2,922,466.99	\$2,844,127.67	\$2,716,110.03

Pursuant to a policy adopted by Resolution in 1993, during the past three fiscal years, the City has transferred up to \$4.5 million dollars of the utility's profits annually to its general fund to defray the costs of ordinary municipal services. (Gantt Dep. p. 25, line 18 – p. 26, line 4); (Caughman Dep. p. 6, line 5 – p. 8, line 2); (Def. Appx. 27: CITY-0008476). 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. (Gantt Dep. p. 28, lines 14-23); *see also* (Caughman Dep. p. 9, line 17 – p. 10, line 4). Transfer of some portion of water and sewer revenues from a city's water and sewer utility to its general fund is a fairly common practice in South Carolina. (Gantt Dep. p. 27, line 22 – p. 28 line 4).

All together, the expenditures and transfers challenged by Appellants comprise less than 10% of the Utility's annual revenues derived from water and sewer charges, as shown below:

⁷ Appellants tend to refer to a chart showing the City's use of water and sewer revenues for the Office of Business Opportunities, Economic Development Department, Public Relations, Development Corporations, Economic Development Contingency, City Center Partnership, and Community Promotions, that was included in a State Newspaper article. The City's Budget Director testified that the numbers in this chart were budgeted amounts, not actual expenditures. (Caughman Dep. p. 38, line 2 – p. 40, line 2). The figures shown in the table above reflect actual expenditures as attested within the affidavit of Mr. Palen, the City's Finance Director at the time the affidavit was executed.

⁸ (Palen Aff. ¶ 26).

⁹ (Palen Aff. ¶ 27).

¹⁰ (Palen Aff. ¶ 28).

¹¹ (Palen Aff. ¶ 29).

¹² (Palen Aff. ¶ 23).

¹³ In FY 2008/2009, the City budgeted \$46,600 for public educational materials relating to the Utility; however, the money was not expended. (Palen Aff. ¶ 23).

Year	Contested Expenditures	Contested Transfer of Net Revenues	Total Contested (expenditures + transfer)	Utility Revenues From Ratepayers
2008/2009	\$2,922,446.99	\$4,500,000.00	\$7,422,446.99	\$96,100,000.00
2009/2010	\$2,844,127.67	\$4,500,000.00	\$7,344,127.67	\$99,100,000.00
2010/2011	\$2,716,110.03	\$4,500,000.00	\$7,216,110.03	\$99,200,000.00

During the time period at issue, water and sewer rates were increased in a manner consistent with a rate study prepared in 2006 by the engineering, consulting and construction company Black & Veatch (“Rate Study”) recommending rate and fee revisions over a five-year period ending June 30, 2011. (Def. Appx. 18: CITY-0005133 at 5225 and 5228). The Rate Study based its analysis on the City’s projected costs and other factors. (See Def. Appx. 18: CITY-0005133 – CITY-0005140). It included a return on investment, or profit, built into the City’s water and sewer rates. (*Id.* at CITY-0005234 and 5239). The Rate Study also factored into the proposed rates the costs associated with the City’s Five-Year Capital Improvement Plan, totaling approximately \$350 million dollars. (*Id.* at CITY-0005224).

The City has always invested in annual maintenance of its sewer system every year. (Gantt Dep. p. 58, lines 15-16). Every fiscal year, the City prepares a list of projects for water and sewer construction, repair and maintenance for funding consistent with its Five-Year Capital Improvement Plan. (Gantt Dep. p. 88, line 19 – p. 89, line 4). Prior to the year 2006, there was a time period in which the City invested more money and attention to its water system due to the important need to upgrade the City’s aging water treatment plant along the Columbia Canal. (Gantt Dep. p. 58, lines 9-25). Since 2006, the City shifted its priorities to its sewer system.¹⁴ (Gantt Dep. p. 58, line 20 – p. 59, line 4). The City

¹⁴ Beginning in 2007, the City experienced more frequent sewer overflows, largely due to infiltration of tree roots into sewer lines and accumulation of grease blocking sewer lines. (Gantt Dep. p. 17, lines 3-13); (Gantt Dep. p. 54, lines 3-21); (Gantt Dep. p. 97, line 16 – p. 99, line 20). The City has significantly reduced sewer overflows from its sewer system. (Gantt Dep., p. 102, lines 9-12). In 2013, largely due to the City’s sewer overflows, the U.S. Environmental Protection Agency (“EPA”), the South Carolina Department of Health and Environmental Control (“DHEC”) and the City entered into a Consent Decree, in which the City did not admit

completed all of the capital improvement projects contained in the Rate Study, which cost approximately \$350 million dollars, within five years. (Gantt Dep. p. 18, line 12 – p. 19, line 2); (Def. Appx. 18: CITY-0005133 at 5224). Of this total of \$350 million dollars, \$212,704,769.00 was dedicated to sewer projects. In 2011, the City embarked on its next Five-Year Capital Improvement Plan to spend \$100 million per fiscal year for sewer projects. (Gantt Dep. p. 18, line 12 – p. 19, line 4); (Def. Appx. 28: CITY-0008569).

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this Court applies the same standard that the trial judge was required to apply under Rule 56(c), SCRCP. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). 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), SCRCP; *Southeast Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 512, 693 S.E.2d 33, 35 (Ct. App. 2010). 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). Speculation and “inferential leaps” are insufficient to defeat a motion for summary judgment. *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010).

any liability under the Clean Water Act. (Pl. Exh. 1, p. 5 (Sept. 13, 2013)). The Decree stated that the City “has voluntarily undertaken various capital improvement projects intended to improve its ... [wastewater treatment plant] as well as reduce the occurrence of [sanitary sewer overflows], which, over the past five years, have resulted in significant expenditures of resources by Columbia.” (*Id.*) The Consent Decree did not impose upon the City any additional capital improvement projects; instead it incorporated the City’s implementation schedule for its previously adopted Five-Year Capital Improvement Plan and made that schedule enforceable under the Consent Decree. (*Id.* at p. 16). The Consent Decree imposed new requirements to improve maintenance and operational protocol, staff training, and emergency response planning. (*Id.* at pp. 17-26).

Proponents of class certification have the burden of proving that the prerequisites of class certification under Rule 23(a), SCRPC, have been met. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 467-468, 388 S.E.2d 799, 801 (1990). The court must apply “a rigorous analysis” to assure that these prerequisites have been satisfied. *Id.* The failure of the proponents to satisfy any one of the prerequisites is fatal to class certification. *Id.* Additionally, a trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion. *Id.*

ARGUMENTS

At issue in this appeal is whether the City's use of Utility revenue to fund its economic development functions and certain public information materials, and to use Utility profits to supplement its general fund, violates municipal finance law governing service fees.¹⁵ Under article VIII, § 16 of the South Carolina Constitution and S.C. Code Ann. § 5-31-610 *et seq.*, the City of Columbia owns and operates a water and sewer utility (“Utility”) with the authority to charge rates for service provided to its customers. Monthly Utility charges for water and sewer service are a lawful fee and not a tax. *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). Further, cities may charge utility rates that yield a fair profit. *Sossamon v.*

¹⁵ Appellants claim that the City's alleged failure to comply with municipal finance law allegedly caused the City's wastewater system “to fall into a state of disrepair and ultimately resulted in the United States Environmental Protection Agency and the South Carolina Department of Health and Environmental Control successfully suing the City of Columbia to force repairs and improvements to the City's sewer system.” Appellants' Brief, p. 7. The City has invested hundreds of millions of dollars in maintaining and improving its Utility and completed all sewer construction projects identified within its five-year capital improvement plan applicable to the time period relevant here. (Gantt Dep. p. 18, line 12 – p. 19, line 2). Appellants' attempt to cast the City's use of about \$7 million dollars per year from its annual water and sewer revenues of approximately \$100 million as the cause of its consent decree with the EPA represents a gross oversimplification of a complex array of issues relating to the current status of the City's wastewater system. The circuit court order properly rejected these assertions as irrelevant to the merits of this case.

