**STATE OF SOUTH CAROLINA**
In the Court of Appeals

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**APPEAL FROM RICHLAND COUNTY**
Court of Common Pleas for the Fifth Judicial Circuit
G. Thomas Cooper, Circuit Court Judge
J. Ernest Kinard, Jr., Circuit Court Judge

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Docket No. 2011-CP-40-6705
Appellate Case No. 2014-000032

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

Appellants,

vs.

**CITY OF COLUMBIA,**

Respondent.

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# INITIAL REPLY BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

I. The Circuit Court committed error in its interpretation and application of Title 6, Chapter 1, Article 3 of the South Carolina Code of Laws, and in particular, S.C. Code § 6-1-330 (Supp. 2013) to the water and sewer fees collected by the City of Columbia from operation of its water and sewer systems.

## ARGUMENTS

### I. THE CIRCUIT COURT COMMITTED ERROR IN ITS INTERPRETATION AND APPLICATION OF TITLE 6, CHAPTER 1, ARTICLE 3 OF THE SOUTH CAROLINA CODE OF LAWS, AND IN PARTICULAR, S.C. CODE §6-1-330 (SUPP. 2013) AS APPLIED TO THE PERMISSIBLE USES OF WATER AND SEWER FEES COLLECTED BY THE CITY OF COLUMBIA FROM OPERATION OF ITS WATER AND SEWER SYSTEMS.

#### A. Respondent's position on the use of water and sewer fees collected by the City of Columbia results in an unconstitutional taxation without representation in violation of S.C. Constitution, Art. X, § 5 as to the "non-resident" water and sewer customers.

It is undisputed that a majority of the City of Columbia's water and sewer customer are non-resident of the City of Columbia. These non-residents have no voice in the election of City Council members or of the Mayor of the City of Columbia.

S.C. Constitution, Article X, § 5 provides as follows:

**S.C. CONST Art. X, § 5**

§ 5. No tax without consent; taxes to be levied in pursuance of law.

> No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.

The facts in this case are undisputed that for decades the City of Columbia has "transferred" millions of dollars from monies collected as water and sewer fees from water and sewer customer who are residents and non-residents into its general operation account and then expended those monies for purposes other than the City's water and sewer system.

Well established case law in this State distinguishes between the permissible use of monies collected as "taxes" and monies collected as "fees". In *J. K. Construction v.*

*Western Carolina Regional Sewer Authority*, 336 S.C. 162, 519 S.E.2d 561 (1999), the South Carolina Supreme Court addressed that distinction stating:

> **1. IS THE FEE A CHARGE OR A TAX?**
>
> JKC contends the trial court erred in ruling the new account fee is a sewer service charge. The fee provides a general benefit to everyone who lives in Authority's district because proceeds will be used to expand treatment capacity. Consequently, the court erred in refusing to hold that the fee is actually a tax which Authority must apply uniformly to all residents of the district, not just to new customers, JKC argues.
>
> We disagree. We hold that the required payment is a charge, not a tax, and Authority has uniformly imposed the charge upon those who are required to pay it.
>
> First, the required payment primarily benefits those who must pay it because they receive a special benefit or service as a result of improvements made with the proceeds. That special benefit is the proper treatment and disposal of sewage. *Brown v. County of Horry,* 308 S.C. 180, 184–85, 417 S.E.2d 565, 568 (1992) (holding that road maintenance fee imposed on all motor vehicles registered in county was a service charge, not a tax). It is true that the entire area may benefit from improved and expanded sewage service, but a charge does not become a tax merely because the general public obtains some benefit. *Brown v. County of Horry, supra; Robinson v. Richland County Council,* 293 S.C. 27, 33, 358 S.E.2d 392, 396 (1987) (holding that required payment imposed to fund installation and maintenance of sewer facility was assessment, and not tax, regardless of whether general public obtained health benefit from elimination of sewage problem).
>
> Second, proceeds from the required payments are dedicated solely to capital improvement projects. **The proceeds are not placed in a general fund to be spent on Authority's ongoing expenses and maintenance, which is a hallmark of a tax.** *Hagley Homeowners Ass'n v. Hagley Water, Sewer, and Fire Auth.,* 326 S.C. 67, 75, 485 S.E.2d 92, 96 (1997) ("[g]enerally, taxes are imposed on all property for the maintenance of government"); *Brown v. County of Horry, supra* (revenue from fees destined for general fund indicates a tax).
>
> Third, as the parties stipulated, the revenue generated by the required payment will not exceed the cost of capital improvements to the system. *C.R. Campbell Constr. Co. v. City of Charleston,* 325 S.C. 235, 481 S.E.2d 437 (1997) (applying factors from *Brown v. County of Horry, supra,* to uphold validity of municipal real estate transfer fee dedicated to

parks and recreation).

