

ORIGINAL

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

SC Court of Appeals

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

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

Appellants,

vs.

CITY OF COLUMBIA,

Respondent.

RECORD ON APPEAL
Volume One

C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post Office Box 11809
Columbia, SC 29211-1809
(803) 799-3074 (voice)
(803) 252-3548 (facsimile)
SC Bar # 3165

M. Mullen Taylor
Mullen Taylor, LLC
1230 Richland Street (29201)
P.O. Box 8567
Columbia, SC 29202
803-254-1344 (voice)
803-253-6084 (facsimile)
SC Bar # 72848

Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (voice)
(843) 238-5050 (facsimile)
SC Bar # 1358

Thomas E. Lydon
PO Box 12519
Columbia, SC 29211

ATTORNEYS FOR APPELLANTS

ATTORNEY FOR RESPONDENT

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-6705

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This matter came before the Court for a hearing on Plaintiffs' Motion for Class Certification. Specifically, the motion before the Court seeks to certify a class of customers of the City of Columbia, past and present as of three years prior to the filing of the Complaint. Having reviewed the pleadings, the motion, and the memoranda submitted by Plaintiffs and Defendant, I find and conclude that class certification is not necessary or appropriate in this case.

The primary issue presented in the case is whether the City of Columbia's water and sewer charges are subject to limitations found in Section 6-1-330 of the South Carolina Code, which provides that service fees collected by local governments must be used for costs related to the service or program for which it was paid. Plaintiffs allege that the City of Columbia violated this statute by using some of its water and sewer revenues for purposes that they contend are unrelated to water and sewer service, such as funding economic development activities. Plaintiffs also allege that the City's annual transfer of up to \$4.5 million dollars from its water and sewer enterprise fund to its

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JEANETTE B. MORRIS
CLERK, P. G.S.C.
RICHLAND COUNTY
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general fund violates Section 6-1-330 of the South Carolina Code. Plaintiffs seek a permanent injunction requiring Defendant in the future "to place all fees collected for operations of and/or capital improvement of the water and sewer system in a segregated account and to only be used for such purposes," and to replace all monies Defendant expended in the past for other purposes.

Plaintiffs are seeking to have a class certified in connection with their claim for injunctive relief. South Carolina appellate courts have not had an opportunity to address a situation involving a proposed class action seeking an injunction against a municipality. However, other courts have held in such cases that, regardless of whether the elements of Rule 23(a) are satisfied, a class should only be certified if there is a need for the complexities and extra costs associated with class suits. *See Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (6th Cir. 1976); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974). These courts concluded that class certification was unnecessary because any declaratory or injunctive relief given in the individual action of the named plaintiffs would inure to the benefit of other similarly situated individuals.

The principle set forth in cases like *Craft v. Memphis Light, Gas and Water Division* and *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach* is directly applicable in this case. Plaintiffs seek injunctive relief directing the City of Columbia to comply with Section 6-1-330 of the South Carolina Code. The named Plaintiffs can fully and adequately present this claim, and the Court can assume that the City will comply with an injunction if the Court ultimately deems it appropriate to enter

such relief. Thus, there is no need for the complexities and extra costs associated with class actions, and no useful purpose will be served by class treatment.

Not only is class certification unnecessary in this case, but Plaintiffs have not established all five of the requirements of Rule 23(a), SCRCF, which are necessary for class certification. The South Carolina Supreme Court has held that proponents of class certification bear the burden of proving five prerequisites under South Carolina law. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRCF. The prerequisites are: 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 with respect to the class as a whole, the amount in controversy must exceed one hundred dollars for each member of the class. Rule 23(a), SCRCF. In deciding whether class certification is proper, the court must apply a rigorous analysis to determine whether each prerequisite is satisfied. Failure to satisfy even one prerequisite is fatal to class certification. *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003).

Plaintiffs seek to certify a class of "all Columbia water customers, past and present as of three years prior to the filing of the Complaint." However, Plaintiffs cannot establish the third and fifth requirements for class certification. The third element is that the claims of the representative parties are typical of the claims of the class. No evidence has been presented that any other potential class members wish to assert a claim.

Plaintiffs are complaining about the manner in which the City is spending water and sewer revenues. Plaintiffs have not shown that other citizens have presented similar complaints.

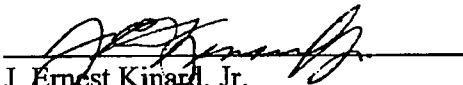
Plaintiffs also fail to meet the fifth requirement for class certification because the relief sought is not primarily injunctive or declaratory with respect to the class as a whole, and the amount in controversy does not exceed one hundred dollars for each class member. Plaintiffs apparently concede that the amount in controversy does not exceed one hundred dollars for each class member. In their Motion, they state that "Plaintiffs request injunctive relief such that the amount in controversy is not in issue." However, a review of Plaintiffs' Second Amended Complaint indicates that the relief primarily sought is not injunctive or declaratory, as required by Rule 23(a)(5), SCRPC.

In their First Cause of Action, the relief primarily sought by Plaintiffs is injunctive relief. However, Plaintiffs allege three additional causes of action which do not seek injunctive or declaratory relief. In the Second Cause of Action, Plaintiffs assert a claim for breach of contract and seek "a refund of all fees collected." In the Third Cause of Action, Plaintiffs assert a claim for "Unconstitutional Collection." The relief sought in that cause of action is the creation of a common fund of all fees collected by the City for water improvements for the past three years. Finally, in the Fourth Cause of Action, Plaintiffs assert a claim for "Unconstitutional Tax." That cause of action asks for "judgment for the class and a common fund and for actual damages and the costs of the action." Thus, only one of the four causes of action alleged by Plaintiffs seeks an injunction as its primary relief. As such, Plaintiffs fail to satisfy the requirement set forth in Rule 23(c)(5) of the South Carolina Rules of Civil Procedure.

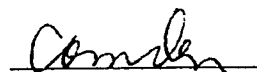
Based on the foregoing, class certification is both unnecessary and inappropriate in this case. If it is ultimately determined that the relief sought by Plaintiffs in this case should be granted, the Court may presume the good faith of government officials to respect such a ruling without the necessity of making this a class action. Moreover, a review of the record in this case indicates that Plaintiffs cannot establish all five elements required for class certification. Accordingly,

Plaintiffs' Motion for Class Certification is DENIED.

AND IT IS SO ORDERED.


J. Ernest Kinard, Jr.
Presiding Judge
Fifth Judicial Circuit

June 22, 2012

, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS
)

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

Civil Action No. 2011-CP-40-6705

Plaintiffs,

vs.

City of Columbia,

Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

This matter came before the Court for a hearing on Plaintiffs' Motion for Reconsideration of the Order Denying Class Certification. At the hearing on the Motion, Plaintiffs' counsel indicated that the Plaintiffs are seeking class certification only with respect to the claim for injunctive relief alleged in the Second Amended Complaint. However, having reviewed the motion, the relevant pleadings, and the briefs submitted by the parties, the Court finds that class certification is not appropriate in this case.

As stated in the Order Denying Class Certification, a class should only be certified if there is a need for the complexities and extra costs associated with class suits. See, *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (6th Cir. 1976); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974). The courts in the cited cases concluded that class certification was unnecessary because any injunctive relief entered in the individual action of the named plaintiffs would inure to the benefit of other similarly situated individuals. The same situation appears to exist in this case. That is, if the Plaintiffs prevail in their cause

RICHLAND COUNTY
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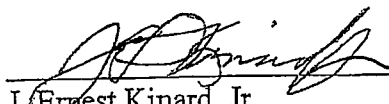


of action for injunctive relief against the City of Columbia, the relief entered in this action will inure to the benefit of other similarly situated individuals.

Based on the foregoing, class certification is both unnecessary and inappropriate in this case. If it is ultimately determined that the relief sought by Plaintiffs in this case should be granted, the Court may presume the good faith of government officials to respect such a ruling without the necessity of making this a class action. Accordingly,

Plaintiffs' Motion for Reconsideration is DENIED.

AND IT IS SO ORDERED.



J. Ernest Kinard, Jr.
Presiding Judge
Fifth Judicial Circuit

September 19, 2012

Camden, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

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C.C.P. & G.S.

RICHLAND COUNTY
FILED

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



SCANNED

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

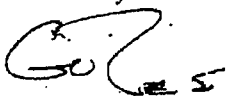
² Under Title 6, municipalities are authorized to issue revenue bonds for the acquisition, construction, improvement, enlargement, and repair of its water and sewer utility. S.C. Code Ann. § 6-21-190; S.C. Code Ann. § 6-17-30.

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

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

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

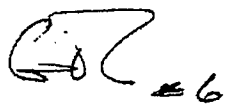
³ In 2013, the City repealed the Resolution and enacted in its place a new policy. The 2013 Resolution, enacted over a year after this litigation was commenced, is not at issue.



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

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

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



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

STANDARD OF REVIEW

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

CONCLUSIONS OF LAW

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

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

1. STANDING OF PLAINTIFFS AZAR AND LETTS

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

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

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

a. Mr. Azar

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

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

b. Mr. Letts

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



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

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

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

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

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

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

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

c. The Public Importance Exception

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

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

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

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

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

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

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

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

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

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

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

2. BREACH OF CONTRACT

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

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

3. VALID FEE OR ILLEGAL TAX

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

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

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

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

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

(1) the revenue generated is used to the benefit of the payers, even if the general public also benefits (2) the revenue generated is used only for the specific improvement contemplated (3) the revenue generated by the fee does not exceed the cost of the improvement and (4) the fee is uniformly imposed on all the payers. *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 236 481 S.E.2d 437, 438 (1997) citing to *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992).

Brown is inapplicable for several reasons.

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

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

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

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

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

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

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

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

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

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

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

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

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

4. THE SERVICE FEE STATUTE

Plaintiff argues that the City's water and sewer charges violate S.C. Code Ann. § 6-1-330 ("Service Fee Statute"), which governs local fees. The Service Fee Statute defines "service or user fee" as "a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee," and "also includes 'uniform service charges.'" S.C. Code Ann. § 6-1-300. The Service Fee Statute states in relevant part:

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

(B) The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid. If the revenue generated by a fee is five percent or more of the imposing entity's prior fiscal year's total budget, the proceeds of the fee must be kept in a separate and segregated fund from the general fund of the imposing governmental entity.

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

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

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

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

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

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

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

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

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

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

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

Even assuming that the City’s amendments to its Water Rate Ordinance and Sewer Rate Ordinance enacted in 2008, 2010 and 2011 would trigger the fee limitations in subsection (B) of the Service Fee Statute, subsection (B) does not, by its plain language, apply to water and sewer charges. S.C. Code Ann. § 6-1-300 defines “service or user fee” as “a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee,” and “also includes ‘uniform service charges.’” This definition of “service or user fee” is broad, and the City concedes that its water and sewer charges meet this statutory definition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. RESIDUAL CONSTITUTIONAL CLAIMS

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

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

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

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

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

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

CONCLUSION

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

AND IT IS SO ORDERED.


The Honorable G. Thomas Cooper
Circuit Court Judge

September 26, 2013

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4006705

Joseph S. Azar

City Of Columbia

Frank J. Cumberland

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☒ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 27 September 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Gene McCain Connell Jr.

Charles D. Lee III

Thomas E. Lydon

M. McMullen Taylor

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

v.

City of Columbia,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

**ORDER DENYING PLAINTIFFS'
MOTION FOR RECONSIDERATION**

RICHLAND COUNTY
FILED
2013 NOV 27 AM 9:26
J. ARLETTE W. HOSCHKE
S.C.P. & O.S.

This matter comes before the Court by way of Plaintiffs' Motion to Reconsider pursuant to Rule 59(e), SCRCF. Specifically, Plaintiffs Joseph S. Azar, Frank J. Cumberland, Jr., and Michael A. Letts ask this Court to reconsider its Order filed September 26, 2013 granting Defendant's Motion for Summary Judgment.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiffs' Motion under to Rule 59(e), SCRCF to Reconsider this Court's Order filed September 26, 2013. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
November 26, 2013


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-

Joseph S. Azar, Individually and as Class
Representative,

Plaintiff,

vs.

City of Columbia,

Defendant.

*Class Action Pursuant
to SCRPC 23*

COMPLAINT

NON-JURY TRIAL

JEANETTE W. McBRIDE
C.C.P. & G.S.

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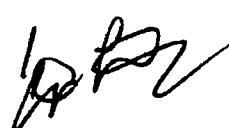
RICHLAND COUNTY
FILED

The Plaintiff, complaining of the Defendant, would respectfully allege unto this Court as follows:

1. The Plaintiff is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.

2. The Defendant, City of Columbia, is a body politic and is a governmental entity organized and existing pursuant to the laws of the State of South Carolina and providing water and sewer service to the Plaintiff and thousands of others in the City of Columbia and surrounding areas.

3. That Plaintiff brings this action pursuant to South Carolina Rule of Civil Procedure 23 which provides in pertinent part that a class action may be brought when there are questions of law and fact common to the class; the class is so numerous; the claims of the representative parties are typical of the claims of the class; the class representatives will fairly and adequately protect the interests of the class; and the amount in controversy exceeds One Hundred Dollars (\$100) for each member of the class.



4. That the Plaintiff, as a citizen and resident of the City of Columbia, Richland County, is and continues to be a water and sewer customer with the Defendant City of Columbia.

5. That the Plaintiff brings this as a class action on behalf of all past and current water and sewer customers of the City of Columbia.

6. That the Defendant City of Columbia did institute water and sewer fees on all customers which were specifically designated for future expenses of and capital improvements of the water and sewer system.

7. That the fees paid by the Plaintiff were for service water and sewer charges and not taxes.

8. That the fees which the Plaintiff paid were specifically designated for expenses of and improvements to the water and sewer systems including the water and sewer treatment plants and the various delivery portions of the water and sewer service throughout the City.

9. That in the past 12 years the City has transferred in excess of \$80 million dollars from its water/sewer fund for other uses.

10. That Plaintiff and thousands of others paid the fees imposed by Defendant City of Columbia through its officers, agents and/or employees for the expense of and improvement of the water and sewer systems.

11. That South Carolina Code § 6-1-330 allows a local governing body by ordinance approval by a positive majority to change and collect a service or user fee.

12. That the City of Columbia enacted such an ordinance.

13. That the service or user fees by the City of Columbia collected for water/sewer service must be used solely to pay costs related to the service or program for which the fee was paid.

14. That the revenue generated is to be used only for the specific improvement contemplated.

15. That the Defendant City of Columbia, in violation of its agreement to collect the fees from Plaintiff and thousands of others for improvement of the water system, did not segregate such fees for improvement of the water system, but placed those monies in the general fund which were used for other purposes than fixing the water system.

16. That those other purposes include moving approximately \$4.5 million dollars or more on a yearly basis to other departments of the City.

17. That Defendant City of Columbia violated South Carolina law by taking the fees and using them as general revenue funds of the City of Columbia.

18. That the water and sewer fees are 5% or more of the Defendant's total budget.

19. That Plaintiff individually and on behalf of a class of other similarly situated customers requests an Order of this Court requiring the City of Columbia to return all the money it took from the water/sewer fund for other purposes.

20. That Plaintiff, as a citizen and resident of the City of Columbia, is informed and believes that such fees have been used in violation of law and have been placed in the general fund and not spent on the City of Columbia's water treatment facilities.

21. That Plaintiff requests this Court issue its Order enjoining the City of Columbia from continuing to collect these fees and not placing them in a special account to be used only for operating expenses of and capital improvements of the water and sewer systems.

22. That Plaintiff is informed and believes that he is entitled to an Order of the Court enjoining the City of Columbia from spending any of the fees generated for operating expenses

of and capital improvement of water and sewer service for any other purpose and that the Court issue its Order enjoining such activities by the City of Columbia.

23. That such funds should be placed in a restricted account during the pendency of this action. Further, the City of Columbia must return all monies it spent from the water/sewer fund.

24. Further, Plaintiff is informed and believes that an injunction is necessary and reasonable and that irreparable harm will occur if the Defendant continues to allow the fees to be used for other purposes other than for operation and improvement of the water and sewer systems.

25. That Plaintiff requests a judgment on the First Cause of Action for Injunction both temporary and permanent requiring the City of Columbia to place all fees collected for operation of and capital improvement of water and sewer service in a segregated account and to only be used for such purpose. Further, Plaintiff requests a mandatory injunction requiring Defendant to replace all monies in the water and sewer fund which was specifically used for that specific purpose.

FOR A SECOND CAUSE OF ACTION

(Breach of Contract)

26. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

27. The Plaintiff individually and on behalf of the class is informed and believes he was required to pay fees to the City of Columbia with the representation/agreement through its ordinance and state law that the City of Columbia would only use such fees for operation of and capital improvement of the water and sewer systems.

28. That for years the Defendant City of Columbia and its officers, agents and/or employees has raided the funds which were to be used solely for expense and capital improvements of the water and sewer systems.

29. That these funds have been repeatedly used for other purposes other than operation and improvement of the water and sewer systems.

30. That Plaintiff is informed and believes that the water and sewer systems are in terrible shape and on the verge of shutdown and the Defendant City of Columbia continues to use the water and sewer fees collected by it for other purposes and put those fees in the general revenue fund.

31. That the Plaintiff is informed and believes under the statutes and case law of the State of South Carolina that Plaintiff, both individually and as class representative, had an agreement and/or contract implied in law and in fact whereby Defendant City of Columbia agreed to collect such water and sewer fees for operation of and capital improvements to the water and sewer systems only and to keep those in a separate account for that purpose.

32. The Plaintiff, individually and on behalf of the class, is further informed and believes that the Defendant City of Columbia did not live up to its agreement and has failed to properly maintain and improve the water and sewer systems with the fees collected from Plaintiff and thousands of others.

33. That Plaintiff requests a court order for a refund of all water and sewer fees collected by the Defendant from Plaintiff and all those individuals similarly situated for the last three years and bases this on breach of contract by the City of Columbia in failing to follow the statutes and case law regarding the collection of such fees and the segregating of such fees into a separate account.

34. That Plaintiff asks for a judgment individually and as a class against the Defendants for breach of contract and for a refund of all fees collected since such fees constitute an illegal tax by the Defendants and that such fees have been used for general revenue for the City of Columbia and not for the specific purpose intended.

35. That such funds should be returned to the water and sewer fund.

FOR A THIRD CAUSE OF ACTION

(Unconstitutional Collection)

36. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

37. That the Plaintiff individually and as class representative requests that this Court find that the use of specific funds dedicated for operation of and capital improvement of the water and sewer service in the City of Columbia be declared unconstitutional when such funds are collected and used as general revenue in violation of case law and the statutes of the State of South Carolina.

38. That use of these fees for other purposes violates S.C. Code Ann. § 6-1-330 and the four part test of the case of C.R. Campbell Construction Co. v. Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997).

39. That in fact Defendant City of Columbia through its agents and/or employees has collected an illegal tax under the guise of charging it as a fee when such fees were not held for the specific purpose provided for when they were collected.

40. That as a result, the aforementioned collection of fees is violative of the South Carolina Constitution because it was implemented improperly by Defendant and that such was not held in a segregated account.

41. That Plaintiff individually and as class representative is informed and believes that the collection of a fee for water and sewer operations and improvements for the City of Columbia and the use of such fees for other municipal purposes is violative of due process, equal protection and the South Carolina statutes in that the fees were collected for a specific purpose and not used for that specific purpose.

42. That Plaintiff individually and on behalf of a class requests a common fund of all fees collected by Defendant for water and sewer operations and improvements for the past three years be formed and that such fees should be returned to the water and sewer fund by the City.

FOR A FOURTH CAUSE OF ACTION

(Unconstitutional Tax)

43. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

44. The Plaintiff individually and as class representative of a class of individuals who paid the fee which was required by the City of Columbia and such fee must be specifically earmarked for water construction and/or water plant improvement.

45. That the aforementioned fees have for years been used by Defendant for general revenue and such fees have not been used for the purpose specifically intended, i.e., for construction and/or improvement of the water service of the City of Columbia.

46. That as a result, such fees collected by the Defendant City of Columbia constitute an illegal and/or unconstitutional tax or taking under the South Carolina Constitution.

47. That as an unfair and/or illegal tax these fees should be returned to the Plaintiff individually and as class representative for the class of affected taxpayers.



48. That the basis of this cause of action is that Defendant collected an unconstitutional tax against the Plaintiff and as such implemented a tax under the guise of fee to use those monies for other general revenue expenses of the City of Columbia.

49. That such use of "service fees" for other municipal purposes is prohibited under established South Carolina Supreme Court precedent.

50. That as further basis of the refund of the unconstitutional tax is that all fees collected must be specifically used and/or kept for their required purpose and cannot used as general revenue funds of the Defendant.

51. That Plaintiff individually and on behalf of the class requests the Court issue its order creating a common fund of monies collected for the past three years from those individuals who have paid such fees that have been used for other purposes and that these funds be returned to the City of Columbia water and sewer fund to be used only for the specific purpose for which the fee was collected.

52. That Plaintiff requests judgment for the class and for a common fund and for actual damages and the costs of the action.

WHEREFORE, Plaintiff prays for judgment as follows:

A. That this Court certify a class under SCRCP 23.

B. On the First Cause of Action individually and as a class for preliminary and permanent injunction against the Defendant collecting such fees unless such fees are specifically segregated and earmarked for improvement of the water and sewer system and for an Order of this court holding such fees in a common fund pending the outcome of this litigation. Plaintiffs only seek such an Order as to excess fees collected and not fees used for operating the water/sewer system.



C. On the Second Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

D. On the Third Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

E. On the Fourth Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

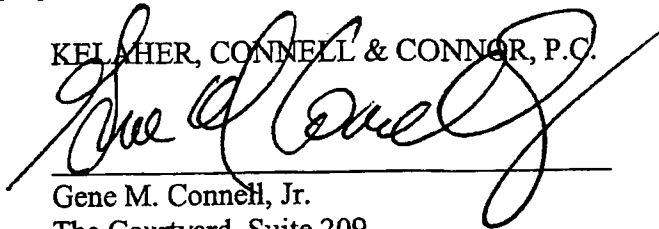
F. For an Order of this Court temporarily and permanently enjoining the Defendant from using the aforementioned money which is collected as fees from any other purpose other than improvement of the water and sewer system.

G. For an Order of this Court certifying a class of individuals, businesses, corporations and the like who paid more than \$100 in fees to the City of Columbia which fees were to be earmarked for use of the water and sewer service system and which fees were instead spent on general revenue projects of the City of Columbia, such funds to be returned to the water and sewer fund.

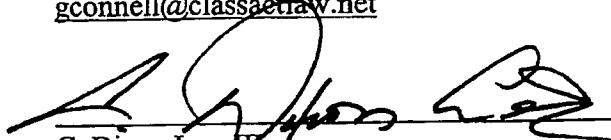
H. For an Order of the Court requiring Defendant to pay attorneys' fees and costs for violating established South Carolina law from the common fund or in the alternative any attorney's fees allowed by South Carolina law.

I. For an Order requiring Defendant to form a common fund to repay the water and sewer fund with all funds used for other purposes by the City.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)

Attorneys for Plaintiff

October 3, 2011
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40- 6705

Joseph S. Azar and Frank J. Cumberland,)
Jr., Individually and as Class)
Representatives,)

Plaintiff,)

vs.)

City of Columbia,)

Defendant.)

*Class Action Pursuant
to SCRCP 23*

AMENDED COMPLAINT

NON-JURY TRIAL

JEANETTE W. McBRIDE
C.C.P. & G.S.

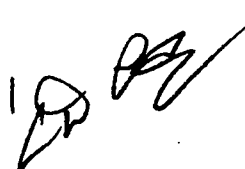
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RICHLAND COUNTY
FILED

ORIGINAL

The Plaintiffs, complaining of the Defendant, would respectfully allege unto this Court as follows:

1. The Plaintiff Joseph S. Azar is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
2. The Plaintiff Frank J. Cumberland, Jr. is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
3. The Defendant, City of Columbia, is a body politic and is a governmental entity organized and existing pursuant to the laws of the State of South Carolina and providing water and sewer service to the Plaintiffs and thousands of others in the City of Columbia and surrounding areas.
4. That Plaintiffs brings this action pursuant to South Carolina Rule of Civil Procedure 23 which provides in pertinent part that a class action may be brought when there are questions of law and fact common to the class; the class is so numerous; the claims of the representative parties are typical of the claims of the class; the class representatives will fairly



and adequately protect the interests of the class; and the amount in controversy exceeds One Hundred Dollars (\$100) for each member of the class.

5. That the Plaintiffs, as a citizens and residents of the City of Columbia, Richland County, are and continue to be a water and sewer customers with the Defendant City of Columbia.

6. That the Plaintiffs bring this as a class action on behalf of all past and current water and sewer customers of the City of Columbia.

7. That the Defendant City of Columbia did institute water and sewer fees on all customers which were specifically designated for future expenses of and capital improvements of the water and sewer systems.

8. That the fees paid by the Plaintiffs were for service water and sewer charges and not taxes.

9. That the fees which the Plaintiffs paid were specifically designated for expenses of and improvements to the water and sewer systems including the water and sewer treatment plants and the various delivery portions of the water and sewer service throughout the City.

10. That in the past 12 years the City has transferred in excess of \$80 million dollars out of its water and sewer fund for other purposes and uses.

11. That Plaintiffs and thousands of others paid the fees imposed by Defendant City of Columbia through its officers, agents and/or employees for the expenses of and improvement of the water and sewer systems.

12. That South Carolina Code § 6-1-330 allows a local governing body by ordinance approval by a positive majority to change and collect a service or user fee.

13. That the City of Columbia enacted such an ordinance.

14. That the service or user fees by the City of Columbia collected for water/sewer service must be used solely to pay costs related to the service or program for which the fee was paid.

15. That the revenue generated is to be used only for the specific improvement contemplated.

16. That the Defendant City of Columbia, in violation of its agreement to collect the fees from Plaintiffs and thousands of others for improvement of the water system, did not segregate such fees for improvement of the water system, but placed those monies in the general fund which were used for other purposes than operations and improvement of the water and sewer systems.

17. That those other purposes include moving approximately \$4.5 million dollars or more on a yearly basis to other departments of the City.

18. That Defendant City of Columbia violated South Carolina law by taking the fees and using them as general revenue funds of the City of Columbia.

19. That the water and sewer fees are 5% or more of the Defendant's total budget.

20. That Plaintiffs, individually and on behalf of a class of other similarly situated, customers request an Order of this Court requiring the City of Columbia to return all the money it took from the water/sewer fund for other purposes.

21. That Plaintiffs, as a citizen and resident of the City of Columbia, are informed and believes that such fees have been used in violation of law and have been placed in the general fund and not spent on the City of Columbia's water and sewer facilities.

22. That Plaintiffs request this Court issue its Order enjoining the City of Columbia from continuing to collect these fees and not placing them in a special account to be used only for operation of and capital improvements of the water and sewer systems.

23. That Plaintiffs are informed and believes that they are entitled to an Order of the Court enjoining the City of Columbia from spending any of the fees generated for operations of and capital improvement of water and sewer systems for any other purpose and that the Court issue its Order enjoining such activities by the City of Columbia.

24. That such funds should be placed in a restricted account during the pendency of this action. Further, the City of Columbia must return all monies it spent for other purposes from the water and sewer fund.

25. Further, Plaintiffs are informed and believes that an injunction is necessary and reasonable and that irreparable harm will occur if the Defendant continues to allow the fees to be used for other purposes other than for improvement of the water system.

26. That Plaintiffs request a judgment on the First Cause of Action for Injunction both temporary and permanent requiring the City of Columbia to place all fees collected for operations of and/or capital improvement of the water and sewers systems in a segregated account and to only be used for such purposes. Further, Plaintiffs request a mandatory injunction requiring Defendant to replace all monies in the water and sewer fund which was specifically used for that specific purpose.

FOR A SECOND CAUSE OF ACTION

(Breach of Contract)

27. The Plaintiffs reallege and reiterate each and every allegation as fully as if repeated verbatim herein.

28. The Plaintiffs, individually and on behalf of the class, are informed and believes they were required to pay fees to the City of Columbia with the representation/agreement through its ordinance and state law that the City of Columbia would only use such fees for the water and sewer systems.

29. That for years the Defendant City of Columbia and its officers, agents and/or employees have raided the funds which were to be used solely for the water and sewer systems.

30. That these funds have been repeatedly used for other purposes other than the water and sewer systems.

31. That Plaintiffs are informed and believe that the water and sewer systems are in terrible shape and on the verge of shutdown and the Defendant City of Columbia continues to use the fees collected by it for other purposes and put those fees in the general revenue fund.

32. That the Plaintiffs are informed and believe under the statutes and case law of the State of South Carolina that Plaintiffs, both individually and as class representatives, had an agreement and/or contract implied in law and in fact whereby Defendant City of Columbia agreed to collect such water and sewer fees for the purpose of the water and sewer system only and to keep those in a separate account for that purpose.

33. The Plaintiffs, individually and on behalf of the class, are further informed and believes that the Defendant City of Columbia did not live up to its agreement and has failed to maintain and improve the water an sewer systems with the fees collected from Plaintiffs and thousands of others.

34. That Plaintiffs request a court order for a refund of all water and sewer fees collected by the Defendant from Plaintiffs and all those individuals similarly situated for the last three years and bases this on breach of contract by the City of Columbia in failing to follow the

statutes and case law regarding the collection of such fees and the segregating of such fees into a separate account.

35. That Plaintiffs asks for a judgment individually and as a class against the Defendant for breach of contract and for a refund of all fees collected since such fees constitute an illegal tax by the Defendant and that such fees have been used for general revenue for the City of Columbia and not for the specific purpose intended.

36. That such funds should be returned to the water and sewer fund.

FOR A THIRD CAUSE OF ACTION

(Unconstitutional Collection)

37. The Plaintiffs reallege and reiterates each and every allegation as fully as if repeated verbatim herein.

38. That the Plaintiffs, individually and as class representatives, requests that this Court find that the use of specific funds dedicated for the water and sewer service in the City of Columbia be declared unconstitutional when such funds are collected and used as general revenue in violation of case law and the statutes of the State of South Carolina.

39. That use of these fees for other purposes violates S.C. Code Ann. § 6-1-330 and the four part test of the case of C.R. Campbell Construction Co. v. Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997).

40. That in fact Defendant City of Columbia through its agents and/or employees has collected an illegal tax under the guise of charging it as a fee when such fees were not held for the specific purpose provided for when they were collected.

41. That as a result, the aforementioned collection of fees is violative of the South Carolina Constitution because it was implemented improperly by Defendant and that such was not held in a segregated account.

42. That Plaintiffs, individually and as class representatives, are informed and believes that the collection of a fee for water improvements for the City of Columbia and the use of such fees for other municipal purposes is violative of due process, equal protection and the South Carolina statutes in that the fees were collected for a specific purpose and not used for that specific purpose.

43. That Plaintiffs individually and on behalf of a class request a common fund of all fees collected by Defendant for water improvements for the past three years be formed and that such fees should be returned to the water and sewer fund by the City.

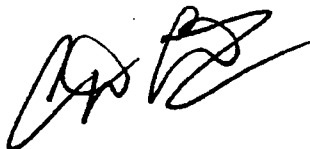
FOR A FOURTH CAUSE OF ACTION

(Unconstitutional Tax)

44. The Plaintiffs reallege and reiterate each and every allegation as fully as if repeated verbatim herein.

45. The Plaintiffs individually and as class representative of a class of individuals who paid the fee which was required by the City of Columbia and such fee must be specifically earmarked for water and sewer operations, construction and/or improvements.

46. That the aforementioned fees have for years been used by Defendant for general revenue and such fees have not been used for the purpose specifically intended, i.e., for operation, construction and/or improvement of the water and sewer service of the City of Columbia.

7 

47. That as a result, such fees collected by the Defendant City of Columbia constitute an illegal and/or unconstitutional tax or taking under the South Carolina Constitution.

48. That as an unfair and/or illegal tax these fees should be returned to the Plaintiff individually and as class representative for the class of affected taxpayers.

49. That the basis of this cause of action is that Defendant collected an unconstitutional tax against the Plaintiff and as such implemented a tax under the guise of fee to use those monies for other general revenue expenses of the City of Columbia.

50. That such use of "service fees" for other municipal purposes is prohibited under established South Carolina Supreme Court precedent.

51. That as further basis of the refund of the unconstitutional tax is that all fees collected must be specifically used and/or kept for their required purpose and cannot used as general revenue funds of the Defendant.

52. That Plaintiffs individually and on behalf of the class requests the Court issue its order creating a common fund of monies collected for the past three years from those individuals who have paid such fees that have been used for other purposes and that these funds be returned to the City of Columbia water and sewer fund to be used only for the specific purpose for which the fee was collected.

53. That Plaintiffs requests judgment for the class and for a common fund and for actual damages and the costs of the action.

WHEREFORE, Plaintiffs prays for judgment as follows:

- A. That this Court certify a class under SCRPC 23.
- B. On the First Cause of Action individually and as a class for preliminary and permanent injunction against the Defendant collecting such fees unless such fees are specifically

segregated and earmarked for improvement of the water and sewer system and for an Order of this court holding such fees in a common fund pending the outcome of this litigation. Plaintiffs only seek such an Order as to excess fees collected and not fees used for operating the water/sewer system.

C. On the Second Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

D. On the Third Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

E. On the Fourth Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

F. For an Order of this Court temporarily and permanently enjoining the Defendant from using the aforementioned money which is collected as fees from any other purpose other than improvement of the water and sewer system.

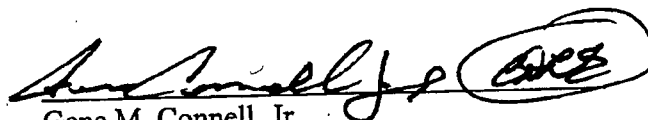
G. For an Order of this Court certifying a class of individuals, businesses, corporations and the like who paid more than \$100 in fees to the City of Columbia which fees were to be earmarked for use of the water and sewer service system and which fees were instead

spent on general revenue projects of the City of Columbia, such funds to be returned to the water and sewer fund.

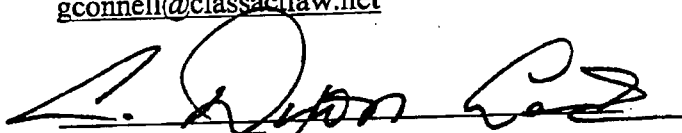
H. For an Order of the Court requiring Defendant to pay attorneys' fees and costs for violating established South Carolina law.

I. For an Order requiring Defendant to form a common fund to repay the water and sewer fund with all funds used for other purposes by the City.

KELAHHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)

Attorneys for Plaintiffs

October 13, 2011
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

*Class Action Pursuant
to SCRPC 23*

SECOND
AMENDED COMPLAINT

NON-JURY TRIAL

FILED
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JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY

The Plaintiffs, complaining of the Defendant, would respectfully allege unto this Court as follows:

FOR A FIRST CAUSE OF ACTION

1. The Plaintiff Joseph S. Azar is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
2. The Plaintiff Frank J. Cumberland, Jr. is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
3. The Plaintiff Michael A. Letts is a citizen and resident of the County of Richland, State of South Carolina, who lives outside the corporate limits of the City of Columbia.
4. The Defendant, City of Columbia, is a body politic and is a governmental entity organized and existing pursuant to the laws of the State of South Carolina.
5. The Defendant provides water and sewer service to the Plaintiffs and thousands of others in the City of Columbia and surrounding areas.