Greater Gaffney Metro Utilities Area, 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). What is more, cities may use that profit for any lawful purpose within the discretion of their governing bodies. See S.C. Const. art. VIII, § 17 (“Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.”).

In spite of this well-established law, Appellants argued below that under *C.R. Campbell v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), the City’s Utility charges are not a valid fee and thus, amount to an unconstitutional tax. Appellants failed to preserve their arguments under *C.R. Campbell* for appellate review, and in any event, the circuit court did not err in holding that *C.R. Campbell* was distinguishable on the facts, or at the very least, not applicable to Non-Resident Utility charges.

Appellants also argue that the City’s expenditure of revenues derived from Utility charges for economic development and public information purposes violates the directive found within S.C. Code Ann. § 6-1-330(B) that 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.” This statute has never before been construed by this Court. The circuit court correctly held that the Service Fee Statute does not apply to the City’s water and sewer charges. In the alternative, the circuit court unerringly ruled that the City’s use of Utility revenues for economic development and certain public information activities are related to the provision of water and sewer services and thus, do not violate S.C. Code Ann. § 6-1-330(B). Additionally, the City’s transfer of \$4.5 million in Utility profits annually from its Utility Enterprise Fund to its general fund

does not violate S.C. Code Ann. § 6-1-330 when read in light of existing common law and in *pari materia* with related statutes.

By demanding that the City raise the equivalent of millions of dollars that were previously spent and dictating that this money should then be used specifically for improvements as opposed to other equally important uses, Appellants 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. Appellants seek to impermissibly intrude upon City Council's legislative budgetary function as well as its discretion in how it chooses to operate its water and sewer system. *See 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"). Appellants' attempt to usurp the City's discretion is unavailing.

I. APPELLANTS IMPROPERLY APPLY CASES DECIDED UNDER *BROWN V. HORRY COUNTY* IN THEIR ARGUMENTS CONSTRUING S.C. CODE ANN. § 6-1-330.

Appellants raise as an issue on appeal that the trial court erred as a matter of law in its interpretation of S.C. Code Ann. § 6-1-330 (also referred to as "Service Fee Statute"). In Appellants' argument concerning the Service Fee Statute, Appellants turn to *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992) as articulated by *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), *J.K. Constr., Inc. v. Western Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 519 S.E.2d 561 (1999), and *Ford v. Georgetown County Water & Sewer District*, 341 S.C. 10, 532 S.E.2d 873 (2000), to support its interpretation of the Service Fee Statute. Appellants' Brief, pp. 12-13. These cases do not

interpret the Service Fee Statute. Reliance on these cases to interpret the Service Fee Statute contravenes the cardinal rule of statutory construction that legislative intent is ascertained solely by the plain and unambiguous language of the statute. *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).

In *Brown*, as articulated in *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 236 481 S.E.2d 437, 438 (1997), the Court set forth a test to determine whether a particular type of fee was a valid service fee and not a tax. 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). The City argues *infra* that Appellants have abandoned appellate review of the circuit court's ruling pertaining to *C.R. Campbell*, and that, in any event, *C.R. Campbell* applies to a context not present here. But for the purposes of this argument, the important point is that the test articulated in *C.R. Campbell* rests upon a constitutional dimension because it serves to determine whether a fee is a valid uniform service charge or an unconstitutional tax. If the fee in question fails to meet the test, then it would be struck down as a tax levied without uniformity in violation of article X, section 6 of the South Carolina Constitution. If a fee is deemed invalid under *Brown*, then the Service Fee Statute would not even come into play because the fee is in actuality an unconstitutional tax.

In contrast, the Service Fee Statute is not intended to discern between a valid fee or an unconstitutional tax; it addresses valid service fees only. The Service Fee Statute injects procedural requirements upon adoption of a fee and it places a limitation upon fees imposed to finance a public service. Any violation of the Service Fee Statute is separate and distinct from a constitutional violation under *Brown* and *C.R. Campbell*. See e.g. *State v. Covert*, 368 S.C. 188, 195, 628 S.E.2d 482, 486 (Ct. App. 2006) ("In South Carolina, the statutory

warrant requirement is separate and distinct from the prohibition in the federal and state constitutions against unreasonable searches and seizures.”). Given these distinctions, Appellants mistakenly assume that *C.R. Campbell* may appropriately be used to interpret the Service Fee Statute.¹⁶

II. TO THE EXTENT THAT APPELLANTS ARE ATTEMPTING TO ARGUE THAT THE CITY’S USE OF REVENUE DERIVED FROM WATER AND SEWER CHARGES FAILS TO COMPLY WITH *C.R. CAMPBELL*, SUCH ARGUMENT IS UNPRESERVED FOR APPELLATE REVIEW; SHOULD THIS COURT FIND OTHERWISE, THE CIRCUIT COURT CORRECTLY RULED THAT *C.R. CAMPBELL* DOES NOT APPLY TO THE FEES AT ISSUE HERE.

Under Rule 208(b)(1)(B), SCACR, an appellant must, in the Initial Brief, set forth the issues to be considered by the appellate court. No point will be considered which is not set forth in the statement of issues on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). If a party fails to raise arguments with supporting authority in the Initial Brief, then such arguments are deemed abandoned on appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). Although rules of issue preservation should not be applied in a rigid, “hyper-technical manner,” it is a basic tenet of the law that an appellate court cannot rule on issues not presented to it. *Herron v. Century BMW*, 395 S.C. 461, 469-470, 719 S.E.2d 640, 644-645 (2011). Appellants have failed to identify as an issue on appeal, or argue within their Initial Brief, any error in the circuit court’s ruling that *C.R.*

¹⁶ Furthermore, the test set forth in *C.R. Campbell* employs different language than the Service Fee Statute. In situations where the benefit that the payer of a fee receives in return for payment of the fee lies in the government’s use of the proceeds of the fee to fund future improvements, *C.R. Campbell* held that such a fee is valid if the revenue generated from a service fee is used only for the specific improvement contemplated and the revenue generated by the fee does not exceed the cost of the improvement. 325 S.C. 235, 236, 481 S.E.2d 437, 438 (1997). In contrast, the Service Fee Statute’s limitation on use of fee revenues applies to fees “imposed to finance the provision of public services.” S.C. Code Ann. § 6-1-330(B). The revenue derived from these fees “must be used to pay costs related to the provision of the service or program for which the fee was paid.” *Id.* The *C.R. Campbell* test is narrower and more restrictive than the Service Fee Statute. By turning to case law addressing whether a fee is a valid service fee or an unconstitutional tax to interpret the Service Fee Statute, Appellants ask this Court to impermissibly resort to forced construction that would limit or expand the Service Fee Statute’s operation. *Harris v. Anderson County Sheriff’s Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).

Campbell does not apply to the facts of this case. An appellant is precluded from using its reply brief to argue any grounds for reversal because all issues must be raised and argued in the Initial Brief. *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct. App. 1997). Therefore, Appellants have abandoned appellate review of their claim under *C.R. Campbell*.

To the extent this Court finds otherwise, the circuit court did not err. Restating *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992), *C.R. Campbell Constr. Co. v. City of Charleston* held that a fee is a valid uniform service charge and not an unconstitutional tax 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....325 S.C. 235, 481 S.E.2d 437, 438 (1997).