> Fourth, Authority uniformly has imposed the required payment upon those who must pay it. The trial court ruled the required payment, because it was a charge imposed by a special purpose district, was not mandated by statute or the constitution to be uniform in the sense that every customer had to pay it. The court noted, however, that Authority uniformly had imposed the required payment on all new customers based on their anticipated water usage.
>
> We agree with the trial court's reasoning. While no statute or constitutional provision explicitly requires charges by special purpose districts to be uniform, the Court has stated that charges or assessments imposed only upon certain individuals "must be fairly and justly apportioned among those charged with their payment. A method of apportionment, whether by statute or by regulation, that is manifestly arbitrary or discriminatory does not fulfill the constitutional requirements of due process and equal protection." *Hagley Homeowners Ass'n,* 326 S.C. at 76–77, 485 S.E.2d at 97 (quoting *Newton v. Hanlon,* 248 S.C. 251, 149 S.E.2d 606 (1966)).
>
> Fifth, we may consider the fact that Authority intended to classify the payment as a charge. *Brown v. County of Horry,* 308 S.C. at 184, 417 S.E.2d at 568 (while governmental entity's intent may be considered, the question of whether a required payment is a charge or a tax depends on its real nature and not the label assigned to it by the governmental entity that approved it). Authority described it as a "new account fee" in the resolution adopting it, and has not used tax levies since 1975 in order to maintain continued eligibility for federal grants. (emphasis added) 519 S.E.2d at 564, 565.
>
> Also see *Ford v. Georgetown County Water & Sewer District*, 341 S.C. 10, 532 S.E.2d 673 (2000).

Here, the City of Columbia has collected water and sewer fees from both residents of the City of Columbia and non-residents of the City of Columbia, initially deposited those monies into the City's "Water and Sewer Enterprise Fund" and then transferred millions of those dollars to the City's general fund. Additionally, the City allowed other departments of City, in addition to the water and sewer department, to spend monies out

of the Water and Sewer Enterprise Fund originally collected and deposited into that account as water and sewer fees.

By definition, the City's use of monies collected as water and sewer fees to pay general operating expense of the City unrelated to its water and sewer system makes any water and sewer fees treated in that manner a "tax" and not a "fee" or "service charge". To the extent such monies were collected from non-residents' of the City of Columbia, the actions of the City of Columbia result in "taxation without representation" in violation of S.C. Constitution, Article X, § 5.

Contrary to its argument otherwise, the City of Columbia is not allowed to collect water and sewer fees, particularly from non-residents of the City, as it has done and continues to do, and then expend those monies for purposes other than its water and sewer system.

**B. The Rules of Statutory Construction require that any potential conflict between the language in S.C. Code Ann. § 6-1-330(b) and S.C. Code Ann. § 6-21-440 (Supp. 2013) must be read to harmonize those statutes.**

Respondent attempts to nullify the language in S.C. Code Ann. § 6-1-330(B) (Supp. 2013) which provides in pertinent part:

> 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.

Appellant submits that there is no conflict in the language between S.C. Code Ann. § 6-1-330(b) and S.C. Code Ann. § 6-21-440 (Supp. 2013). However, if this Court determines that such a conflict exists then the Rules of Statutory Construction require that this Court read those statues in a manner to harmonize them. *Hodges v. Rainey*, 341 S.C.

79, 533 S.E.2d 578 (2000); *Davis v. School District of Greenville County*, 374 S.C. 39, 647 S.E.2d 219 (2007).

Here, any claimed, supposed or perceived conflict between the language in S.C. Code Ann. § 6-1-330(b) and S.C. Code Ann. § 6-21-440 (Supp. 2013) is easily harmonized. S.C. Code Ann. § 6-1-330(B) (Supp. 2013) is the general rule which expressly and unambiguously mandates that revenue derived as a service or user fee be used to finance the costs of the service or program for which the fee was paid. S.C. Code Ann. § 6-21-440 (Supp. 2013) provides a limited exception to that rule when and only when specific four preconditions, discussed in more detail in the Brief of Appellant, are satisfied. The City of Columbia has not satisfied any one of those four preconditions much less all four of them and, thus, cannot shield itself under S.C. Code Ann. § 6-21-440 (Supp. 2013).