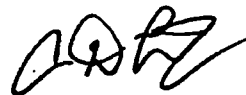


6. Plaintiffs bring this action pursuant to South Carolina Rule of Civil Procedure 23 which provides in pertinent part that a class action may be brought when there are questions of law and fact common to the class; the class is so numerous; the claims of the representative parties are typical of the claims of the class; the class representatives will fairly and adequately protect the interests of the class; and the amount in controversy exceeds One Hundred Dollars (\$100) for each member of the class.
7. Plaintiffs are and continue to be water and sewer customers with the Defendant City of Columbia.
8. That the Plaintiffs bring this as a class action on behalf of all past and current water and sewer customers of the City of Columbia.
9. The Defendant City of Columbia did institute water and sewer fees on all customers of its water and sewer system which were specifically designated, intended and required by South Carolina law to be used to pay costs related to the specific service or program for which those fees were paid, the water and sewer system.
10. That the fees paid by the Plaintiffs were for water and sewer charges or fees and not taxes.
11. That the fees which the Plaintiffs paid were specifically designated for expenses of and improvements to the water and sewer systems including the water and sewer treatment plants and the various delivery portions of the water and sewer service throughout the City and other areas where the City provides water and sewer service.
12. That for more than a decade, and notwithstanding the provisions of S.C. Code Ann. § 6-1-300, *et. seq.* (Supp. 2010) restricting the use of revenue derived from a service or



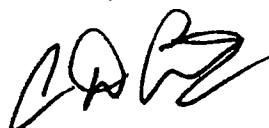
user fee imposed to finance the provision of public services to pay the costs related to the service or program for which the fee was paid, the City of Columbia has diverted and spent monies it collected as water and sewer fees for uses and purposes other than the City of Columbia water and sewer system.

13. That in the past 12 years the City has transferred in excess of \$80 million dollars out of its water and sewer fund for purposes and uses other than its water and sewer system.
14. That at the same time the City of Columbia was diverting and spending monies it collected as water and sewer fees for uses and purposes other than expenses of the City of Columbia water and sewer system, the City of Columbia was deferring, postponing, delaying and/or neglecting to perform appropriate and necessary upkeep, maintenance, repairs and improvements to the water and sewer system necessary to keep those systems in good condition and proper working order.
15. That as a direct and proximate result of the City of Columbia deferring, postponing, delaying and/or neglecting to perform appropriate and necessary upkeep, maintenance, repairs and improvements to the water and sewer system, the water and sewer system decayed, became run-down and dilapidated, and aged beyond its useful life to a point where water and sewer leaks, overflows and other problems were not only common but also exceeded levels of discharges allowed by Environmental Protection Agency ("EPA") and/or the South Carolina Department of Health and Environmental Control ("SC DHEC") rules and regulations.
16. That, on information and belief, in an effort to deceive the general public including its water and sewer customers, the EPA and/or SC DHEC, the City of Columbia falsified



record keeping of sewage overflows so as to make it appear that the untreated sewage overflows, spills or discharges by the City of Columbia were less severe than the sewage overflows which actually occurred.

17. That sewage overflows from the City of Columbia water and sewer system have exceeded allowable levels per EPA and SC DHEC rules and regulations and have resulted in unwarranted pollution of the lands and waters of the areas served by City of Columbia water and sewer system as well as those waterways downstream from where such sewage overflows occurred and, on occasion, have resulted in Plaintiff's and others being denied peaceful use and enjoyment of public and private properties due to the health hazards resulting from those sewage overflows.
18. That Plaintiffs are informed and believe that the water and sewer systems have not been properly operated or maintained resulting in otherwise unnecessary sewage overflows and water leaks, present unnecessary and unreasonable health hazards to Plaintiffs and other members of the public and are or were on the verge of being taken over by the Environmental Protection Agency and/or the South Carolina Department of Environmental Control. Notwithstanding, the Defendant City of Columbia continues to use the fees collected by it for other purposes and transfer those fees in the general revenue fund.
19. That the numerous leaks and overflows of untreated sewerage by the City of Columbia water and sewer system have resulted, from time to time, in the foul, unpleasant and offensive stench of raw sewage wafting through various parts of the City of Columbia and has been objectionable and offensive to Plaintiffs and other persons of normal sensibilities within those areas.

A handwritten signature in black ink, appearing to be 'CAB' or similar, located at the bottom right of the page.

20. That, belatedly, the City of Columbia recognized the folly of its actions in spending water and sewers fees for purposes other than the water and sewer system and, at the same time neglecting, postponing and deferring proper upkeep, maintenance, repairs and improvements to its water and sewer system and hired Black & Veatch, an engineering, consulting and construction company, to conduct a study of and issue a report on the City's water and sewer system, which report concluded that the City needed to spend hundreds of millions of dollars, possibly as much as \$500,000,000.00, above normal operational expenses and implement rate increases of 5% per year for each year for a period of five (5) years to bring its water and sewer system into good and proper working order.
21. That in 2011 the City of Columbia increased water and sewer fees by 5% and passed an municipal ordinance authorizing the issuance of \$135,000,000.00 in new water and sewer bonds, in addition to the approximately \$180,000,000.00 proceeds collected from the sale of water and sewer bonds between January 1, 2009 and June 30, 2011.
22. That on or about November 2, 2011 the City of Columbia offered for sale, in two separate series, a total of \$135,000,000.00 in Waterworks and Sewer System Revenue Bonds, [\$100,000,000.00 of City of Columbia Waterworks and Sewer System Revenue Bonds, Series 2011A rated Aa1 by Moody's Investors Service and \$35,000,000.00 of City of Columbia Waterworks and Sewer System Revenue Bonds, Series 2011B also rated Aa1 by Moody's Investors Service] to help pay for upkeep, maintenance, repairs, improvements and expansion of its water and sewer system.



23. That the City of Columbia has pledged future water and sewer fees revenue to pay for the foregoing \$135,000,000.00 in Waterworks and Sewer System Revenue Bonds which it issued and sold.
24. That the monies which have and will be raised from the sale of aforesaid Waterworks and Sewer System Revenue Bonds and the rate increases necessary to pay for those bonds have been, are being and/or will be used by the City of Columbia to pay for upkeep, maintenance, repairs, improvements and expansions of its water and sewer system, which, but for the City of Columbia having diverted and spent monies previously collected as water and sewer fees from Plaintiffs for other purposes would have been paid for, in whole or in part, by the water and sewer fee money the City of Columbia previously collected from Plaintiffs and misspent for other non-water and sewer purposes, resulting in Plaintiffs having to pay twice for the same expenses.
25. As a direct and proximately result of the City of Columbia having issue bonds and to borrow money to replace the money it spent derived from water and sewer fees on purposes other than the water and sewer system, Plaintiffs will be forced to pay additional water and sewer fees to pay the attorney fees, other expenses and bond interest necessary to raise money to replace the earlier misspent monies.
26. The aforesaid conduct of City of Columbia has brought the City under the scrutiny of the EPA and/or SC DHEC, which is or has conducted an investigation of the City's water and sewer systems and operations and has or is, on information and belief, negotiated or is negotiating an agreement to make extensive repairs and improvements to its water and sewer system which will likely include payment of a substantial fine by the City of Columbia, the costs and expense of the same which



will inevitably have to be paid by Plaintiffs and which would otherwise have not occurred had the City of Columbia not misused the money it previously collected as water and sewer fees and, correspondingly, neglected and deferred proper upkeep, maintenance, repairs and improvements to its water and sewer system.

27. That Plaintiffs and thousands of others paid the water and sewer fees imposed by Defendant City of Columbia through its officers, agents and/or employees for the expenses of and improvement of the water and sewer systems.
28. That S.C. Code Ann. § 6-1-300, *et. seq.* allows a local governing body by ordinance approval by a positive majority to change and collect a service or user fee.
29. That the City of Columbia enacted such an ordinance.
30. That the service or user fees by the City of Columbia collected for water/sewer service must be used under South Carolina law solely to pay costs related to the service or program for which the fee was paid.
31. That the revenue generated from such service of users fees is to be used only for the program for which the fee was paid.
32. That the Defendant City of Columbia, in violation of its agreement to collect the fees from Plaintiffs and thousands of others for operation and/or improvement of the water system, did not segregate such fees for operations or improvement of the water system, but placed those monies in the general fund which were used for other purposes than operations and improvement of the water and sewer systems.
33. That those other purposes include moving approximately \$4.5 million dollars or more on an annual basis to other departments of the City.

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34. That Defendant City of Columbia violated South Carolina law by taking the fees and using them as general revenue funds of the City of Columbia.
35. That the water and sewer fees are 5% or more of the Defendant's total budget.
36. That Plaintiffs, individually and on behalf of a class of other similarly situated, customers request an Order of this Court requiring the City of Columbia to return all the money it took from the water/sewer fund for other purposes to the water and sewer fund.
37. That Plaintiffs, as a citizen and resident of the City of Columbia and/or customers of the City of Columbia water and sewer systems, are informed and believes that such fees have been used in violation of law and have been placed in the general fund and not spent on the City of Columbia's water and sewer facilities.
38. That Plaintiffs request this Court issue its Order enjoining the City of Columbia from continuing to collect these fees and not placing them in a special account to be used only for operation of and capital improvements of the water and sewer systems.
39. That Plaintiffs are informed and believes that they are entitled to an Order of the Court enjoining the City of Columbia from spending any of the fees generated for operations of and capital improvement of water and sewer systems for any other purpose and that the Court issue its Order enjoining such activities by the City of Columbia.
40. That such funds should be placed in a restricted account during the pendency of this action. Further, the City of Columbia must return all monies it spent for other purposes from the water and sewer fund.

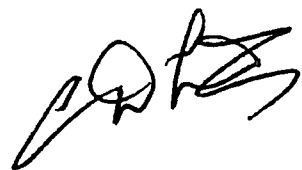
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41. Further, Plaintiffs are informed and believes that an injunction is necessary and reasonable and that irreparable harm will occur if the Defendant continues to allow the fees to be used for other purposes other than for improvement of the water system.
42. That Plaintiffs request a judgment on the First Cause of Action for Injunction both temporary and permanent requiring the City of Columbia to place all fees collected for operations of and/or capital improvement of the water and sewers systems in a segregated account and to only be used for such purposes. Further, Plaintiffs request a mandatory injunction requiring Defendant to replace all monies in the water and sewer fund which was specifically used for that specific purpose.

FOR A SECOND CAUSE OF ACTION

(Breach of Contract)

43. The Plaintiffs reallege and reiterate each and every allegation as fully as if repeated verbatim herein.
44. The Plaintiffs, individually and on behalf of the class, are informed and believes they were required to pay fees to the City of Columbia with the representation/agreement through its ordinance and state law that the City of Columbia would only use such fees for the water and sewer systems.
45. That for years the Defendant City of Columbia and its officers, agents and/or employees have raided the funds which were to be used solely for the water and sewer systems.
46. That these funds have been repeatedly used for other purposes other than the water and sewer systems.

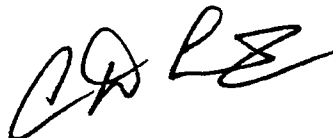
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47. That the Plaintiffs are informed and believe under the statutes and case law of the State of South Carolina that Plaintiffs, both individually and as class representatives, had an agreement and/or contract implied in law and in fact whereby Defendant City of Columbia agreed to collect such water and sewer fees for the purpose of the water and sewer system only and to keep those in a separate account for that purpose.
48. The Plaintiffs, individually and on behalf of the class, are further informed and believes that the Defendant City of Columbia did not live up to its agreement and has failed to maintain and improve the water an sewer systems with the fees collected from Plaintiffs and thousands of others.
49. That Plaintiffs request a court order for a refund of all water and sewer fees collected by the Defendant from Plaintiffs and all those individuals similarly situated for the last three years and bases this on breach of contract by the City of Columbia in failing to follow the statutes and case law regarding the collection of such fees and the segregating of such fees into a separate account.
50. That Plaintiffs asks for a judgment individually and as a class against the Defendant for breach of contract and for a refund of all fees collected since such fees constitute an illegal tax by the Defendant and that such fees have been used for general revenue for the City of Columbia and not for the specific purpose intended.
51. That such funds should be returned to the water and sewer fund.

FOR A THIRD CAUSE OF ACTION

(Unconstitutional Collection)

52. The Plaintiffs reallege and reiterates each and every allegation as fully as if repeated verbatim herein.

A handwritten signature in black ink, appearing to be 'C. W. R. E.', is written over the page number.

53. That the Plaintiffs, individually and as class representatives, requests that this Court find that the use of specific funds dedicated for the water and sewer service in the City of Columbia be declared unconstitutional when such funds are collected and used as general revenue in violation of case law and the statutes of the State of South Carolina.
54. That use of these fees for other purposes violates S.C. Code Ann. § 6-1-330 and the four part test of the case of C.R. Campbell Construction Co. v. Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997).
55. That in fact Defendant City of Columbia through its agents and/or employees has collected an illegal tax under the guise of charging it as a fee when such fees were not held for the specific purpose provided for when they were collected.
56. That as a result, the aforementioned collection of fees is violative of the South Carolina Constitution because it was implemented improperly by Defendant and that such was not held in a segregated account.
57. That Plaintiffs, individually and as class representatives, are informed and believes that the collection of a fee for water improvements for the City of Columbia and the use of such fees for other municipal purposes is violative of due process, equal protection and the South Carolina statutes in that the fees were collected for a specific purpose and not used for that specific purpose.
58. That Plaintiffs individually and on behalf of a class request a common fund of all fees collected by Defendant for water improvements for the past three years be formed and that such fees should be returned to the water and sewer fund by the City.

FOR A FOURTH CAUSE OF ACTION

A handwritten signature in black ink, appearing to be 'C. P. S.', is written over the page number.

(Unconstitutional Tax)

59. The Plaintiffs reallege and reiterate each and every allegation as fully as if repeated verbatim herein.
60. The Plaintiffs individually and as class representative of a class of individuals who paid the fee which was required by the City of Columbia and such fee must be specifically earmarked for water and sewer operations, construction and/or improvements.
61. That the aforementioned fees have for years been used by Defendant for general revenue and such fees have not been used for the purpose specifically intended, i.e., for operation, construction and/or improvement of the water and sewer service of the City of Columbia.
62. That as a result, such fees collected by the Defendant City of Columbia constitute an illegal and/or unconstitutional tax or taking under the South Carolina Constitution.
63. That as an unfair and/or illegal tax these fees should be returned to the Plaintiff individually and as class representative for the class of affected taxpayers.
64. That the basis of this cause of action is that Defendant collected an unconstitutional tax against the Plaintiff and as such implemented a tax under the guise of fee to use those monies for other general revenue expenses of the City of Columbia.
65. That such use of "service fees" for other municipal purposes is prohibited under established South Carolina Supreme Court precedent.
66. That as further basis of the refund of the unconstitutional tax is that all fees collected must be specifically used and/or kept for their required purpose and cannot used as general revenue funds of the Defendant.



67. That Plaintiffs individually and on behalf of the class requests the Court issue its order creating a common fund of monies collected for the past three years from those individuals who have paid such fees that have been used for other purposes and that these funds be returned to the City of Columbia water and sewer fund to be used only for the specific purpose for which the fee was collected.

68. That Plaintiffs requests judgment for the class and for a common fund and for actual damages and the costs of the action.

WHEREFORE, Plaintiffs prays for judgment as follows:

A. That this Court certify a class under SCRCP 23.

B. On the First Cause of Action individually and as a class for preliminary and permanent injunction against the Defendant collecting such fees unless such fees are specifically segregated and earmarked for improvement of the water and sewer system and for an Order of this court holding such fees in a common fund pending the outcome of this litigation. Plaintiffs only seek such an Order as to excess fees collected and not fees used for operating the water/sewer system.

C. On the Second Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

D. On the Third Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.



E. On the Fourth Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

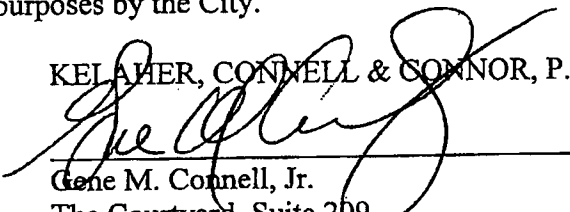
F. For an Order of this Court temporarily and permanently enjoining the Defendant from using the aforementioned money which is collected as fees from any other purpose other than improvement of the water and sewer system.

G. For an Order of this Court certifying a class of individuals, businesses, corporations and the like who paid more than \$100 in fees to the City of Columbia which fees were to be earmarked for use of the water and sewer service system and which fees were instead spent on general revenue projects of the City of Columbia, such funds to be returned to the water and sewer fund.

H. For an Order of the Court requiring Defendant to pay attorneys' fees and costs for violating established South Carolina law.

I. For an Order requiring Defendant to form a common fund to repay the water and sewer fund with all funds used for other purposes by the City.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.

The Courtyard, Suite 209

1500 U. S. Highway 17 North

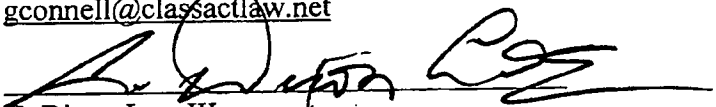
Post Office Drawer 14547

Surfside Beach, South Carolina 29587-4547

(843) 238-5648 (phone)

(843) 238-5050 (facsimile)

gconnell@classactlaw.net



C. Dixon Lee, III

McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)
Attorneys for Plaintiffs

December __, 2011
Surfside Beach, South Carolina

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

DEFENDANT
CITY OF COLUMBIA
ANSWER TO AMENDED
COMPLAINT

JEANE M. WILCOX
CLERK
C.S. & G.S.

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RICHLAND COUNTY
FILED

COMES NOW Defendant City of Columbia, hereby answering Plaintiffs' Amended

Complaint as follows:

FOR A FIRST DEFENSE

1. Every allegation of the Amended Complaint is denied unless hereinafter specifically admitted.
2. Answering Paragraph 1, Defendant admits the allegations set forth in Paragraph 1.
3. Answering Paragraph 2, Defendant is without knowledge or information sufficient to form a belief as to the allegations stated in Paragraph 2 and would therefore deny the same and demands strict proof thereof.
4. Answering Paragraph 3, Defendant admits that it is a body politic and governmental entity organized and existing under state law. Further answering Paragraph 3, Defendant denies that it provides water and sewer service to Plaintiff Joseph S. Azar. Further answering Paragraph 3, Defendant admits that it provides water and sewer service within the City of Columbia and outside of the City's corporate limits. Further answering Paragraph 3, Defendant is without knowledge

or information sufficient to form a belief as to whether it provides water and sewer service to Frank J. Cumberland, Jr.; therefore denies the same and demands strict proof thereof.

5. Answering Paragraph 4, Defendant admits that Rule 23 of the South Carolina Rules of Civil Procedure provides for certification of class actions if certain criteria are met.
6. Answering Paragraph 5, Defendant admits that Plaintiff Joseph S. Azar is a resident of the City of Columbia; however, Defendant denies that Plaintiff Joseph S. Azar is or continues to be a water and sewer customer of the Defendant. Further answering, Defendant lacks sufficient information or knowledge to form a belief as to the allegation that Plaintiff Frank J. Cumberland, Jr. is a resident of the City of Columbia and would therefore deny the same and demands strict proof thereof. Further answering, Defendant admits that its records indicate an active account or accounts in the name of a Frank J. Cumberland, Jr. for water and sewer service, but Defendant lacks sufficient information or knowledge to form a belief that the Plaintiff and Frank J. Cumberland, Jr. are one and the same person and would therefore deny the same and demands strict proof thereof.
7. Answering Paragraph 6, Defendant admits only that the Plaintiffs seek class certification of their action. Answering further, Defendant lacks sufficient knowledge or information to form a belief as to whether Plaintiffs represent all past and current water and sewer customers of the City of Columbia and would therefore deny the same and demands strict proof thereof.

8. Answering Paragraph 7, Defendant admits that it has enacted water and sewer rates applicable to its water and sewer customers. Answering further, Defendant admits that it uses revenues derived from its water and sewer system to pay costs associated with the water and sewer system. Answering further, Defendant denies any remaining allegations in Paragraph 7 and demands strict proof thereof.
9. Answering Paragraph 8, Defendant lacks information or knowledge sufficient to form a belief as to the allegations and legal conclusions set forth in Paragraph 8 and would therefore deny the same and demands strict proof thereof.
10. Answering Paragraph 9, Defendant denies that Plaintiff Joseph S. Azar pays to the City charges for water and sewer services. Answering further, Defendant lacks information or knowledge sufficient to form a belief as to whether Plaintiff Frank J. Cumberland, Jr., pays to the City charges for water and sewer services and would therefore deny the same and demands strict proof thereof. Answering further, Defendant admits that it uses revenues derived from its water and sewer system to pay costs associated with the water and sewer system. Answering further, Defendant denies any remaining allegations in Paragraph 9 and demands strict proof thereof.
11. Answering Paragraph 10, Defendant denies the allegations made therein and demands strict proof thereof.
12. Answering Paragraph 11, Defendant denies that Plaintiff Joseph S. Azar pays to the City charges for water and sewer services and demands strict proof thereof. Answering further, Defendant lacks information or knowledge sufficient to form a belief as to whether Plaintiff Frank J. Cumberland, Jr., pays to the City charges

for water and sewer services and would therefore deny the same and demands strict proof thereof. Answering further, Defendant admits that the City provides water and sewer services to thousands of customers. Answering further, Defendant admits that it uses revenues derived from its water and sewer system to pay costs associated with the water and sewer system. Answering further, Defendant denies any remaining allegations in Paragraph 11 and demands strict proof thereof

13. Answering Paragraph 12, Defendant admits that S.C. Code Ann. § 6-1-330 pertains to certain service or user fees imposed by local governments, but denies Plaintiffs' allegations, characterization or legal conclusion regarding this statute and demands strict proof thereof
14. Answering Paragraph 13, Defendant denies the allegation set forth therein and demands strict proof thereof.
15. Answering Paragraph 14, Defendant denies the allegations set forth therein and demands strict proof thereof.
16. Answering Paragraph 15, Defendant denies the allegations set forth therein and demands strict proof thereof.
17. Answering Paragraph 16, Defendant denies the allegations set forth therein and demands strict proof thereof.
18. Answering Paragraph 17, Defendant admits that it has transferred approximately \$4.5 million dollars in water and sewer revenues to the City's general fund annually for the past three years. Answering further, Defendant denies any remaining allegations set forth in Paragraph 17 and demands strict proof thereof.

19. Answering Paragraph 18, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
20. Answering Paragraph 19, Defendant admits the allegation set forth therein.
21. Answering Paragraph 20, Defendant admits that this Paragraph states that Plaintiffs seek an Order as described therein, but denies all remaining allegations and legal conclusions set forth therein and demands strict proof thereof.
22. Answering Paragraph 21, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
23. Answering Paragraph 22, Defendant admits that this Paragraph states that Plaintiffs seek an Order as described therein, but denies all remaining allegations and legal conclusions set forth therein and demands strict proof thereof.
24. Answering Paragraph 23, Defendant admits that this Paragraph states that Plaintiffs seek an Order as described therein, but denies all remaining allegations and legal conclusions set forth therein and demands strict proof thereof.
25. Answering Paragraph 24, Defendant denies the allegations set forth therein and demands strict proof thereof and further answer that Plaintiffs are not entitled to the relief sought therein.
26. Answering Paragraph 25, Defendant denies the allegations and legal conclusions and demands strict proof thereof and further answer that Plaintiffs are not entitled to the relief sought therein.
27. Answering Paragraph 26, Defendant admits that Plaintiffs seek judgment as described therein, but denies all remaining allegations and legal conclusions and

demands strict proof thereof, and further answer that Plaintiffs are not entitled to the relief sought therein.

28. Answering Paragraph 27, Defendant reasserts and incorporates its answers to Paragraphs 1 through 26 above.
29. Answering Paragraph 28, Defendant denies the allegations set forth therein.
30. Answering Paragraph 29, Defendant denies the allegations set forth therein.
31. Answering Paragraph 30, Defendant denies the allegations set forth therein.
32. Answering Paragraph 31, Defendant denies the allegations set forth therein.
33. Answering Paragraph 32, Defendant denies the allegations set forth therein.
34. Answering Paragraph 33, Defendant denies the allegations set forth therein.
35. Answering Paragraph 34, Defendant admits that Plaintiffs seek an order as described therein, but denies all remaining allegations and legal conclusions and further answer that Plaintiffs are not entitled to the relief sought therein.
36. Answering Paragraph 35, Defendant admits that Plaintiffs seek a judgment as described therein, but denies all remaining allegations and legal conclusions and further answer that Plaintiffs are not entitled to the relief sought therein.
37. Answering Paragraph 36, Defendant denies the allegation set forth therein.
38. Answering Paragraph 37, Defendant reasserts and incorporates its answers to Paragraphs 1 through 36 above.
39. Answering Paragraph 38, Defendant admits that Plaintiffs seek an order as described therein, but denies all remaining allegations and legal conclusions and further answers that Plaintiffs are not entitled to the relief sought therein.

40. Answering Paragraph 39, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
41. Answering Paragraph 40, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
42. Answering Paragraph 41, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
43. Answering Paragraph 42, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
44. Answering Paragraph 43, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof and further answer that Plaintiffs are not entitled to a common fund.
45. Answering Paragraph 44, Defendant reasserts and incorporates its answers to Paragraphs 1 through 43 above.
46. Answering Paragraph 45, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
47. Answering Paragraph 46, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
48. Answering Paragraph 47, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
49. Answering Paragraph 48, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
50. Answering Paragraph 49, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.

51. Answering Paragraph 50, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
52. Answering Paragraph 51, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
53. Answering Paragraph 52, Defendant admits that Plaintiffs seek the creation of a common fund, but denies that Plaintiffs are entitled to a common fund and demands strict proof thereof. Answering further, Defendant denies all remaining allegations and conclusions set forth therein and demands strict proof thereof.
54. Answering Paragraph 53, Defendant denies that Plaintiffs are entitled to the relief sought and demands strict proof thereof.
55. Answering Plaintiffs' prayer for judgment, Defendant denies all allegations and legal conclusions and further denies that Plaintiffs are entitled to any relief sought.

FOR A SECOND DEFENSE

56. Plaintiffs lack standing to bring all claims against Defendant.

FOR A THIRD DEFENSE

57. No justiciable controversy exists between these parties.

FOR A FOURTH DEFENSE

58. Plaintiffs' cause of action for a permanent injunction requiring Defendant to return all monies it allegedly spent for purposes unrelated to provision of water and sewer services is barred by the doctrine of laches.

FOR A FIFTH DEFENSE

59. To the extent Plaintiffs seek return of funds for the past three years under the equitable remedy of quantum meruit or contract implied by law, such remedy is barred by the doctrine of laches.

FOR A SIXTH DEFENSE

60. S.C. Code Ann. § 6-1-330 does not apply to Defendant.

FOR A SEVENTH DEFENSE

61. S.C. Code Ann. § 6-1-330 is unconstitutional as applied to Defendant.

FOR AN EIGHTH DEFENSE

62. Even if S.C. Code Ann. § 6-1-330 applies to Defendant, Defendant's use of its water and sewer revenues is lawful.

FOR A NINTH DEFENSE

63. The test set forth in *C.R. Campbell Construction Co. v. Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997) does not apply to Defendant.

FOR A TENTH DEFENSE

64. Even if *C.R. Campbell Construction Co. v. Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997) applies to Defendant, Defendant's use of its water and sewer revenues is lawful.

FOR AN ELEVENTH DEFENSE

65. Plaintiffs have failed to state facts sufficient to constitute a cause of action for breach of contract, whether in law or equity.

FOR A TWELFTH DEFENSE

66. Plaintiffs have failed to state facts sufficient to constitute a cause of action for violation of due process or equal protection.

FOR A THIRTEENTH DEFENSE

67. Plaintiffs have failed to state facts sufficient to constitute a cause of action for a taking of property without just compensation.

FOR A FOURTEENTH DEFENSE

68. Plaintiffs have failed to state facts sufficient to constitute a cause of action for violation of Article X of the South Carolina Constitution.

FOR A FIFTEENTH DEFENSE

69. Plaintiffs' request for return of all fees collected and used by Defendant for purposes other than water and sewer operation and improvement for placement in a common fund amounts to an unconstitutional intrusion into the legislative function of the City Council by overturning or usurping its discretionary policy-making decisions.

FOR A SIXTEENTH DEFENSE

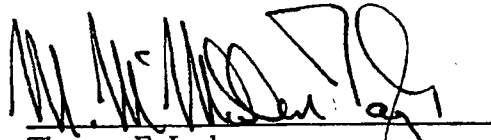
70. This case does not meet the requirements for class certification as set forth in Rule 23, SCRC.

FOR A SEVENTEENTH DEFENSE

71. Defendant reserves the right to assert additional defenses as the facts and legal issues of this case develop.

WHEREFORE, having fully answered, Defendant prays the Amended Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court deems just and proper.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'M. McMullen Taylor', is written over a horizontal line.

Thomas E. Lydon
M. McMullen Taylor
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300

Attorneys for Defendant City of Columbia

Columbia, South Carolina
November 14, 2011

STATE OF SOUTH CAROLINA
PLEAS

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

IN THE COURT OF COMMON

FIFTH JUDICIAL CIRCUIT

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

DEFENDANT'S NOTICE
MOTION AND MOTION
TO DISMISS PURSUANT
TO RULE 12(b)(1), SCRC

FILED
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J. BETTIE W. McBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

TO: Plaintiffs Joseph S. Azar and Frank J. Cumberland, Jr., and their Attorneys,
C. Dixon Lee, III, Esq. and Gene M. Connell, Jr., Esq.:

You will please take Notice that Defendant City of Columbia, by and through its undersigned counsel, will move before the presiding judge of the Fifth Judicial Circuit, Richland County Judicial Center, Columbia, South Carolina, on the tenth (10th) day after service thereof, or as soon thereafter as counsel may be heard, an order dismissing the above-captioned action pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure ("SCRCP"), for lack of standing to bring this action.

Plaintiffs allege that they are both residents and water and sewer customers of the City of Columbia. Am. Compl. ¶¶ 1-2, 5. Plaintiffs allegedly paid water and sewer fees to the City. Am. Compl. ¶ 8. Plaintiffs contend that these fees must be "specifically designated for expenses of and improvements to the water and sewer systems," yet the City failed to do so. Am. Compl. ¶ 16. Plaintiffs allege that the City has violated South Carolina law by using water and sewer fees for purposes other than maintaining and improving its water and sewer system, including use for general government operations.

Am. Compl. ¶¶ 16-18. Plaintiffs allege that "in the past twelve years the City has transferred in excess of \$80 million dollars out of its water and sewer fund for other purposes and uses." Am. Compl. ¶ 10. Plaintiffs seek a temporary injunction restraining the City from continuing to allegedly use its water and sewer revenue for any other purpose but operation and improvement of its water and sewer system, and a permanent injunction requiring the City to return all water and sewer revenues used for other purposes. Am. Compl. ¶ 26. Additionally, Plaintiffs seek a refund of all water and sewer fees collected for the past three years and used for other purposes, to be placed in a court-created common fund from which attorneys fees would be paid. Am. Compl. ¶¶ 34-35, 43, 52-53, H.

Plaintiffs lack standing to bring this action. "A private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992). To establish standing, Plaintiffs carry the burden of showing that they have met each element of the following three-part test:

First, the plaintiff must have suffered an "injury-in-fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the

independent action of some third party not before the court.

Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008); *Sea Pines Assoc. for the Protection of Wildlife, Inc. v. S.C. Dept. of Natural Resources*, 345 S.C. 594, 602, 550 S.E.2d 287, 292 (2001).

In order for an injury to be concrete and particularized, “it must affect the Plaintiff in a personal and individual way” and “not merely of general interest common to all members of the public.” *Sea Pines Assoc. for the Protection of Wildlife, Inc. v. S.C. Dept. of Natural Resources*, 345 S.C. 594, 602, 550 S.E.2d 287, 292 (2001). Plaintiff Joseph S. Azar (hereinafter referred to as “Azar”) fails to meet the requirement of a concrete and particularized injury because he is not a water and sewer customer of the City of Columbia. Aff. Adams, ¶ 4 (Exhibit A). A search of the City’s water and sewer accounts reveal no account held in the name of Azar. Aff. Adams, ¶ 3 (Exhibit A). In the absence of such status as a water and sewer customer, Azar cannot meet his burden to establish a concrete and particular injury. See e.g. *Charleston Trident Home Builders, Inc. v. Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 866 (2006) (stating that payment of contested impact fee constituted injury). Without showing a direct injury, Azar’s claims are not personal in nature, but “merely of general interest common to all members of the public.” *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992).

As for Plaintiff Frank J. Cumberland Jr. (hereinafter referred to as "Cumberland"), he alleges that he is a water and sewer customer of the City, and the City admits in its Answer that it holds two active accounts in the name of Frank J. Cumberland, Jr. However, even if Cumberland is a water and sewer customer, he nevertheless fails to show how he has suffered a concrete and actual invasion of a legally protected interest arising from the City's use of these collected fees. At most, a water and sewer customer has a legally protected interest in receiving the service paid for. Nowhere has Cumberland, or Azar for that matter, alleged that the City failed to provide water and sewer services to them. Through their allegation that the City's water and sewer systems are "in terrible shape" and "on the verge of shutdown," Plaintiff(s) may argue that, under the municipal finance statute and case law that they rely upon¹, they possess an interest in a water and sewer system in good repair. Am. Compl. ¶ 31. However, Plaintiffs do not allege any causation between the condition of the City's water and sewer system and the City's use of collected water and sewer fees. Plaintiffs' allegation is conjectural and speculative, not actual or imminent, which is not enough to establish standing to challenge the City's collection and use of water and sewer fees.²

In the alternative, Plaintiffs may argue that they have taxpayer standing to bring their claims. Taxpayer standing is an exception to the general rule that a plaintiff must show individual harm. *Beaufort County v. Trask*, 349 S.C. 522, 529, 563 S.E.2d 660, 664 (Ct. App. 2002). The obvious problem with this argument is that Plaintiffs have failed to

¹ Plaintiffs base their claims primarily on S.C. Code Ann. § 6-1-330 and *C.R. Campbell Construction Co. v. Charleston County*, 325 S.C. 235, 481 S.E.2d 437 (1997), and breach of contract.

² Plaintiffs have other statutory means by which they could reach the issue of whether the City's water and sewer systems "are in terrible shape," which would more readily confer standing. For example, Plaintiffs have the option of bringing a citizen suit under the Clean Water Act, 33 U.S.C. § 1365, for failure to comply with its National Pollutant Discharge Elimination System permit for discharge of wastewater.

allege in their Amended Complaint that they are taxpayers of the City, and even if they did, at issue here is not the expenditure of tax dollars but of revenue derived from fees. Taxes and fees are distinguished under South Carolina law. Taxes are imposed on all property for the maintenance of government while fees are charged to those who receive a specific benefit in return. *Ford v. Georgetown County Water & Sewer District*, 341 S.C. 10, 13, 532 S.E.2d 873, 875 (2000). South Carolina courts have not raised taxpayer standing in cases involving user fees. In *Charleston Trident Home Builders, Inc. v. Town of Summerville*, the question of standing was at issue, and the court found standing to challenge a service fee based on payment of the fee in dispute. 369 S.C. 498, 502, 632 S.E.2d 864, 866 (2006). Due to the differences between user fees and taxes, as well as the lack of application in suits disputing fees, taxpayer standing is inapplicable.