It is well established in South Carolina that a monthly water or sewer charge is not a tax, but rather, a rent or charge for services rendered, collected merely as compensation by those who choose to receive and use the water. *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). Appellants Letts and Cumberland¹⁷ have entered into a contract with the City to receive water and sewer supply delivered through the City's water and sewer infrastructure. (Def. Appx. 14: CITY-0003969); (Def. Appx. 24: CITY-0005409). In return for this access to and use of City property and consumption of water supply, they pay a monthly base rate for up to 300 gallons of water used and an additional rate based upon

¹⁷ Appellant Azar is not a customer of the City's Utility. He has no account or service contract in his name with the City, does not receive a utility bill from the City, and does not pay any Utility charges to the City. Mr. Azar is a resident of the Hermitage Condominiums, whose association is a customer of the City. Mr. Azar reimburses the Hermitage Condominium Association for his pro rata share of the water and sewer bills paid by the Association. (See Def. Mem. In Supp. of Mot. to Dismiss, p. 10 and Exhibit A (May 30, 2012)).

actual consumption beyond 300 gallons per month. (*See* Def. Appx. 11: CITY-0000108). For sewer, they also pay a base rate and an additional rate based upon cubic feet of wastewater created. (*Id.*) In other words, Messrs. Letts and Cumberland have a *quid pro quo* arrangement with the City where they receive the benefit of water and sewer in exchange for monetary payment based upon actual consumption. Thus, the City's water and sewer rates constitute a lawful fee.¹⁸ Because the question of whether a municipal utility charge for water and sewer service has already been answered, there is no need to apply *C.R. Campbell* to the City's water and sewer charges.

Further, *Brown*, as articulated by *C.R. Campbell*, is distinguishable from the facts of this case. Unlike the situation here, where Utility customers receive the benefit of water and sewer service in return for their payment of water and sewer actually consumed, in *Brown* and its progeny, the payers of the fee did not receive a direct exchange of money for a service provided, but instead benefitted from how the proceeds were to be spent for future improvements. *Brown*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992). Because the benefit received in *Brown* was the future use of proceeds from the fee imposed, the Court devised a test containing limits on use of this revenue in order to maintain the constitutional distinction between a fee and a tax. However, 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," *Brown* does not apply. *BellSouth Telecommunications v. City of Orangeburg*, 337 S.C. 35, 39-40, 522 S.E.2d 804, 806 (1999). The benefit Appellants receive in return for payment of the City's water and sewer charges is not in how the City

¹⁸ 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).

expends the revenue derived from water and sewer fees. The benefit is in the immediate delivery of water and sewer service when Appellants turn on the faucet within their residences. In such a situation, the *Brown* test is inapplicable.

Any reliance on *Ford v. Georgetown County Water & Sewer District*, 341 S.C. 10, 532 S.E.2d 873 (2000) and *J.K. Construction, Inc. v. Western Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 519 S.E.2d 561 (1999) is misplaced. At issue in these cases was sewer impact fees imposed to pay for future sewer improvements. See *Ford*, 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*, 336 S.C. 162, 519 S.E.2d 561 (1999) (sewer impact fee imposed to pay for sewer improvements). Like the situation in *Brown*, the payers in *Ford* and *J.K. Construction* did not receive a direct benefit in exchange for the fee paid, but instead derived a benefit from how the proceeds of the sewer impact fee would be spent. Here, Appellants challenge an entirely different type of fee than that challenged in *Ford* and *J.K. Construction*. Appellants challenge the City's monthly water and sewer service charges paid by customers in return for the access to and use of drinking water and the disposal of wastewater. Thus, *C.R. Campbell* has no bearing on the issues presented in this appeal.

Even if this Court holds that *C.R. Campbell* applies to municipal water and sewer rates generally, *Brown* cannot apply to charges for water and sewer service to Non-Resident customers. *C.R. Campbell* addresses whether a uniform service charge, as authorized under S.C. Code Ann. § 5-7-30, is valid. *C.R. Campbell*, 325 S.C. 235, 237, 481 S.E.2d 437, 438 (1997). Pursuant to S.C. Code Ann. § 5-7-30, a municipality is empowered to establish "uniform service charges" within its corporate boundaries. S.C. Code Ann. § 5-7-30 does not govern charges outside of the City's corporate limits. See *Lomax v. Greenville*, 225 S.C.

289, 297, 82 S.E.2d 191, 195 (1954) (“It is apparent that this grant of power for purposes of municipal legislation is ... broad and comprehensive ... limited alone ... by the territorial confines of the municipality authorized to exercise it”). A city’s relationship with its non-resident utility customers is governed solely by contract. S.C. Code Ann. § 5-7-60; S.C. Code Ann. § 5-31-1710; S.C. Code Ann. § 5-31-1910; *Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 687 (2001); *Childs v. City of Columbia*, 87 S.C. 566, 571, 70 S.E. 296, 298 (1911). Nothing in the water and sewer service contract between the City and its Non-Resident customers obligates the City to use revenues derived from Non-Resident customers in any particular manner, nor does it subject the City to the dictates of *C.R. Campbell*. *C.R. Campbell* simply has no bearing on charges for water and sewer service to Non-Resident customers. (Def. Appx. 24: CITY-0005409); *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 utility rates). The City’s revenues derived from Non-Resident water and sewer customers 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. (Palen Aff. ¶ 11). This revenue generated by Non-Resident customers more than covers the expenditures Appellants complain of.

III. THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY’S WATER AND SEWER CHARGES, OR AT LEAST NON-RESIDENT CHARGES, ARE NOT SUBJECT TO S.C. CODE ANN. § 6-1-330(B).

Appellants assert that the City’s water and sewer charges violate S.C. Code Ann. § 6-1-330, which states:

(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.

South Carolina 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.'" The Service Fee Statute does not apply to the City's water and sewer service charges, or at the very least, does not apply to the City's revenues derived from Non-Resident customers.

A. The City's monthly water and sewer service rate structure was enacted prior to the Service Fee Statute.

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 clearly has prospective effect only.¹⁹

The City’s Water and Sewer Rate Ordinances were enacted long before the effective dates of the Service Fee Statute. A historical review of the City’s water and sewer ordinances indicates that the City first enacted a water rate ordinance in 1895 and a sewer rate ordinance in 1970. (Moore Aff. ¶ 4, ¶ 7). Subsequent to the Service Fee Statute’s effective dates, the City re-codified its ordinances in 1998; however, the City’s Water and Sewer Rate Ordinances were continued in effect without interruption. (Moore Aff. ¶ 5, ¶ 9, ¶ 11); (Def. Appx. 19: CITY-0008622 at CITY-0008625, Section 1-3). Because the Service Fee Statute has prospective effect, not retroactive, the City’s long-standing Water and Sewer Rate Ordinances are not subject to the limitations found in S.C. Code Ann. § 6-1-330(B). *See, e.g., C.R. Campbell*, 325 S.C. 235, 481 S.E.2d 437, 438 n. 2 (1997) (stating that law enacted after City’s enactment of real estate transfer fee does not apply).

Appellants argue that amendments to the City’s water and sewer ordinances enacted after the effective date of S.C. Code Ann. § 6-1-330 to increase rates constitute a “new service or user fee” subject to the limitations found in S.C. Code Ann. § 6-1-330(B). In 1997, 1998, 2000, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2010, 2011, 2012 and 2013, the City amended its Water and/or Sewer Rate Ordinances to modify certain rates contained therein. (Moore Aff. ¶ 6, ¶ 10); (Pl. Exh. 2 (entered into evidence Sept. 13, 2013)). S.C. Code Ann. § 6-1-330 does not apply to amendments.

The legislature’s choice of words within the Service Fee Statute indicate that amendments to a service fee enacted prior to December 31, 1996 or July 1, 1997 were not

¹⁹ Aside from the express language of the statute, “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).

intended to be subject to the limitations imposed on newly enacted service or user fees. 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 subsequent amendments to a pre-existing ordinance that already established a fee. This Court 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 General Assembly could have added the word “amend” or “amendment” to this section but chose not to do so.²⁰ 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 City’s reliance on and expectation of stability and continuity in its management and operation of its Utility.

B. Revenue derived from Non-Resident monthly Utility charges are not subject to S.C. Code Ann. § 6-1-330(B).

Even if this Court holds that the Service Fee Statute applies to the City’s subsequent amendments to its water and sewer ordinances, S.C. Code Ann. § 6-1-330(B) cannot apply to revenues derived from Non-Resident customers. As explained above, Non-Resident water and sewer charges are governed solely by contract. Nothing in the City’s contract with Non-Residents limits the City’s discretion in how collected Utility charges are used.