## CONCLUSION

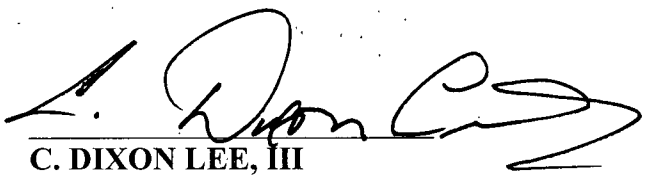
If Respondent prevails in this appeal and the decision of the Circuit Court is affirmed the longstanding distinctions in this State between "service charges or user fees" and "taxes", which appear in our statutory lay and the prior decisions of the appellate courts of this State, will be fundamentally abolished. Counties, cities, town, public service districts and other governmental entries who charge service charges or user fees will be free to spend the revenues collected from those sources in virtually any manner they desire with no constraints. Carried to its logical conclusion, tax increases requiring the consent "...of the people or their representatives..." would no longer be necessary. Governmental entities could simply increase or create new service charges or user fees and then redirect the revenues derived to pay for whatever project or other uses that governmental entity desired, without limitation or restriction. Property and other tax burdens now paid by "residents" could easily be shifted to "non-residents" by increasing service charges or user fees charged to those non-residents and then using the revenues derived from those service charges or user fees to pay the expenses previously paid by tax revenues.

The decision of the Circuit Court in this case is not only in error but also, if affirmed, opens the proverbial door for undesirable consequences far beyond the scope of this case. The existing law in this State governing the use of monies collected as service charges or user fees is clear and unambiguous. The Circuit Court did not follow that law in its decision in this case and, thus, was in error.

Accordingly, Plaintiffs request this Court (1) reverse the decision of the Circuit Court in this case; (2) issue its order enjoining this practice by the City of Columbia; and, (3) require the City of Columbia to return to the City's "Water and Sewer Enterprise Fund"

account all monies which were transferred from that account to the City's general fund by the City of Columbia and all monies used by the City's various development corporations who directly spent money out of the City's "Water and Sewer Enterprise Fund" for the time period three (3) years prior to commencement of this lawsuit, the applicable statute of limitations, through date of return of those monies.

Plaintiffs further request that this Court then remand this case to the Circuit Court for further proceedings including awarding Plaintiffs class action status.



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Columbia, South Carolina

Dated: August 14, 2014

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In the Court of Appeals

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Appellants,

vs.

**CITY OF COLUMBIA,**

Respondent.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on the 14th day of August 2014 he/she did serve one (1) copy of the Initial Reply Brief of Appellants on opposing counsel by depositing the same in the United States Mail, sufficient first class postage prepaid addressed as follows:

Thomas E. Lydon, Esquire
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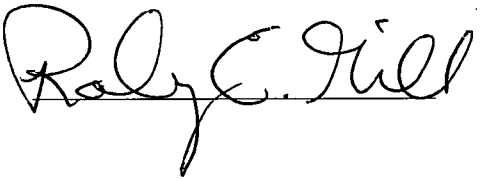
Dated this 14th day of August 2014 at Columbia, South Carolina.



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August 14, 2014

The Honorable Jenny Abbott Kitchings
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Re: *Joseph S. Azar, et. al. v. City of Columbia*
Docket No. 2011-CP-40-6705
Appellate Case No. 2014-000032

Dear Mr. Kitchings:

Enclosed for filing I am forwarding to you by United States Mail the following:

1) The original of the Initial Reply Brief of Appellants in the above-referenced case.

2) Original Proof of Service of the foregoing Initial Reply Brief of Appellants on the attorneys for the Respondent.

Should you have any questions regarding this matter, please feel free to contact me

Yours very truly,

C. Dixon Lee, III

CDL,III/mms
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cc: Thomas E. Lydon, Esquire w/enclosures
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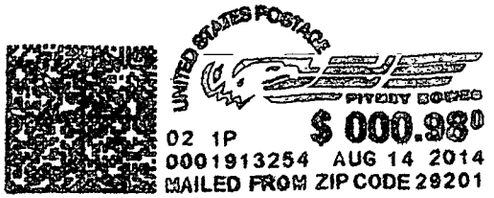


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