Even if taxpayer standing applies, Plaintiff(s) must still show more than the existence of an abstract right to test the validity the City's actions. Taxpayers must show that the effect of the challenged action would be to increase their tax burden or cause some other economic injury to the public fisc. *Beaufort County v. Trask*, 349 S.C. 522, 529, 563 S.E.2d 660, 664 (Ct. App. 2002). Plaintiffs have failed to allege that the City's actions cause any such economic injury. As noted above, the allegation that the City's water and sewer systems are "in terrible shape and on the verge of shutdown" could implicitly state some sort of economic harm. But Plaintiffs oversimplify the situation by failing to take into account the complexities of the City's water and sewer operations, including its rate structures. For customers residing outside the City's corporate limits, the City charges a higher rate for water and sewer, and these charges are not governed or limited by state law. *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911);

Calcaterra v. City of Columbia, 315 S.C. 196, 432 S.E.2d 498 (Ct. App. 1993). In the calendar year 2010, the City's billing for residential water and sewer service for customers residing within the City limits amounted to \$15,574,260.94. (See Exhibit B). In the calendar year 2010, the City's billing for residential water and sewer service for customers residing outside of the City limits amounted to \$50,159,313.02. (*Id.*). Economic harm must be ascertained by looking at the whole fiscal context of the City's water and sewer utility. See *West Farms Mall, LLC v. Town of West Hartford*, 279 Conn. 1, 13, 901 A.2d 649, 657 (2006) (stating that taxpayer standing is determined by showing injury from the entire fiscal context of the program involved). Given the significant revenues generated by out-of-City customers, Plaintiffs would be hard pressed to demonstrate that the City's use of their fees, paid under the in-City rate, were used for an unlawful purpose, much less the cause of economic injury. Plaintiffs cannot rest on assumptions to show the requisite injury. *Orange County Rescue Squad, Inc. v. County of Orange*, 2011 U.S. Dist. LEXIS 27838, *35-36 (M.D. N.C. 2011).

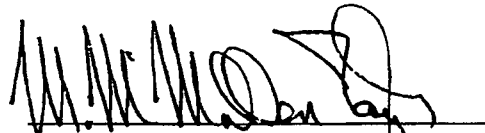
Lastly, Plaintiffs may argue that their Amended Complaint raises an important public issue which should be decided regardless of whether they have standing. "The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke per se a judicial determination of the issue." *Sloan v. Greenville County*, 356 S.C. 531, 549, 590 S.E.2d 338, 347 (Ct. App. 2003). The public importance exception to standing may apply if the issue raised is of such public importance that a resolution is needed for future guidance. *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). It is not at all clear whether a decision in this case would have any legal impact upon municipalities across the State.

The particular circumstances of this case, namely the fact that the City collects water and sewer fees from a class of customers not protected by any statute, do not make out a straightforward set of facts from which meaningful guidance can be had. The court must balance the competing interests of citizen access to the judicial process against judicial economy and the ability of government to carry out its functions without being subjected to answer every citizen grievance in court. *Id.* Here, the issues raised in Plaintiffs' Amended Complaint do not rise to the level of public importance contemplated by our courts.

In conclusion, Plaintiffs lack the requisite standing to bring their claims against the City. Accordingly, the City respectfully asks for an Order of this Court dismissing any and all claims against it for lack of subject matter jurisdiction.

This Motion is based upon the South Carolina Rules of Civil Procedure, applicable law, a supplemental memorandum of law with attached affidavits and other exhibits to be filed prior to the hearing of this Motion, and any other matters the Court may permit to be presented at the hearing on this matter.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Thomas E. Lydon', written over a horizontal line.

Thomas E. Lydon

M. McMullen Taylor

McAngus Goudelock & Courie, LLC

Post Office Box 12519

Columbia, South Carolina 29211

(803) 779-2300

Attorneys for Defendant City of Columbia

Columbia, South Carolina
November 14, 2011.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

DEFENDANT'S ANSWER TO
PLAINTIFFS' SECOND AMENDED
COMPLAINT

JEANETTE W. MURKIN
C.C.P. & G.S.

2012 FEB 21 PM 3:24

RICHLAND COUNTY
FILED

COMES NOW Defendant City of Columbia, hereby answering Plaintiffs' Second

Amended Complaint as follows:

FOR A FIRST DEFENSE

1. Every allegation of the Second Amended Complaint is denied unless hereinafter specifically admitted.
2. Answering Paragraph 1, Defendant admits the allegations set forth in Paragraph 1.
3. Answering Paragraph 2, Defendant admits the allegations set forth in Paragraph 2.
4. Answering Paragraph 3, Defendant is without knowledge or information sufficient to form a belief as to whether Michael A. Letts is a citizen and resident of Richland County. Further answering Paragraph 3, Defendant admits that its water and sewer billing records indicate an address for Michael A. Letts that is located outside the corporate limits of the Defendant.
5. Answering Paragraph 4, Defendant admits the allegations set forth in Paragraph 4.

6. Answering Paragraph 5, Defendant denies that it provides water and sewer service to Plaintiff Joseph S. Azar. Further answering Paragraph 5, Defendant admits that it provides water and sewer service to Plaintiffs Frank J. Cumberland, Jr. Further answering, Defendant admits that its records indicate an active account in the name of Michael A. Letts for water and sewer service, but lacks sufficient information or knowledge to form a belief as to whether this account holder is the named Plaintiff Michael A. Letts and would therefore deny the same and demand strict proof thereof. Further answering, Defendant admits that it provides water and sewer services to others inside and outside the City of Columbia's corporate limits.
7. Answering Paragraph 6, Defendant admits that Rule 23 of the South Carolina Rules of Civil Procedure provides for certification of class actions if certain criteria are met.
8. Answering Paragraph 7, Defendant denies that Plaintiff Joseph S. Azar is or continues to be a water and sewer customer of the Defendant. Further answering, Defendant admits that Plaintiff Frank J. Cumberland, Jr. is a water and sewer customer of the Defendant. Further answering, Defendant admits that its records indicate an active account in the name of Michael A. Letts for water and sewer service, but Defendant lacks sufficient information or knowledge to form a belief that this account holder is the named Plaintiff Michael A. Letts and would therefore deny the same and demand strict proof thereof.
9. Answering Paragraph 8, Defendant admits only that the Plaintiffs seek class certification of their action. Answering further, Defendant lacks sufficient

knowledge or information to form a belief as to whether Plaintiffs represent all past and current water and sewer customers of the City of Columbia and would therefore deny the same and demand strict proof thereof.

10. Answering Paragraph 9, Defendant admits that it has enacted water and sewer rates applicable to its water and sewer customers. Answering further, Defendant denies the remaining allegations in Paragraph 9 and demands strict proof thereof.
11. Answering Paragraph 10, Defendant lacks information or knowledge sufficient to form a belief as to the allegations and legal conclusions set forth in Paragraph 10 and would therefore deny the same and demand strict proof thereof.
12. Answering Paragraph 11, Defendant denies that Plaintiff Joseph S. Azar pays to the City charges for water and sewer services. Answering further, Defendant admits that Plaintiff Frank J. Cumberland, Jr., pays to the City charges for water and sewer services. Answering further, Defendant lacks knowledge or information sufficient to form a belief as to whether Plaintiff Michael A. Letts pays to the City charges for water and sewer services. Answering further, Defendant denies the remaining allegations in Paragraph 11 and demands strict proof thereof.
13. Answering Paragraph 12, Defendant denies the allegations made therein and demands strict proof thereof.
14. Answering Paragraph 13, Defendant denies the allegations made therein and demands strict proof thereof.
15. Answering Paragraph 14, denies the allegations made therein and demands strict proof thereof.

16. Answering Paragraph 15, Defendant denies the allegations set forth therein and demands strict proof thereof.
17. Answering Paragraph 16, Defendant denies the allegations set forth therein and demands strict proof thereof.
18. Answering Paragraph 17, Defendant denies the allegations set forth therein and demands strict proof thereof.
19. Answering Paragraph 18, Defendant denies the allegations set forth therein and demands strict proof thereof.
20. Answering Paragraph 19, Defendant lacks information and knowledge sufficient to form a belief as to whether the normal sensibilities of Plaintiffs or others have been offended by what Plaintiffs describe as "foul, unpleasant and offensive stench of raw sewage wafting through various parts of the City," and therefore deny the same. Answering further, Defendant denies any remaining allegations set forth in Paragraph 19 and demands strict proof thereof.
21. Answering Paragraph 20, Defendant admits that Black & Veatch conducted a rate study in 2006 to evaluate the capability of the Defendant's rate structure to fund its capital improvement plan. Answering further, Defendant denies all remaining allegations and demands strict proof thereof.
22. Answering Paragraph 21, Defendant admits the allegations set forth therein, but would describe more accurately that the sale of water and sewer bonds in 2009 and 2010 generated, rather than collected, \$180 million dollars.
23. Answering Paragraph 22, Defendant admits that it offered water and sewer revenue bonds, Series 2011A and 2011B in November 2011. Answering further,

Defendant admits that Series 2011A, in an amount of \$100 million dollars, was issued for the purpose of improving and enlarging Defendant's water and sewer system. Answering further, Defendant denies the remaining allegations set forth therein.

24. Answering Paragraph 23, Defendant admits that its water and sewer revenue bonds, Series 2011A and 2011B, are secured by net revenues derived from its water and sewer system after deducting operation and maintenance expenses. Answering further, Defendant denies any remaining allegations set forth therein.
25. Answering Paragraph 24, Defendant denies the allegations set forth therein and demands strict proof thereof.
26. Answering Paragraph 25, Defendant denies the allegations set forth therein and demands strict proof thereof.
27. Answering Paragraph 26, Defendant admits that it is currently negotiating with the U.S. Environmental Protection Agency ("EPA") regarding purported violations of Defendant's National Discharge Elimination System Permit for operation of its wastewater treatment plant, with a consent decree as a possible outcome. Answering further, Defendant denies that all remaining allegations and demands strict proof thereof.
28. Answering Paragraph 27, Defendant denies that Plaintiff Joseph S. Azar pays to the City charges for water and sewer services. Answering further, Defendant admits that Plaintiff Frank J. Cumberland, Jr., pays to the City charges for water and sewer services. Answering further, Defendant lacks knowledge or information sufficient to form a belief as to whether Plaintiff Michael A. Letts

pays to the City charges for water and sewer services. Answering further, Defendant denies the remaining allegations in Paragraph 27.

29. Answering Paragraph 28, Defendant denies the allegations and legal conclusions set forth therein.
30. Answering Paragraph 29, Defendant denies the allegations and legal conclusions set forth therein.
31. Answering Paragraph 30, Defendant denies the allegations and legal conclusions set forth therein.
32. Answering Paragraph 31, Defendant denies the allegations and legal conclusions set forth therein.
33. Answering Paragraph 32, Defendant denies the allegations and legal conclusions set forth therein.
34. Answering Paragraph 33, Defendant admits that it has transferred \$4.5 million dollars from its water and sewer account to its general fund during fiscal years 2007-2008, and 2008-2009; however, Defendant did not transfer \$4.5 million dollars from its water and sewer account to its general fund during fiscal year 2010-2011 (year ending June 30, 2011). Answering further, Defendant admits that these particular transfers were used to pay direct costs associated with operation or improvement of its water and sewer system. Answering further, Defendant denies any remaining allegations set forth therein.
35. Answering Paragraph 34, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.

36. Answering Paragraph 35, Defendant admits that its water and sewer revenues, including revenue derived from water and sewer charges, constitutes over five percent of its total budget.
37. Answering Paragraph 36, Defendant admits that Plaintiffs seek an order as described therein, but denies all remaining allegations and legal conclusions and further answer that Plaintiffs are not entitled to the relief sought therein.
38. Answering Paragraph 37, Defendant denies all allegations and legal conclusions set forth therein.
39. Answering Paragraph 38, Defendant admits that Plaintiffs seek an order as described therein, but further answers that Plaintiffs are not entitled to the relief sought therein.
40. Answering Paragraph 39, Defendant admits that Plaintiffs seek an order as described therein, but further answers that Plaintiffs are not entitled to the relief sought therein.
41. Answering Paragraph 40, Defendant denies that Plaintiffs are entitled to the relief sought therein.
42. Answering Paragraph 41, Defendant denies that Plaintiffs are entitled to the relief sought therein.
43. Answering Paragraph 42, Defendant denies that Plaintiffs are entitled to the relief sought therein.
44. Answering Paragraph 43, Defendant reasserts and incorporates its answers to Paragraphs 1 through 42 above.

45. Answering Paragraph 44, Defendant denies the allegations and legal conclusions set forth therein.
46. Answering Paragraph 45, Defendant denies the allegations set forth therein.
47. Answering Paragraph 46, Defendant admits that it currently transfers \$4.5 million dollars or less from its water and sewer account to its general fund on an annual basis. Answering further, Defendant denies any remaining allegations set forth therein.
48. Answering Paragraph 47, Defendant denies the allegations and legal conclusions set forth therein.
49. Answering Paragraph 48, Defendant denies the allegations and legal conclusions set forth therein.
50. Answering Paragraph 49, Defendant denies that Plaintiffs are entitled to the relief sought therein.
51. Answering Paragraph 50, Defendant denies that Plaintiffs are entitled to the relief sought therein.
52. Answering Paragraph 51, Defendant denies that Plaintiffs are entitled to the relief sought therein.
53. Answering Paragraph 52, Defendant reasserts and incorporates its answers to Paragraphs 1 through 51 above.
54. Answering Paragraph 53, Defendant denies all allegations and legal conclusions and further answers that Plaintiffs are not entitled to the relief sought therein.
55. Answering Paragraph 54, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.

56. Answering Paragraph 55, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
57. Answering Paragraph 56, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
58. Answering Paragraph 57, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
59. Answering Paragraph 58, Defendant denies that Plaintiffs are entitled to the relief sought therein.
60. Answering Paragraph 59, Defendant reasserts and incorporates its answers to Paragraphs 1 through 58 above.
61. Answering Paragraph 60, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
62. Answering Paragraph 61, Defendant admits that it currently transfers \$4.5 million dollars or less from its water and sewer account to its general fund on an annual basis. Answering further, Defendant denies any remaining allegations set forth therein.
63. Answering Paragraph 62, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
64. Answering Paragraph 63, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof, and further answers that Plaintiffs are not entitled to the relief sought therein.
65. Answering Paragraph 64, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.

66. Answering Paragraph 65, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
67. Answering Paragraph 66, Defendant denies the allegations and legal conclusions set forth therein and demands strict proof thereof.
68. Answering Paragraph 67, Defendant admits that Plaintiffs seek the creation of a common fund, but denies that Plaintiffs are entitled to a common fund and demands strict proof thereof. Answering further, Defendant denies all remaining allegations and conclusions set forth therein and demands strict proof thereof.
69. Answering Paragraph 68, Defendant denies that Plaintiffs are entitled to the relief sought and demands strict proof thereof.
70. Answering Plaintiffs' prayer for judgment, Defendant denies all allegations and legal conclusions and further denies that Plaintiffs are entitled to any relief sought.

FOR A SECOND DEFENSE

71. Plaintiffs lack standing to bring all claims against Defendant.

FOR A THIRD DEFENSE

72. No justiciable controversy exists between these parties.

FOR A FOURTH DEFENSE

73. Plaintiffs' cause of action for a permanent injunction requiring Defendant to return all monies it allegedly spent for purposes unrelated to provision of water and sewer services is barred by the doctrine of laches.

FOR A FIFTH DEFENSE

74. To the extent Plaintiffs seek return of funds for the past three years under the equitable remedy of quantum meruit or contract implied by law, such remedy is barred by the doctrine of laches.

FOR A SIXTH DEFENSE

75. S.C. Code Ann. § 6-1-300 *et seq.* does not create a private right of action.

FOR A SEVENTH DEFENSE

76. S.C. Code Ann. § 6-1-330 does not apply to Defendant's water and sewer charges.

FOR AN EIGHTH DEFENSE

77. To the extent that S.C. Code Ann. § 6-1-330 does apply to Defendant's water and sewer charges, such statute is unconstitutional as applied to Defendant.

FOR AN NINTH DEFENSE

78. Even if S.C. Code Ann. § 6-1-330 applies to Defendant, Defendant's use of its water and sewer revenues is lawful.

FOR A TENTH DEFENSE

79. The test set forth in *C.R. Campbell Construction Co. v. Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997) does not apply to Defendant.

FOR AN ELEVENTH DEFENSE

80. Even if *C.R. Campbell Construction Co. v. Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997) applies to Defendant, Defendant's use of its water and sewer revenues is lawful.

FOR A TWELFTH DEFENSE

81. Plaintiffs have failed to state facts sufficient to constitute a cause of action for breach of contract, whether in law or equity.

FOR A THIRTEENTH DEFENSE

82. Plaintiffs have failed to state facts sufficient to constitute a cause of action for violation of due process or equal protection.

FOR A FOURTEENTH DEFENSE

83. Plaintiffs have failed to state facts sufficient to constitute a cause of action for a taking of property without just compensation.

FOR A FIFTEENTH DEFENSE

84. Plaintiffs have failed to state facts sufficient to constitute a cause of action for violation of Article X of the South Carolina Constitution.

FOR A SIXTEENTH DEFENSE

85. Plaintiffs' request for return of all revenues collected and used by Defendant for purposes other than water and sewer operation and improvement for placement in a common fund amounts to an unconstitutional intrusion into the legislative function of the City Council by overturning or usurping its discretionary policy-making decisions.

FOR A SEVENTEENTH DEFENSE

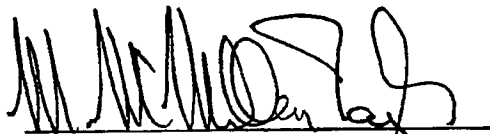
86. This case does not meet the requirements for class certification as set forth in Rule 23, SCRPC.

FOR A EIGHTEENTH DEFENSE

87. Defendant reserves the right to assert additional defenses as the facts and legal issues of this case develop.

WHEREFORE, having fully answered, Defendant prays the Second Amended Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court deems just and proper.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Thomas E. Lydon', written over a horizontal line.

Thomas E. Lydon
M. McMullen Taylor
McAngus Goudelock & Courte, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300

Attorneys for Defendant City of Columbia

Columbia, South Carolina
February 21, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,)

vs.)

City of Columbia,)

Defendant.)

NOTICE OF MOTION AND MOTION
FOR CLASS CERTIFICATION

JEANETTE W. McBRIDE
C.P. & G.S.

2012 MAR 27 AM 10:01

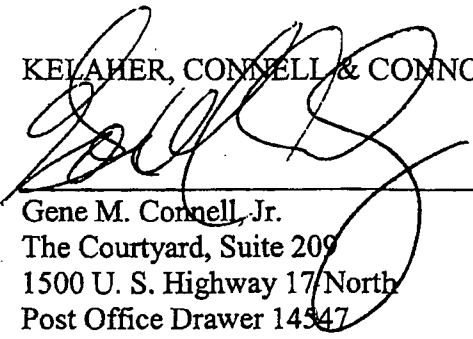
RICHLAND COUNTY
FILED

TO: THE DEFENDANT, CITY OF COLUMBIA, AND ITS ATTORNEYS

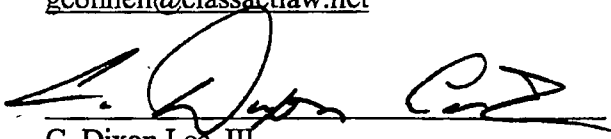
YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Plaintiffs, will, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, move this Court for an Order certifying a class of water customers pursuant to SCRCP 23. The basis of this motion is that SCRCP 23 provides that the court may certify a class: (1) if the class is so numerous that joinder of all members is impracticable; (2) there are common questions of law and fact; (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class; and (4) the represented parties, i.e., will fairly and adequately protect the interest of the class. Finally, the Plaintiffs request injunctive relief such that the amount in controversy is not an issue.

WHEREFORE, Plaintiffs requests the Court issue its Order certifying a class of all Columbia water customers and that the Court define such class to include all Columbia water customers, past and present as of three years prior to the filing of the Complaint, and for such other and further relief as the court may deem just, necessary, and proper

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)
Attorneys for Plaintiff

March 26, 2012

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
)

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

) DEFENDANT'S NOTICE OF
) AMENDED MOTION AND
) AMENDED MOTION TO DISMISS
) PURSUANT TO RULE 12(b)(1)
)

2012 MAY 17 AM 9:20
JEANETTE W. McBRIDE
C.C.P. & G.S.

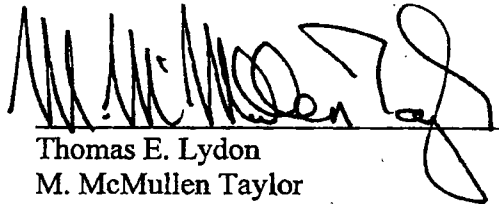
RICHLAND COUNTY
FILED

TO: Plaintiffs Joseph S. Azar and Frank J. Cumberland, Jr., and Michael A. Letts, and
their Attorneys, C. Dixon Lee, III, Esq. and Gene M. Connell, Jr., Esq.:

On November 14, 2011, Defendant filed a Motion to Dismiss Pursuant to Rule 12(b)(1) for lack of standing, which has been scheduled for hearing on June 4, 2012. Since this Motion was filed, Plaintiffs filed a Second Amended Complaint to add another Plaintiff, Michael A. Letts, and add new factual allegations addressing various harms that Defendant's actions have caused Plaintiffs. Please take Notice that Defendant City of Columbia, by and through its undersigned counsel, hereby amends its original Motion to Dismiss Pursuant to Rule 12(b)(1) filed with this Court on November 14, 2011 to address the addition of Mr. Letts as a Plaintiff, as well as Plaintiffs' additional factual allegations. Defendant moves before the presiding judge of the Fifth Judicial Circuit, Richland County Judicial Center, Columbia, South Carolina, for an order dismissing all or some of the causes of action within the above-captioned action pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure ("SCRCP"), for lack of standing to bring this action.

Defendant asserts that Plaintiffs lack standing to bring some or all of their stated causes of action based on lack of a private cause action under S.C. Code Ann. § 6-1-330; failure to meet the requirements of constitutional standing; and/or failure to demonstrate the public importance of the issues raised. This Motion is based upon the South Carolina Rules of Civil Procedure, applicable law, a memorandum or memoranda of law to be submitted by the Defendant at or before a hearing on this Motion, and any other matters the Court may permit to be presented at the hearing on this matter.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'M. McMullen Taylor', is written over a horizontal line.

Thomas E. Lydon
M. McMullen Taylor
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300

Attorneys for Defendant City of Columbia

Columbia, South Carolina
May 16, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,)

vs.)

City of Columbia,)

Defendant.)

PLAINTIFFS' NOTICE OF MOTION,
MOTION FOR RECONSIDERATION
AND MEMORANDUM OF LAW IN
SUPPORT OF RECONSIDERATION

2012 JUL -6 AM 11:55
JANETTE W. MCGRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Plaintiffs, move this Court for an Order reconsidering the Court's Order Denying Plaintiffs' Motion for Class Certification dated June 22, 2012, filed June 26, 2012 and received by Plaintiffs' counsel on July 2, 2012. The basis of Plaintiffs' Motion for Reconsideration is as follows.

A. PLAINTIFFS WERE NOT GIVEN A HEARING BEFORE THE COURT.

Plaintiffs' Counsel appeared before the Court at a hearing on June 5, 2012 in the Richland County Courthouse at which time the Court advised the parties that the Court did not wish to have oral argument at that time because the Court had been hearing motions all day. The Court further advised the parties that it would schedule a hearing the following week in Camden and that each side should present proposed orders. Plaintiffs' counsel presented a proposed order and a letter (Exhibit 1) in which Plaintiffs' counsel offered to come to Camden for arguments. Plaintiffs' counsel did not receive an indication from the Court that such arguments would be heard. Instead on June 26, 2012 Plaintiffs' counsel was advised that the Court had denied Plaintiffs' motion.

Plaintiffs request an on-the-record hearing so that Plaintiffs can state their arguments for class certification.

B. LITTLEFIELD CONTROLS THIS CASE.

The Order Denying Class Certification filed June 26, 2012 is erroneous in that the Order is directly contra to the case of *Littlefield v. South Carolina Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1991) (Exhibit 2) in which the Supreme Court of South Carolina reversed a denial of class certification. The circuit court had based its decision on the argument by the State that a class action was not necessary against the State because the State would comply with any relief which was granted. Plaintiff points out that the Order in this case states as follows:

Based on the foregoing, class certification is both unnecessary and inappropriate in this case. If it is ultimately determined that the relief sought by Plaintiffs in this case should be granted, the Court may presume the good faith of government officials to respect such a ruling without the necessity of making this a class action.

Such finding by the Court is contra to *Littlefield* and is not a basis for denying class certification. Accordingly, Plaintiffs request that the Court reconsider its position on this issue.

C. FEDERAL CASE LAW IS NOT APPLICABLE UNDER SCRCF 23.

The Court in denying class certification also cited two federal cases: *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (6th Cir. 1976); and *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974). Both these cases concluded under federal law that class certification was unnecessary because any declaratory or injunctive relief given in the individual action would inure to the benefit of other similarly situated individuals. However, these cases are not applicable, especially in light of the Supreme Court's statement in *Littlefield v. South Carolina Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1991) in which the Supreme Court held:

Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23 SCRCP, endorses a more expansive view of class action availability than its federal counterpart. (*Littlefield* 523 S.E.2d at 784).

Accordingly, any citation to these federal cases is inappropriate because state class action law is more expansive and these federal cases do not apply. Further, the *Craft* case holds that there was no predominant question of fact or law as the reason for the denial of class certification. South Carolina does not have in its class action rule the predominance factor which is cited in Federal Rule of Civil Procedure 23. (*Craft* 534 F.2d 686).

D. GOOD FAITH OF THE CITY IS NOT A DEFENSE.

The Order of this Court specifically violates *Littlefield* by holding the Court may presume good faith of government officials to act without a class action. The error being that this is not a defense and that *Littlefield* specifically held that a presumption that the state would voluntarily comply is no defense to the class action rule. See *Littlefield* 523 S.E.2d 784 wherein the Court held:

As the second asserted basis, the circuit court ruled that state agencies should be afforded an opportunity to comply voluntarily with any final judgment invalidating their method of calculation of annual leave. Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP).

E. TYPICALITY DOES NOT REQUIRE PROOF OF OTHER CLASS MEMBERS.

The Court also erred in holding that SCRCP 23(a)(3) of the class action rule had not been met. In the Court's Order, the Court noted: "The third element is that the claims of the representative parties are typical of the claims of the class." (See Order Denying Class Certification, p. 3).

Further, the Court held:

No evidence has been presented that any other potential class members wish to assert a claim. Plaintiffs are complaining about the manner in which the City is spending water and sewer revenues. Plaintiffs have not shown that other citizens have presented similar complaints. (Order Denying Class Certification, pp. 3-4).

However, SCRCP 23 does not require that the Plaintiff show that other people wish to join the class action. SCRCP 23(a)(3) only requires that the claims of the named Plaintiffs, i.e., the representative parties, are typical or similar of the claims of the class. Here each Plaintiff and every absent class member has the identical claim. (Indeed over 100,000 water and sewer customers have identical interests to the class representatives.) The water and sewer fees the named Plaintiffs are paying into the water and sewer fund are being used not for the water and sewer repair and/or maintenance, but are being used by the City of Columbia for other non-related purposes.

To satisfy the typicality requirement the named representatives' claims must be similar enough to those of the class to ensure that class interests are vigorously prosecuted. The City of Columbia admits that water and sewer funds have been used for other purposes and that those water and sewer funds are paid by all water and sewer customers (over 100,000 customers). Accordingly, each class member and the class representatives have the same issue in common -- the use of water and sewer funds for other purposes. The fact that other class members have not indicated they want to join the class is of no consequence and to read this as a requirement of the class action rule violates *Littlefield*. Plaintiffs only need to show that the members of the class have the same claims as the class representative. See 7A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, (2nd Ed. 1986). The typicality requirements of Rule 23(a)(3) only requires that the claims or defenses of the class be typical not that they wish to join the class. To satisfy the typicality requirement the named representatives' claims must be similar enough to those of the class to assure that the class interests are vigorously prosecuted. Here, just like in *Littlefield*,

there is one main issue of law, a large number of people are affected and public policy favors this court finding a way to reconcile Rule 23 so that the claims affecting every class member be litigated in an economical fashion. The Supreme Court has on numerous occasions expressed the viewpoint that class actions are favored in this state. In the recent case of *Grazia v. S. C. State Plastering, LLC*, 390 S.C. 562, 569, 703 S.E.2d 197 (2010), the Court expressed the opinion that our state class action rule differs significantly from its federal counterpart and is expansive. (703 S.E.2d at 203). Accordingly, it is respectfully submitted that the Court erred in finding that representative parties' claims were not typical of the claims or defenses of the class.

F. PLAINTIFFS DO NOT SEEK MONEY DAMAGES AND THUS SCRCP 23(a)(5) IS NOT APPLICABLE.

The Court also erred in finding that the fifth requirement to certify a class was not met. In fact, Plaintiffs' Complaint (attached as Exhibit 3) clearly indicates that the class representatives do not seek any money damages but only seek to return water and sewer fees to the utility fund. Plaintiffs' Complaint only seeks injunctive and declaratory relief and a return of the money to the water and sewer utility fund to be used for water and sewer utility purposes.¹ Because the Complaint seeks injunctive and declaratory relief, the \$100 requirement for each class member is not necessary.² Further, as is stated in *Grazia*, the Supreme Court has said class actions are favored in this state and because plaintiffs were seeking an injunctive and declaratory relief this court erred in finding that SCRCP 23(a)(5) (the \$100 rule) should be met in this case.

¹ See SCRCP 23(a)(5) "in class actions in which the primary relief is not declaratory or injunctive there must be \$100 in damages per class member. (Here, Plaintiffs seek injunctive relief not money to the class members.)

² South Carolina's class action rule (SCRCP 23(a)(5) makes it clear that equitable or declaratory relief is permitted in state class actions. Further, Plaintiffs' first cause of action is for injunctive relief. (See Exhibit 3). See also *South Carolina Public Service Authority v. C&S National Bank of S.C.*, 300 S.C. 142, 386 S.E.2d 775 (1989). (Bondholder class action certified for declaratory relief to change its fiscal year.)

G. THE COURT'S ORDER IS NOT CONSISTENT WITH SOUTH CAROLINA LAW.

The Court's Order *in toto* violates the principals set forth in *Grazia* and *Littlefield* that South Carolina favors class actions and that class actions are expansive in this state. The Court's opinion *in toto* is contra to existing state law and the order specifically violates *Littlefield* by presuming the state will act in good faith without a class action. Also, the Court's Order cites federal cases and the Court specifically finds that each claimant must have \$100 or more in order to proceed with an injunctive class action.³ Such not being the case when Plaintiffs are not seeking damages but are seeking injunctive and declaratory relief and a return of the money to the water and sewer utility fund for the benefit of all water and sewer customers.

H. THE COURT ERRED IN NOT GRANTING CLASS CERTIFICATION ON THE INJUNCTION CAUSE OF ACTION.

The Plaintiffs' Complaint has as a first cause of action injunction. The Court in denying a certified class on the injunctive relief found that South Carolina Appellate Courts have not "had an opportunity to address a situation involving a proposed class action seeking an injunction against a municipality." Plaintiffs beg to differ. If the prerequisites of Rule 23 are satisfied, a class action must be certified. The Court's Order citing federal cases is directly contra to *Littlefield* and the plain language of SCRCP 23. Defendant in its brief indicates that numerosity and common questions of law and fact have been satisfied. Defendant complains that a class should not be certified against a municipality because of the extra expense and the fact that "the City will comply with any injunctive relief."

Plaintiffs respectfully suggest to the Court that these reasons are not found in SCRCP 23 and are inappropriate to deny class status. As Plaintiffs have stated, the leading authority on class actions, Newberg in his treatise, Newberg on Class Actions, writes that a declaratory or

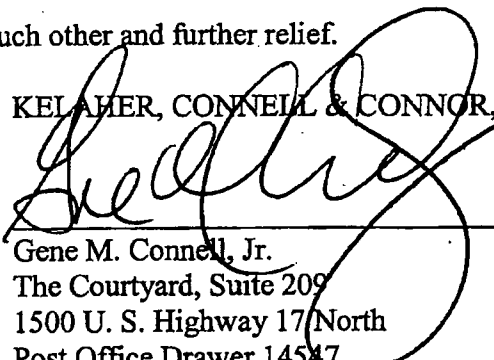
³ This ruling violates SCRCP 23(a)(5) which does not require damages in an injunctive or declaratory action.

injunctive class is an inexpensive and powerful tool to provide representation for small claimants. See Newberg on Class Actions, Section 411. Further, an injunctive class protects the rights of all water and utility customers since there is one main issue of law and thousands of people are involved. Accordingly, the Court's decision to deny class certification on the injunctive relief request is not consistent with SCRCP 23 or the case law which finds that class actions are favored in this state. See *Grazia v. S. C. State Plastering, LLC*, 390 S.C. 562, 569, 703 S.E.2d 197 (2010). In sum, SCRCP 23(a)(5) makes it clear that equitable or declaratory relief is permitted in state court class actions and that the \$100 rule does not apply. Accordingly, Plaintiffs need only show the other four elements of the rule have been met, which are numerosity (admitted by the Defendant), common questions of law or fact (admitted by the Defendant) and the representative parties will fairly and adequately protect the interests of the class (admitted by the Defendant).

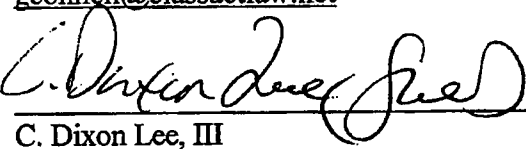
Finally, as has been stated previously, the Court's argument that other individuals have not come forward to become members does not defeat the typicality provision of SCRCP 23(a)(3). Counsel can cite to numerous cases throughout the country where a single class representative has had a case certified when other class members have not come forward and asked to be members of the class. Defendant misreads the typicality provision of SCRCP in that that provision only requires that the absent class members' claims be similar to the claims of the class representative. It is clear in this case that each water and sewer customer has a vested interest in making sure the fees they paid are used only for water and sewer services. Thus, absent class members' claims are typical of the class representatives' claims and in fact are one and the same. Accordingly, the Court erred in failing to certify an injunctive class.

WHEREFORE, Plaintiffs request a hearing on this matter and that the Court reverse its Order Denying Class Certification and for such other and further relief.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)

July 5, 2012

Attorneys for Plaintiff

RULE 11 CERTIFICATION

The attorney(s) below hereby certifies that either:

- ☐ A. He/She has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion; or
- ☒ B. Such consultation would serve no useful purpose, or could not be timely held; or
- ☐ C. Due to the nature of the motion, there is no duty to consult opposing counsel in that this is a motion:
- ☐ a. To Dismiss
- ☐ b. For Summary Judgment
- ☐ c. For New Trial
- ☐ d. For Judgment NOV

KEELAH, CONNELL & CONNOR, P.C.

Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)

Attorneys for Plaintiffs

July 5, 2012

HIGHLAND COUNTY
FILED

2012 JUL -6 AM 10:56

JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,)

vs.)

City of Columbia,)

Defendant.)

AFFIDAVIT OF SERVICE
BY MAIL

JEANEITE W. McBRIDE
C.C.P. & G.S.

2012 JUL -6 AM 10:55

FILED

RICHLAND COUNTY

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

Thomas E. Lydon, Esq.
M. McMullen Taylor, Esq.
McAngus Goudelock & Courie, LLC
P. O. Box 12519
Columbia, SC 29211

DOCUMENT: Plaintiffs' Notice of Motion, Motion for Reconsideration and
Memorandum of Law in Support of Reconsideration

DATE OF MAILING: July 5, 2012

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 5th day of July, 2012.

Shawn M. Ryan
Notary Public for South Carolina
My Commission Expires: 2-25-19

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff(s)

vs.