A statutory limitation on how a municipality uses revenues derived from Non-Resident customers applies only if the statute expressly applies to fees paid by Non-Resident customers. *See Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 686 (2001)

²⁰ Compare § 6-1-330 with § 6-1-315 within 1997 S.C. Acts 138, in which local governments are authorized to “impose a business license tax or increase the rate of a business license tax.” (emphasis added).

(ruling that a statute “does not apply for the benefit of nonresidents unless expressly provided.”). The Service Fee Statute does not expressly apply to Non-Resident water and sewer customers.

Aside from complete silence in the Service Fee Statute concerning applicability to Non-Resident Utility charges, the language of Service Fee Statute provides further reason to conclude that Non-Resident Utility charges are outside the reach of the Service Fee Statute. Under S.C. Code Ann. § 6-1-330(B), 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” 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](http://dictionary.reference.com/browse/impose)). The City cannot impose water and sewer service upon Non-Residents. If Non-Resident wishes to receive water and sewer from the City, he or she submits an application for a water service contract to the City. (See Def. Appx. 14: CITY-0003969). The contract is voluntary. Moreover, a water and sewer customer is paying for water actually consumed. As a result, the amount of the fee paid by a water and sewer customer can be controlled by the customer. The less water consumed, the less the monthly water charge, or conversely, the more water consumed, the more the monthly water charge. Because a pre-determined water and sewer charge is not unilaterally imposed on Non-Resident customers, S.C. Code Ann. § 6-1-330(B) does not govern Non-Resident Utility charges.²¹

²¹ 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 water charge is a rent or charge for services rendered, collected merely as compensation by those who choose to receive and use the water). Further, through a private contract with individual customers, the City sells a retail commodity. (Ellis Dep. p. 49, line 10 – p. 50, line 13); see *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). Water and sewer service is a voluntary contractual sale entered for the benefit of the parties. See *Peeples v. South Carolina Power Co.*, 166 S.C. 150,

The Service Fee Statute cannot be used to limit how the City makes use of Utility revenues derived from Non-Resident customers. *See* 2012 S.C. AG LEXIS 79 (S.C. A.G. 2012) (opining that the Service Fee Statute applies to fees imposed within the city limits, but not for fees imposed outside the city limits). 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 Appellants. Revenues derived from Non-Resident customers more than cover the expenditures that Appellants complain of.

IV. TO THE EXTENT THIS COURT ADDRESSES WHETHER THE CITY'S CHALLENGED USES OF REVENUE DERIVED FROM MONTHLY WATER AND SEWER CHARGES VIOLATE THE SERVICE FEE STATUTE, THE CITY'S USE OF SUCH REVENUES IS LAWFUL.

South Carolina Code Ann. § 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.” Appellants argue that S.C. Code Ann. § 6-1-330(B) “clearly prohibits” the City of Columbia from using water and sewer revenue for anything other than “the operation, repair, upgrade, maintenance and/or expansion of the water and sewer system of the City.” Appellant’s Brief, p. 12. In particular, Appellants argue that: 1) the City’s expenditures from its Utility enterprise fund for economic development functions and the printing of Utility-specific public educational material violates S.C. Code Ann. § 6-1-330(B);²² and 2) the City’s transfer

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 arguably does not apply to monthly water and sewer charges paid by Non-Residents or Residents.

²² Appellants’ Brief, on p. 24, states that Appellants are challenging the City’s expenditures for the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, various Development Corporations, and the Economic Development Contingency Fund (which is the same as what the City describes as the Economic Development Special Project Fund). Yet on page 19, Appellants seem to challenge approximately \$7.5 million dollars in expenditures as identified in a Black & Veatch Cost of Service Study as budgeted expenditures from the water and sewer enterprise fund to pay for costs that the City deemed appropriate, which Black and Veatch opined otherwise. (CITY-0000012). The \$7.5 million dollars identified

of up to \$4.5 million dollars in Utility profits from its Utility enterprise fund to its general fund to defray costs of ordinary government operations violates S.C. Code Ann. § 6-1-330(B). The circuit court correctly ruled that these uses do not run afoul of S.C. Code Ann. § 6-1-330(B).

A. The City's use of Utility revenues to fund a specific public information expense and to fund economic development activities is related to the provision of water and sewer service, and therefore, lawful under the Service Fee Statute.

S.C. Code Ann. § 6-1-330(B) states in relevant part that 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). 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>. The legislature could have chosen restrictive language such as “solely” or “exclusively;” instead, the word “related” gives a measure of discretion to the City in determining how it may use its Utility revenues. See *Thompson v. County of Horry*, 294 S.C. 81, 84, 362 S.E.2d 646, 648 (Ct. App. 1987) (explaining that legislature’s choice of less restrictive language shows legislative intent

by Black & Veatch include expenditures for the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, various Development Corporations, and the Economic Development Contingency Fund; but it also includes expenditures that Appellants did not raise in their Motion to Reconsider. To the extent that Appellants are now challenging the categories of expenditures identified by Black & Veatch on CITY-0000012, other than those for the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, the Development Corporations, and the Economic Development Special Project Fund, they are unpreserved for appellate review. *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 554, 709 S.E.2d 99, 111 (Ct. App. 2011).

to confer a measure of discretion in how revenues can be spent). The circuit court did not err in ruling that the City's expenditures to print public educational materials about clean water and sewer overflows, and to fund its economic development activities,²³ are indeed related to the provision of water and sewer service.

Appellants challenge the City's charge to its Utility Enterprise Fund for expenses of printing material distributed during National Water Week to educate the public about the City's water quality test results for its drinking water, and also printing fliers to educate the public on how to help reduce sewer overflows. (Gantt Dep. p. 80, line 7 – p. 82, line 7). Clearly, informing the public about the performance and functioning of the Utility is related to the provision of water and sewer service, and therefore, is lawful under S.C. Code Ann. § 6-1-330(B).

Appellants challenge the City's charge to its Utility Enterprise Fund for its economic development activities. A water and sewer utility has been long recognized in this State as having an important role in economic development. *Green v. City of Rock Hill*, 149 S.C. 234, 264, 147 S.E. 346, 357 (1929); *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 LEXIS 54, 14 (1952). A water and sewer utility “lower[s] the rate of insurance, increase[es] the general sense of security, and therefore the general happiness, diminish[es] the risk of numbers of persons being thrown out of employment, and generally ... giv[es] steadiness and confidence to the life and the enterprises of a city.” *Green*, at 264-65, 357. A municipal water and sewer utility serves the needs of industry “upon which the prosperity of so many modern urban communities vitally depends.” *Id.* The City's Utility is an engine of economic development

²³ Appellants challenge the general category of economic development-related expenditures, not particular expenditures within this category, with the exception of expenditures for the City Center Partnership (business improvement district). (See H'rg Tr. p. p. 53, line 7 – p. 54, line 7 (Aug. 5, 2013)).

that attracts businesses to the Midlands region. (Caughman Dep. p. 33, lines 5-7; p. 34, lines 9-14, p. 36, lines 10-13); (Gantt Dep. p. 35, lines 23-25). Adequate water supply is an important economic development tool. (Gantt Dep. p. 60, lines 17-19). The City's economic development activities serve to capitalize on the important role its Utility plays in the local economy.

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. (Gantt Dep. p. 82, line 19 – p. 84, line 1); (Gantt Dep. p. 105, line 15 – p. 106, line 8). The goal of the City's economic development office and its designated economic development special project fund²⁴ is to attract new businesses to the region and encourage expansion of existing business in order to grow the Utility's customer base. (*Id.*) In the process, the Midlands region benefits by strengthening the economy. (*See* Caughman Dep. p. 34, lines 4-14). The City's use of water and sewer revenues for its economic development office and economic development special projects are related to the provision of water and sewer service, and therefore, are lawful under S.C. Code Ann. § 6-1-330(B).

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. (Gantt Dep. p. 69, lines 7-22). Coaching small businesses how to bid on water and sewer projects increases the number of bids received, which improves

²⁴ Appellants single out the City's use of \$70,000.00 from its economic development special projects fund for the downtown business improvement district, more popularly known as the City Center Partnership, as violative of S.C. Code Ann. § 6-1-330(B). (Def. Appx. 13: CITY-0003931). The City Center Partnership is a business improvement district that works to enhance new development or redevelopment of Main Street. (Gantt Dep. p. 86, line 10 – p. 87, line 5). The City Center Partnership was instrumental in the development of the Meridian Building and Number One Main Street Building, both of which are significant water and sewer users. (Gantt Dep. p. 86, line 10 – p. 87, line 2).

bidding competitiveness, thereby lowering the City's water and sewer construction costs. (Gantt Dep. p. 69, line 7 – p. 70, line 9). 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 City funds four development corporations from its water and sewer revenues. "The Columbia Development Corporation assists 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." (Def. Appx. 12: CITY-0002277 at 2317). The Columbia Development Corporation was instrumental in transforming the Vista, a declining warehouse district, into a vibrant entertainment district. (Gantt Dep. p. 84, lines 6-23). The Eau Claire Development Corporation redevelops neighborhoods and commercial corridors in North Columbia. (Def. Appx. 12: CITY-0002277 at 2317); (Gantt Dep. p. 84, line 24 – p. 85, line 3). Both the Columbia Housing Development Corporation and the Development Corporation assist the City in the development of affordable housing and to promote growth in the residential base of the City. (Def. Appx. 12: CITY-0002277 at 2317). 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 enlarge their business in the Columbia area." (Gantt Dep. p. 85, lines 6-18). The City's use of water and sewer revenues to fund its development corporations is related to the provision of water and sewer service, and therefore, is lawful under S.C. Code Ann. § 6-1-330(B).

Appellants argued below that construing the Service Fee Statute to allow use of Utility revenues to pay for the City's economic development activities is an overly broad reading that would ultimately result in the City being able to fund virtually all of its operations, such as fire, police, parks, recreations, streets, museums, etc., out of water and sewer fee revenues because those expenditures enhance the attractiveness and prosperity of the City. Appellants' argument misses the point that the City's above-described activities are related to water and sewer service not because they generally make the City a better place to live, but because they benefit the Utility by strengthening and increasing its residential and commercial customer base, and in the case of the office of business opportunities, by lowering the costs of water and sewer construction through enhanced business competition. The City's use of Utility revenues for economic development purposes has a clear and rational connection to its Utility. Appellants impermissibly ask this Court to strictly construe the word "related" to mean only expenditures for operation, maintenance and improvement of the Utility, in contravention of article VIII, section 17 of the South Carolina Constitution, which mandates that "all laws concerning local government shall be liberally construed in their favor."

In addition, Appellants rely heavily on a report by the engineering firm Black & Veatch prepared in 2007 that examined the City's use of Utility revenues. (Pl. Dep. Exh. 2: Black & Veatch 2007 Indirect Cost of Service Study (April 2, 2007)). In this report, Black & Veatch analyzed two categories of Utility expenditures: 1) a charge to the Utility for the estimated costs of support services provided by other City departments to the Utility, such as legal services, human resources and accounting (described as "indirect costs"); and 2) charges to the Utility for City functions that directly and measurably serve or benefit the

Utility (described as “direct costs”). (*Id.* at CITY-0000001). At issue here is the recommendation from Black & Veatch that direct costs totaling \$7.5 million dollars charged to the Utility should not be charged to the Utility because, in Black & Veatch’s opinion, the services paid for by the Utility bore no “direct cost causation or benefit” to the Utility. Included within this \$7.5 million dollar figure is the cost of the City’s economic development activities and the public education materials that Appellants have challenged.²⁵ According to Appellants, this recommendation conclusively establishes that the City’s use of Utility revenue for the economic development activities and public education materials described above violates the Service Fee Statute; however, the Black & Veatch recommendation does nothing of the sort. The City is not bound by the recommendation of a consultant. *See e.g. Tucker v. S.C. Dep’t of Highways & Pub. Transp.*, 314 S.C. 131, 133, 442 S.E.2d 171, 173 (1994) (holding that recommendations from a legislative delegation to a county transportation committee are not binding upon the county); *F.B.R. Investors v. County of Charleston*, 303 S.C. 524, 528, 402 S.E.2d 189, 191 (Ct. App. 1991) (holding that County Council is not bound to follow recommendations from its boards and committees). Black & Veatch took a very narrow view of direct causation or benefit, so narrow that it saw the costs of collecting outstanding water and sewer bills by the City Finance Department, the cost to

²⁵ Appellant’s Brief quotes from this Black & Veatch Cost of Service Study (CITY-0000001) its recommendation to reduce the amount from \$3.2 million to \$2.27 million that the City charged to the Utility for administrative services provided to the Utility by other City departments, such as its legal, human resources, and accounting offices, which City chose to do. Appellant’s Brief, p. 19; (Caughman Dep. p. 27, lines 2-16). During the summary judgment hearing before Judge Cooper, Appellants stated that they were not complaining of these expenditures. (H’rg Tr. p. 72, lines 16-17(Aug. 5, 2013)). A party is bound by the statements of its counsel. *See Smith v. Pearson*, 210 S.C. 524, 530, 43 S.E.2d 479, 482 (1947). To the extent Appellants are now attempting to challenge the City’s use of \$2.27 million in Utility revenues to pay for administrative support of the Utility, it is unpreserved for appellate review because Appellants failed to raise this issue in their Motion to Reconsider. (Pl. Mot. Reconsider (Oct. 14, 2013)); *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 554, 709 S.E.2d 99, 111 (Ct. App. 2011).

maintain fire hydrants,²⁶ and the cost of GIS mapping of the Utility's water and sewer lines, to lack "direct causation or benefit" to the Utility. (*Id.* at CITY-0000003). Black & Veatch's recommendations are not determinative of the issue here.

B. The City's use of a portion of its Utility profits to defray expenses of ordinary government operations does not violate the Service Fee Statute.

The General Assembly is "presumed to enact legislation with reference to existing law, and there is a strong presumption it does not intend, by statute, to change common law rules." *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 483, 517 S.E.2d 235, 238 (Ct. App. 1999). "Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." *16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012). "If [a] statute is in derogation of a common law right, it must be strictly construed and not extended in application beyond clear legislative intent." *Id.*

Thus, the legislature is presumed to know that water and sewer charges for monthly service are unique in comparison to many other local government fees. Article VIII, § 16 of the South Carolina Constitution entitles municipalities to operate a water and sewer utility as a business enterprise like any other public utility.²⁷ *Sossamon v. Greater Gaffney Metro Utilities Area*, 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). Like any

²⁶ The former City Manager testified that "It's the water utility's responsibility to make sure that we have operating fire hydrants on our water system throughout our service area. That's not a fire service. That's a utility service." (Gantt Dep. p. 43, line 22 – p. 44, line 4).

²⁷ Appellants claim that it was error for the circuit court to accept that the City fiscally manages its Utility in a proprietary manner because *Calcaterra v. City of Columbia*, 315 S.C. 196, 432 S.E.2d 498 (1993) holds that "the furnishing of water to residents and non-residents is a governmental function, and the State makes no distinction between proprietary and governmental functions of municipalities." While true that many aspects of municipal provision of water and sewer service are deemed a governmental function, "there can be no doubt that in the fiscal aspect thereof the operation and maintenance of such utility partake largely of the nature of a commercial or business enterprise." *Green*, 149 S.C. 234, 264, 147 S.E. 346, 356-357 (1929). In fact, the City manages its Utility Enterprise Fund in a proprietary manner consistent with Generally Accepted Accounting Principles set forth by the Governmental Accounting Standards Board. (Palen Aff. ¶ 3).

other public utility, a municipality may charge a rate for water and sewer service that generates a profit. *Sossamon*, 236 S.C. 173, 182, 113 S.E.2d 534, 538 (1960); *Simons*, 181 S.C. 353, 358, 187 S.E. 545, 547 (1936); *Green*, 149 S.C. 234, 264, 147 S.E.2d 346, 357 (1929). “Profit” is defined as “excess of revenues over expenditures” or “gain,” meaning that “profit” is monies remaining after the City’s budgeted expenditures are met. Black’s Law Dictionary, Pocket Edition, p. 505 (5th ed. 1979).