City of Columbia

Defendant(s)

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

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

Plaintiff's Attorney:
Gene M. Connell, Jr., Esquire Bar No. 1358
Address:
Post Office Drawer 14547
Surfside Beach, South Carolina 29587
phone: (843) 238-5648 fax: (843) 238-5050
e-mail: gconnell@classactlaw.net

Defendant's Attorney:
M. McMullen Taylor Bar No. 72848
Address: McAngus, Goudelock & Courie, LLC
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211-2519
(803) 779-2300
Direct number: (803) 227-4945 Fax: (803) 748-0526
e-mail: mullen.taylor@mgclaw.com

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Summary Judgment

Estimated Time Needed 2 hours

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief of action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

August 14, 2012
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: metk

Date Filed: 8/14/12

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

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

) DEFENDANT'S NOTICE OF
) MOTION AND MOTION FOR
) SUMMARY JUDGMENT

TO: Plaintiffs Joseph S. Azar, Frank J. Cumberland, Jr., and Michael A. Letts, and their
attorneys, C. Dixon Lee, III, Esq. and Gene M. Connell, Jr., Esq.:

You will please take Notice that Defendant City of Columbia, by and through its undersigned counsel, will move before the presiding judge of the Fifth Judicial Circuit, Richland County Judicial Center, Columbia, South Carolina, on the tenth (10th) day after service thereof, or as soon thereafter as counsel may be heard, for summary judgment pursuant to Rule 56(b) of the South Carolina Rules of Civil Procedure ("SCRCP"). Defendant's grounds for summary judgment are as follows:

1) As to Plaintiffs' First Cause of Action:

- a. The Defendant's water and sewer charges were enacted prior to the effective date of S.C. Code Ann. § 6-1-330.
- b. S.C. Code Ann. § 6-1-330, construed in *pari materia* with specific statutory authority to operate and finance a municipal utility, does not apply to municipal water and sewer service charges, or at least does not apply to surplus water and sewer revenues.

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JENNIFER W. MCNEIL
C.C.P. & G.S.

- i. In the alternative, Defendant's use of water and sewer revenues to fund its Office of Economic Development, Office of Business Opportunities, various development corporations, public relations concerning industrial development, City Center Partnership, and economic development special projects meets the requirements of S.C. Code Ann. § 6-1-330.
 - ii. In the alternative, Defendant's charges to the Water and Sewer Enterprise Fund for administrative services provided to the utility meet the requirements of S.C. Code Ann. § 6-1-330.
 - iii. In the alternative, Defendant's water and sewer revenues are properly segregated in an enterprise fund.
- c. S.C. Code Ann. § 6-1-330 is unconstitutional as applied to the Defendant's water and sewer service charges because the statute operates to limit Defendant's use of water and sewer revenues and/or take the property of Defendant's utility in violation of section 17, article VIII of the South Carolina Constitution.
 - d. Plaintiffs fail to meet their burden to show irreparable harm, and the balancing of equities does not favor the issuance of an injunction.
 - e. Plaintiffs Azar and Letts lack standing to bring this action, and the public importance exception does not apply.

2) As to Plaintiffs' Second Cause of Action:

- a. No express or implied contract term exists that restrict Defendant's use of water and sewer revenues.

- b. Plaintiffs lack standing to bring this action, and the public importance exception does not apply.

3) As to Plaintiffs' Third and Fourth Causes of Action:

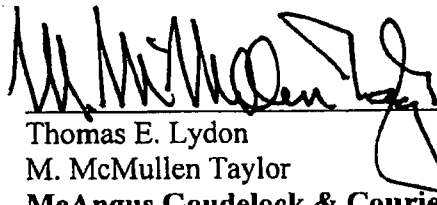
- a. *C.R. Campbell Construction Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), is inapplicable to water and/or sewer charges because such charges are of a different kind and nature than the fees addressed in *C.R. Campbell* and other cases applying the test for a valid service fee, and such charges are not a tax.

- i. In the alternative, *C.R. Campbell* does not apply to water and sewer revenues derived from non-resident water and sewer customers.
- ii. In the alternative, Defendant's use of water and sewer revenues to fund its Office of Economic Development, Office of Business Opportunities, the City Center Partnership, various development corporations, public relations concerning industrial development, and economic development special projects meets the *C.R. Campbell* test for valid service fees.
- iii. In the alternative, Defendant's charges to the Water and Sewer Enterprise Fund for administrative services provided to the utility meets the *C.R. Campbell* test for valid service fees.
- iv. In the alternative, Defendant's transfer of water and sewer revenue from its water and sewer enterprise fund to its general fund does not convert those transferred funds to an unconstitutional tax.

- b. Grounds for summary judgment concerning Defendant's alleged violation of S.C. Code Ann. § 6-1-330 as described above under 1(a) – (c) are repeated herein.
- c. Defendant's collection and use of water and sewer charges have not deprived Plaintiffs of their property in violation of due process.
- d. Defendant's collection and use of water and sewer charges have not taken Plaintiffs' property without just compensation.
- e. Plaintiffs have failed to show they are a member of a class of water and sewer customers that have been deprived of equal protection of law.
- f. Plaintiffs Azar and Letts lack standing to bring this claim, and the public importance exception does not apply.

This Motion is based upon the South Carolina Rules of Civil Procedure, the depositions and discovery in this case, applicable law, affidavits, a memorandum or memoranda of law to be submitted by the Defendant at or before a hearing on this Motion, and any other matters the Court may permit to be presented at the hearing on this matter.

Respectfully Submitted,


Thomas E. Lydon
M. McMullen Taylor
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300

Attorneys for Defendant City of Columbia

Columbia, South Carolina
Aug. 14, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,

vs.

City of Columbia,

Defendant.

PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT

2012 SEP 21 AM 9:15
C.C.P. & G.S.
JEW McBRIDE

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Plaintiff, will, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, move this Court for an Order granting Summary Judgment to the Plaintiff pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. The basis of this Motion is as follows:

1. It is admitted that the City of Columbia takes money from the Utility Enterprise Fund and places those funds in the General Fund. (See depositions of City of Columbia officials.)
2. It is admitted the funds are transferred to the General Fund and such funds are used by other City departments.
3. It is admitted that the City of Columbia charges water and sewer customers fees for services.
4. It is admitted the City of Columbia transfers at least \$4.5 million annually to the General Revenue Fund of the City.
5. Such use of water and sewer fees from the Utility Enterprise Fund violates the established State law including:

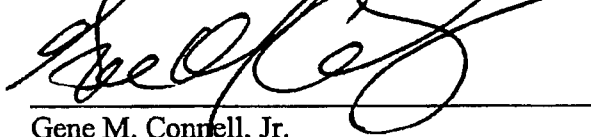
A. S.C. Code Ann. § 6-1-300(6) to § 6-1-330 (2011) does not allow use of charges for services as general revenue funds.

B. Established South Carolina case law from the South Carolina Supreme Court requires fees for services not be used for other City services.

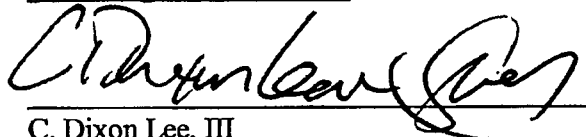
6. The City's consultant recommended that \$7.6 Million of service fees should not fund other services (Black & Veatch 2007 Indirect Cost of Service Study; City Document 0004633-4636).

WHEREFORE, Plaintiffs request an Order of this Court declaring this practice illegal and for an Order requiring the City to return those funds to the Utility Enterprise Fund.

KELAYER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)

September 18, 2012

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,

vs.

City of Columbia,

Defendant.

AFFIDAVIT OF SERVICE
BY MAIL

FILED
2012 SEP 21 AM 9:15
CLERK OF COURT
C.C.P. & G.S.

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

Thomas E. Lydon, Esq.
M. McMullen Taylor, Esq.
McAngus Goudelock & Courie, LLC
P. O. Box 12519
Columbia, SC 29211

DOCUMENT:

Plaintiffs' Notice of Motion and Motion for Summary Judgment

DATE OF MAILING:

September 20, 2012

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 20th day of September, 2012.

Thomas E. Lydon
Notary Public for South Carolina
My Commission Expires: 2-25-19

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,

vs.

City of Columbia,

Defendant.

PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR
RECONSIDERATION

YOU WILL PLEASE TAKE NOTICE that the undersigned moves the Court pursuant to South Carolina Rules of Civil Procedure 59. The basis of this Motion is as follows:

1. The Court held that Azar and Letts lacked standing and fails to explain why it is not bound by the previous Order of Judge Kinard;
2. The Court overruled the Order of another Circuit Court Judge in regard to the standing of Letts and Azar which is impermissible pursuant to the laws of South Carolina;
3. The Court's Order finds that the Child's case is applicable. The error being that the Child's case was decided in 1925 and was prior to the Service Fee Statute, thus, it was error to cite such in the Court's Order;
4. The Court erred in holding that Azar and Letts failed to meet the Public Importance Exception. The error being that Judge Kinard had already ruled on this matter;
5. The Court erred in holding that non-residents had no rights under the Service Fee Statute;

6. The Court erred in holding that Brown vs Horry County, 308 SC 180, 417 SE 2nd 565 (1992) is not applicable to municipal water and sewer charges;

7. The Court erred in holding that all profits in the City of Columbia's Water and Sewer System may be used for any purpose that the City deems appropriate;

8. The Court erred that finding the Service Fee Statute was not applicable because the City water and sewer charges were adopted prior to the General Assembly adopting the Service Fee Statute;

9. The Court erred in finding the Service Fee Statute does not apply to fees imposed outside the city limits since the Service Fee Statute does not have such limitation in its language;

10. The Court erred in holding that the City's accounting practices do not provide a means to ascertain non-resident verses resident revenues. The error being that such is easily ascertainable and is cited on page 4 of this Court's Order;

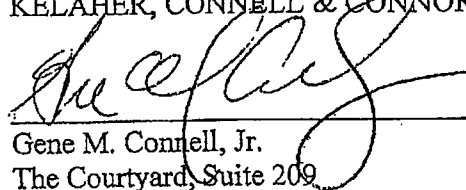
11. The court erred in finding the city's Water and Sewer funds may be used for economic development, business development and development corporations. The error being the City's Water and Sewer funds may not be used for that purpose under the Service Fee Statute;

12. The Court erred in finding that the Revenue Bond Refinance Act of 1937 is related to the Service Fee Statute. The error being that a general statute (Revenue Bond Statute) controlled over a specific statute (the Service Fee Statute);

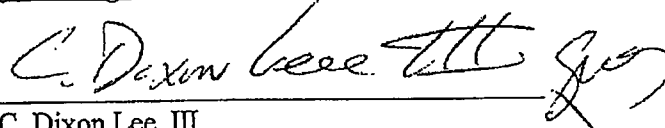
13. The Court erred in holding that the City may use surplus water and sewer fees in any manner it deems appropriate;

WHEREFORE, Plaintiff prays that for these reasons and the reasons set forth this Court should reconsider its Order and rule for the Plaintiffs.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)

October 14, 2013

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

DEFENDANT'S MEMORANDUM
IN SUPPORT OF ITS AMENDED
MOTION TO DISMISS PURSUANT
TO RULE 12(b)(1)

FILED
MAY 30 PM 3:10
JANETTE W. MCBRIDE
C.C.P. & G.S.

Defendant submits this Memorandum in support of its Motion to Dismiss for lack of standing. Defendant is not seeking to dismiss this Second Amended Complaint in its entirety; instead Defendant seeks an order from this Court that:

- 1) Dismisses Plaintiff Cumberland as lacking standing to bring his breach of contract claim;
- 2) Dismisses Plaintiff Azar as lacking standing to bring all causes of action; and
- 3) Dismisses Plaintiff Letts as lacking standing to bring all causes of action.

THE PLAINTIFFS AND THEIR CLAIMS

Plaintiff Azar resides within the City of Columbia; however, he does not pay water and sewer charges to the City, and has no contract for water and sewer service with the City. 2nd Am. Compl. ¶ 1; Pl. Interrog. Resp. ¶¶ 5, 9 (Attached as Exhibit A); Adams Aff. ¶ 4 (Attached as Exhibit B). Plaintiff Cumberland resides within the City of Columbia and is a water and sewer customer as manifested by the attached service contract with the City of Columbia (Attached as Exhibit C), and pays the City for this service. 2nd Am. Compl. ¶ 2; Pl. Interrog. Resp. ¶ 1.

Plaintiff Letts resides outside of the City's corporate limits, is also a water and sewer customer by virtue of the attached service contract with the City (Included in Exhibit C), and pays the City for this service. 2nd Am. Compl. ¶ 3.

The Second Amended Complaint seeks to certify a class action on behalf of all past and current water and sewer customers of the City of Columbia. In its First Cause of Action, Plaintiffs contend that the City's water and sewer charges are subject to limitations found in S.C. Code Ann. § 6-1-330, which states that service fees collected by local governments must be used for costs related to the service or program for which it was paid. 2nd Am. Compl. ¶¶ 28-31. The City has allegedly violated this statute by using some of its water and sewer revenues for purposes that Plaintiffs contend are unrelated to water and sewer service, such as funding economic development activities. 2nd Am. Compl. ¶¶ 12-21; Pl. Mot. Injunctive Relief. Plaintiffs also allege that the City's annual transfer of up to \$4.5 million dollars from its water and sewer enterprise fund to its general fund violates S.C. Code Ann. § 6-1-330. Plaintiffs seek a permanent injunction requiring Defendant in the future "to place all fees collected for operations of and/or capital improvement of the water and sewer system in a segregated account and to only be used for such purposes," and to replace all monies Defendant expended in the past for other purposes. 2nd Am. Compl. ¶ 42.

For a Second Cause of Action, Plaintiffs claim that they "agreed or contracted with the Defendant to purchase and did purchase from the City of Columbia water and sewer service for which Plaintiffs agreed to pay a fee." Pl. Interrog. Resp. ¶ 16.; 2nd Am. Compl. ¶ 44. "The City of Columbia was bound, as a condition of that contract or agreement, by South Carolina law to use the monies it collected as water and sewer fees to pay costs related to the provision of the service or program for which the fee was paid and [to] keep that money in a separate and

segregated account, as provided by S.C. Code Ann. § 6-1-330(B).” *Id.* However, the City allegedly violated this contract or agreement by failing comply with S.C. Code Ann. § 6-1-330(B) to maintain and improve the water and sewer systems with the fees collected. 2nd Am. Compl. ¶ 48. To remedy their breach of contract claim, Plaintiffs seek a refund of all fees collected over the past three years and used for unlawful purposes to be placed in a common fund and used only for lawful purposes. 2nd Am. Compl. ¶¶ 49-51.

In their Third Cause of Action, Plaintiffs seek an order holding that Defendant’s use of water and sewer revenue for general government operations amounts to an unconstitutional collection of taxes “under the guise of a fee” because such use violates S.C. Code Ann. § 6-1-330 and the test for valid uniform service fees found in *C.R. Campbell Construction v. Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997). As a result, the Defendant’s “collection of fees is violative of the South Carolina Constitution because it was implemented improperly ... and not held in a segregated account.” 2nd Am. Compl. ¶ 56. Such use violates due process and equal protection of the laws. 2nd Am. Compl. ¶¶ 50 - 57. Plaintiffs demand that Defendant return all fees collected and used as general revenue funds for the past three years, to be placed in a court-mandated common fund to be used for lawful purposes. 2nd Am. Compl. ¶ 58. In their Fourth Cause of Action, Plaintiffs contend that Defendant’s use of revenues collected from its water and sewer charges for purposes other than operation, construction and improvement of its water and sewer service constitutes an unconstitutional tax prohibited under South Carolina Supreme Court precedent. 2nd Am. Compl. ¶¶ 60-65. Plaintiffs demand a refund of fees collected for the past three years to be used for lawful purposes. 2nd Am. Compl. ¶ 67.

Plaintiffs also seek an order enjoining the City from "using the aforementioned money which is collected as fees [for] any other purpose other than improvement of the water and sewer system." 2nd Am. Compl. ¶ F.

STANDARD OF REVIEW

"Subject matter jurisdiction is a question of law for the court." *Doe v. Barnwell Sch. Dist.* 45, 369 S.C. 659, 660, 661, 633 S.E.2d 518, 519 (Ct. App. 2006). On a motion to dismiss for lack of subject matter jurisdiction, affidavits and other evidence outside the pleadings may be considered to prove lack of jurisdiction when the allegations of the complaint do not affirmatively show subject matter jurisdiction. *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). The presentation of such evidence does not convert the motion to dismiss into one for summary judgment. *Id.* In cases where the Defendant presents evidence challenging subject matter jurisdiction, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims." 2-12 MOORE'S FEDERAL PRACTICE - Civil § 12.30.

ARGUMENTS

"Standing to sue is a fundamental requirement in instituting an action." *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007). The requirement of standing "ensures that a plaintiff has a personal stake in the outcome of a dispute, and that judicial resolution of the dispute is appropriate. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011). "Standing may be acquired "through the rubric of constitutional standing" or "under the 'public importance' exception." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337 (2008). Each Plaintiff bears the

burden of establishing that he has standing to bring each cause of action asserted in their Complaint. See *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000) (deciding issue of whether plaintiff had standing to challenge certain sections of an ordinance); *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 28, 416 S.E.2d 641, 645 (1992) (examining whether plaintiffs had standing to bring a particular cause of action); *Hedeman v. Postell*, 250 S.C. 515, 520, 159 S.E.2d 230, 232 (1968) (holding that plaintiffs in class action suit lacked standing to challenge certain actions). Defendant challenges each Plaintiffs' standing to bring some or all of their causes of action.

1. CONSTITUTIONAL STANDING

To establish constitutional standing, Plaintiffs carry the burden of showing that they have met each element of the following three-part test as applied to each cause of action:

First, the plaintiff must have suffered an "injury-in-fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent," not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008); *Sea Pines Assoc. for the*

Protection of Wildlife, Inc. v. S.C. Dept. of Natural Resources, 345

S.C. 594, 602, 550 S.E.2d 287, 292 (2001).

Plaintiffs must demonstrate what interest is protected by each of their causes of actions and how Defendant's actions have injured that interest in a concrete and particularized manner. See *Sea Pines Assoc. for Protection of Wildlife, Inc. v. S.C. Dept. of Nat'l Resources*, 345 S.S. 594, 600-602, 550 S.E.2d 287, 291-292 (2001) (describing plaintiffs' aesthetic interest in wildlife alleged to be harmed by termination of deer); *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000) (stating that plaintiff's economic interest harmed by ordinance provisions). To establish standing, the plaintiffs' injury must fall within the zone of interests that the statute, constitution or contract is intended to protect or regulate. See *Energy Research Foundation v. Waddell*, 295 S.C. 100, 102, 367 S.E.2d 419, 420 (1988) (holding that interest "in good government and wise use and conservation of natural resources" not sufficient to have standing to challenge composition of S.C. Coastal Council; to challenge composition of S.C. Coastal Council, plaintiffs must be subject to agency's authority); see also *Burke v. City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998).

A. Plaintiff Cumberland

Plaintiff Cumberland alleges he is a resident of the City of Columbia, and is also a water and sewer customer of the City. Based on these facts, Defendant does not dispute his standing to bring all causes of action, with the exception of his breach of contract claim.

In his cause of action for breach of contract, Cumberland alleges that a "contract implied in law and in fact" exists between himself and the City. 2nd Am. Compl. ¶ 47. In response to

Defendant's Interrogatory asking Plaintiffs to explain the basis for this contract claim, Plaintiffs' counsel answered¹ as follows:

Plaintiffs agreed or contracted with the City of Columbia to purchase and did purchase from the City of Columbia water and sewer service in return for which Plaintiffs agreed to pay a fee. The City of Columbia was bound, as a condition of that contract or agreement, by South Carolina law to use the monies it collected as water and sewer fees to pay costs related to the provision of the service or program for which the fee was paid and too [sic] keep that money in a segregated account, as provided by S.C. Code Ann. § 6-1-330(B). (Supp. 2010). The City of Columbia has failed to use the money it collected as water and sewer fees to pay costs related to the provision of the service or program for which the fee was paid but, rather, spent substantial amounts of that money on other unrelated purposes or programs and failed to keep that money in a separate and segregated account and thereby breached it [sic] contract or agreement with Plaintiffs. Pl. Resp. to Def. First Set of Interrog., ¶ 16 (Attached as Exhibit A).

No mention was made in either the Complaint or the above answer to Defendant's Interrogatories that Cumberland receives water and sewer service under an express written contract he executed with the City of Columbia. As part of this Motion, Defendant has come forward with a copy of the express contract, which is attached (hereinafter referred to as "Service Contract"). Nothing in this contract contains any sort of express condition that restricts Defendant use of collected revenues from water and sewer charges in any manner whatsoever. Because Cumberland bears the burden of establishing standing to bring his breach of contract claim, he must now convince this Court that the Service Fee Statute is a condition of his express written contract by operation of law.

There is no evidence in the Service Contract itself that shows intent to incorporate any state law provisions by reference. In order to incorporate extrinsic terms by reference, a contract

¹ Defendants are entitled to rely on Plaintiffs' interrogatory response as the basis for Plaintiffs' contract claim. See *Stamm v. Konica Minolta Bus. Solutions U.S.A., Inc.*, 2008 U.S. Dist. LEXIS 95807 (D.S.C. 2008) (stating additional basis for contract claim presented in opposition to summary judgment precluded when plaintiff did not identify in response to interrogatory).

does not have to use "magic words," but "must explicitly or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract" *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 394 S.C. 300, 307-08, 715 S.E.2d 655, 659 (Ct. App. 2011). Here there is no language whatsoever in the Service Contract that could be construed as incorporating S.C. Code Ann. § 6-1-330 (hereinafter referred to as "Service Fee Statute").

Without an express term, Cumberland bears the burden of showing that the Service Fee Statute is an implied term of the express Service Contract. *Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 101, 311 S.E.2d 91, 94 (Ct. App. 1984). "Implied terms are not favored in the law." *Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 101, 311 S.E.2d 91, 94 (Ct. App. 1984). Moreover, courts are reluctant to supply implied covenants in contracts. *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 211, 452 S.E.2d 622, 625 (Ct. App. 1994). Implied terms may be supplied by a court only when "an implied term is necessary to effectuate the intention of the parties," *Id.*, 311 S.E.2d at 94 (emphasis added), and where the implied terms do not contradict the express terms of the contract. *Hooton v. Carolina Treatment Ctr., Inc.*, 300 S.C. 37, 40, 386 S.E.2d 287, 289 (Ct. App. 1989). The Service Contract is straightforward. It simply provides that the City will supply water in return for payment of compensation. There is nothing in the language of the Service Contract to suggest that the City agreed to spend its collected water and sewer charges in any particular manner or to hold them in any specific account, nor can it be shown that such an agreement is indispensable or necessary to the Service Contract.

Furthermore, there is a well-established presumption in South Carolina that "statutes do not create contractual rights." *Ahrens v. South Carolina Police Officers Retirement Sys.*, 392 S.C. 340, 349, 709 S.E.2d 54, 58 (2011), citing *Layman v. South Carolina*, 368 S.C. 631, 630

S.E.2d 265 (2006). The only way the Legislature can create contractual rights in a statute is "through the express language of the statute." *Ahrens*, 392 S.C. at 349, 709 S.E.2d at 59. "Absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Abraham v. Palmetto Unified Sch. Dist. No. 1*, 343 S.C. 36, 453 S.E.2d 656, 660 (Ct. App. 2000). Plaintiffs in this case bear the burden of overcoming the presumption that statutes do not create private, contractual rights. See *Alston v. City of Camden*, 322 S.C. 39, 47, 471 S.E.2d 174, 179 (1996); *Atchison, Topeka*, 470 U.S. at 466, 105 S. Ct. at 1452 (noting that the party asserting that a statute creates a contract bears the burden of overcoming the "well-founded presumption," and that courts should proceed cautiously in identifying any such contract).

In *Layman*, the South Carolina Supreme Court held that language in a retirement statute unambiguously demonstrated the Legislature's intent to bind itself through the statute, where the statute "fixed obligations, required affirmative actions by both the State and old TERI program participants, and contained contractually significant language." 368 S.C. at 639, 630 S.E.2d at 269.² In contrast, the Service Fee Statute does not use words that may be construed as creating a contractual obligation on the part of the City to those who pay water and sewer charges.

In sum, while there is an existing written contract between the City and Cumberland, that contract only contemplates payment in return for provision of water. Thus, the Service Contract does not include a protected interest in the City's use of water and sewer revenues. Without such

² In reaching this conclusion, the Court noted that the Legislature had "used terms that are indicative of a contract: 'A . . . member who is eligible [to retire under TERI] . . . and complies with the requirements of this article . . . shall agree . . .'" 368 S.C. at 639, 630 S.E.2d at 269. The Court contrasted this language with that from a different retirement statute, which provided that 60 days after a state employee officially retired, he "may return to employment covered by the system and earn up to fifty thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system." The Court held that this latter provision did not create any contractual rights. 368 S.C. at 642, 630 S.E.2d at 271.

an interest protected by contract, Cumberland cannot show any breach of the contract and how that breach injured him. Other causes of action properly protect Cumberland's interests. For these reasons, this court should dismiss Cumberland's breach of contract claim for lack of standing.

B. Plaintiff Azar

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

Plaintiff Azar is a resident of the Hermitage Condominiums within the City of Columbia. 2nd Am. Compl. ¶ 1; Pl. Interrog. Resp. ¶ 6. He alleges that he is a water and sewer customer of the City. 2nd Am. Compl. ¶ 7. And, in his responses to Defendant's interrogatories, Azar's counsel states that he is a fee payer. Pl. Interrog. Resp. ¶ 5. However, Azar is not a water and sewer customer of Defendant. Azar has no water and sewer account in his name. Adams Aff. ¶ 4. Water and sewer service at the Hermitage is paid by the Hermitage Condominium Association. Pl. Interrog. Resp. ¶ 6. Azar does not pay water and sewer fees to the City of Columbia. *Id.* Instead, Azar reimburses the Hermitage for his pro rate share of the Hermitage's water and sewer bill. *Id.* Similarly, Azar owns a commercial business at 746 Harden Street within the City of Columbia. Pl. Interrog. Resp. ¶ 9(c). "The water and sewer bill for [this] ... property ... is in the name of Noi Ketavongsa and Plaintiff Joseph S. Azar pays a portion of each monthly bill as mutually agreed between Noi Ketavongsa and Plaintiff Joseph S. Azar." *Id.*

In all of Azar's causes of action, he alleges that Defendant's use of revenues derived from payments by its water and sewer customers violates S.C. Code Ann. § 6-1-330 and/or *C.R. Campbell v. City of Charleston*. Therefore Defendant will focus on these two bases for his

causes of actions. Under *C.R. Campbell*, a fee is a valid uniform service fee, and not an illegal 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. *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 236 481 S.E.2d 437, 438 (1997) citing to *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992). Similarly, under S.C. Code Ann. § 6-1-330 (referred to as "Service Fee Statute"), "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." *Id.* Clearly, both *C.R. Campbell* and the Service Fee Statute serve to protect the interests of fee payers.

In all the case law applying the test found in *C.R. Campbell* for validity of "uniform service fees," the plaintiffs had in fact paid the contested fee to the local government, or the stated facts suggest that the plaintiffs had paid the fee. See, e.g., *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992) (plaintiffs paid road maintenance fee); *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997) (plaintiff paid under protest real estate transfer fee); *Skyscraper Corp. v. Newberry County*, 323 S.C. 412, 475 S.E.2d 764 (1996) (facts only state that plaintiff received solid waste disposal charges on its property tax bill); *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*, 336 S.C. 162, 519 S.E.2d 561 (1999) (plaintiff paid under protest a sewer impact fee). See e.g. *Charleston Trident Home*

Builders, Inc. v. Town of Summerville, 369 S.C. 498, 502, 632 S.E.2d 864, 866 (2006) (stating that payment of contested impact fee conferred standing). Without actually paying the fee he complains of, Azar fails to show a protected interest under *C.R. Campbell*, and therefore, lacks standing to bring a claim under *C.R. Campbell*. Like the *C.R. Campbell* test, the Service Fee Statute is intended to protect fee payers by assuring that fees paid are "used to pay costs related to the provision of the service or program for which the fee was paid." S.C. Code Ann. § 6-1-330(B). Once again, Azar cannot demonstrate standing under this statute because he does not pay water and sewer charges to the City. Mere reimbursement to those who actually do pay the City's monthly water and sewer charges is too attenuated to give Azar a real stake in this controversy.

Azar may argue that simply being a consumer of the City's water is an interest protected under *C.R. Campbell* and the Service Fee Statute. Mere use of the City's water is not what *C.R. Jackson* or the Service Fee Statute intends to protect. To hold otherwise would confer standing upon any tourist who turns on a faucet within the City of Columbia. Even assuming for the moment that, regardless of whether he pays the City for the service, Azar has a legally protected interest in using the City's water and sewer service, his water use is not injured by how the City uses the monies it collects from paying water and sewer customers. Instead, he has made rather speculative allegations regarding the condition of the City's water and sewer infrastructure, none of which show injury to Azar's use of water.

Azar alleges that the City's use of its water and sewer revenues for purposes he contends are unlawful has caused the City's sewer system to become "decayed, ... run-down and dilapidated, and aged beyond its useful life to a point where water and sewer leaks, overflows and other problems ... exceeded levels of discharges allowed by Environmental Protection

Agency ("EPA") and/or the South Carolina Department of Health and Environmental Control" 2nd Am. Compl. ¶ 15. He goes on to allege that, "on information and belief, in an effort to deceive the general public including its water and sewer customers, the EPA and/or SC DHEC, the City of Columbia falsified record keeping of sewage overflows so as to make it appear that the untreated sewage overflows, spills or discharges by the City of Columbia were less severe than the sewage overflows which actually occur."³ 2nd Am. Compl. ¶ 16. These dramatic allegations of a wastewater treatment plant falling apart and the City lying to federal officials have no bearing on whether Defendant has violated municipal finance law.⁴

Furthermore, Azar cannot successfully argue that he has any sort of a legally protected interest in the condition or state of repair of the City's water and sewer system. Generally, the local governing body has the discretion to determine whether its system is in good repair and working order and what expenditures it will make to keep its system in good repair and working order. See *Green v. City of Rock Hill*, 149 S.C. 234, 262, 147 S.E.2d 346, 356 (1929) (stating that municipality, in operating and maintaining its property, has "discretion in the choice of means and methods"). The City has obligated itself to the holders of its issued revenue bonds to "operate and maintain its water and sewer system "properly and in an economical and efficient manner," keep the system in "good repair, working order and condition, "and shall from time to time make all necessary and proper repairs and replacements so that at all times the operation of the system may be properly and advantageously conducted." § 7.1 and § 7.3, 1993 City of Columbia Bond Ordinance (Attached as Exhibit D). These covenants inure to the sole

³ Plaintiffs served a Request for Admissions seeking for an admission by this City of this allegation. In its answer to the Request, the City denied the truth of the matter.

⁴ Azar's allegations concerning violations of the City's permit issued by the U.S. Environmental Protection Agency and/or the S.C. Department of Health and Environmental Control speak to possible injuries that the Federal Clean Water Act or the State Pollution Control Act seek to protect by express statutory authority. Here, Azar has put the cart before the horse by alleging injuries protected under pollution control laws without actually stating a cause of action for violation of these laws.

benefit of bond holders. *Id.* at § 13.1. No other person has any legal or equitable right to enforce any covenants regarding rates or proper maintenance and operation. *Id.* Azar has not alleged that he is a bond-holder; thus he cannot claim a right to a particular state of repair of the City's water and sewer system.

Azar's allegations that he has an interest in use and enjoyment of his own property as well as public property also fail to confer standing. Azar has not alleged that any sewer overflow has occurred within his condominium, nor has he alleged that he encountered a sewer overflow while recreating in or along navigable waters. Further, Azar has not shown that the foul odor he complains of is attributable to the City. Most importantly, these allegations regarding impaired use and enjoyment is not an interest protected by *C.R. Campbell* and the Service Fee Statute. Injury to use and enjoyment of property is remedied by a nuisance cause of action, not by causes of action for violation of municipal finance law. *See Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 573, 614 S.E.2d 619, 620 (2005) (stating that nuisance action serves to protect against an interference with the use or enjoyment of rights in land).

Moreover, Azar takes issue with Defendant's issuance of revenue bonds, alleging that he has been injured by recent bond issues because they would not have been necessary had the City not "diverted and spent monies previously collected." 2nd Am. Compl. ¶¶ 23-24. He also claims that he "will be forced to pay additional water and sewer fees to pay the attorney fees, other expenses and bond interest necessary to raise money to replace the earlier misspent monies." *Id.* at ¶ 25. Azar's alleged injuries rest on an unsupported assumption that Defendant's 2011 bond issuances will fund some long neglected list of capital projects that were deferred due to what Plaintiffs contend are unlawful diversions of funds. These alleged injuries stemming from the City's bond issuances are too speculative to confer standing.

Azar has also brought a breach of contract claim. Plaintiffs premise their contract claim on their statement that "Plaintiffs agreed or contracted with the City of Columbia to purchase and did purchase from the City of Columbia water and sewer service." Pl. Interrog. Resp. ¶ 16. Azar has no contract with the Defendant and he has not paid water and sewer charges to the City. All water and sewer customers of the City become customers by virtue of a written service contract with the City. There is no such contract between the City and Azar. Without having entered into a service contract with the City for provision of water and sewer, Azar fails to establish he has a legally protected contractual interest that has been harmed by Defendant's actions.

Azar's cause of action for an unconstitutional tax restates his essential claim that the City has used its water and sewer revenue in a manner that violates the Service Fee Statute and *C.R. Campbell*. 2nd Am. Compl. ¶ 54. Defendant has already argued that Azar lacks standing under the Service Fee Statute and *C.R. Campbell*. Styling this cause of action as a constitutional claim does not transform this statute and case law into constitutional provisions. He goes on to allege that the City's collection of fees also violates the due process and equal protection clause of the South Carolina Constitution "because it was implemented improperly by Defendant and that such was not held in a segregated account." 2nd Am. Compl. ¶ 56.

No one has standing to bring a constitutional claim unless the plaintiff's rights have been "invaded and injuriously affected." *State v. Chavis*, 261 S.C. 408, 411, 200 S.E.2d 390, 391 (1973). To prove a denial of due process, a party must show that he was deprived of an interest in life, liberty or property. *Robert K. v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430 593 S.E.2d 462, 469 (2004). Here, as the Defendant has already pointed out, Azar does not pay the City for water and sewer service; thus, the City has not deprived Azar of his property interest in

money. Azar has not entered into a contract with the City for water and sewer service; thus, he cannot say he has a property interest based on a contract. Azar has failed to meet his burden that he has standing to bring his due process claim.

As for his equal protection claim, "the *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *McLeod v. Starnes*, __ S.C. __, 723 S.E.2d 198, 203 (2012). Azar has not identified what legislation has allegedly created a class or who comprises this class, nor has he alleged or explained how he has been injured by disparate treatment. Azar's allegations on their face are insufficient to confer standing to bring an equal protection claim.

In his cause of action for an unconstitutional tax, Azar alleges that Defendant has used water and sewer revenues for general revenue purposes which constitute an illegal tax or a taking of property without just compensation under the South Carolina Constitution. 2nd Am. Compl. ¶¶ 61-62. Azar appears to bring this claim as a taxpayer; however, he has failed to allege that he is a taxpayer of the City, and payment of taxes is not the issue here. To the extent this cause of action is a re-characterization of the test for a valid uniform service fee under *C.R. Jackson*, Defendant has already argued why Azar lacks standing to bring this claim. As for his taking claim, Azar must show some property interest that was taken. *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 283-284, 721 S.E.2d 423, 426 (2012) ("The takings clause of the South Carolina Constitution protects private property rights."). As the Defendant has already pointed out, Azar does not pay the City for water and sewer service; thus, the City has not deprived Azar of his property interest in money. Azar has not entered into a contract with the City for water and sewer service; thus, he cannot say he has a property interest based on a contract. Azar has failed to meet his burden that he has standing to bring his takings claim.

In sum, Azar has brought causes of action that challenge the way the City uses its water and sewer revenues as violating a statute and common law concerning municipal authority to charge fees. To have standing to bring these causes of action, he must be a fee payer, meaning that he receives a bill from the City and he remits payment to the City. Because he is not a fee payer, he lacks a sufficient stake in this controversy. Azar's allegations of a failing wastewater treatment plant, sewer overflows and foul odors do not relate to the interest of protecting service fee payers from government overreach. They are allegations of injury that fall outside of the zone of interests that the Service Fee Statute and *C.R. Campbell* protect. Azar's allegations of injury relating to the City's bond issuances are too speculative to confer standing and also bear no relation to the interests protected by the Service Fee Statute or *C.R. Campbell*. Without having entered into a contract with the City for water and sewer service, Azar cannot show that he has standing to bring his cause of action for breach of contract. Lastly, Azar has failed to demonstrate the requisite property interest necessary to bring a due process or takings claim, and he has failed to articulate how the Defendant's actions have brought about a concrete injury to his right to equal protection. Plaintiff Azar should be dismissed from this Complaint for lack of standing on all causes of action.

C. Plaintiff Letts

Plaintiff Letts lives outside the corporate limits of the City of Columbia. 2nd Am. Compl. ¶ 3. He is under contract with the City of Columbia for water and sewer service, as evidenced by his Service Contract attached to this Memorandum within Exhibit C. Municipalities may, by contractual arrangement, provide water and sewer services to those residing outside of its corporate limits "when in the judgment of the city or town council it is for the best interest of the municipality so to do." S.C. Code Ann. § 5-31-1910. The City may sell its water to

nonresidents "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); *see also Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 686 (2001). A nonresident has "no rights whatever against the city except such as he may have acquired by contract." *Id.*; *Calcaterra v. City of Columbia*, 315 S.C. 196, 198, 432 S.E.2d 498, 499 (1993). Defendant has produced a copy of Letts' contract and argued elsewhere in this Memorandum that the Service Fee Statute is not a term or condition of this contract. For the same reasons as previously argued, Letts' cause of action for breach of contract should be dismissed.

Furthermore, any statutory provision that does not expressly apply to nonresident water and sewer customers cannot provide a nonresident with the basis to challenge the City's water and sewer rates. *Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 687 (2001). The Service Fee Statute makes no mention of water and sewer charges to non-residents or even any sort of charge to nonresidents. Thus, Letts lacks standing under any other cause of action to challenge Defendant's use of its water and sewer revenues under the Service Fee Statute because as a nonresident, he is not afforded statutory protections given to City residents.

As for Letts' remaining causes of action which rely on the *C.R. Campbell*, this case addresses whether a service charge, as authorized under S.C. Code Ann. § 5-7-30, is valid. *C.R. Campbell Const. Co. Inc. v. City of Charleston*, 325 S.C. 235, 236, 481 S.E.2d 437, 438 (1997). Pursuant to S.C. Code Ann. § 5-7-30, a municipality is empowered to:

enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and the general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, including the authority to levy and collect taxes on real

and personal property ... and establish uniform service charges relating to them" (emphasis added)

The underlined portions of this statute demonstrate that uniform service charges may be established within a municipality's corporate limits. S.C. Code Ann. § 5-7-30 does not govern charges outside of the City's corporate limits. Because this statute does not apply to charges outside of the City's corporate limits, then it follows that *C.R. Campbell* does not apply to charges for water and sewer service outside the City's municipal limits. Hence, Letts cannot claim any legally protected interest derived from *C.R. Campbell*.

Lastly, Letts has brought due process, equal protection and takings claims. While he may have a property interest sufficient to confer standing to bring his due process and takings claims, he nevertheless has failed to articulate any injury to his property interest. As with Azar's equal protection claim, Letts has not identified what legislation has allegedly created a class or who comprises this class, nor has he alleged or explained how he has been injured by disparate treatment. Letts' allegations on their face are insufficient to confer standing to bring his constitutional claims.

In sum, Plaintiff Letts, as a nonresident water and sewer customer, has no basis to assert standing to bring any of his claims. His sole interest that he can lay claim to is his Service Contract with the City. However, this Contract does not include any provision, express or implied, that governs how the City uses the charges he pays. The Service Fee Statute and *C.R. Campbell* do not provide Letts any protection as to how the City uses its revenue derived from his payments to the City. Letts has failed to sufficiently state how his due process and equal protection rights have been injured, and how his property has been taken without just

compensation. For these reasons, Letts should be dismissed as a party to this action for lack of standing to bring all claims.

2. TAXPAYER STANDING

Plaintiffs Azar and Letts may argue that they have taxpayer standing to bring their causes of action against Defendant. South Carolina courts have recognized limited taxpayer standing since 1890. *Mauldin v. City Council of Greenville*, 33 S.C. 1, 18, 11 S.E. 434, 435 (1890). In *Mauldin*, the court took up the issue of whether taxpayers of the City could bring a suit to enjoin the City from purchasing and operating an electric plant. *Id.* The court explained that the general rule was that a plaintiff showing injury common to all citizens lacked standing. *Id.* An individual taxpayer "can obtain standing ... only by alleging and proving that the illegal act complained of will inflict damage special and peculiar to himself." *Id.* The court held that taxpayers have standing to seek injunctive relief to prevent ultra vires acts because taxpayers have the requisite special injury "in the increase of the burden of taxation upon their property situated in the city." *Id.* at 19, 436. Taxpayer standing necessarily requires that: 1) the plaintiffs pay taxes; 2) the funds at issue must be derived from taxes; 3) the government's actions are alleged to be ultra vires; and 4) the ultra vires act will increase their tax burden. *Mauldin v. City Council of Greenville*, 33 S.C. 1, 18, 11 S.E. 434, 435 (1890); *Crews v. Beattie*, 197 S.C. 32, 51, 14 S.E.2d 351, 358-359 (1941). South Carolina courts have never before conferred taxpayer standing upon fee payers. In fact, the South Carolina Supreme Court has outright rejected taxpayer standing for payers of utility charges. *Crews v. Beattie*, 197 S.C. 32, 49, 14 S.E.2d 351, 358 (1941). Furthermore, the South Carolina Supreme Court has established that water and sewer charges are not taxes. *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). This court has ample reason to deny taxpayer standing to Plaintiffs.

3. PUBLIC IMPORTANCE EXCEPTION

Plaintiffs Azar and Letts may also argue that their causes of action fall under the "public importance" exception, and therefore, they are not required to demonstrate their standing to bring their claims. The South Carolina Supreme Court has recognized a "public importance" exception to constitutional standing requirements. *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). Standing may be conferred "when an issue is of such public importance as to require its resolution for future guidance." *Id.* Not every legislative or executive action rises to the level of importance great enough to confer standing. *Id.* at 199, 341; see e.g. *Richland County Recreation District v. City of Columbia*, 290 S.C. 93, 348 S.E.2d 363 (1986) (holding that no overriding public importance in Plaintiffs' pursuit of declaratory and injunctive relief to prevent City from collecting taxes and administering recreational services). The issue presented must be significant and "of wide concern." *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999); *Sloan v. School District of Greenville*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000). Additionally, "... the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). The issue presented must be of a public nature, not some mere private interest. *Id.*

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

An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

Under this test, Plaintiffs' breach of contract claim can easily be disposed of. A claim that Defendant has breached the terms of a private contract for water and sewer service is not public in nature. In *Sloan v. Greenville County*, the plaintiff brought an action for declaratory and injunctive relief challenging the county's award of public works contracts in violation of its procurement ordinance. 356 S.C. 531, 540, 590 S.E.2d 338, 343 (Ct. App. 2003). In examining the nature of his claims, the court noted that the plaintiff was bring his claims "not as a private individual seeking redress under the terms of a particular contract," but "to prevent the County from awarding future public works contracts in the manner employed in the present case." *Id.* at 545, 346. Given this distinction, Sloan was granted the public importance exception to bring his claim. *Id.* at 551, 349. Here, Plaintiffs are bringing a breach of contract claim as private individuals seeking redress under the terms of an express contract. The "public importance" exception has no application in this context.

Plaintiffs' remaining claims fall outside of the "public importance" exception due to the relief they seek. The public importance exception has been recognized only where the relief sought is purely injunctive or declaratory. *Thompson v. S.C. Comm. on Alcohol and Drug*

Abuse, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976) (declaration); *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (injunction); *Sloan v. School District of Greenville County*, 342 S.C. 515, 516, 537 S.E.2d 299, 301 (Ct. App. 2000) (declaration); *Sloan v. Greenville County*, 356 S.C. 531, 543, 590 S.E.2d 338, 344 (Ct. App. 2003) (injunction and declaratory relief); *Sloan v. Sanford*, 357 S.C. 431, 433, 593 S.E.2d 470, 471 (2004) (declaration); *Sloan v. DOT*, 365 S.C. 299, 302, 618 S.E.2d 876, 877 (2005) (declaration); *Sloan v. DOT*, 379 S.C. 160, 163, 666 S.E.2d 236, 238 (2008) (declaration). No money damages or refunds are awarded in these cases. Instead, the plaintiffs in these "public importance" cases sought a declaration or injunction intended to prevent the government from continuing to violate the law. In this case, Plaintiffs seek more than an injunction preventing future unlawful action, or a declaration that such action is unlawful. They are asking this Court for an order requiring the City to recover monies that have already been budgeted, allocated, and spent over the past three years and direct the City to use this money solely for improvements to its wastewater system. This relief is far more expansive than any case where the "public importance" exception was granted, thus Plaintiffs have postured themselves in a manner where the exception does not apply.

Even if this court is inclined to consider the "public importance" exception in this case, granting the exception in this case would be unprecedented and upset the "cautious balancing" of competing interests that is required. In all the court's prior cases granting the "public importance" exception, the remedy of a declaration or injunction to prevent future harm works well in the court's balancing of competing interests. Citizens that fail to meet standing requirements are still afforded access to the court to address alleged injustices; yet at the same time, the government is not burdened with defending against claims that could result in financial

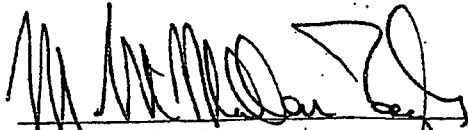
liability. Certainly, a plaintiff can pursue monetary damages from a government, but justice and fairness demands that when they do, they meet their burden of establishing standing to bring their claim. What Plaintiffs seek in this case upsets the careful balance that the Supreme Court has so strongly emphasized.

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

CONCLUSION

In this action, three Plaintiffs bring four causes of action against Defendant City of Columbia, all challenging the City's use of revenues derived from residential water and sewer customers who pay a monthly charge for water and sewer service. Each Plaintiff bears the burden of establishing that they have standing to bring each cause of action. Defendant does not challenge Plaintiff Cumberland's standing to bring three of his four causes of action because he is in fact a resident of the City who pays for water and sewer service. However, Cumberland lacks standing to bring his breach of contract action because his contract does not include any protected interest in how his payment to the City is spent by the City. The City has no doubt that Plaintiff Azar and Plaintiff Letts are genuinely concerned about the wellbeing of the City; yet they must demonstrate more than concern in order to have standing to maintain their four causes of action. Azar is not a water and sewer customer of the City, and this fact is fatal to his ability to show standing. Mere use of water and sewer, or concern about sanitary sewer overflows, is not enough to confer standing. Plaintiff Letts, as a nonresident water and sewer customer, cannot rely on his asserted interests protected under statutory and common law due to his status as a nonresident whose rights are governed solely by contract. His contract with the City affords him no protected interest in how the City uses his payments to the City, thus he lacks standing to bring even his contract claim. Plaintiffs Azar and Letts cannot claim taxpayer standing, for they are bringing claims as fee payers, not taxpayers. And finally, the remedy Plaintiffs Azar and Letts seek takes their causes of action out of the ambit of the "public importance" exception. Even if this exception applies, what they complain of and ultimately seek from the City amounts to disgruntled overreaching which disrupts the careful balance of competing interests that the "public importance" exception requires.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Thomas E. Lydon', written over a horizontal line.

Thomas E. Lydon

M. McMullen Taylor

McAngus Goudelock & Courie, LLC

Post Office Box 12519

Columbia, South Carolina 29211

(803) 779-2300

Attorneys for Defendant City of Columbia

Columbia, South Carolina
May 30, 2012.

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

JOSEPH S. AZAR AND FRANK J.
CUMBERLAND, JR., INDIVIDUALLY
AND AS CLASS REPRESENTATIVES,

Plaintiffs,

vs.

CITY OF COLUMBIA,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO.: 2011-CP-40-6705

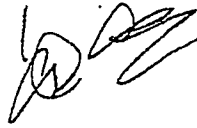
**PLAINTIFFS' RESPONSES TO
DEFENDANT'S FIRST SET OF
INTERROGATORIES**

**TO: DEFENDANT, CITY OF COLUMBIA, AND THEIR ATTORNEYS, THOMAS E.
LYDON, ESQUIRE AND M. MCMULLEN TAYLOR, ESQUIRE**

Plaintiffs hereby respond to Defendant's First Set of Interrogatories dated November 30, 2011. In setting forth answers thereto, the Plaintiffs do not waive the attorney-client, work product, or any other privilege or immunity from disclosure which may attach to information called for herein or responsive to the Interrogatories. The Plaintiffs do not concede the relevance or materiality of the Interrogatories, and the subject matters to which the Interrogatories refer. These answers are submitted by the Plaintiffs subject to, and without in any way waiving or intending to waive, but on the contrary intended to reserve and reserving:

A. All questions as to competency, relevancy, materiality, privilege and admissibility as evidence for any purpose of any of the documents referred to or answers given, or the subject matter thereof in any subsequent proceeding in, or the trial of this action or any other action or proceeding;

B. The right to object to other discovery procedures involving or relating to the subject matters of the Interrogatories herein responded to; and



COPY

C. The right at any time to revise, correct, add to or clarify any of the answers set forth herein or documents referred to herein.

PRELIMINARY STATEMENTS

Plaintiffs have not yet completed discovery or their gathering of facts and documents relating to this action and, therefore, reserve the right to revise, collect, add to, supplement or clarify the responses set forth below.

Each response to the interrogatory is made subject to these Preliminary Statements and the objections to particular interrogatories. By responding to an interrogatory in as complete a manner as possible subject to these Preliminary Statements, Plaintiffs do not in any way waive any applicable objection or the right to seek appropriate protective orders, if necessary.

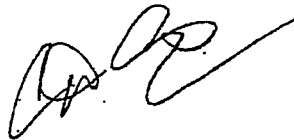
GENERAL OBJECTIONS

1. Plaintiffs objects to each Interrogatory to the extent it seeks information that constitutes, evidences, or reflects confidential communications between Plaintiffs and counsel on the grounds that such communications are privileged and are not subject to discovery.

2. Plaintiffs object to each Interrogatory to the extent it seeks information that constitutes, evidences, or reflects trial preparation materials or work product of Plaintiffs or representatives, agents, or attorneys on the grounds that such materials are immune from discovery.

3. Plaintiffs object to each Interrogatory to the extent it exceeds the scope of Rules 26 and 33 of the South Carolina Rules of Civil Procedure.

4. Plaintiffs object to each Interrogatory to the extent it seeks information already available to or as equally available to Defendant.



5. Plaintiffs expressly state that the Responses set forth are premised upon information presently known. Further discovery and case investigation in this matter may yield further information affecting these responses. Plaintiffs will supplement responses only as required by the applicable South Carolina Rules of Civil Procedure.

Without waiving these objections Plaintiffs hereby respond to Defendant's First Set of Interrogatories as follows:

RESPONSES TO INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case.

RESPONSE:

Joseph S. Azar
746 Harden Street
Columbia, South Carolina 29205

- Joseph S. Azar is a Plaintiff in this case. At all times since December 1999 he has owned and lived at Hermitage Condominiums, Unit 701, 619 King Street, Columbia, SC 29205 and received and paid for water and sewer service from the City of Columbia at that address. Plaintiff Joseph S. Azar is anticipated to testify to his objection and protest to the City of Columbia using monies collected by Defendant as water and sewer fees for purposes other than the water and sewer system and the resulting financial and other harm to him from that occurring as well as pollution of lands and waters resulting from sanitary sewer overflows occurring from the City of Columbia's failure to properly maintain and improve its water and sewer system.

Frank J. Cumberland, Jr.
4225 Mimosa Road
Columbia, South Carolina 29205

- Frank J. Cumberland, Jr., is a Plaintiff in this case. Plaintiff Frank J. Cumberland, Jr., (along with Kim Diana Connolly) acquired 4225 Mimosa Road, Columbia, SC 29205 in July 2000 and lived at that address until 2006. In May 2006, Plaintiff Frank J. Cumberland, Jr., (along with Kim Diana Connolly) acquired 2916 Forest Drive, Columbia, SC 29204 and moved to that address. Plaintiff Frank J. Cumberland, Jr., currently lives at 4225 Mimosa Road, Columbia, SC 29205 and has a City of Columbia water and sewer account at that address, in his name, which he pays. Plaintiff Frank J. Cumberland, Jr., also has a City of Columbia water and

sewer account at 2916 Forest Drive, Columbia, SC 29204, in his name, which he pays. Plaintiff Frank J. Cumberland, Jr., is anticipated to testify to his objection and protest to the City of Columbia using monies collected as water and sewer fees for purposes other than the water and sewer system and the resulting financial and other harm to him from that occurring as well as pollution of lands and waters resulting from sanitary sewer overflows occurring from the City of Columbia's failure to properly maintain and improve its water and sewer system.

Michael A. Letts
2 Stagbriar Court
Columbia, SC 29229

- At all times since 1993 Michael A. Letts (along with Melanie W. Letts) has owned and lived at 2 Stagbriar Court, Columbia, SC 29229 and received and paid for water and sewer service from the City of Columbia at that address. Michael A. Letts is anticipated to testify to his objection and protest to the City of Columbia using monies collected as water and sewer fees for purposes other than the water and sewer system as well as pollution of lands and waters resulting from sanitary sewer overflows occurring from the City of Columbia's failure to properly maintain and improve its water and sewer system.

Currently unidentified individual(s) employed by the City of Columbia in the finance or accounting departments to identify records and testify to the historic use and diversion of monies collected by the City as water and sewer fees or purposes other than the water and sewer system.

Currently unidentified individual(s) employed by the City of Columbia in the water and sewer department to identify records and testify to the past and current condition of the City of Columbia water and sewer system, any needed repairs or upgrades and its history of sewer overflows and water leaks.

Currently unidentified individual(s) employed by the South Carolina Department of Health and Environmental Control to identify records and testify to the City of Columbia's water and sewer system history of sewer overflows and water leaks.

Currently unidentified individual(s) employed by the Environmental Protection Agency to identify records and testify to the City of Columbia's water and sewer system history of sewer overflows, and corrective action taken by the Environmental Protection Agency and any resulting actual or anticipated fines which have been or are anticipated to be assessed or levied against the City of Columbia and the reason or reasons for those fines.

Currently unidentified individual(s) employed by the City of Columbia, the South Carolina Department of Health and Environmental Control and/or the Environmental Protection Agency and/or the City of Columbia's water and sewer system to identify and testify to any

falsified records kept by the City of Columbia's water and sewer system history of sewer overflows and the reason or reason behind those records being falsified.

Currently unidentified individuals employed by Black & Veath to identify and testify to the study and report done for the City of Columbia on the City of Columbia's water and sewer system.

Current and former member of Columbia City Council to testify to their knowledge and involvement of diversion of water and sewer fees to purposes other than the water and sewer system and related subjects.

Such additional witnesses as Plaintiffs may become aware of and identity in the future.

2. For each person known to the parties or counsel to be a witness concerning the facts of this case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE:

See response to Interrogatory #1 above.

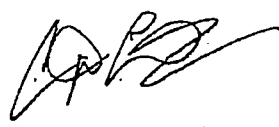
3. Set forth a list of documents in the possession of the parties or counsel (other than documents produced by Defendant) that relates to any claim or defense in this case.

RESPONSE:

A complete list has not been determined; however, Plaintiffs generally believe that all pleadings, orders, and affidavits filed with the Court; deposition and hearing transcripts; all documents and information exchanged between the parties through discovery, as well as all documents received through third-party subpoenas; financial account records including financial institution statements; all expert reports and/or valuations; all electronic and written communication between the parties; correspondence between counsel and the like, will be used as evidence at the trial of this case.

Records, facts and admissions produced or made by the City of Columbia in response to Plaintiffs' discovery request in this case.

Records from City of Columbia's finance and/or accounting departments as identified in response to Interrogatory # 1 above.



Records from City of Columbia's water and sewer department as identified in response to Interrogatory # 1 above.

Records from South Carolina Department of Health and Environmental Control as identified in response to Interrogatory # 1 above.

Records from Environmental Protection Agency as identified in response to Interrogatory #.1 above.

Records of Columbia City Council meetings where the water and sewer system and/or water and sewer fees were discussed.

The Black & Veath study/report prepared in 2010 or 2011 for the City of Columbia on its water and sewer system. (Not yet in the possession or control of Plaintiffs, but now in the possession and/or control of the Defendant City of Columbia).

Plaintiffs reserve the right to supplement this response as additional information becomes available.

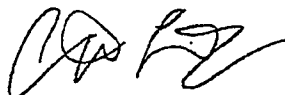
4. List the names and addresses of any expert witnesses whom Plaintiffs propose to use as a witness at the trial of this case.

RESPONSE:

- None known at the present time. However, if the City of Columbia denies the existence or substance of the Black & Veath study/report prepared for the City of Columbia on its water and sewer system, Plaintiffs may call one or more witness from Black & Veath to authenticate and testify to the substance, conclusions and recommendations of that study/report.
5. Identify and describe in detail what Plaintiff Joseph S. Azar (hereinafter referred to as "Azar") contends to be his legally protected interest(s) that he relies upon in order to have standing to bring the above-captioned action.

RESPONSE:

- Plaintiff Azar is pursuing this action as a water and sewer consumer and fee payer to the City of Columbia and; to the extent monies he has paid to the City of Columbia for that purpose have been unlawfully or illegally diverted and spent for purposes other than the water and sewer system he and all other water and sewer fee consumers and fees payers to the City of Columbia have suffered a direct personal injury and have a special interest in the subject matter of this lawsuit and



in insuring that expenditures of monies collected by the City of Columbia as water and sewer fees are done so lawfully and are not spent illegally or unlawfully. The issue is one of great public importance. The issue is also capable of repetition and will evade review if not addressed by the Courts.

- Plaintiff Azar also has standing to sue under the South Carolina Pollution Control Act, S.C. Code Ann. § 48-1-30, et. seq. (Supp. 2010) and in particular under S.C. Code Ann. § 48-1-250 (Supp. 2010) to remedy pollution cause by the City of Columbia acts and/or omissions and to abate future pollution from similar actions and/or omissions by the City of Columbia in the future.

6. Explain in detail whatever arrangement that may exist between Azar and The Hermitage condominium association for provision of water and sewer services.

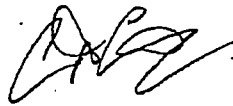
RESPONSE:

- Plaintiff objects to this Interrogatory on the grounds it seeks information that is obtainable from some other source; and it is unduly burdensome. Subject to and without waiving said objections, Plaintiff states:
- At all times since December 1999 and through and including the date of this response, Plaintiff Joseph S. Azar has owned and lived at (Hermitage Condominiums), Unit 701, 619 King Street, Columbia, SC 29205. Plaintiff Azar receives, uses and pays for water and sewer service from the City of Columbia at that address through Hermitage Condominiums Homeowners Association to which he pays a prorate share of the total water and sewer bill on a periodic basis as requested by the Hermitage Condominiums Homeowners Association.

7. Identify and describe in detail what Plaintiff Frank J. Cumberland, Jr. (hereinafter referred to as "Cumberland") contends to be his legally protected interest(s) that he relies upon in order to have standing to bring the above-captioned action.

RESPONSE:

- Plaintiff Cumberland is pursuing this action as a water and sewer consumer and fee payer to the City of Columbia and, to the extent monies he has paid to the City of Columbia for that purpose have been unlawfully or illegally diverted and spent for purposes other than the water and sewer system he and all other water and sewer fee consumers and fees payers to the City of Columbia have suffered a direct personal injury and have a special interest in the subject matter of this lawsuit and



in insuring that expenditures of monies collected by the City of Columbia as water and sewer fees are done so lawfully and are not spent illegally or unlawfully. The issue is one of great public importance. The issue is also capable of repetition and will evade review if not addressed by the Courts.

Plaintiff Cumberland also has standing to sue under the South Carolina Pollution Control Act, S.C. Code Ann. § 48-1-30, et. seq. (Supp. 2010) and in particular under S.C. Code Ann. § 48-1-250 (Supp. 2010) to remedy pollution cause by the City of Columbia acts and/or omissions and to abate future pollution from similar actions and/or omissions by the City of Columbia in the future.

8. State the full street address of each and every real property wholly or jointly owned by Cumberland and for each property, identify the following:

a. The date on which Cumberland purchased, obtained title or otherwise obtained an ownership interest.

- 4225 Mimosa Road, Columbia, SC 29205, purchased in 2000 (jointly with Kim Diana Connolly)

- 2916 Forest Drive, Columbia, SC 29204, purchased in 2006 (jointly with Kim Diana Connolly)

b. Whether the property is residential or commercial.

- Both of the above properties are residential.

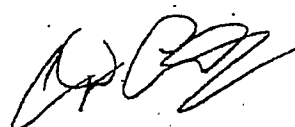
c. For residential property, whether Cumberland occupies such property.

RESPONSE:

- Plaintiffs object to this Interrogatory on the grounds it seeks information that is already available to or as equally available to Defendant; that it seeks information that is obtainable from some other source; that it seeks information that is of public record; and it is unduly burdensome. Subject to and without waiving said objections, Plaintiffs state the following:

- Plaintiff Frank J. Cumberland, Jr. occupies and currently lives at 4225 Mimosa Road, Columbia, SC 29205.

- 2916 Forest Drive, Columbia, SC 29204 is currently vacant.



9. State the full street address of each and every real property wholly or jointly owned by Azar and for each property, identify the following:

RESPONSE:

- Plaintiffs object to this Interrogatory on the grounds it seeks information that is already available to or as equally available to Defendant; that it seeks information that is obtainable from some other source; that it seeks information that is of public record; and it is unduly burdensome. Subject to and without waiving said objections, Plaintiffs state the following:

a. The date on which Azar purchased, obtained title or otherwise obtained an ownership interest:

- Unit 701, 619 King Street, Columbia, SC 29205 (Hermitage Condominiums) acquired in December 1999.

- 746 Harden Street, Columbia, SC 29205 acquired in July 1985

b. Whether the property is residential or commercial.

- Unit 701, 619 King Street, Columbia, SC 29205 (Hermitage Condominiums) is residential

- 746 Harden Street, Columbia, SC 29205 is commercial.

c. For residential property, whether Azar occupies such property.

- Plaintiff Joseph S. Azar has owned and lived at Unit 701, 619 King Street, Columbia, SC 29205 (Hermitage Condominiums) at all times since 1999.

- Plaintiff Joseph S. Azar has owned 746 Harden Street, Columbia, SC 29205 at all times since 1985 and currently operates a commercial business known as "Upstairs Audio" from that location. Plaintiff Joseph S. Azar has and uses water and sewer service from the City of Columbia at 746 Harden Street, Columbia, SC 29205. Plaintiff Joseph S. Azar leases part of that property to Noi Ketavongsa. The water and sewer bill for the entire property (one meter) is in the name of Noi Ketavongsa and Plaintiff Joseph S. Azar pays a portion of each monthly bill as mutually agreed between Noi Ketavongsa and Plaintiff Joseph S. Azar.



10. For each month over the past twelve (12) months, identify the time period (in months, weeks or days as appropriate to represent the time period in the most accurate manner) during which Cumberland has occupied his residential property located within the City of Columbia.

RESPONSE:

From June 2010, through June 2011, and again from September 2011 through the present, Plaintiff Frank J. Cumberland, Jr., lived at 4225 Mimosa Road, Columbia, SC 29205 and since January 2011 has a City of Columbia water and sewer account at that address, in his name, which he pays. The account number is 01-9257543-1027146-7. From June 2010 to September 2011, Plaintiff Frank J. Cumberland, Jr., lived at 2916 Forest Drive, Columbia, SC 29204. Since January 2011, he has had a City of Columbia water and sewer account at that address, in his name, which he pays. The account number is 01-9257543-1016557-3.

11. Over the past twelve (12) months, identify for each month the name of the person who has paid the water and sewer bills for each and every water and sewer bill sent by the City of Columbia to Cumberland, and the account number shown on such bill(s).

RESPONSE:

A. 4225 Mimosa Road, Columbia SC 29205:

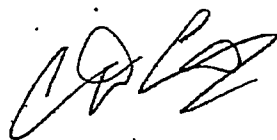
- a. December 2010: bill addressed to Kim Diana Connolly at 4225 Mimosa Road, Columbia, SC 29205; paid by Plaintiff Frank J. Cumberland, Jr.;
- b. January 2011 – present: bill addressed to by Plaintiff Frank J. Cumberland, Jr. at 4225 Mimosa Road, Columbia, SC 29205; paid by Plaintiff Frank J. Cumberland, Jr.

B. 2916 Forest Drive, Columbia, SC 29204:

- a. December 2010: bill addressed to Kim Diana Connolly at 1313 Maple Road, Williamsville, NY 14221; paid by Kim Diana Connolly;
- b. January 2011 – present: bill addressed to by Plaintiff Frank J. Cumberland, Jr. at 4225 Mimosa Road, Columbia, SC 29205; paid by Plaintiff Frank J. Cumberland, Jr.

12. Identify and describe any and all injury(s) Azar has suffered as a result of Defendant's actions as described in Plaintiffs' Amended Complaint.

RESPONSE:



- To the extent the City of Columbia has diverted money collected as water and sewer fees and used those monies for purposes other than the water and sewer system, Plaintiff Azar is being and will be forced to pay twice for the expenses of operating, repairing, upgrading and expending the water and sewer system. Further, to the extent the City of Columbia has to borrow money to replace the water and sewer money spent elsewhere, Plaintiff Azar will also have to pay for attorney fees and costs incurred in issuing bonds and interests on those bonds. The City of Columbia has or will be required to pay fines for its inept operation of the water and sewer system and resulting sewer overflows, which Plaintiff Azar will have to pay as well as attorney fees and costs to defend the City of Columbia from its conduct in that regard. The lands and waters in and around Columbia have been polluted by sewer overflows resulting from the failure of the City of Columbia to properly maintain its water and sewer system in good operational condition. Plaintiff Azar has also been subjected to the stench of raw sewage resulting from sewer overflows and other malfunctions of the improperly maintained and operated City of Columbia water and sewer system.

- Plaintiff Azar has also suffered from the pollution caused by sewer overflows resulting from the failure of the City of Columbia to properly maintain and improve its water and sewer system.

13. Identify and describe any and all injury(s) Cumberland has suffered as a result of Defendant's actions as described in Plaintiffs' Amended Complaint.

RESPONSE:

- To the extent the City of Columbia has diverted money collected as water and sewer fees and used those monies for purposes other than the water and sewer system, Plaintiff Frank J. Cumberland, Jr. is being and will be forced to pay twice for the expenses of operating, repairing, upgrading and expending the water and sewer system. Further, to the extent the City of Columbia has to borrow money to replace the water and sewer money spent elsewhere, Plaintiff Frank J. Cumberland, Jr. will also have to pay for attorney fees and costs incurred in issuing bonds and interests on those bonds. The City of Columbia has or will be required to pay fines for its inept operation of the water and sewer system and resulting sewer overflows, which Plaintiff Frank J. Cumberland, Jr. will have to pay as well as attorney fees and costs to defend the City of Columbia from its conduct in that regard. The lands and waters in and around Columbia have been polluted by sewer overflows resulting from the failure of the City of Columbia to properly maintain its water and sewer system in good operational condition. Plaintiff Frank J. Cumberland, Jr. has also been subjected to the stench of raw sewage resulting from sewer overflows and other malfunctions of the improperly maintained and operated City of Columbia water and sewer system.



- Plaintiff Azar has also suffered from the pollution caused by sewer overflows resulting from the failure of the City of Columbia to properly maintain and improve its water and sewer system.

14. Identify the specific action(s) taken by Defendant that supports Plaintiffs' claim that Defendant has taken their property without just compensation.

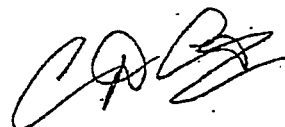
RESPONSE:

- Under South Carolina law monies' collected as water and sewer fees are required to be spent to pay costs related to the provision of the service or program for which the fee was paid. Defendant has taken Plaintiff's monies as water and sewer fees but has failed to provide to Plaintiffs' a properly functioning or working water and sewer system thereby denying Plaintiffs' the benefit of the bargain for which they have paid.

15. Identify the specific action(s) taken by Defendant that supports Plaintiffs' claim that Defendant has violated their right to equal protection under the law.

RESPONSE:

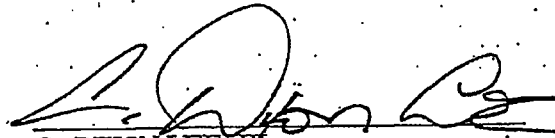
The Defendant violated the constitutional rights of the Plaintiffs' class by using money collected as water and sewer fees for other purposes when the money was paid as a fee. Defendant knew such use was inappropriate and unlawful under current statutory and case law concerning user fees or service charges collected by a municipality. Further, Defendant knew the unrelated use of fees charged and collected for specific program violated a state law. This conduct is borne out by the fact Defendant has advised the South Carolina Attorney General that the statute is unconstitutional. Such conduct by Defendant city is an intentional and knowing violation of the law which requires Defendant city to enforce all laws fairly and equally-especially when it comes to the use of fees collected in a fiduciary capacity. Defendant in its interrogatories admits the fees were not used to repair the system but were used for other city services. The Plaintiffs' class had a right to expect the fees paid would be used only in conformity with the law and not be spent for other illegal purposes. The Plaintiffs' class had their equal protection rights violated when Defendant used money collected for one purpose for another purpose which the South Carolina statutory and case law specifically prohibits. This knowing conduct by Defendant continued for years as the city used the fees collected for other purposes than to fix the sewer system. Each time a fee was used by Defendant a separate equal protection violation occurred. Plaintiffs' class had the right to believe the city would follow the law and not use fees collected from one class of citizens for the benefit of another class of citizens who did not pay the fees.



16. Identify any and all legal authority which supports Plaintiffs' allegation(s) set forth in paragraph 32 of their Amended Complaint.

RESPONSE:

- Plaintiffs' agreed or contracted with the City of Columbia to purchase and did purchase from the City of Columbia water and sewer service in return for which Plaintiffs' agreed to pay a fee. The City of Columbia was bound, as a condition of that contract or agreement, by South Carolina law to use the monies it collected as water and sewer fees to pay costs related to the provision of the service or program for which the fee was paid and too keep that money in a separate and segregated account, as provided by S.C. Code Ann. § 6-1-330(B) (Supp. 2010). The City of Columbia failed to use the money it collected as water and sewer fees to pay costs related to the provision of the service or program for which the fee was paid but, rather, spent substantial amounts of that money on other unrelated purposes or programs and failed to keep that money in a separate and segregated account and thereby breached its contract or agreement with Plaintiffs.



C. DIXON LEE, III
McLAREN & LEE
1508 Laurel Street
Post Office Box 11809 (29211)
Columbia, South Carolina 29201
Telephone: (803) 799-3074
Facsimile: (803) 252-3548

GENE M. CONNELL, JR.
KELAHER, CONNELL & CONNOR, P.C.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
PO Box 14547
Surfside Beach, South Carolina 29587

ATTORNEY FOR PLAINTIFFS

Columbia, South Carolina

Dated: January 13, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

JOSEPH S. AZAR AND FRANK J.
CUMBERLAND, JR., INDIVIDUALLY
AND AS CLASS REPRESENTATIVES,

Plaintiffs,

vs.