Any profit or surplus remaining after Utility expenses are paid or obligated may be used for other purposes. See “*Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E. 2d 684, 687, fn. 9 (2001) (“A city’s rate to non-resident water customers that generates revenue greater than the cost of service for the purpose of “raising revenue to meet increasing municipal needs is a legitimate governmental goal...”); *Cox v. Bates*, 237 S.C. 198, 215, 116 S.E.2d 828, 835 (1960) (holding that “where a surplus remains after payment of appropriations, it may be appropriated to other purposes.”); *Welling v. Clinton Newberry Natural Gas Authority*, 221 S.C. 417, 427, 71 S.E.2d 7, 11 (1952) (noting that remaining revenues of a joint municipal utility after expenses and debt service paid was to be distributed to participating municipalities); *Parker v. Bates*, 216 S.C. 52, 60, 56 S.E.2d 723, 726 (1949) (stating that “where a surplus remains after the accomplishment of the purpose for which an appropriation is made, it may be diverted to other causes.”).²⁸ The City’s power to use its Utility profits in any manner within its sound discretion is fairly implied under its authority to make a profit from its Utility. See S.C. Const. art. VIII, § 17 (“Powers, duties,

²⁸ See also 1968 S.C. A.G. LEXIS 158 (S.C. A.G. 1968); 1962 S.C. AG LEXIS 530 (S.C. A.G. 1962); 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.”).

and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.”).

As already noted, 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.” Notably, the plain language of S.C. Code Ann. § 6-1-330(B) does not expressly prohibit the City from using surplus Utility revenue for some other legitimate purpose after its Utility costs are met.²⁹ In the absence of any language within S.C. Code Ann. § 6-1-330(B) prohibiting use of any surplus revenues or profit remaining after the costs and obligations of the Utility are paid, this subsection should be construed as not prohibiting the City to use \$4.5 million of its profit to offset property taxes. *See 16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) (“If [a] statute is in derogation of a common law right, it must be strictly construed and not extended in application beyond clear legislative intent.”); *see also Thompson v. County of Horry*, 294 S.C. 81, 84, 362 S.E.2d 646, 648 (Ct. App. 1987) (“The Legislature could easily have restricted the use of county (C) funds in the manner argued for by the Community Associations. It need only have provided that the revenues be spent “exclusively” in the “unincorporated areas” of the county in which the proceeds of the tax are collected.”).

²⁹ 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.” 1997 S.C. Acts 138, § 6-1-520 & § 6-1-730 (emphasis added).

Appellants concede that the City is entitled to a profit from its Utility,³⁰ but assert that the Service Fee Statute essentially abrogates the City's right to use that profit for other purposes, thereby requiring that all revenues, including profits, be used to pay the direct costs of the Utility. Appellants' argument does not square with the meaning of the word "profit," defined as monies remaining after the City's budgeted expenditures are met. In other words, Appellants ask this Court to ignore well-settled law establishing the City's right to a profit by insisting that its profit be extinguished. The Service Fee Statute does not prohibit the City from realizing a profit from its Utility and applying that profit in a manner within its sound discretion as part of its budgeting process. To construe the Service Fee Statute as extinguishing the City's right to make a profit from its Utility contravenes a municipality's right to operate a utility under art. VIII, § 16 of the South Carolina Constitution. *Sossamon v. Greater Gaffney Metropolitan Utilities Area*, 236 S.C. 173, 184, 113 S.E.2d 534, 539 (1960).

In addition, to hold otherwise would impermissibly intrude upon the City's legislative discretion to establish a budget for its Utility and within that budget, decide what improvements will be funded. A municipality is afforded broad discretion in how it chooses to operate its water and sewer utility. See *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 426, 593 S.E.2d 462, 468 (2004) ("the decision whether to grant a sewer extension request generally must be left to the sound discretion of municipal leaders"); *Sossamon*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960) (stating that cities have right to determine how to use their surplus water). The City has the discretion to determine whether its utility is in good repair and working order and what expenditures it will make to keep its system in

³⁰ (See H'rg Tr. p. 9, lines 17-20 (Aug. 5, 2013)) ("The defendants argue in their brief that they can make a profit and do with it as they see fit. And we don't argue that they can't make a profit. We don't have a problem with that.").

good repair and working order. *Green v. City of Rock Hill*, 149 S.C. 234, 262, 147 S.E.2d 346, 356 (1929); *Werts v. Feagle*, 83 S.C. 128, 135, 65 S.E. 226, 229 (1909).

Moreover, “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). The City’s statutory authority to charge utility rates, along with the Revenue Bond Refinancing Act of 1937 and the Revenue Bond Act for Utilities found within Title 6 must be read together in *pari materia* with the Service Fee Statute in order to determine whether the City’s transfer is unlawful.

Pursuant to S.C. Code Ann. § 5-31-670, “any city or town or special service district may, after acquiring a waterworks or sewer system, furnish water to persons for reasonable compensation and charge a minimum and reasonable sewerage charge for maintenance or construction of such sewerage system within such city or town or special service district.” Under S.C. Code Ann. § 5-7-60 and § 5-31-1910, the City by contract may provide service to non-residents, and in doing so, is obligated “to sell its surplus water for the sole benefit of the city at the highest price obtainable.” *Childs v. City of Columbia*, 87 S.C. 566, 571, 70 S.E. 296, 298 (1911). 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. Water and sewer rates shall be

sufficient to provide for the payment of the interest upon 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 are necessary to preserve it in good repair and working order,” to build up a reserve for depreciation 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 “shall be disposed of by the [City] as it may determine from time to time to be for the best interest of the [City].”³¹ 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. These provisions “shall be liberally construed.” S.C. Code Ann. § 6-21-570.

Pursuant to these statutes, the City has adopted a revenue bond ordinance (“Bond Ordinance”) which authorized the issuance of water and sewer revenue bonds with the bond payments paid solely from net Utility revenues remaining after payment for operation and

³¹ Appellants argue that no evidence exists that the City has complied with the requirements of S.C. Code Ann. § 6-1-440 that must first be met before the City may use any surplus funds in a manner deemed by the City Council to be in the best interest of the City. Appellants’ Brief, pp. 21-23. Contrary to Appellant’s contention, the City’s Bond Ordinance established the various funding obligations required under S.C. Code Ann. § 6-21-440, and this ordinance was entered into evidence. (Def. Appx. 16: CITY-0004740, from CITY-0004760-CITY-0004765). The City’s Resolution states that the Utility has “produced annual revenues in excess of the sum of the expenses of operating and maintaining of the System and debt service” and further states that the City has maintained “rates and charges ... sufficient to allow the City to meet the financial covenants of its Bond Ordinances.” (Def. Appx. 27: CITY-0008476). The former City Manager testified as to funds set aside for debt service, operations and maintenance, and reserves, how the City’s bondholders annually scrutinize the Utility’s finances, and how the City retains surplus funds. (Gantt Dep. p. 61, line 24 – p. 64, line 4). The City’s budget director testified that the Utility almost always generates surplus funds after expenditures are paid or obligated. (Caughman Dep. p. 15, lines 5-18). The Rate Study shows the City’s funds for existing and future debt service and depreciation. (Def. Appx. 18: CITY-0005229). The City’s Comprehensive Annual Finance Report for fiscal year 2010/2011 shows the City’s coverage of its Utility revenue bonds and its reserve cash required to be kept pursuant to its Bond Ordinance. (Def. Appx. 28 at CITY-0008612).

maintenance of the system was made.³² (Def. Appx. 16: CITY-0004740 at 4745). Pursuant to § 6.7 of the City's General 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." (Def. Appx. 16: CITY-0004740 at 4765). The City Council adopted a resolution ("Resolution")³³ establishing a policy regarding use of Utility revenues left after these obligations were met. (Def. Appx. 27: CITY-0008476 – CITY-0008478).