CITY OF COLUMBIA,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO.: 2011-CP-40-6705

PROOF OF SERVICE

This is to certify that a copy of the foregoing *Plaintiffs' Responses To Defendant's First Set Of Interrogatories* has been served upon Defendant's counsel, Thomas E. Lydon, Esquire and M. McMullen Taylor, Esquire by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 13th day of January 2012:

Thomas E. Lydon, Esquire
M. McMullen Taylor, Esquire
McAngus Goudelock & Courie, LLC
PO Box 12519
Columbia, South Carolina 29211

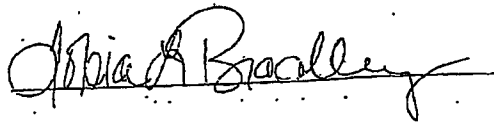


Exhibit B

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiffs,

vs.

City of Columbia,

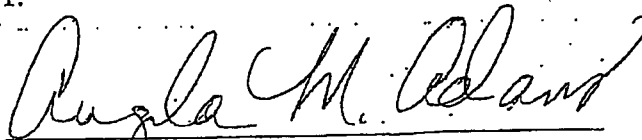
Defendant.

AFFIDAVIT OF
ANGELA M. ADAMS

I, Angela M. Adams, being competent to testify as to the matters herein, and being duly sworn, do hereby testify to the following matters within my personal knowledge:

1. I am employed by the City of Columbia as Water and Sewer Customer Service Administrator.
2. In my capacity as Water and Sewer Customer Service Administrator, I serve as the custodian of the water and sewer account records of the City of Columbia.
3. Upon searching the City of Columbia's water and sewer customer accounts, I found no active account in the name of Joseph S. Azar or any variation of that name.
4. Joseph S. Azar is not a water and sewer customer of the City of Columbia.

FURTHER AFFIANT SAYETH NOT.



Angela M. Adams
City of Columbia
Customer Service Department
1339 Main Street

Columbia, South Carolina 29201
545-3306

Sworn before me, this the 03 day of November, 2011.

Galena Aford (Galena Aford)
Notary Public for State of South Carolina

My Commission expires 6/30/2014.

Exhibit C

Dec 13 11 04:13p

City Of Columbia

8035453486

P.2

JAN-21-2011 14:12

FMO SCMD

803 806 4329

P.01/01



CITY OF COLUMBIA - CUSTOMER SERVICE
P.O. BOX 147, COLUMBIA, S.C. 29217
PHONE: (803) 545-3300 | FAX: (803) 733-8218

(F)
01/21/11

APPLICATION FOR WATER SERVICE CONTRACT

☐ **NEW SERVICE REQUEST** **Effective Date of Request:**

New Service Address:

City _____ SC _____ Zip Code _____ Plus 4 _____ 21

☒ **TRANSFER SERVICE REQUEST** **Transfer Effective:** January 26, 2011

☐ **DISCONNECT CURRENT SERVICE** **Disconnect Effective:**

Current Service Address: 4225 Mimosa Road

Columbia SC 29205 3543
City State Zip Code Plus 4

New Service Address: 4225 Mimosa Road

Columbia SC 29205 3543
City State Zip Code Plus 4

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 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.

It is understood and agreed that at any future time should any part of the property described above become contiguous to the city limits of the City of Columbia, the owner will cause that property to be annexed. In this event, the City of Columbia reserves the right to discontinue service until the above described property is annexed.

The undersigned agrees to notify the City of Columbia when he/she desires to have this service terminated. Water Customer Service shall be allowed five (5) days after the receipt of such notice to take a final reading of the meter and to discontinue service. Your account responsibility does not end until a final reading of the meter is obtained and a bill marked "Final Bill" is mailed. (You can not terminate an account the same day service is requested)

The City of Columbia has the right pursuant to the South Carolina Setoff Debt Collection Act to collect any sum due and owed by the applicant through offset of the applicant's state income tax refund. If the City of Columbia chooses to pursue debts owed by the applicant through the Setoff Debt Collection Act, the applicant agrees to pay all fees and costs incurred through the setoff process, including fees charges by the Department of Revenue.

A \$30.00 NEW ACCOUNT FEE AND \$15.00 SERVICE CHARGE WILL APPLY TO ALL NEW OR TRANSFER SERVICE REQUESTS (Section 23-141)

Name: Cumberland, Jr. Frank James
Last Name or Business Name First Name Middle Name

Mailing Address: 4225 Mimosa Road
(if different from New Service Address) Columbia SC 29205 3543
City State Zip Code Plus 4

Telephone Number: 803.238.5626 Email Address: jcumberland@yahoo.com

Driver's License Number: Redacted Issuing State: D Last Five of SSN: Redacted

Applicant Signature: [Signature] Date: 01/21/11
A Representative must speak with the applicant before the contract is processed.

For Office Use Only
Customer Service Representative Name _____ Date 1-21-10
Customer Number 9257543 Premise 10871410

City of Columbia Customer Service, PO Box 147, Columbia, SC 29217-0001

TOTAL P.01

CITY-0003969

ROA-0179



CITY OF COLUMBIA
SOUTH CAROLINA

CUSTOMER SERVICE/P.O. BOX 147/ COLUMBIA, S.C. 29217/ (803) 733-8285

APPLICATION FOR SERVICE CONTRACT

Owner New ☐ Prev. ☒ Tenant New ☐ Prev. ☐ Guarantor ☐

Name: M. A. Letts

Account Number: 5819-1806

Service Location: 2 STAGBRIAR

Mailing Address: 11 29223

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.

It is understood and agreed that at any future time should any part of the property described above become contiguous to the city limits of the City of Columbia, the owner will cause that property to be annexed. In this event, the City of Columbia reserves the right to discontinue service until the above described property is annexed.

The undersigned agrees to notify the City of Columbia in person or in writing with proper identification, when he/she desires to have his service terminated. Water Customer Service shall be allowed five (5) days after the receipt of such notice to take a final reading of the meter and to discontinue service. For all new services, or if your service is terminated for nonpayment, you will be subject to a maximum deposit of up to \$100.00.

Redacted

Driver's License # Redacted

(S) SS # _____

(S) Driver's License # _____

(G) SS # _____

(G) Driver's License # _____

Work Place: _____

HP # 736-9945

BP # 728-8300

Work Place: _____

HP # _____

BP # _____

Previous or Guarantor Account: 5770-3446-9

Bill Paid ☒ Yes

No

Previous or Guarantor Address: 132 WINDYDOGE RD

Deposit Amount \$ _____

IE # _____

Signature: [Signature]

Signature: _____

Received By: [Signature]

Dated: 10/25/93

CITY-0005409

Exhibit D

CITY OF COLUMBIA, SOUTH CAROLINA

GENERAL BOND ORDINANCE NO. 93-43

AUTHORIZING AND PROVIDING FOR THE ISSUANCE OF WATERWORKS AND SEWER SYSTEM REVENUE BONDS OF THE CITY OF COLUMBIA, SOUTH CAROLINA; LIMITING THE PAYMENT OF THE BONDS SOLELY TO THE NET REVENUES DERIVED FROM THE OPERATION OF THE SYSTEM AND PLEDGING THE REVENUES TO SUCH PAYMENT; CREATING CERTAIN FUNDS AND PROVIDING FOR PAYMENTS INTO SUCH FUNDS; AND MAKING OTHER COVENANTS AND AGREEMENTS IN CONNECTION WITH THE FOREGOING.

CERTIFIED
A TRUE COPY

W. D. Hoar
CITY CLERK 05.29.12

CITY-0004640

ARTICLE VII

COVENANTS

Section 7.1. Rates and Charges. The City covenants and agrees to operate the System in an efficient and economical manner and establish, levy, maintain, revise and collect such fees, rates and other charges for the use of the services and facilities furnished by the System as may be necessary or proper, which fees, rates, and other charges, together with other Revenues and other available moneys, shall at all times be at least sufficient after making due and reasonable allowances for contingencies and for a margin of error in estimates to provide an amount equal to (a) one hundred percent (100%) of the amounts required to pay Expenses of Operating and Maintaining the System for the then current Fiscal Year; (b) at least one hundred ten percent (110%) of the annual principal and interest requirements on the Outstanding Senior Lien Bonds, so long as any Senior Lien Bonds are Outstanding, and otherwise sufficient to comply with all covenants set forth in the proceedings authorizing the issuance of such Senior Lien Bonds for the then current Fiscal Year; (c) one hundred ten percent (110%) of the amounts required to be deposited into each Debt Service Fund for the then current Fiscal Year; (d) one hundred percent (100%) of the amounts required to be deposited into each Debt Service Reserve Fund for the then current Fiscal Year; (e) one hundred percent (100%) of the amounts required to provide for payment of any Junior Bonds for the then current Fiscal Year; and (f) the amounts necessary to comply in all respects with the terms of the Ordinance or any other contract or agreement with the Holder of a Bond (the "Rate Covenant").

Section 7.2. To Pay Principal, Premium, and Interest on the Bonds. The City covenants and agrees to punctually pay, or cause to be paid, out of the Net Revenues pledged to such payment in Article VI hereof, the principal of, redemption premium, if any, and the interest on each and every Bond issued under the provisions of the Ordinance, at the place, on the dates and in the manner provided herein.

Section 7.3. Operation of System. The City covenants and agrees it shall at all times operate the System properly and in an efficient and economical manner and will maintain, preserve and keep the same with the appurtenances and every part and parcel thereof in good repair, working order and condition, and shall from time to time make all necessary and proper repairs and replacements so that at all times the operation of the System may be properly and advantageously conducted.

Section 7.4. Covenant with Respect to Senior Lien Bonds. On and after the date of the delivery of the Bonds of 1993 issued pursuant to the Ordinance, the City covenants, agrees and confirms for the benefit of the Holders of the Bonds that it will not issue

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A TRUE COPY

Wanda D. Moore
CITY CLERK 05.29.2012

CITY-0004667

any further bonds pursuant to the authorization of the Bond Ordinance of 1985.

Section 7.5. Records, Accounts and Audits. The City covenants and agrees to keep proper books of records and accounts (separate from all other records and accounts), in which complete and correct entries shall be made of all transactions relating to the System. A complete financial statement of the System shall be prepared within 180 days after the end of each Fiscal Year and shall be prepared in accordance with generally accepted accounting principles and audited by an Accountant. The City will cause to be furnished to any Holder of any of the Bonds, who make written request therefor, a copy of such statement. Such records shall be kept in accordance with the standards from time to time prescribed by the Governmental Accounting Standards Board or its successor. The City will cause to be furnished to any Holder of any of the Bonds, who make written request therefor, copies of financial statements certified by an accountant.

Section 7.6. Sale, Lease or Other Encumbrances. The City covenants and agrees not to issue any bonds, notes, certificates or other obligations or evidences of indebtedness other than the Bonds or obligations authorized or permitted hereby secured by a pledge of the Net Revenues, and it will not create or cause to be created any lien or charge on the Revenues other than the liens and charges created or permitted to be created hereby, and no part of the System will be sold, mortgaged, leased or otherwise disposed of or encumbered; provided, however, the City may from time to time permanently abandon the use of, sell, trade or lease any property forming a part of the System, but only if there shall be filed with the Clerk of the City prior to such abandonment, sale or lease a certificate, signed by the City Manager, stating:

(a) that the City is not then in Default in the performance of any of the covenants, conditions, agreements or provisions contained in the Ordinance, and

(b) that the Net Revenues for the preceding Fiscal Year, after giving effect to such abandonment, sale or lease and any replacement and after adjustment to reflect the moneys which would have been received if the rate schedule in effect on the date of such certificate had been in effect throughout such Fiscal Year, are not less than one hundred percent (100%) of the Debt Service for any Fiscal Year thereafter. Amounts received from any such sale or disposition shall be considered Revenues of the System.

Section 7.7. Insurance. The City covenants and agrees to make provision to maintain adequate insurance (including self-insurance) on the works, plants, facilities and properties comprising the System against the risks, accidents or casualties, of the kinds and in at least the amounts which are usually and

CERTIFIED

31

A TRUE COPY

Wanda D. Moore

CITY CLERK 05.29.2012

CITY-0004668

customarily carried on similar plants, properties and systems which are owned and operated by a public or municipal corporation, including without limiting the generality of the foregoing, fire, extended coverage, general liability and workmen's compensation, and also all additional insurance covering such risks as may be deemed necessary or desirable by the City or recommended by a competent independent engineer or other advisor employed for the purpose of making such recommendations.

Section 7.8. No Free Service. The City covenants and agrees that no free service will be furnished by the System to the City or to any agency, instrumentality or person. The reasonable costs and value of any services of the System rendered to the City through the operation of the System shall be charged against the City and shall be paid as the service accrues from the current funds and such funds, when so paid, shall be accounted for in the same manner as other Revenues of the System.

Section 7.9. Annual Budget. Prior to the beginning of each Fiscal Year, the City covenants and agrees to prepare an annual budget for the ensuing Fiscal Year which shall set forth in reasonable detail the estimated Revenues and operation and maintenance expenses. The City also may at any time adopt an amended Annual Budget for the remainder of the then current Fiscal Year.

CERTIFIED

A TRUE COPY

Wanda D. Brown
MAY 29 2012

32

CITY-0004669

ARTICLE XIII

MISCELLANEOUS

Section 13.1. Benefits of Ordinance Limited to the City and Holders of the Bonds. With the exception of rights or benefits herein expressly conferred, nothing expressed or mentioned in or to be implied from the Ordinance or the Bonds is intended or should be construed to confer upon or give to any person other than the City and the Holders of the Bonds, any legal or equitable right, remedy or claim under or by reason of or in respect to the Ordinance or any covenant, condition, stipulation, promise, agreement or provision herein contained. The Ordinance and all of the covenants, conditions, stipulations, promises, agreements and provisions hereof are intended to be and shall be for and inure to the sole and exclusive benefit of the City and the Holders from time to time of the Bonds as herein and therein provided.

Section 13.2. Ordinance Binding Upon Successors or Assigns of the City. All the terms, provisions, conditions, covenants, warranties and agreements contained in the Ordinance shall be binding upon the successors and assigns of the City and shall inure to the benefit of the Holders of the Bonds.

Section 13.3. No Personal Liability. No recourse shall be had for the enforcement of any obligation, covenant, promise or agreement of the City contained in this Ordinance or the Bonds, against any member of the City, any officer or employee, as such, in his or her individual capacity, past, present or future, of the City, either directly or through the City, whether by virtue of any constitutional provision, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise, it being expressly agreed and understood that the Ordinance and the Bonds are solely corporate obligations, and that no personal liability whatsoever shall attach to, or be incurred by, any member, officer or employee as such past, present or future, of the City, either directly or by reason of any of the obligations, covenants, promises, or agreements entered into between the City and any Bondholder or to be implied therefrom as being supplemental hereto or thereto, and that all personal liability of that character against every such member, officer and employee is, by the adoption of this Ordinance and the execution of the Bonds, and as a condition of, and as a part of the consideration for, the adoption of the Ordinance and the execution of the Bonds, expressly waived and released. The immunity of members, officers and employees of the City under the provisions contained in this Section 13.3 shall survive the termination of the Ordinance.

Section 13.4. Effect of Saturdays, Sundays and Legal Holidays. Whenever the Ordinance requires any action to be taken on a Saturday, Sunday, legal holiday or bank holiday in the State

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of South Carolina, such action shall be taken on the first business day occurring thereafter. Whenever in the Ordinance the time within which any action is required to be taken or within which any right will lapse or expire shall terminate on a Saturday, Sunday, legal holiday or bank holiday, in the State of South Carolina, such time shall continue to run until midnight on the succeeding business day.

Section 13.5. Partial Invalidity. If any one or more of the covenants or agreements or portions thereof provided in the Ordinance on the part of the City or any Registrar or Paying Agent to be performed should be determined by a court of competent jurisdiction to be contrary to law, then such covenant or covenants, or such agreement or agreements, or such portions thereof, shall be deemed severable from the remaining covenants and agreements and portions thereof provided in the Ordinance and the invalidity thereof shall in no way affect the validity of the other provisions of the Ordinance or of the Bonds, but the Holders of the Bonds shall retain all the rights and benefits accorded to them hereunder and under any applicable provisions of law.

If any provisions of the Ordinance shall be held or deemed to be or shall, in fact, be inoperative or unenforceable or invalid as applied in any particular case in any jurisdiction or jurisdictions or in all jurisdictions, or in all cases because of conflicts with any constitution or statute or rule of public policy, or for any other reason, such circumstances shall not have the effect of rendering the provision in question inoperative or unenforceable or invalid in any other case or circumstance, or of rendering any other provision or provisions herein contained inoperative or unenforceable or invalid to any extent whatever.

Section 13.6. Law and Place of Enforcement of the Ordinance. The Ordinance shall be construed and interpreted in accordance with the laws of the State of South Carolina and all suits and actions arising out of the Ordinance shall be instituted in a court of competent jurisdiction in said State.

Section 13.7. Effect of Article and Section Headings and Table of Contents. The headings or titles of the several Articles and Sections hereof, and any table of contents appended hereto or to copies hereof, shall be solely for convenience of reference and shall not affect the meaning, construction, interpretation or effect of the Ordinance.

Section 13.8. Repeal of Inconsistent Ordinances and Resolutions. All ordinances and resolutions of the City, and any part of any ordinance or resolution, inconsistent with the Ordinance are hereby repealed to the extent of such inconsistency.

Section 13.9. Effectiveness of this Ordinance. This Ordinance shall become effective upon its enactment; provided,

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however, that it shall not be necessary for the City to establish the funds and accounts created in Article VI hereof prior to the issuance of any Bonds.

Section 13.10. Notices. All notices, certificates, or other communications hereunder or under the Ordinance shall be sufficiently given and shall be deemed given when mailed by registered mail, postage prepaid, or given when dispatched by telegram addressed as follows:

If to the City:

City of Columbia
1737 Main Street
Columbia, South Carolina 29201.
Attention: City Manager

Section 13.11. Codification. This Ordinance shall be forthwith codified in the Code of City Ordinances in the manner required by law and the name shall be indexed under the general heading "General Bond Ordinance - Waterworks and Sewer System Revenue Bonds."

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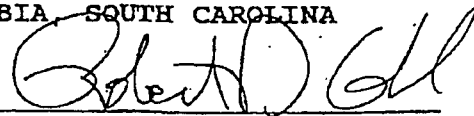
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Eula D. Moore
CITY CLERK 05.29.2012

CITY-0004682

Enacted by the City Council of the City of Columbia,
South Carolina, this 21st day of May, 1993.

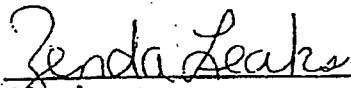
CITY COUNCIL OF THE CITY OF
COLUMBIA, SOUTH CAROLINA

By: 

Mayor

(SEAL)

ATTEST:


Clerk

Date of First Reading: May 12, 1993

Date of Second Reading: May 21, 1993

CERTIFIED
A TRUE COPY


CITY CLERK 05.29.2012

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CITY-0004683

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-6705

JEANETTE W. McBRIDE
C.C.P. & G.S.

2012 MAY 30 PM 3:10

RICHLAND COUNTY
FILED

**DEFENDANT'S MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Defendant submits this Memorandum in opposition to Plaintiffs' Motion for Class Certification. Because this is an action for injunctive relief against a government actor, it is unnecessary to certify a class; the proposed class will benefit from any judgment in the Plaintiffs' favor regardless of whether a class is certified. Alternatively, Plaintiffs have not carried the burden of showing that all of the prerequisites for class certification have been satisfied.

I. PLAINTIFFS HAVE NOT DEMONSTRATED A NEED FOR CLASS CERTIFICATION.

Plaintiffs are seeking to have a class certified in connection with their claim for injunctive relief. South Carolina appellate courts have not had an opportunity to address a situation involving a proposed class action seeking an injunction against a municipality. However, the federal courts have consistently held in such cases that, regardless of whether the elements of Rule 23(a) are satisfied, a class should only be certified if there is a need for the complexities and extra costs associated with class suits. *See Craft v.*

Memphis Light, Gas and Water Division, 534 F.2d 684 (6th Cir. 1976); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974). Where, as here, a plaintiff seeks a determination that a municipality is violating a state statute, there is no need for class certification because the Court may presume the good faith of government officials to respect such a ruling on a broadly applicable basis.

In *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (6th Cir. 1976), individual plaintiffs challenged a city's policy of terminating and refusing to connect power and water services, sought a declaratory judgment that the policy was unconstitutional, and sought an injunction barring prospective enforcement of the policy. The district court refused to certify a proposed class and the court of appeals agreed, explaining that "the district court properly recognized that such relief to the extent granted would . . . accrue to the benefit of others similarly situated and, consequently, ... no useful purpose would be served by permitting this case to proceed as a class action because the determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action." *Id.* at 686; see also *Johnson v. City of Opelousas*, 488 F.Supp. 433, 436 (W.D. La. 1980) (in a constitutional challenge to a curfew law, finding that a class action was unnecessary to insure an appropriate examination of the constitutionality of the ordinance in question and that any declaratory or injunctive relief given in the individual action of the named plaintiffs would inure to the benefit of other similarly situated minors).

The principle set forth in cases like *Craft v. Memphis Light, Gas and Water Division* and *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach* is directly applicable in this case. Plaintiffs seek injunctive relief directing the City of Columbia to comply with Section 6-1-300 of the South Carolina Code. The Court should assume that the City will comply with an injunction if the Court deems it appropriate to enter such relief. Thus, no useful purpose will be served by class treatment.

II. PLAINTIFF HAS NOT SATISFIED THE REQUIREMENTS OF RULE 23.

Proponents of class certification bear the burden of proving five prerequisites under South Carolina law. See *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRCP. The prerequisites are: 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 with respect to the class as a whole, the amount in controversy must exceed one hundred dollars for each member of the class. Rule 23(a), SCRCP. In deciding whether class certification is proper, the court must apply a rigorous analysis to determine whether each prerequisite is satisfied. Failure to satisfy even one prerequisite is fatal to class certification. *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003).

Plaintiffs seek to certify a class of "all Columbia water customers, past and present as of three years prior to the filing of the Complaint." However, Plaintiffs cannot establish the third, fourth, and fifth requirements for class certification.

The third element is that the claims of the representative parties are typical of the claims of the class. No evidence has been presented that any other potential class members wish to assert a claim. Plaintiffs are complaining about the manner in which the City is spending water and sewer revenues. Plaintiffs have not shown that other citizens have similar complaints. The manner in which the City is spending such funds has been widely reported in the media, but the only complaint filed is that filed by Plaintiffs. Thus, it is likely that at least some of the proposed class members do not object to the manner in which the funds are being spent.

The fourth element necessary for class certification is that the representative parties must fairly and adequately protect the interests of the class. As explained in Defendant's Memorandum in Support of Motion to Dismiss for Lack of Standing, there are serious questions about whether the named Plaintiffs have standing to assert the claims alleged in the Second Amended Complaint on their own behalf. If the Plaintiffs do not have standing to assert the claims individually, then they clearly do not have standing to assert them in a representative capacity.

Finally, Plaintiffs fail to meet the fifth requirement for class certification because the relief sought is not primarily injunctive or declaratory with respect to the class as a whole, and the amount in controversy does not exceed one hundred dollars for each class member. Plaintiffs apparently concede that the amount in controversy does not exceed one hundred dollars for each class member. In their Motion, they state that "Plaintiffs

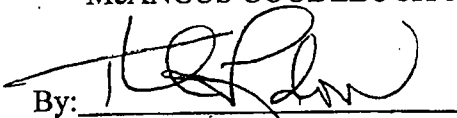
request injunctive relief such that the amount in controversy is not in issue." However, a review of Plaintiffs' Second Amended Complaint establishes that the relief primarily sought is not injunctive or declaratory, as required by Rule 23(a)(5), SCRPC.

In their First Cause of Action, the relief primarily sought by Plaintiffs is injunctive relief. However, Plaintiffs allege three additional causes of action which do not seek injunctive or declaratory relief. In the Second Cause of Action, Plaintiffs assert a claim for breach of contract and seek "a refund of all fees collected." In the Third Cause of Action, Plaintiffs assert a claim for "Unconstitutional Collection." The relief sought in that cause of action is the creation of a common fund of all fees collected by the City for water improvements for the past three years. Finally, in the Fourth Cause of Action, Plaintiffs assert a claim for "Unconstitutional Tax." That cause of action asks for "judgment for the class and a common fund and for actual damages and the costs of the action." Thus, only one of the four causes of action alleged by Plaintiffs seek an injunction as its primary relief. As such, Plaintiffs fail to satisfy the requirement set forth in Rule 23(c)(5) of the South Carolina Rules of Civil Procedure.

CONCLUSION

Class certification is both unnecessary and inappropriate in this case. If the Court determines that the injunctive relief sought by Plaintiffs is appropriate, the Court may presume the good faith of government officials to respect such a ruling. Alternatively, a review of the record in this case indicates that Plaintiffs cannot establish three of the five elements required for class certification. Therefore, Defendant respectfully requests that the Court deny Plaintiffs' Motion for Class Certification.

McANGUS GOUDELOCK & COURIE

By: 

Thomas E. Lydon
M. McMullen Taylor
P. O. Box 12519
Columbia, South Carolina 29211
(803) 779-2300
Attorneys for Defendant

May 25, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,

vs.

City of Columbia,

Defendant.

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF CLASS CERTIFICATION

I. BACKGROUND FACTS

This case involves a challenge by water and sewer customers (of the City) to the City of Columbia's decision to annually transfer monies paid by those customers from the water and sewer utility fund to the City of Columbia's general fund. Each year, the City of Columbia transfers \$4.5 Million from the water and sewer utility fund to the general fund and has done so for many years (back to the 1990's). Further, the City of Columbia directly funds the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, various Development Corporations, the Economic Development Contingency Fund, the City Center Partnership and Community Promotions by transferring money from the water and sewer fund for those other uses. Plaintiffs' lawsuit claims that such transfers are illegal and in violation of well-established South Carolina Supreme Court case law.

Plaintiffs seek a declaratory classwide judgment on behalf of all City water customers to require Columbia to repay the utility fund those funds transferred to the General Fund of the City for the last three years since this lawsuit was filed. Monies in the water and sewer utility fund,

pursuant to State law, are specifically designated for use for water and sewer services only and may not be used for other unrelated purposes.

The essence of this case turns on whether or not the City of Columbia may use monies from its water and sewer utility fund for other unrelated purposes. The Plaintiffs allege that the City of Columbia may not use these funds for other purposes other than for repair, upgrade or maintenance of the water and sewer systems of the City. S.C. Code § 6-1-330 and § 6-1-300(6) (2004) define a service or user fee as follows:

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.

Several South Carolina Supreme Court cases have consistently held that a sewer service charge is a fee and cannot be used for other purposes. See *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*, 519 S.C.2d 561 (1999); *Campbell Construction Co. v. City of Charleston*, 481 S.E.2d 437 (1997); *Ford v. Georgetown County Water and Sewer District*, 532 S.E.2d 873 (2000).

It is well settled in South Carolina that service or user fees collected by a city for water/sewer service must be used solely to pay costs related to the service or program for which the fee was paid. In this case, the Defendant City of Columbia, in violation of South Carolina statutes and case law collected fees for services from the water and sewer service and transferred those monies each year to the City's general fund for use in other departments.

Plaintiffs' action is to require the City to return those monies within the last three years that were paid to the general fund (about \$4.5 Million per year) which were used to fund other unrelated City departments. See *Brown v. County of Horry*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992) (South Carolina Supreme Court explained that "a service charge is imposed on the

theory that the portion of the community which is required to pay the charge receives some special benefit as a result of the improvement made with the proceeds of the charge." The *Brown* Court characterized service charges as an alternative to increasing general property taxes intended to reduce the tax burden which otherwise would have to be borne by all taxpayers generally. Similarly S.C. Code § 6-1-330 contemplates that "a service or user fee might be used to fund a service that was previously funded by property tax revenues."

II. DEFENDANT'S OWN DOCUMENTS PROVE CLASS CERTIFICATION SHOULD BE GRANTED.

Plaintiffs have received voluminous discovery in this case which also supports class certification. While the Court should not be burdened with all the discovery served, key documents prove all the elements of SCRCP 23(a). The first key document is entitled "Evaluation of General Fund Transfer" (City document 0004637-0004639 attached to this memo as Exhibit 1). It is a study by Black & Veatch, consultants of the City of Columbia, and discusses at length the transfer of \$4.5 Million annually to the general fund from the water and sewer utility fund. The document states:

- The current transfer of \$4.5 Million to the general fund is relatively high compared to industry averages. (The common issue to all rate payers under SCRCP 23(a).)
- The most defensible level of transfer would not exceed \$3.0 Million. (A common issue to all rate payers under SCRCP 23(a).)
- It is recommended that the transfer be reduced to \$3.0 Million to be consistent with the estimated tax liability the utilities would experience if they were a private entity. (Another common issue to all rate payers under SCRCP 23(a).)

The Court should also be aware of a second document produced by the City in discovery entitled "2007 Indirect Cost of Service Study" by Black & Veatch, (City document 0004633-4636 attached as Exhibit 2.) This study was commissioned by the City to justify the transfer of monies from the utility fund to the general fund. The Study's salient points which relate directly to SCRCP 23(a) are:

- The City provides water service to 114,000 customers (numerosity under SCRCP 23(a).)
- The City provides wastewater service to 59,000 customers. (numerosity under SCRCP 23(a).)
- Black & Veatch was hired by the utility to review its direct funding and indirect transfers to the City and the services provided by these non-utility departments.
- The utility on a yearly basis transfers \$4.5 Million to the City's general fund as directed by resolution.
- Certain City departments provided services primarily to the benefit of the entire Columbia community but no services discreetly attributable to the utility operations.
- Based on our analysis of the utility's 2006 budget of \$94.8 Million, approximately \$7.6 Million of directly funds costs should not be funded by the Utility Enterprise Fund and are more appropriately funded through the general fund budget.
- Our analysis indicates no direct cost causation or benefit could be attributed to the utility for these services, and therefore, no justification for

direct funding from the utility fund was supported for purposes of this study.

- As an enterprise fund that receives its operating revenues from rate payers for water and wastewater services received, it is important that the operating budget be directly attributable to the supply, treatment and distribution of water, and the collection, treatment, and disposal of wastewater. (Black & Veatch Corporate Study for City of Columbia dated March 19, 2007, City document 0004633-0004636 attached as Exhibit 2.)

In sum, the consultant for the City recommended over five years ago that the Utility Enterprise Fund not be raided by the City for other programs. Instead the study recommended the monies collected in the utility enterprise fund be used for the water and sewer system only – exactly what South Carolina case law has held. (See §§ 6-1-300 - 330; *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*, 519 S.E.2d 561 (1999); *Campbell Construction Co. v. City of Charleston*, 481 S.E.2d 437 (1997); *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992). It is particularly important to the rate payers that all funds collected by the City be used to fix the water and sewer systems since the EPA has found:

...the number and seriousness of these violations, and the substantial costs and work that will be necessary to return the City's wastewater system to compliance, EPA has referred this matter to the U.S. Department of Justice for civil enforcement.

(Letter to Mayor of City of Columbia dated May 18, 2010 from Cesar A. Zapata, Acting Chief, Clean Water Enforcement Branch Water Protection Division, United States Environmental Protection Agency (City document 0005420-0005421 attached as Exhibit 3).

III. SOUTH CAROLINA'S CLASS ACTION RULE IS EXPANSIVE.

The Plaintiffs have filed for class action status do not seek money damages only a return of monies to the water and sewer utility fund by the City of Columbia. South Carolina Rule of Civil Procedure 23 provides as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as a representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; (4) the representative parties will fairly and adequately protect the interests of the class; (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds One Hundred Dollars to each member of the class.¹

Further, it is settled in South Carolina that the class action rule (SCRCP 23) is more expansive than its federal counterpart and is appropriately used to effectuate classwide resolution of claims. In *Littlefield v. South Carolina Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1991), a group of former State employees challenged the manner in which State agencies were calculating pay for unused annual leave of retiring State employees. The Supreme Court reversed the denial of class certification that relied on several federal cases. The Court went on to note that the South Carolina class action rule differs significantly from Federal Rule 23. The Court stated "this State endorses a more expansive use of class action availability than its federal counterpart." 523 S.E.2d at 784.

In *Kennedy v. South Carolina Retirement System*, 549 S.E.2d 243 (2000), the Supreme Court reversed denial of class certification. The Court again noted that the South Carolina Class Action Rule is different from the Federal Class Action Rule. In its opinion, the Court then unequivocally observed "the adoption of the new Rule 23 in 1985 signaled the end of our

¹ Because this is an injunctive/declaratory class, SCRCP 23(a)(5) is not applicable.

restrictive view of class certification. This court will not read into a class action rule additional requirements based on federal law.” (*Kennedy* at 549 S.E.2d at 244).

The Supreme Court again reaffirmed this view in *Guazia v. South Carolina State Plastering, LLC* (703 S.E.2d 197 (2010)). In that case, the Court held that class actions are favored in this State and that we have a more expansive view of class actions here than our federal counterparts. The Court again reversed the trial court for a denial of class certification.

Other cases should also guide this court regarding class actions. In *Gardner v. Newsome*, 304 S.C. 328, 404 S.E.2d, 200 (1991), the court was faced with a class action over a \$99.50 closing fee in a car sale. The court noted the class action device saves the resources of the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion. This rationale was followed by the court in *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d, 190 (2003).

A. The Plaintiffs meet the numerosity requirement of the class action rule.

In order to prove this matter should be certified as a class, the Plaintiffs must meet the numerosity requirement. While South Carolina has not decided how many class members are needed to meet numerosity, this is not an issue in this case. The City of Columbia has over 114,000 water customers and 59,000 wastewater customers which is admitted by them. South Carolina courts have certified class actions with fewer than twenty members. See *Premium Investment Corp. v. Green*, 283 S.C. 464, 324 S.E.2d (S.C. App. 1984). Here, the vast number of water and sewer customers clearly prove numerosity and the fact that this action seeks only to return money to the water and sewer utility fund for all customers shows that numerosity is easily proven.

B. This case involves a common question.

South Carolina's class action rule requires common questions of law and fact exist as to members of the class. The commonality requirement is liberally construed and given permissive application so that common questions have been found to exist in a wide range of context. See *McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 54, 157-58 (Ct.App. 1986) which held:

It is important to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. **In fact, a single common issue will suffice....**

The *McGann* case has become a mainstay in South Carolina Class Action law and has been cited numerous times by the Supreme Court and Court of Appeals. Here, common issues abound since all 114,000 water customers and 59,000 sewer customers have the same interest. All class members have a common interest that the service fees they are for paying water and sewer service is used to repair and/or maintain the system. The common question that this case involves is whether or not the City of Columbia may transfer funds from the water and sewer utility fund to the general fund for purposes other than water and sewer expansion, maintenance and repair. This common question pervades this case and applies equally to all class members as do the claims and defenses of the Defendants.

Plaintiffs point to the original opinion in *Kennedy v. South Carolina Retirement System* *withdrawn on unrelated grounds and superseded by substitute opinion*, 345 S.C. 339, 549, S.E.2d 243, *rehearing denied*, 349 S.C. 339, 534 S.E.2d 322 (2001) as authority for a class in this case. In the original *Kennedy* opinion, the Supreme Court stated:

We believe the current case especially appropriate for class treatment. The number of potential plaintiffs is very large, there is one main issue of law, that issue is identical for each plaintiff, all injuries result from the same misapplication of the statute by the Retirement System and individual calculation of damages would be simple.