In reading these statutes together with the Service Fee Statute, it is clear that municipalities have a specific right to charge rates for water and sewer service that includes a profit. 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. Code Ann. § 6-21-440; (Def. Appx. 16: CITY-0004740 at 4765, § 6.7); (Def. Appx. 27: CITY-0008476). 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 nothing to interfere with this discretion.

³² In subsequent years, including the time period relevant to this case, the City supplemented the 1993 ordinance to authorize additional bond issuances. *See e.g.* (Def. Appx. 17: CITY-0005062-CITY-0005072).

³³ The Resolution authorized transfer of monies from its water and sewer enterprise fund to its general fund so long as such transfer did not 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 levels, and 4) maintain the capacity to fund capital improvements without unduly relying on bond issuances. (Def. Appx. 27: CITY-0008476 – CITY-0008478). 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.*) 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.

V. THE CIRCUIT COURT DID NOT VIOLATE APPELLANTS' DUE PROCESS RIGHTS

Appellants argue in their Brief, p. 27, that the circuit court, in offering to decide their motion for class certification by reviewing proposed orders rather than hearing oral argument, denied their due process right to oral argument during a hearing. A hearing was in fact scheduled on June 5, 2012 to hear both Appellants' Motion for Class Certification and the City's Motion to Dismiss. (H'rg Tr. pp. 21, line 25 – 24, line 13 (June 5, 2012)). Prior to the hearing, both parties submitted memoranda supporting their respective positions on class certification. (Pl. Mem. Supp. Class Cert., July 1, 2012); (Def. Mem. Opp. Class Cert., May 30, 2012). After hearing arguments on the City's Motion to Dismiss, the Circuit Court Judge offered to hear oral argument on Appellants' Motion for Class Certification but suggested instead that the parties simply submit proposed orders. (H'rg Tr. p. 22, line 8 – p. 23, line 24 (June 5, 2012)) (note that the Court Reporter misidentified counsel – what is attributed as Mr. Lydon's statements, is actually those of Mr. Lee, counsel for Appellants). The Circuit Court Judge also offered to reschedule oral argument for another day. (H'rg Tr. p. 23, lines 18-24 (June 5, 2012)). Appellants' counsel seemingly agreed to submit proposed orders. (H'rg Tr. p. 22, line 24 – p. 23, line 17 (June 5, 2012)). On June 7, 2012, the City's counsel sent its proposed order to the circuit court and opposing counsel. (Email from Lydon to Judge Kinard attaching proposed order, June 7, 2012). On June 8, 2012, Appellants' counsel submitted their proposed order, along with copies of their previously filed memoranda in support of class certification. (Connell Letter and Proposed Order to Judge Kinard (June 8, 2012). Although Appellants' cover letter to their proposed order mentioned the possibility of a subsequent hearing, they took no further action to follow-up with the court to make sure that a hearing was scheduled. Another hearing was not scheduled. On

June 26, 2012, the circuit court's order denying class certification was entered. In response to Appellants' motion to reconsider the court's denial of class certification, the class certification prerequisites and other issues was given a full hearing by the court. (H'rg Tr. Sept. 13, 2012).

There is no due process violation here. *See Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) ("The fundamental requirements of due process ... include notice, an opportunity to be heard in a meaningful way, and judicial review. Further, due process is flexible and calls for such procedural protections as the particular situation demands."); *FCC v. WJR, Goodwill Station, Inc.*, 337 U.S. 265, 276 (1949) (holding that procedural due process does not require oral argument in all cases). The lack of another hearing was not prejudicial to the Appellants; at best, it was harmless error. An error not shown to be prejudicial does not constitute grounds for reversal. *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997); Rule 61, SCRCP; *see also* 56 AM.JUR 2D *Motions, Rules, and Orders* § 32 ("Unless a hearing on a motion is specifically required by court rule, failure to conduct a hearing on that motion ordinarily will not constitute reversible error absent abuse of discretion; there is no abuse of discretion when the complaining party can point to no single, definable aspect of its position which could not have been adequately presented by a written submission.").

VI. THE CIRCUIT COURT DID NOT ERR IN DENYING CLASS CERTIFICATION.

Review of the circuit court's order denying class certification is only necessary if Appellants prevail on the substantive merits of this appeal. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003). Pursuant to Rule 23(a), SCRCP, the court may certify a class of plaintiffs only if the court finds: 1) the class must be "so numerous that

joinder of all members is impracticable;” 2) there must be “questions of law or fact common to the class;” 3) the claims or defenses of the representative parties must be “typical of the claims or defenses of the class;” 4) “the representative parties [must] fairly and adequately protect the interests of the class;” and 5) “in cases in which the relief primarily sought is not injunctive or declaratory ... the amount in controversy exceeds one hundred dollars for each member of the class.” “Proponents of class certification bear the burden of proving five prerequisites under South Carolina law.” *Gardner v. S.C. Dep’t of Revenue*, 353 S.C. 1, 20, 577 S.E.2d 190, 200 (2003). “In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied.” *Id.* at 21, 200. Failure to establish one prerequisite is fatal to class certification. *Id.*

Appellants take issue with every aspect of the circuit court’s denial of class certification. Because failure to withstand rigorous analysis of just one of the five prerequisites for class certification will defeat class certification, the City argues that Appellants fail to meet the adequacy requirement. To meet the adequacy requirement of Rule 23(a)(4), SCRC, “Appellants must demonstrate they have no interest antagonistic to or in conflict with the interests of the unnamed members of the class such that they are fairly and adequately able to protect the interests of the purported class.” *Waller v. Seabrook Island Property Owners Ass’n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). A named plaintiff who has economic interests that are antagonistic or adverse to those of the class fails to meet this adequacy requirement. *Id.* Where a named Plaintiff seeks relief that conflicts with the interests of the class, class certification is precluded. *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 337 (4th Cir. 1998).

Mr. Letts, a named Plaintiff, is a Non-Resident customer of the Utility. Mr. Cumberland, a named Plaintiff, is a Resident customer of the Utility. Appellants moved to certify a class comprised of all water and sewer customers of the City, both Resident and Non-Resident, over the three years prior to the initiation of their suit. The relief sought by Appellants is to require the City to pay into a common fund an amount representing at a minimum, the total amount of Utility revenues transferred into the City's general fund for the past three years, which amounts to \$13.5 million dollars.³⁴ If the challenged economic development and public information expenses are included, at a maximum, Appellants seek to require the City to pay into a common fund up to approximately \$22 million dollars.³⁵ In order to comply with any such order granting this remedy, the City would likely be forced to significantly raise property taxes.³⁶ A common fund of \$22 million dollars would require the staggering burden of an additional tax levy of 44 mils upon City taxpayers. (*See Gantt Dep. p. 28, lines 14-23* (stating that one mil equals about \$500,000.00)).

In addition, Appellants seek to enjoin future transfers of \$4.5 million dollars per fiscal year from its water and sewer enterprise fund to the general fund, and from using approximately \$2.7 million dollars in Utility revenues for economic development functions. If the City was enjoined from future transfers of \$4.5 million from its enterprise fund to its general fund, the City would be required to increase the tax burden upon City residents by 9 mils in order to fill the funding gap left by the City's inability to supplement its general fund with Utility profits. (*Gantt Dep. p. 28, lines 14-20*). To fund the City's economic development activities from the general fund would add yet another 5.4 mils. (*See Gantt*

³⁴ (*See H'rg Tr., p. 12, line 11 – p. 13, line 12* (Aug. 5, 2013)).

³⁵ *See* footnote 1.

³⁶ (*See Caughman Dep. p. 8, line 3-11*). The City's Utility debt service and debt service reserve accounts maintained pursuant to its Bond Ordinance cannot be used for any other purpose, thus, cannot be used to create a common fund. (*See Def. Appx. 16: CITY-0004761 – CITY-0004763*).

Dep. p. 28, lines 14-23 (stating that one mil equals about \$500,000.00). A prospective injunction would therefore add 14.4 mils to the tax bills of Resident customers.

Undoubtedly, the economic interests of City Residents would be adversely affected by Appellants' requested relief. The interests of Mr. Letts, as a Non-Resident customer who does not pay City property taxes, conflicts with Resident class members, who would be forced to bear a significant tax burden in order to achieve the outcome that Mr. Letts seeks.³⁷

Similarly, the interests of Appellant Cumberland, as a Resident Utility customer, are adverse to the interests of Non-Resident Utility Customers. Instead of raising property taxes to comply with any order creating a common fund, the City could significantly raise Non-Resident sewer rates while either minimally raising Resident rates or leaving Resident rates unchanged.³⁸ Should this Court enjoin the City from using Utility revenues derived from Resident customers, Non-Resident customers would shoulder the entire burden of paying for economic development expenditures through increased rates. Under these scenarios, Mr. Cumberland's economic interests are adverse to Non-Resident Utility customers who would bear the brunt of complying with the remedy Appellants seek. For these reasons, Appellants fail to meet the adequacy prerequisite of Rule 23(a), SCRPC. *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 337 (4th Cir. 1998); *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990).

³⁷ Although S.C. Code Ann. § 6-1-320(A)1 limits local governments' ability to increase its operating millage, there is an exception for compliance with a court order. S.C. Code Ann. § 6-1-320(B)(3).

³⁸ Pursuant to 1971 S.C. Acts 474, § 1, the City is prohibited from raising rates for water service to Non-Resident customers more than double that of Residents' rates. It does not place this same limitation upon Non-Resident sewer rates.

VII. THE CIRCUIT COURT DID NOT ERR IN DISMISSING ON SUMMARY JUDGMENT MR. LETTS AND MR. AZAR FOR LACK OF STANDING BECAUSE NO FINAL ORDER HAD BEEN ENTERED ARISING FROM A PREVIOUS HEARING ON THE CITY'S RULE 12(B)(1) MOTION TO DISMISS FOR LACK OF STANDING.

On November 14, 2011, the City moved to dismiss Messrs. Azar and Cumberland for lack of standing pursuant to Rule 12(b)(1), SCRCF. (Def. Mot. 12(b)(1) (Nov. 14, 2011)). A Second Amended Complaint was filed on January 17, 2012 to add Mr. Letts as a plaintiff, individually and as a class representative. On May 17, 2012, the City's Rule 12(b)(1) Motion was amended and supplemented to include arguments that Mr. Letts lacked standing. Am. Mot. 12(b)(1) (May 17, 2012). During a hearing held on June 5, 2012, Circuit Court Judge Kinard orally denied this motion. (H'rg Tr. p. 24, lines 7-13 (June 5, 2012)). After approximately one month expired without receipt of an order, the City followed up with the Circuit Court Judge requesting an order. (Email from Taylor to Judge Kinard's Office (Aug. 1, 2012)). The City received no response, and a written order was never entered.³⁹

In an effort to assure that a ruling on the issue of the Appellant's standing would be forthcoming, the City included lack of standing of Messrs. Azar and Letts⁴⁰ as part of its Motion for Summary Judgment. No written order had been entered as of the date of the summary judgment hearing held over a year after the City originally argued its Rule 12(b)(1) Motion before Judge Kinard. In ruling that Messrs. Azar and Letts lacked standing, Judge Cooper did not impermissibly overrule the decision of another circuit court judge, as Appellants argue. Judge Cooper was not bound by a prior verbal order by Judge Kinard

³⁹ Even if Judge Kinard had entered a written order denying the City's Motion to Dismiss for lack of standing, the denial of a Motion to Dismiss "does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." *Woodard v. Westvaco Corp.*, 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995) (stating that "an order *denying* a motion to dismiss for lack of subject matter jurisdiction does not finally determine anything" and further explaining that such motion can be raised again at a later stage in the proceedings) (emphasis in original).

⁴⁰ The City withdrew its previous assertions that Mr. Cumberland lacked standing to bring his breach of contract claim.

because Judge Kinard never did reduce his ruling to writing and enter it for recordation by the Clerk of Court. *Hilton Head Resort Four Seasons Ctr. Horizontal Property Regime Council of Co-Owners v. Resort Inv. Corp.*, 311 S.C. 394, 397, 429 S.E.2d 459, 461-462 (Ct. App. 1993).

“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. The written order is the trial judge's final order and as such constitutes the final judgment of the court. *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001). A judgment is not effective until an order is entered by the clerk of court. Rule 58(a), SCRPC. An oral order of the court is not final and binding until reduced to writing, signed by the judge, and delivered for recordation. *Brailsford v. Brailsford*, 380 S.C. 443, 452, 669 S.E.2d 342, 346 (Ct. App. 2008). Thus, Judge Kinard's oral ruling could not have become the law of the case.

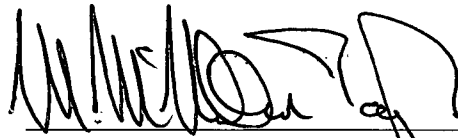
Appellants raise the novel argument that a hearing transcript constitutes a written order, and that the City should have expeditiously obtained a copy of the transcript of the hearing before Judge Kinard where he denied the City's Motion to Dismiss, and moved for reconsideration of the circuit court's verbal ruling as reduced to writing in the transcript. Appellant's Brief, p. 41. Then, Appellants argue, the City should have appealed Judge Kinard's decision to this Court. Because the City did not do these things, Judge Kinard's verbal ruling that the Appellants have standing is the law of the case, Appellants assert. Therefore, Appellants contend that the City was prohibited from raising the standing issue in the subsequent summary judgment hearing before Judge Cooper, and from raising it here. *Id.* at p. 42. Appellants cite no law for this proposition, nor can they, for there is no Rule of

Civil Procedure or Appellate Practice, and no law that supports their argument. This Court should reject Appellants' argument as lacking any foundation in the law.

CONCLUSION

For the foregoing reasons, the City respectfully asks this Court to uphold the Order Granting Summary Judgment, and the Order Denying Class Certification.

Respectfully submitted,



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Attorneys for Respondent City of Columbia

July 25, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUL 25 2014

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

The Honorable G. Thomas Cooper
The Honorable J. Ernest Kinard

Case No. 2011-CP-40-6705

JOSEPH S. AZAR, FRANK J. CUMBERLAND, JR. AND
MICHAEL A. LETTS, INDIVIDUALLY AND AS
CLASS REPRESENTATIVES, APPELLANTS,

v.

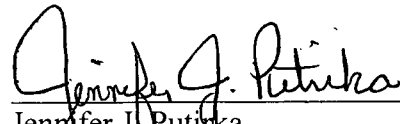
CITY OF COLUMBIA, RESPONDENT.

CERTIFICATE OF SERVICE

I certify that I have served a copy of Initial Brief of Respondent City of Columbia and Designation of Matter to be included in the Record on Appeal by placing in the United States Mail, postage prepaid, on the 25th day of July, 2014, addressed to counsel of record as follows:

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July 25, 2014

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

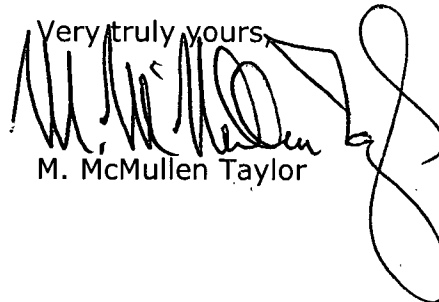
RE: Joseph S. Azar, Frank J. Cumberland, Jr., and Michael A. Letts,
Individually and as Class Representatives, Appellants, v. City of Columbia,
Respondent
Our File No.: 20203.11129
Appellate Case No. 2014-000032

Dear Ms. Kitchings:

Enclosed please find an original and one copy of Respondent City of Columbia's Initial Brief and Designation of Matter. Please return a file-stamped copy to my runner. By copy of this letter, I am hereby serving this Initial Brief upon Appellants.

If you have any questions, please contact me.

Very truly yours,



M. McMullen Taylor

enclosures

cc: Dixon Lee, Esquire
Gene Connell, Esquire

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JUL 25 2014

SC Court of Appeals