See also *Littlefield v. S.C. Forestry Commission*, 337 S.C. 348, 521 S.E.2d 781 (1999).²

As the Supreme Court has previously recognized, certain types of cases are ideal for class certification because there is one main issue of law such as this one which is whether or not the City of Columbia can use monies from the water and sewer utility fund for purposes other than maintenance, expansion and/or repair of that fund. As has previously been stated, the commonality question is easily met in this case.

C. The claim of the class representative is typical of all claims of class members.

The tenets of commonality and typicality most often are dealt with as one in terms of class certification. *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 158 (1982) (The commonality and typicality requirements of Rule 23(a) tend to merge). The typicality requirements of Rule 23(a)(3), requires that the claims or defenses of the class be typical. To satisfy the typicality requirement, the named representatives' claims must be similar enough to those of the class to assure that the class's interests are vigorously prosecuted. 7A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, (2nd Ed. 1986).

Here, the claims and defenses of the representative parties are typical of the claims and defenses of the class. Each Plaintiff has the identical claim. The monies that they are paying into the water and sewer utility fund are being used not for the water and sewer repair and/or maintenance but are being used by the City of Columbia for other purposes. Thus, it is clear that the most effective method of trial in this case would be through the class action vehicle. A common set of stipulated facts will apply to all class members just as it did in the *Littlefield* and *Kennedy* cases cited above.

² The Supreme Court rejected the argument that a governmental entity would comply with an Order of the Court and that a class action was not appropriate.

Further, Defendant City of Columbia committed its acts uniformly with regard to each of the class members and therefore by virtue of the acts committed, if the act is illegal or inappropriate as to the named Plaintiff, it is also illegal as to any water and sewer customer. Thus, there is no individual advantage in proceeding separately. In fact, there is a distinct disadvantage when compared with the potential costs of bringing this action, because the expense and burden of this litigation is unjustifiable for individual actions. Further, judicial economy requires that the court not be required to try each case since to do so would be duplicious. The class device resolves this case in a single action. Accordingly, because the claims of all class members and the class representative are typical, the typicality provision of the class action rule has been met.

D. The named Plaintiffs are adequate representatives.

South Carolina Rule of Civil Procedure 23(a)(4) requires that the named plaintiff fairly and adequately protect the interests of the class. The protection involves two factors: (1) counsel must be qualified, experienced and generally able to conduct the proposed litigation; and (2) Plaintiffs' claims must be sufficiently interrelated and not antagonistic to the class claims. See *Lott v. Westinghouse Savannah River Co.*, 2000 F.R.D. 539, 561 (D.S.C. 2000).

Here there is no real argument that petitioners will not fairly and adequately protect the interest of the class. Cumberland's claim is identical to the claim of every water and sewer customer for the City of Columbia. Cumberland challenges the City of Columbia's legal authority to use monies from the water and sewer fund for other purposes such as transferring those monies to the general fund. Because Cumberland's claim is exactly like all the other water and sewer customers, Cumberland has satisfied the requirement that he is an adequate representative.

Further, Petitioner's counsel have extensive experience in litigation, class actions and appellate practice in this state. Because Plaintiffs' counsel have such experience, the adequacy of representation prong of the class action rule has been satisfied.³

IV. SOUTH CAROLINA COURTS FAVOR CLASS ACTIONS IN DECLARATORY JUDGMENTS.

This case is not about money damages. It is about a class wide finding that fees collected for water and sewer charges cannot be used by the City of Columbia for other purposes. South Carolina Rule 23(a)(5) makes it clear that equitable or declaratory relief is permitted in state court class actions. The State Supreme Court has affirmed certification of a class action for declaratory judgment. See *South Carolina Public Service Authority v. C&S National Bank of South Carolina*, 300 S.C. 142, 386 S.E.2d 775 (1989). In that case, a class consisting of bondholders was certified in a declaratory judgment brought by a utility concerning its rights to change its fiscal year. It should also be noted that in *South Carolina Public Service Authority*, the Court found that publication was the appropriate way to advise class members and that it satisfied due process. 386 S.E.2d at 785.⁴

V. DISGORGEMENT IS APPROPRIATE FOR CLASS ACTIONS.

This case is one in which the Plaintiffs seek disgorgement of monies that were paid from the water and sewer fund to the general fund of the City of Columbia. Here, Plaintiffs only seek that the monies that were paid to the general fund be returned to the water and sewer fund. While no South Carolina case has defined disgorgement, a United States Supreme Court case has found that disgorgement is primarily an equitable claim and is intertwined with injunctive relief. See *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990). See also

³ If the Court is concerned, counsel can prepare an Affidavit of his prior experience in these types of cases.

⁴ Newberg, the leading authority on class actions has written in his book, Newberg on Class Actions, Section 411, that a declaratory or injunctive class is an inexpensive and powerful tool to provide representation for small claimants.

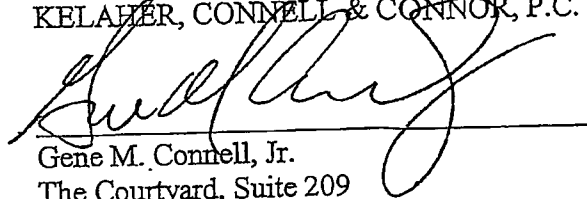
Littlefield v. South Carolina Forestry Commission, 337 S.C. 348, 523 S.E.2d 781 (1999) (since adoption of Rule 23, SCRCF, this Court has heard many cases that have used the class action procedure to allow adequate representatives to address issues which affect large groups of citizens in our state.) See *Redmond v. Lexington County School District No. 4*, 314 S.C. 431, 445 S.E.2d 441 (1994); *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992); *Payne v. Duke Power Co.*, 304 S.C. 447, 407 S.E.2d 399 (1991); *South Carolina Public Service Authority v. Citizens and Southern National Bank of South Carolina*, 300 S.C. 142, 386 S.E.2d 775 (1998).

VI. CONCLUSION

In summary, Plaintiffs' motion for an injunctive/declaratory class action should be granted and a class certified of all present and past City of Columbia water and sewer customers from 2008 to present. Further, class certification is particularly appropriate in this case because the number of potential plaintiffs is very large (114,000 water service customers and 59,000 wastewater service customers); there is one main issue of law (Can the City of Columbia transfer monies from the water and sewer utility fund to the general fund and to other City departments to pay for their operation?); the issues are identical for each plaintiff and/or class members and all injuries result from the same misapplication of South Carolina law. See *Kennedy v. S.C. Retirement System*, 345 S.C. 339, 549 S.E.2d 243 rehearing denied 349 S.C. 339, 534 S.E.2d 322 (2001). Accordingly, Plaintiffs request the Court certify a class of all water and sewer customers commencing three years prior to the filing of the Complaint.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)
DLEE@mcclarenandlee.com

Attorneys for Plaintiff

June 1, 2012

EXHIBIT #1

EVALUATION OF GENERAL FUND TRANSFER

BACKGROUND

The utility currently transfers approximately \$4.5 million annually to the general fund. As a part of the examination of indirect and overhead costs the water and sewer utility are apportioned, Black & Veatch was asked to examine the reasonableness of the \$4.5 million annual transfer. This transfer is not associated specifically with a service and in that way resembles a Payment in Lieu of Tax (PILOT). According to *AWWA MI*, PILOT is a "payment made to a governmental entity by the government-owned utility instead of taxes." PILOT payments are relatively common for municipally owned utilities that are typically exempt from local property taxes.

Evaluation Approach

The approach used to establish PILOT transfers varies. Because the payment is by definition intended to represent property taxes paid as if the utility was a private entity, the current local mil levies can be applied as one way to establish the level of payment. Some utilities may establish the transfer level as a percent of revenues. It is not uncommon for a utility to explain a level of transfer as having been set as a matter of policy, perhaps many years ago, with no clear line of sight to the original basis. Due to the variety of manners in which such a transfer can be set, we recommend evaluating the level of the Columbia transfer through a combination of benchmarking of available information as well as a calculation of the estimated tax liability that could be assessed if the utility was a private entity rather than municipally owned.

Benchmarking Data

Fortunately several resources are available for comparative purposes. Some of the resources are industry surveys that captured PILOT as a percent of utility revenues, or provided enough information that such a calculation could be made. One of our resources is an internal survey conducted by B&V that documented PILOT as a percent of utility revenues. The resources used in our comparisons in this report are defined below:

2005 NACWA Financial Survey. Published by the North American Clean Water Agencies (NACWA) since 1981, NACWA performs a financial survey of its membership every three years. Its membership is comprised of over 300 public wastewater treatment agencies in 45 states within the U.S., as well as Puerto Rico and the District of Columbia. The 2005 Survey included 141 respondents and covered a wide array of financial matters, including the identification of PILOT payments and utility revenue streams.

1999 AWWA STATS Survey. This survey is the result of a cooperative effort by the American Water Works Association (AWWA) and the AWWA Research Foundation. The survey included comprehensive utility financial and revenue statistics from over 600 U.S. and Canadian drinking water utilities. For analytical purposes our results focused on 45 utilities that served populations of 500,000 to 2,000,000. This subset includes 3 Canadian and 42 U.S. water utilities, representing communities such as Miami-Dade Water & Sewer Department, Kansas City Water Services Department, the City of Dayton, and Newport News Waterworks. Results included PILOT payments and utility revenues.

1999 AMSA Financial Survey. Conducted and published by the Association of Metropolitan Sewerage Agencies (AMSA) is a national trade association representing nearly 300 of the U.S. publicly owned wastewater utilities. The 1999 Survey gathered extensive information on revenues and expenses, including user charges and PILOT expense. Survey results for the purpose of this study included 39 wastewater utilities.

Black & Veatch Internal PILOT Survey. This survey accumulates PILOT as a percent of water utility revenues for 40 water utilities, for internal B&V use to help utilities address questions about typical PILOT levels. This information was last updated in 2002.

EVALUATION OF GENERAL FUND TRANSFER

The information contained in these surveys provides good context for evaluating the level of payment made by the Columbia Water and Sewer utility. We have attempted to include as many resources in the analysis as possible to overcome any shortcomings that may be perceived due to the age of the information used. Additionally, we have examined the results from these sources as a percent of utility revenue, which mitigates time value of money issues that could result from examining the payments in dollars.

Tax Proxy

In addition to examining benchmarking data, we have estimated the property tax liability that could be incurred if the utility was not a tax-exempt municipally owned entity. This calculation uses the utility's asset value of original cost less depreciation as the market value, and applies a commercial factor of 6 percent, to derive an estimate of assessed value. The City of Columbia mil levy is then applied to the estimated assessed value to determine the potential property tax liability of the utility. The results of this calculation are shown in Table 1, and will provide additional perspective when reviewing benchmarking information.

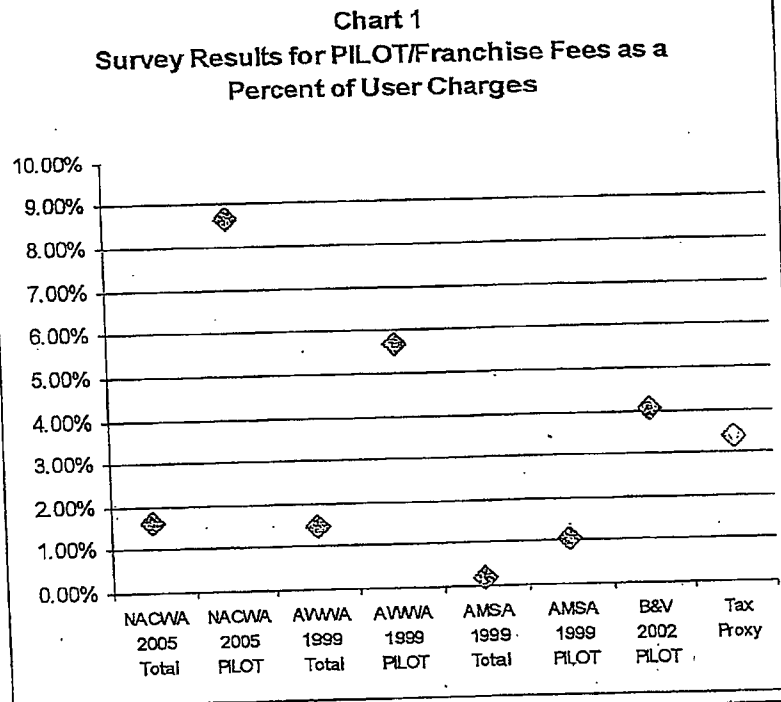
Table 1
Estimating a Tax Liability

OCLE	481,617,593
Commercial Factor	0.06
Estimated Assessed Value	28,897,056
Columbia Municipal Mil Levy	0.1025
Hypothetical Property Tax Liability	\$ 2,961,948
As a % of 2006 Revenues	3.40%

Comparative Results

The results of the benchmarking data and the estimated tax liability are shown in Chart 1 below, presented as the average of PILOT as a percent of user charges. For the NACWA, AWWA, and AMSA surveys we have shown the results for the total population of survey participants as well as for the subset of the survey participants that disclosed a PILOT payment. For example, the average PILOT as a percent of revenue across all survey participants was 1.6% according to NACWA. If we look at the average of only those participants that disclosed a PILOT payment, the average in the NACWA survey climbs to 8.6%. The Total Survey result present a result comparable to an industry average, while the PILOT only results apply only to those utilities that indicated paying a PILOT charge. It is not surprising then that the PILOT-only results are higher than that of the survey population in general.

Overall, the industry average for a PILOT transfer appears less than 2%. If we look just at the utilities that have a PILOT



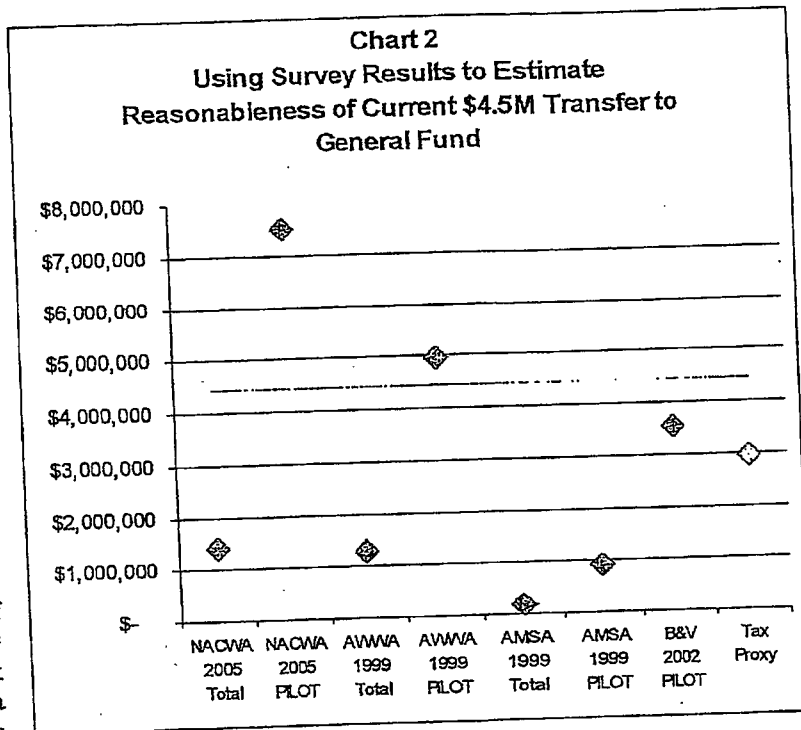
EVALUATION OF GENERAL FUND TRANSFER

transfer, the average ranges broadly from 1% to almost 9%. The tax proxy of \$2.9M calculated in Table 1 falls generally in the middle of the results at 3.4%.

The average percentage results identified in the surveys can be applied to the Columbia utility revenue stream to identify the potential range of transfer dollars supported in this analysis. The results of this exercise are shown in Chart 2.

In Chart 2, the current \$4.5 million transfer is represented by the red line. The results associated with each survey are achieved by multiplying the percent of revenue benchmark for each survey (from Chart 1) against the \$87 million utility revenue stream in 2006. This equation provides a range of transfers from approximately \$1 million to over \$7 million.

Of the 8 benchmarking results captured in Chart 2, 6 are below the current level of transfer of \$4.5 million. This suggests the current \$4.5 million transfer is relatively high compared with industry averages. In our opinion, the most defensible level of transfer would not exceed \$3.0 million as calculated in the tax proxy benchmark, representing a cost reduction of approximately \$1.5 million for the utility in 2007 budget dollars.



Given the utility pays for water received through the General Fund through other transfer arrangements and could argue the paying an additional amount through a PILOT approach is another company. However, there are services provided through the General Fund for the Protection, Police, etc. that provide a reasonable benefit and are not specifically funded through other mechanisms. In this context, a PILOT approach is a reasonable fit for Columbia.

Conclusions

All benchmarks suffer from flaws that erode their ability to be compared on an apples-to-apples basis. In the case of this analysis, some of the data is somewhat aged, some data applies to water or sewer and not necessarily both, and there are likely other limitations. However, we believe the strength of the analysis improves with the inclusion of multiple benchmarks and the general interpretation of the insights they provide. In summary:

- o Overall, the current \$4.5 million transfer appears high relative to PILOT/franchise fee benchmarks obtained from four sources.
- o It is recommended that the transfer be reduced to \$3.0 million to be more consistent with the estimated tax liability the utilities would experience if they were a private entity.

EXHIBIT #2



BLACK & VEATCH
building a world of difference

ENERGY WATER INFORMATION GOVERNMENT

March 19, 2007

Mr. John Dooley, P.E.
Director of Utilities

Ms. Missy Caughman
Budget Administrator

City of Columbia
PO Box 147
Columbia, SC 29177

Re: 2007 Indirect Cost of Service Study

Dear Mr. Dooley and Ms. Caughman:

Black & Veatch is pleased to submit to you the results of the 2007 Direct and Indirect Cost of Service Study (the "Study"). This letter provides the background, methodology, findings, and recommendations regarding the 2007 Study. Attached to this letter are summary tables indicating the results of our analysis of the 2006 budget for both the general fund (indirect budget) and the Utility (direct budget). We wish to thank the City departments that assisted with the conduct of this study and graciously provided their time, data, and perspective on cost drivers and benefit provided to the Utility.

Background

The City of Columbia, SC (the "City") operates a water and wastewater system (the "Utility") serving customers within City limits and outside the City in outlying areas, providing water service to 114,000 customers and wastewater service to 59,000 customers. The Utility's operating budget is a self sustaining Enterprise Fund, separate from the City's General Fund, where the Utility primarily recovers its operating and capital expenses through user rates.

The City provides various administrative and support services to the Utility, such as accounting, human resources, and legal. The majority of the employees and functions involved in providing these administrative services are funded by the City's General Fund. In return the Utility pays the City for these services through an indirect transfer to the General Fund, totaling \$3.2 million for 2006/07. This transfer covers functions provided by organizations such as the city manager's office and council's office.

In addition to the indirect costs, direct costs include the supply, treatment, and distribution of water, and the collection, treatment, and disposal of wastewater, as well as support services and other municipal functions that have been budgeted by the Utility based on historical precedent and City budget practices.

City departments that currently reside within the Utility enterprise fund budget, totaled approximately \$15 million in 2006. Departments that directly provide service to the Utility, include customer service, GIS management, and construction management, among others.

Black & Veatch was hired by the Utility to review its direct funding and indirect transfers to the City and the services provided by these non-Utility departments. Part of the study was to determine the level of service provided to the Utility and at what costs. Black & Veatch also looked for services that the Utility

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Black & Veatch Corporation · 1145 Sanctuary Parkway · Suite 475 · Alpharetta, GA 30004 USA · Telephone: 770.751.7517

City of Columbia, South Carolina
Mr. Dooley & Ms. Caughman

Page 2
March 19, 2007

may have been receiving from the General Fund but were not explicitly included in the current budget transfer mechanisms.

In addition to the indirect transfer of \$3.2 million, and the direct cost of \$15 million, the Utility transfers an additional \$4.5 million to the City's General Fund as directed by resolution. Analysis of this transfer was not included in the scope of this study, and therefore no opinion has been made in its regard.

Methodology

The first step in the study was to review both the Fiscal Year 2006 general fund budget and the Utility budget to identify and understand the departments within each budget. We then met with staff from both the Utility and City to discuss general fund department functions and roles, and the degree to which a given department may provide service to the Utility. After these discussions, we were able to determine that certain departments provided services primarily to the benefit of the entire Columbia community, but no services discreetly attributable to the Utility operations. Such departments included solid waste, parks and recreation, police, and municipal court. The departments were excluded from further analysis under this study. For the remaining general fund departments, key managers and employees were interviewed to understand their major functions, activities, and responsibilities, in order to determine whether or not a causal relationship could be established between these department's activities and the Utility operations. If a causal link was identified, workload and cost drivers were discussed as a first step in determining a method for calculating the cost of service provided.

A similar process was followed with respect to municipal departments currently funded directly by the Utility budget. After reviewing the Utility budget, and following the initial discussions with the Utility and City budget staff, interviews were conducted with key municipal department managers and leadership to develop a deeper understanding of operations of these municipal departments. The purpose of these interviews was to identify areas where services provided by the municipal department were likely to provide benefit to organizations beyond the Utility itself. These interviews followed the same general approach as those conducted to better understand the indirect allocation described above. Specifically, we met with department managers and leadership to determine a given department's primary function, activities, and responsibilities. We collaborated with department managers in the development of causal links, workload and cost drivers, as a first step in determining a method for quantifying the benefit received by the Utility.

After this set of initial interviews and data gathering, activity-based costing principles were applied to establish unit costs for various services provided by departments. Some of the cost drivers used to allocate department budgets between the Utility and general fund budget included the number of employees, number of workstations, square footage occupied, or number of purchase orders. The cost drivers varied depending on the nature of the service provided. For example, under accounting function (1401), payroll staff expense was allocated to the Utility based on the number of City employees, under the assumption that payroll transaction costs are generally the same for any given City employee and therefore the best driver of costs is most directly related to the number of employees for whom payroll transactions are processed.

This approach works well for departments that provide a transaction-based service, such as payroll. However, some departments and cost centers are not transaction-based, and did not have a clear cost-causative method for allocating expenses. In such instances it is necessary and reasonable to gather subject matter expert (SME) estimates that represent the amount of time spent or resources dedicated to providing services to City departments and functions. These estimates were primarily gathered during

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City of Columbia, South Carolina
Mr. Dooley & Ms. Caughman

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March 19, 2007

the initial interview process. In some instances, follow up interviews were required to develop a deeper understanding of a department's functions and costs, and validating the approach.

For example, the City council and the City managers office does not have a transaction-based set of responsibilities. However, based on interviews with City staff it was determined a significant amount of time and resources within those departments are focused on two primary activities, which included budget development, review, and approval, and Council agenda items. After costs were attributed to these primary functions based on SME estimates, the costs were assigned to the Utility based on its proportionate share of total budget dollars or agenda items reviewed.

Findings & Recommendations

Through the conduct of the study and associated interviews with department managers, some of the key findings include:

- Services funded by the Utility provide benefit to both the general fund and the Utility, such as GIS.
- Departments provide services that benefit the Utility, but were being 100% funded by the general fund, such as
 - Overtime for Homeland Security personnel
 - Fire hydrant maintenance vehicles and materials
- Department budgets that were 100% funded directly by the Utility provided no direct, causal benefit to the Utility, such as Economic Development.
- Utility funds have purchased 5 buildings that are used by both Utility and Municipal departments, yet no rent or return is being assessed for use of the buildings by non-Utility personnel.

In addition to the key findings noted above, we have two primary recommendations for further actions by the City and Utility:

- The City should continue its pursuit of performance-based budgeting, as it provided a strong basis for further refinement in cost attribution to the Utility.
- As part of the analysis, a model is being created to enable repeated applications of the study framework. The model inputs should be updated annually as part of the budget cycle to provide current linkage between activities, costs, and drivers.

Based on our analysis, of the Utility's 2006 budget of \$94.8 million, approximately \$7.6 million of directly funded costs should not be funded by the Utility Enterprise Fund and are more appropriately funded through the general fund budget. This includes \$3.6 million for non-departmental, capital improvements, and component units (development corporations). Our analysis is not intended to suggest the activities and functions provided by these departments is not of value to the City; rather, our analysis indicates no direct cost causation or benefit could be attributed to the Utility for these services, and therefore no justification for direct funding from the Utility was supported for purposes of this study.

The cost of services and associated benefit to the Utility provided through the indirect transfer totals \$2.22 million. These costs are primarily associated with legal support, human resources, legislative offices, and accounting. When compared to the budgeted indirect transfer level of \$3.2 million, our analysis supports a reduction in this transfer of \$978,000. It should be noted, based on the manner in which the Utility budget is presented, this amount is included in the \$7.6 million noted above.

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City of Columbia, South Carolina
Mr. Dooley & Ms. Caughman

Page 4
March 19, 2007

This study assumes that the budget for each department is commensurate with the level of service provided to support the operating functions of the City government and Utility. This study did not include a performance or efficiency assessment of the City and Utility departments.

Finally, during the conduct of the study it was determined that some buildings that were purchased with Utility funds were being used and occupied by departments other than the Utility itself. Because these assets were purchased with Utility funds, it is reasonable to expect a return on investment that could be recouped through rent or other such charges applied to the City departments that currently use the space. This amount was not quantified during the conduct of the study and warrants further study regarding the remaining value of the assets on the Utility books and ways in which a return on those assets may be achieved.

Conclusion

As the City grows and evolves, it is reasonable to expect roles and activities of each department to change, and levels of service to the Utility to shift. It is therefore recommended that the City complete an indirect cost of service study like this one every five to ten years. As an enterprise fund that receives its operating revenues from rate payers for water and wastewater services received, it is important that the operating budget be directly attributable to the supply, treatment, and distribution of water, and the collection, treatment, and disposal of wastewater.

We appreciate the opportunity to work with you and your staff. If you have any further questions or concerns, please call me at (213) 804-6702.

Very truly yours,

BLACK & VEATCH

Thomas Peterson
Vice President

CC:
Craig Rittling
John Kersten

DRAFT

EXHIBIT #3



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

MAY 18 2010

RECEIVED

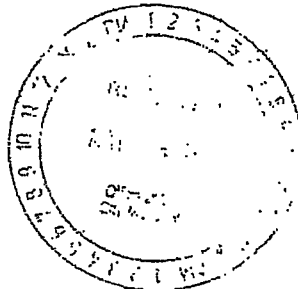
MAY 20 2010

CITY OF COLUMBIA
MAYOR'S OFFICE

OVERNIGHT MAIL

The Honorable Robert D. Coble
Mayor of Columbia
1737 Main Street
Columbia, South Carolina 40507

Re: Clean Water Act Violations
NPDES Permit: SC0020940



Dear Mayor Coble:

On April 14, 2009, the U.S. Environmental Protection Agency, Region 4, (EPA) issued a Notice of Violation to the City of Columbia (the City) for effluent limit violations of the subject permit issued under the National Pollutant Discharge Elimination System (NPDES) and the Clean Water Act (CWA).

Since that time, EPA has reviewed information submitted by the City in response to requests made under Section 308¹ of the CWA, 33 U.S.C. § 1318, and other information submitted by the City relating to the compliance status of its wastewater system. EPA's review has resulted in the identification of numerous additional violations of the CWA. These violations include the frequent occurrence of sanitary sewer overflows (SSOs) from the City's sanitary sewer system over a long period, which continue to be reported to EPA by the City on a routine basis. EPA has also identified additional effluent limit violations of the NPDES permit for the City's WWTP discharge, and violations of requirements in that permit relating to implementation of the City's approved industrial pretreatment program. Such violations are subject to enforcement action pursuant to Section 309 of the Act, 33 U.S.C. § 1319. This Section provides for the issuance of administrative compliance orders, administrative actions to assess penalties, and/or the initiation of civil judicial or criminal actions.

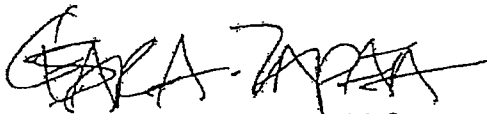
In light of the number and seriousness of these violations, and the substantial costs and work that will be necessary to return the City's wastewater system to compliance, EPA has referred this matter to the U.S. Department of Justice for civil enforcement. EPA's preference is to negotiate a resolution of this matter that will ensure the City takes appropriate actions to address its compliance problems in a timely manner and pays an appropriate penalty. Such a resolution would be memorialized in a Consent Decree that would be entered in federal court and enforceable as an Order of the Court.

¹ The Section 308 responses were not complete. To the extent that this was due to Columbia's lack of access to certain responsive documents at the time of the response, EPA requests that the City promptly respond to the missing items as it gains access to this information.

prepared to describe and discuss any existing plans the City has to bring the wastewater system into compliance. The City has the right to be represented by legal counsel.

Please have your appropriate staff contact Ms. Mary Millner, Enforcement Officer, at (404) 562-9792 to indicate the City's availability for a meeting on the proposed date, or your attorney may contact Mr. Paul Schwartz, Associate Regional Counsel, at (404) 562-9576.

Sincerely,

A handwritten signature in black ink, appearing to read "César A. Zapata", with a long horizontal flourish extending to the right.

César A. Zapata, Acting Chief
Clean Water Enforcement Branch
Water Protection Division

cc: Glenn Trofatter, SC DHEC, Bureau of Water
Roger P. Hall, SC DHEC Office of General Counsel
Amy Gillespie, US DOJ
Carol DeMarco, US EPA, Office of Civil Enforcement

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,

vs.

City of Columbia,

Defendant.

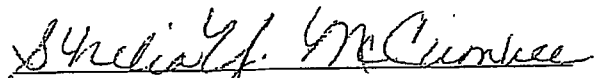
AFFIDAVIT OF SERVICE
BY MAIL

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

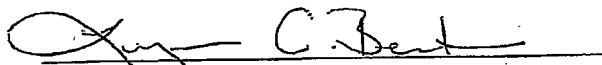
Thomas E. Lydon, Esq.
M. McMullen Taylor, Esq.
McAngus Goudelock & Courie, LLC
P. O. Box 12519
Columbia, SC 29211

DOCUMENT: Plaintiffs' Memorandum in Support of Class Certification

DATE OF MAILING: June 1, 2012


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 1st day of June, 2012.


Notary Public for South Carolina
My Commission Expires: 2-17-19

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,

vs.

City of Columbia,

Defendant.

PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
STANDING

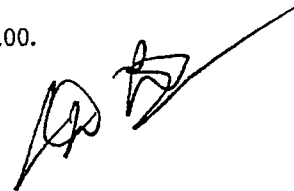
RICHLAND COUNTY
FILED
2012 JUN -5 PM 12:23
JANETTE W. McBRIDE
C.C.P. & G.S.

BACKGROUND FACTS

This case involves a challenge by customers of the City of Columbia's water and sewer system to the practices of the City of Columbia of transferring monies collected by the City of Columbia as water and sewer fees to the City of Columbia's general fund where those monies are spent for purposes other than the water and sewer system and allowing other departments of the City of Columbia, particularly those within the City's Office of Economic Development, to spend money out of the account where water and sewer fees are deposited.

On a fiscal year basis the City of Columbia collects in excess of \$100,000,000.00 in water and sewer fees¹. Water and sewer fees collected by the City of Columbia are approximately 48% to 49% of the City of Columbia's total annual budget. Each year, the City of Columbia transfers \$4.5 Million from monies collected as water and sewer fees to the general fund and has done so for many years (see EXHIBITS 1 and 2 - City of Columbia Budget Summaries for FY=2010/2011 and FY 2011/2012). Further, the City of Columbia funds the Office of Business Opportunities, the Economic Development Department, the Public Relations

¹ FY 2010/2011= \$103,708,234.00. FY 2011/2012 = \$110,400,499.00.



Department, various development corporations, the Economic Development Contingency Fund, the City Center Partnership and Community Promotions by using money collected from water and sewer fees for those other uses. Plaintiffs' lawsuit alleges that such transfers are illegal and in violation of established South Carolina precedent.

Plaintiffs seek a declaratory class-wide judgment on behalf of all City water customers to require Columbia to repay the utility fund those funds transferred to the General Fund of the City for the last three years and to recover money expended by the City from water and sewer fees for purposes other than the water and sewer system. Monies in the water and sewer utility fund are specifically designated for use for water and sewer services only and may not be used for other purposes. See S.C. Code Ann. § 6-1-330(B) (Supp. 2011) ("EXHIBIT 3") – "The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid."

The essence of this case turns on whether or not the City of Columbia may use monies collected as water and sewer fees for other purposes. The Plaintiffs believe that South Carolina law prohibits the City of Columbia from using these monies for other than for the operation, repair, upgrade, maintenance and/or expansion of the water and sewer systems of the City. S.C. Code Ann. §§ 6-1-330 and 6-1-300 subsection 6 (Supp. 2011) define a service or user fee as follows:

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.

A number of South Carolina Supreme Court cases have held that a sewer service charge is a fee and cannot be used for other purposes. See *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*, 519 S.C.2d 561 (1999); *Campbell Construction Co. v. City of*

Charleston, 481 S.E.2d 437 (1997); *Ford v. Georgetown County Water and Sewer District*, 532 S.E.2d 873 (2000). Also see *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992).

It is well settled law in South Carolina that service or user fees collected by a city for water/sewer service must be used solely to pay costs related to the service or program for which the fee was paid. In this case, the Defendant City of Columbia, in violation of South Carolina statutes collected fees for services from the water and sewer service and transferred those monies each year to the City's general fund for use in other departments.

Plaintiffs' action seeks to require the City to return those monies within the last three years that were paid to the general fund (about \$4.5 million per year) which were used to fund other City departments. See *Brown v. County of Horry*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992) (South Carolina Supreme Court explained that "a service charge is imposed on the theory that the portion of the community which is required to pay the charge receives some special benefit as a result of the improvement made with the proceeds of the charge." The *Brown* Court characterized service charges as an alternative to increasing general property tax intended to reduce the tax burden which otherwise would have to be borne by taxpayers generally. Similarly, S.C. Code Ann. § 6-1-330 contemplates that "a service or user fee might be used to fund a service that was previously funded by property tax revenues."

The City of Columbia has challenged the standing of the Plaintiffs to maintain this lawsuit and have moved to dismiss Plaintiff's action on that basis. Plaintiffs oppose that Motion and submit that they do have standing to bring and maintain this action against the City of Columbia.

With regard to the Plaintiffs, Plaintiffs' Second Amended complaint alleges:



FOR A FIRST CAUSE OF ACTION

1. The Plaintiff Joseph S. Azar is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
2. The Plaintiff Frank J. Cumberland, Jr. is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
3. The Plaintiff Michael A. Letts is a citizen and resident of the County of Richland, State of South Carolina, who lives outside the corporate limits of the City of Columbia.
4. The Defendant, City of Columbia, is a body politic and is a governmental entity organized and existing pursuant to the laws of the State of South Carolina.
5. The Defendant provides water and sewer service to the Plaintiffs and thousands of others in the City of Columbia and surrounding areas.
6. Plaintiffs bring this action pursuant to South Carolina Rule of Civil Procedure 23 which provides in pertinent part that a class action may be brought when there are questions of law and fact common to the class; the class is so numerous; the claims of the representative parties are typical of the claims of the class; the class representatives will fairly and adequately protect the interests of the class; and the amount in controversy exceeds One Hundred Dollars (\$100) for each member of the class.
7. Plaintiffs are and continue to be water and sewer customers with the Defendant City of Columbia.

8. That the Plaintiffs bring this as a class action on behalf of all past and current water and sewer customers of the City of Columbia..... (Plaintiffs' Second Amended Complaint at pages 1 and 2).

For the reasons set forth hereinafter Plaintiff's submits that Defendant's Motion to Dismiss for lack of standing should be denied.

MOTIONS TO DISMISS ARE DECIDED BASED UPON
THE ALLEGATIONS IN THE PLEADINGS

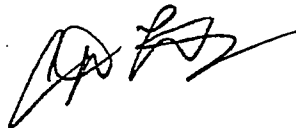
Defendant's Amended Motion to Dismiss has been made under Rule 12(b)(1), *SCRCP*.

Rule 12(b)(1), *SCRCP*, provides:

RULE 12

**DEFENSES AND OBJECTIONS - WHEN AND HOW PRESENTED - BY
PLEADING OR MOTION - MOTION FOR JUDGMENT ON PLEADINGS**

(b) **How Presented.** Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a cause of action or defense to which an adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that cause of action or defense. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. (emphasis added)



As stated by the South Carolina Supreme Court in *Toussaint v. Ham*, 292 S.C. 415, 357

S.E.2d 8 (1987):

A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987). See also 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 (1969) (The question is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. The complaint should not be dismissed merely because the court doubts that plaintiff will prevail in the action.) (emphasis added) 357 S.E.2d at 8.

Accord *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006); *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007).

PLAINTIFFS HAVE STANDING TO SUE IN THIS CASE

Perhaps the most instructive South Carolina appellate court cases addressing, both directly and indirectly, the standing of a citizen litigant to sue government entities over unlawful spending of public monies is the line of cases involving lawsuits brought by Edward D. Sloan, Jr., a Greenfield County resident. See *Sloan v. Friends of the Huntley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *Sloan v. Greenville Hospital System*, 388 S.C. 152, 694 S.E.2d 532 (2010); *Sloan v. Greenville County*, 380 S.C. 528, 670 S.E.2d 663 (Ct. App. 2009); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007); *Sloan v. Friends of the Huntley*, 369 S.C. 20, 630 S.E.2d 474 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Greenville County*, 361 S.C. 568, 606 S.E.2d 464 (2004); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C.



531, 590 S.E.2d 338 (Ct. App. 2003); and, *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000)².

Ten of the twelve "*Sloan*" cases involved challenges concerning the expenditure of public monies by a government or quasi-government entity. Two of those nine cases were Freedom of Information cases requesting information on the expenditure of public monies and awards of attorneys fees to the prevailing party in those cases (*Sloan v. Friends of the Huntley* in 2006 and 2011). One case involved the dual office holding provisions of the S.C. Constitution (*Sloan v. Sanford*). One case involved a constitutional issue regarding appointment of S.C. Highway Department Commissioners (*Sloan v. Wilkins*). The eight remaining cases all directly involved challenges by a citizen litigant (*Sloan*) to the expenditure of public monies by a government entity.

In ten of the twelve "*Sloan*" cases the Defendant unsuccessfully challenged *Sloan's* standing to bring or maintain the subject lawsuits.

In *Sloan v. Department of Transportation* (2008), Supra, *Sloan* challenged the S.C. Department of Transportation's decision to use an "emergency procurement" provision rather than competitive bidding to award an \$8,000,000.00 highway construction project. The South Carolina Supreme Court addressed the issue of *Sloan's* standing to maintain the lawsuits stating:

Generally, "a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained." *Sloan v. Wilkins*, 362 S.C. 430, 436, 608 S.E.2d 579, 582-83 (2005). Nonetheless, "[a] taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina," *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct.App.2000), and indeed has been repeatedly recognized as to *Sloan* himself. See, e.g., id.: *170 *Sloan v. Department of Transp.*, 365 S.C. at 304, 618 S.E.2d at 878-79; *Greenville County I*, 356 S.C. at 548, 590 S.E.2d at 347.7 Furthermore,

² In each of the twelve (12) cited "*Sloan*" cases was also granted "class action" status.

"[s]tanding may be conferred upon a party 'when an issue is of such public importance as to require its resolution for future guidance.'" *Sloan v. Wilkins*, 362 S.C. at 436-37, 608 S.E.2d at 583 (quoting *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)).

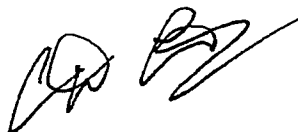
The Court of Appeals has stated that "[t]he expenditure of public funds pursuant to a competitive bidding statute is of immense public importance." *Sloan v. School Dist. of Greenville County*, 342 S.C. at 524, 537 S.E.2d at 303. Numerous other jurisdictions which have addressed taxpayer standing when the issue involves competitive bidding requirements have specifically found that competitive bidding laws are for the benefit of taxpayers. See *id.* at 521-22, 537 S.E.2d at 302-03 (and cases cited therein). Indeed, the requirement that contracts "only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to maintain the public's trust and confidence in governmental management of public funds." *Id.* at 524, 537 S.E.2d at 303.

We find *Sloan v. School Dist. of Greenville County* is particularly instructive on this issue. In that case, the School District procured construction contracts in February 1998 for three middle schools pursuant to its own procurement code's emergency exception to the competitive sealed bid procedure. The District justified the need for the emergency procurement because it wanted the construction of the schools completed before school started in August 1999. The Court of Appeals found *Sloan* had standing, stating as follows: "the public interest involved is the prevention of the unlawful expenditure of money raised by taxation. Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts. Taxpayers must have some mechanism of enforcing the law." *Id.* at 523, 537 S.E.2d at 303 (citation, quotation marks, and alteration omitted).

Likewise, in this case, Sloan has standing because he has alleged a misuse of the statutory emergency procurement provision and therefore an unlawful expenditure by public officials. (emphasis added) 666 S.E.2d at 241

Here, Plaintiff's lawsuit challenges the unlawful past, present and future unlawful expenditure of tens of millions of dollars collected by the City of Columbia as water and sewer fees for purposes other than its water and sewer system. Plaintiff, and others similarly situated, have been directly harmed by the City of Columbia's unlawful appropriation of these monies for purposes other than its water and sewer system in several different ways. Plaintiff's Second Amended Complaint alleges:

11. That the fees which the Plaintiffs paid were specifically designated for expenses of and improvements to the water and sewer systems including the water and sewer treatment plants and the various delivery portions of the water and sewer service throughout the City and other areas where the City provides water and sewer service.
12. That for more than a decade, and notwithstanding the provisions of S.C. Code Ann. § 6-1-300, *et. seq.* (Supp. 2011) restricting the use of revenue derived from a service or user fee imposed to finance the provision of public services to pay the costs related to the service or program for which the fee was paid, the City of Columbia has diverted and spent monies it collected as water and sewer fees for uses and purposes other than the City of Columbia water and sewer system.
13. That in the past 12 years the City has transferred in excess of \$80 million dollars out of its water and sewer fund for purposes and uses other than its water and sewer system.
14. That at the same time the City of Columbia was diverting and spending monies it collected as water and sewer fees for uses and purposes other than expenses of the City of Columbia water and sewer system, the City of Columbia was deferring, postponing, delaying and/or neglecting to perform appropriate and necessary upkeep, maintenance, repairs and improvements to the water and sewer system necessary to keep those systems in good condition and proper working order.
15. That as a direct and proximate result of the City of Columbia deferring, postponing, delaying and/or neglecting to perform appropriate and necessary upkeep, maintenance, repairs, improvements and/or expansions to the water and sewer



system, the water and sewer system decayed, became run-down and dilapidated, and aged beyond its useful life to a point where water and sewer leaks, overflows and other problems were not only common but also exceeded levels of discharges allowed by Environmental Protection Agency ("EPA") and/or the South Carolina Department of Health and Environmental Control ("SC DHEC") rules and regulations.

16. That, on information and belief, in an effort to deceive the general public including its water and sewer customers, the EPA and/or SC DHEC, the City of Columbia falsified record keeping of sewage overflows so as to make it appear that the untreated sewage overflows, spills or discharges by the City of Columbia were less severe than the sewage overflows which actually occurred.
17. That sewage overflows from the City of Columbia water and sewer system have exceeded allowable levels per EPA and SC DHEC rules and regulations and have resulted in unwarranted pollution of the lands and waters of the areas served by City of Columbia water and sewer system as well as those waterways downstream from where such sewage overflows occurred and, on occasion, have resulted in Plaintiff's and others being denied peaceful use and enjoyment of public and private properties due to the health hazards resulting from those sewage overflows.
18. That Plaintiffs are informed and believe that the water and sewer systems have not been properly operated or maintained resulting in otherwise unnecessary sewage overflows and water leaks, present unnecessary and unreasonable health hazards to Plaintiffs and other members of the public and are or were on the verge of being taken over by the Environmental Protection Agency and/or the South Carolina Department of Environmental Control. Notwithstanding, the Defendant City of Columbia



continues to use the fees collected by it for other purposes and transfer those fees in the general revenue fund.

19. That the numerous leaks and overflows of untreated sewerage by the City of Columbia water and sewer system have resulted, from time to time, in the foul, unpleasant and offensive stench of raw sewage wafting through various parts of the City of Columbia and has been objectionable and offensive to Plaintiffs and other persons of normal sensibilities within those areas.

20. That, belatedly, the City of Columbia recognized the folly of its actions in spending water and sewers fees for purposes other than the water and sewer system and, at the same time neglecting, postponing and deferring proper upkeep, maintenance, repairs and improvements to its water and sewer system and hired Black & Veatch, an engineering, consulting and construction company, to conduct a study of and issue a report on the City's water and sewer system, which report concluded that the City needed to spend hundreds of millions of dollars, possibly as much as \$500,000,000.00, above normal operational expenses and implement rate increases of 5% per year for each year for a period of five (5) years to bring its water and sewer system into good and proper working order.

There are numerous exceptions to the general rule that a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained: "Taxpayer standing" where government is unlawfully spending public monies is one example as is evident from the *Sloan*



line of cases. Here, the only distinction is that monies which the City of Columbia is unlawful spending are "fees" collected by the City from "fee payers" as opposed to "taxes" collected from "taxpayers". That terminology distinction is immaterial and irrelevant to the issue of standing.

Other exceptions include "public importance".

The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted). Yet the very nature of the public importance exception to general standing requirements resists a formulaic approach, as each case must turn on "the competing policy concerns" as we expressed in *Sloan v. Sanford*.FN2. *ATC v. Charleston County*, 380 S.C. 191, at 198, 669 S.E.2d 337 at 341 (2008)

Here, the issues raised by Plaintiff Complaint are clearly issues of significant public importance. The financial practices which the City of Columbia has engaged with water and sewer fees are longstanding practices which the City has shown not only no intent to cease and every intention of continuing going into the future. How the City of Columbia spends or is entitled to spend monies it collects as water and sewer fees is an issue of public importance which directly affects well more than 100,000 water and sewer fee payers, involves more than \$100,000,000.00 annually and thus cries out for future guidance.

Also see *Evins v. Richland County Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000).

In addition to the foregoing Plaintiff's Complaint alleges that the City's mismanagement of its water and sewer system and failure to properly maintain the same has resulted in the discharge of untreated sewage overflows, spills or discharges by the City of Columbia sewer



system and polluted the lands and waters in and around the City. Plaintiff's also have standing to sue under the South Carolina Pollution Control Act, S.C. Code Ann. § 48-1-30, et. seq. (Supp. 2011) and in particular under S.C. Code Ann. § 48-1-250 (Supp. 2011) to remedy pollution cause by the City of Columbia acts and/or omissions and to abate future pollution from similar actions and/or omissions by the City of Columbia in the future.

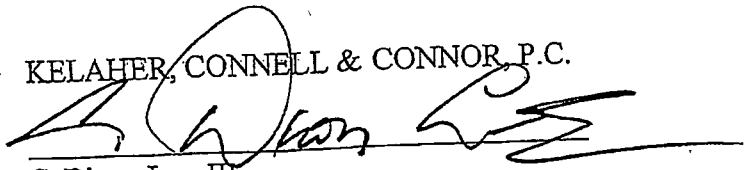
CONCLUSION

Plaintiff's Second Amended Complaint alleges that the City of Columbia has and continues to unlawfully spend millions of dollars of monies it has collected and continues to collect as water and sewer fees for purposes other than the City's water and sewer system. Plaintiffs pay water and sewer fees. They have standing to sue in this case by virtue of the fact that they pay the very water and sewer fees which the City has and continues to spend unlawfully, contrary to the statutory law of this State, as well as by virtue of the fact that issues raised by their Complaint are issues of great public importance. Finally, Plaintiffs have standing to sue under the South Carolina Pollution Control Act, S.C. Code Ann. § 48-1-30, et. seq. (Supp. 2011) and in particular under S.C. Code Ann. § 48-1-250 (Supp. 2011) to remedy pollution cause by the City of Columbia acts and/or omissions and to abate future pollution from similar actions and/or omissions by the City of Columbia in the future.

For the reasons set forth above, individually and collectively, Plaintiffs submit that Defendant's Motion to Dismiss should be denied.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)

Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)
(803) 252-3548 (facsimile)
dlee@mclarenandlee.com

Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

Attorneys for Plaintiff

June 4, 2012

EXHIBIT 1



FY 2010/2011
CITY OF COLUMBIA
PROPOSED BUDGET SUMMARIES

- Combined Funds Summaries with Special Revenues & Grants
- General Fund
- Utilities
 - Water & Sewer Operating
 - Storm Water Operating
 - Parking
- Special Revenue
 - Hospitality Tax
 - Accommodations Tax

**CITY OF COLUMBIA
COMBINED OPERATING FUNDS
BUDGET SUMMARY**

FY 2010/2011

	GENERAL FUND	WATER & SEWER	STORM WATER	PARKING	HT	AT	COUNTY FIRE & 911	CDBG/HOME/HO PWA GRANTS*	GRANTS*	TOTAL
REVENUE										49,273,135
GENERAL PROPERTY TAX	49,273,135				7,500,000					34,970,800
LICENSES AND PERMITS	27,470,800					1,200,000				12,287,058
FROM OTHER AGENCIES	11,087,058									120,079,925
CURRENT SERVICE CHARGES	9,032,605	101,852,824	4,801,396	4,393,100						3,198,611
FINES & FORFEITURES	913,611	250,000		1,900,000	15,000			404,851		524,886
MISCELLANEOUS REVENUE	25,935	20,500		73,800						2,130,000
INTEREST ON INVESTMENT	50,000	1,500,000	300,000	280,000						352,450
RENTS & SALE OF PROPERTY	179,050	85,000		88,400						222,816,865
TOTAL REVENUE	98,032,194	103,708,324	5,101,396	6,735,300	7,515,000	1,200,000		0	404,651	
TRANSFERS IN										1,001,044
FROM GENERAL FUND			800,000							
FM GRANTS			200,000				19,785,872	3,817,051	14,000,622	21,524,302
FROM OTHER FUNDS	1,538,430									4,500,000
FROM WATER & SEWER OPERATING	4,500,000									1,000,000
FROM PARKING FUND	1,000,000									25,000
FROM ACCOMMODATIONS TAX	25,000									2,300,000
FROM HOSPITALITY TAX	2,300,000							889,233		2,565,509
FROM FUND BALANCE	0	0		676,096	975,180	25,000	19,785,872	4,706,284	14,000,622	36,732,906
TOTAL TRANSFERS IN	9,363,430	0	1,000,000	676,096	975,180	25,000	19,785,872	5,110,835	14,000,622	259,549,771
TOTAL REVENUE & TRANSFERS IN	107,395,624	103,708,324	6,101,396	7,411,396	8,490,180	1,225,000	19,785,872	5,110,835	14,000,622	
DEPARTMENTS										8,019,469
GENERAL GOVERNMENT	8,236,187	1,783,282								2,515,924
MUNICIPAL COURT	2,515,924									7,067,794
FINANCE	2,097,909	4,849,836		120,049				0	21,353	4,007,140
DEVELOPMENT SERVICES	4,007,140						18,247,332		4,275,082	69,966,993
PUBLIC SAFETY	50,167,839	1,230,778						106,000	93,745	8,380,095
PARKS & RECREATION	9,275,095								26,000	21,411,323
PUBLIC WORKS	17,439,980	1,115,067	2,759,357	96,909					247,581	3,109,486
GENERAL SERVICES	1,427,035	1,682,451								3,478,145
INFORMATION TECHNOLOGY/IGIS	2,766,042	712,103								46,290,017
UTILITIES & ENGINEERING		45,236,100	1,053,917					1,282,695	3,292,281	3,949,390
COMMUNITY & ECONOMIC DEVELOPMENT	462,511	2,224,184								2,815,928
PARKING GARAGE OPERATIONS				2,815,928						182,011,704
TOTAL DEPARTMENTS	86,395,662	58,833,801	3,813,284	3,032,886	0	0	18,247,332	1,367,695	7,986,042	
NON-DEPARTMENTAL & MISC.										240,000
NON-DEPARTMENTAL & MISC.	150,000	85,000	0	5,000						540,000
ECONOMIC DEVELOPMENT CONTINGENCY		640,000				4,631,600	1,200,000	1,888,887	99,296	7,965,487
COMMUNITY PROMOTION AGENCY FUNDING	175,000	70,000								25,000
RICHLAND SD# 1/TOGETHER WE CAN	25,000						0			505,000
OFFICE SPACE LEASE	505,000						0			350,000
DETENTION CENTER PER DIEM	350,000							145,166	522,731	1,062,166
HOMELESS SERVICES	917,000	0	0	0				108,383		1,157,961
SPECIAL RESERVE	1,004,129			45,449						30,608,623
DEBT SERVICE		27,440,562		3,168,061						43,076,264
TOTAL NON-DEPARTMENTAL	3,126,129	28,135,562	0	3,218,510	4,631,600	1,200,000	0	2,142,436	622,027	
TOTAL EXPENDITURES	99,521,791	86,969,363	3,813,284	6,251,396	4,631,600	1,200,000	18,247,332	3,510,131	8,578,069	224,465,941
TRANSFERS OUT & OTHER FINANCING USES										2,606,021
TO OTHER FUNDS					1,556,580		1,538,540	1,067,481	0	6,979,694
TO DEBT SERVICE	5,421,114	819,500		160,000						2,632,219
TO INTERNAL SERVICE FUNDS	1,652,719	11,419,461	2,288,112					533,323	5,422,553	14,240,896
TO CAPITAL PROJECTS		4,500,000		1,000,000	2,300,000	25,000				7,825,000
TO GENERAL FUND	800,000									800,000
TO STORM DRAIN	7,873,833	16,738,961	2,288,112	1,160,000	3,858,580	25,000	1,538,540	1,600,804	5,422,553	35,083,830
TOTAL TRANSFER OUT	107,395,624	103,708,324	6,101,396	7,411,396	8,490,180	1,225,000	19,785,872	5,110,935	14,000,622	259,549,771
TOTAL BUDGET										
TOTAL SURPLUS(DEFICIT)	0	0	0	0	0	0	0	0	0	0

* CDBG, HOME & HOPWA are subject to review and final approval

** GRANTS - budgets listed are based on current grant balances as of 4/30/2010 and known grant awards for FY 10/11. These allocations may include multi-year funding and are subject to change.

8/17/2010

GENERAL FUND SUMMARY
FISCAL YEAR 2010/2011

revised 6/16/10

	ACTUAL FY 08/09	APPROVED FY 09/10	APPROVED FY 10/11
REVENUE			
GENERAL PROPERTY TAX	48,292,379	48,785,696	49,273,135
LICENSES AND PERMITS	29,590,835	26,763,600	27,470,800
FROM OTHER AGENCIES	11,669,903	10,692,340	11,087,058
CURRENT SERVICE CHARGES	9,387,072	8,940,856	9,032,605
FINES & FORFEITURES	922,674	880,000	913,611
MISCELLANEOUS REVENUE	26,500	130,000	25,935
INTEREST ON INVESTMENT	97,831	250,000	50,000
RENTS & SALE OF PROPERTY	2,730,963	219,050	179,050
TOTAL REVENUE	102,738,158	96,661,542	98,032,194
TRANSFERS IN			
FROM OTHER FUNDS	1,138,185	1,506,526	1,538,430
FROM WATER & SEWER OPERATING	4,500,000	4,500,000	4,500,000
FROM PARKING FUND	1,000,000	1,250,000	1,000,000
FROM ACCOMMODATIONS TAX	25,000	85,000	25,000
FM HOSP. TAX FOR PARK RANGERS & PUBLIC SAFETY	2,300,000	2,300,000	2,300,000
TOTAL TRANSFERS IN	8,963,185	9,641,526	9,363,430
TOTAL GENERAL FUND REV & TRANS	111,701,343	106,303,068	107,395,624
BUDGET UNIT DEPARTMENTS			
1100 LEGISLATIVE - COUNCIL	491,312	594,480	537,537
1100 ADMINISTRATION - CITY MANAGER	678,657	422,270	568,848
1100 GOVERNMENTAL AFFAIRS & COMMUNITY RELATIONS	564,380	464,635	421,537
1100 ADMINISTRATION - ACM OPERATIONS	259,781	258,299	0
1100 ADMINISTRATION - ACM DEVELOPMENT	(37,213)	0	0
1100 ADMINISTRATION - ADMINISTRATIVE SERVICES	381,108	415,808	420,650
1100 ADMINISTRATION - SR. ASSISTANT CM	211,717	302,899	431,110
1100 ADMINISTRATION - ACM PUBLIC SAFETY			228,467
1100 HUMAN RESOURCES	777,967	798,110	795,484
1100 TRAINING DEVELOPMENT	159,516	0	0
1100 PUBLIC RELATIONS	454,107	474,550	487,389
1100 CITIZEN SUPPORT SERVICES	355,277	376,351	310,258
1100 OFFICE OF BUSINESS OPPORTUNITIES	360,008	459,295	462,511
1100 LEGAL	2,178,109	1,981,156	2,054,907
1502 MUNICIPAL COURT	2,279,491	2,513,950	2,515,924
1600 FINANCE	2,501,962	2,148,577	2,097,909
1600 PLANNING	0	0	
HOMELESS SERVICES	488,053	531,145	4,007,140
1900 DEVELOPMENT SERVICES	4,027,389	4,111,355	28,202,838
2000 POLICE	28,386,273	26,405,181	
2050 PUBLIC SAFETY/HOMELAND SECURITY	1,942,003	1,637,665	2,288,361
2100 911 EMERGENCY COMMUNICATIONS	2,056,210	2,366,206	19,686,640
2200 FIRE	21,688,383	19,720,960	9,275,095
2300 PARKS & RECREATION	9,889,043	9,241,878	17,439,980
2400 PUBLIC WORKS	19,489,716	19,658,264	0
2600 GENERAL SERVICES ADMIN	119,113	0	1,427,035
2600 GENERAL SVCS/SUPPORT SERVICES	1,220,960	1,428,741	2,766,042
2700 INFORMATION TECHNOLOGY	2,507,624	2,342,903	96,395,662
TOTAL DEPARTMENT	103,528,884	98,655,669	
NON-DEPARTMENTAL & MISC.			
1200 COMMUNITY PROMOTIONS COMMITTEE	346,210	200,425	100,000
4307 COMMUNITY PROMOTION - AGENCIES	519,000	435,200	75,000
6403 COUNCIL CONTINGENCY	93,738	0	0
8404 SOLICITOR'S OFFICE	0	70,000	70,000
8410 HOMELESS SERVICES	0	0	700,000
MIDLANDS HOUSING ALLIANCE	0	0	217,000
8418 681310 RICHLAND SD# 1/TOGETHER WE CAN	77,702	25,000	25,000
8418-638520 DETENTION CENTER PER DIEM	365,775	350,000	350,000
8499 SPECIAL EMERGENCY RESERVE	0	818,732	1,094,129
8406/8701/87 NON-DEPARTMENTAL & MISC.	(90,025)	80,000	80,000
8701 OFFICE SPACE LEASE - 1225 LADY STREET	449,363	465,000	505,000
8702/8703 BAD DEBT/CASH OVER/SHORT/SALES TAX	244,109	0	0
TOTAL NON-DEPARTMENTAL	2,005,873	2,445,357	3,126,129
TOTAL EXPENDITURES	105,534,757	101,101,026	99,521,791
TRANSFERS OUT			
8704/8803/8779 TO INTERNAL SERVICE FUNDS	3,409,905	539,385	1,652,719
8801 TO DEBT SERVICE	3,729,148	3,662,657	5,421,114
8802 TO COMPONENT UNIT - COLUMBIA ACTION COUNCIL	200,000	0	0
8803 741000 TO OTHER FUNDS	2,784,316	0	0
8803 741200 TO GRANTS	69,214	0	0
8803 744030 TO CAPITAL IMPR. & STREETS	655,101	0	0
8803 74553 TO STORM WATER	1,000,000	1,000,000	800,000
TOTAL TRANSFERS OUT	11,847,684	5,202,042	7,873,833
TOTAL BUDGET	117,382,441	106,303,068	107,395,624
TOTAL SURPLUS/(DEFICIT)	(5,681,098)	0	0

8/17/2010

WATER/SEWER OPERATING FUND SUMMARY
FISCAL YEAR 2010/2011

	ACTUAL FY 08/09	BUDGET FY 09/10	APPROVED FY 10/11
<u>REVENUE</u>			
WATER SALES	60,817,134	59,837,592	60,475,100
SEWER SALES	41,888,723	40,297,620	41,377,724
MISCELLANEOUS REVENUE	17,868	51,000	20,500
FINES AND FORFEITURES	255,415	250,000	250,000
TOTAL OPERATING REVENUES	102,979,140	100,436,212	102,123,324
<u>NON-OPERATING REVENUE & TRANSFERS IN</u>			
INTEREST	3,711,510	2,500,000	1,500,000
RENTS & PROPERTY	124,828	85,000	85,000
FM PRIOR YEAR UN-APPROPRIATED SURPLUS	0	1,000,000	0
	3,836,338	3,585,000	1,585,000
TOTAL REVENUE & TRANSFERS IN	106,815,478	104,021,212	103,708,324
<u>EXPENDITURES</u>			
<u>Operating Departments & Non-Departmental</u>			
CUSTOMER SERVICE	1,508,654	1,775,002	1,736,140
FINANCE - COLLECTIONS	838,589	1,452,532	1,171,612
FINANCE/WATER ADMINISTRATION	3,541,313	3,787,458	3,678,224
FIRE HYDRANT MAINTENANCE	508,566	472,538	473,813
CSO/PUBLIC SAFETY	469,482	756,942	756,965
PUBLIC WORKS-STREET REPAIR	977,838	1,110,799	1,115,067
UTILITIES & ENGINEERING	41,701,502	44,401,449	45,238,100
GENERAL SERVICES PUBLIC BLDGS.	1,215,530	1,668,737	1,682,451
GIS MANAGEMENT	508,784	694,393	712,103
TOTAL OPERATING	51,270,259	56,119,850	56,562,475
<u>Non-Operating Departments & Non-Departmental</u>			
OFFICE OF BUSINESS OPPORTUNITIES	393,935	276,144	278,283
ECONOMIC DEV DEPARTMENT	814,544	808,219	805,418
PUBLIC RELATIONS	0	47,142	47,142
DEVELOPMENT CORPORATIONS	1,053,522	1,154,478	1,140,483
TOTAL NON-OPERATING DEPARTMENTS	2,262,001	2,285,983	2,271,326
DEPRECIATION	19,269,433		0
DEBT SERVICE	6,802,036	17,296,704	27,440,562
ECONOMIC DEV CONTINGENCY	554,267	540,000	540,000
CITY CENTER PARTNERSHIP	70,000	70,000	70,000
NON-DEPARTMENTAL	85,473	35,000	85,000
BAD DEBT	416,458	0	0
RESERVE	0	276,786	0
TOTAL NON-DEPARTMENTAL OPERATING	27,197,667	18,218,490	28,135,562
<u>TRANSFERS OUT</u>			
TO GENERAL FUND	4,500,000	4,500,000	4,500,000
TO CAPITAL PROJECTS (STREETSCAPING)	1,857,821	1,857,821	1,857,821
TO WATER/SEWER CAPITAL IMPROVEMENT PROGRAM	130,551,758	20,719,568	9,561,840
TO INTERNAL SERVICE FUNDS	2,121,900	319,500	819,500
TOTAL TRANSFERS	139,031,479	27,396,889	16,738,961
TOTAL BUDGET	219,761,405	104,021,212	103,708,324
TOTAL SURPLUS/(DEFICIT)	(112,945,928)	0	0

STORM WATER OPERATING SUMMARY
FISCAL YEAR 2010/2011

revised 6/16/10

	<u>ACTUAL</u> <u>FY 08/09</u>	<u>APPROVED</u> <u>FY 09/10</u>	<u>APPROVED</u> <u>FY 10/11</u>
<u>REVENUE</u>			
<u>Operating Revenue</u>			
STORM WATER SURCHARGE	4,652,409	4,705,392	4,801,396
<u>Non-operating Revenue & Transfers</u>			
INTEREST	571,833	375,000	300,000
TRANSFER FROM GENERAL FUND	1,000,000	1,000,000	800,000
TRANSFER FROM LIQUOR REBATE			200,000
TOTAL REVENUES & TRANSFERS IN	<u>6,297,276</u>	<u>6,080,392</u>	<u>6,101,396</u>
<u>EXPENDITURES</u>			
UTILITIES & ENGINEERING	733,945	1,147,390	1,053,917
PUBLIC WORKS	1,388,975	2,368,858	2,759,367
NON-DEPARTMENTAL EXPENSES	255,305		
TOTAL EXPENDITURES	<u>2,378,225</u>	<u>3,516,248</u>	<u>3,813,284</u>
<u>TRANSFERS OUT</u>			
TO STORM WATER CAPITAL PROJECTS	3,276,613	2,564,144	2,288,112
TOTAL OTHER	<u>3,276,613</u>	<u>2,564,144</u>	<u>2,288,112</u>
TOTAL BUDGET	<u>5,654,838</u>	<u>6,080,392</u>	<u>6,101,396</u>
TOTAL SURPLUS/(DEFICIT)	<u>642,438</u>	<u>0</u>	<u>0</u>

8/17/2010

**PARKING OPERATING FUND SUMMARY
FISCAL YEAR 2010/2011**

	ACTUAL FY 08/09	APPROVED FY 09/10	APPROVED FY 10/11
<u>OPERATING REVENUES</u>			
STREET PARKING METERS	1,930,608	2,100,000	2,050,000
PARKING GARAGES	2,700,576	2,478,600	2,174,100
PARKING LOTS	104,900	106,800	69,000
IN-OUT PARKING	54,460	60,000	60,000
PARKING METER BAG FEE	24,800	20,000	15,000
MISCELLANEOUS REVENUE	12,453	90,100	73,800
VALIDATIONS	35,906	42,000	25,000
NON-MOVING VIOLATIONS	1,364,388	1,765,000	1,900,000
TOTAL REVENUE	6,228,090	6,662,300	6,366,900
<u>NON-OPERATING & TRANSFERS IN</u>			
RENT	34,184	22,950	88,400
INTEREST REVENUE	1,292,408	600,000	280,000
FROM PRIOR YEAR UN-APPROPRIATED SURPLUS	0	500,000	676,096
TOTAL NON-OPERATING & TRANSFERS	1,326,592	1,122,950	1,044,496
TOTAL REVENUES & TRANSFERS IN	7,554,682	7,785,250	7,411,396
<u>EXPENDITURES</u>			
<u>Operating Departments</u>			
FINANCE - PARKING COLLECTIONS	100,444	113,048	120,049
PARKING OPERATIONS	2,845,421	2,756,497	2,815,928
PUBLIC WORKS	5,224	380,973	96,909
TOTAL OPERATING DEPARTMENTS	2,951,089	3,250,518	3,032,886
<u>Non-Departmental</u>			
DEBT SERVICE	2,600,475	3,169,732	3,168,061
EMPLOYEE TUITION PROGRAM	65	5,000	5,000
EMPLOYEE sick/vac/cola	31,395	0	0
RESERVE	0	0	45,449
TOTAL NON-DEPARTMENTAL	2,631,936	3,174,732	3,218,510
<u>TRANSFERS OUT</u>			
TO GENERAL FUND	1,127,113	1,250,000	1,000,000
TO OTHER FUNDS	0	0	100,000
TO INTERNAL SERVICE FUNDS	99,063	110,000	60,000
TOTAL TRANSFERS	1,226,176	1,360,000	1,160,000
TOTAL BUDGET	6,809,201	7,785,250	7,411,396
TOTAL SURPLUS/(DEFICIT)	745,481	0	0

8/17/2010

**HOSPITALITY TAX SUMMARY
FISCAL YEAR 2010/2011**

	ACTUAL FY 08/09	APPROVED FY 09/10	APPROVED FY 10/11
<u>REVENUES</u>			
HOSPITALITY TAX	8,051,587	7,400,000	7,500,000
FINES & LATE FEES	19,203	0	15,000
MISCELLANEOUS	(4,982)		0
INTEREST	280,835	0	0
TOTAL REVENUES	8,346,643	7,400,000	7,515,000
<u>TRANSFERS IN</u>			
FM FUND BALANCE	0	2,792,742	975,180
TOTAL REVENUE & TRANSFERS IN	8,346,643	10,192,742	8,490,180
<u>EXPENDITURES</u>			
HOSPITALITY TAX COMMITTEE	2,843,419	2,550,000	2,550,000
EdVENTURE	509,850	509,850	509,850
COLUMBIA MUSEUM OF ART	695,250	695,250	695,250
HISTORIC COLUMBIA FOUNDATION	451,500	451,500	451,500
COLUMBIA MUSIC FESTIVAL ASSOC.	260,000	225,000	225,000
STATE MUSEUM	631,316	200,000	200,000
TOTAL EXPENDITURES	5,391,335	4,631,600	4,631,600
<u>TRANSFERS OUT</u>			
TO GEN. FUND - PARK RANGERS & PUBLIC SAFETY	2,300,000	2,300,000	2,300,000
TO DEBT SERVICE	1,979,142	3,261,142	1,558,580
TO CAPITAL PROJECTS	725,357	0	0
TOTAL TRANSFERS OUT	5,004,499	5,561,142	3,858,580
TOTAL BUDGET	10,395,834	10,192,742	8,490,180
TOTAL SURPLUS/(DEFICIT)	(2,049,191)	0	0

8/17/2010

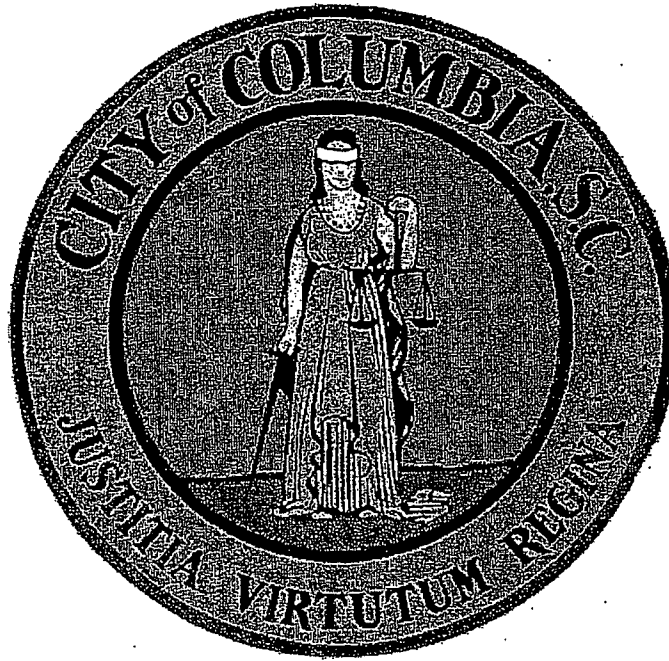
REVISED 8/17/10

ACCOMMODATIONS TAX
FISCAL YEAR 2010/2011

	ACTUAL FY 08/09	APPROVED FY 09/10	PROPOSED FY 10/11
<u>REVENUES</u>			
ACCOMMODATIONS TAX	1,382,009	1,250,000	1,200,000
MISCELLANEOUS REVENUE	491		
TOTAL REVENUES	1,382,501	1,250,000	1,200,000
<u>TRANSFERS IN</u>			
FM GENERAL FUND	407,103	0	0
FM FUND BALANCE	0	35,000	25,000
TOTAL REVENUE & TRANSFERS IN	1,789,604	1,285,000	1,225,000
<u>EXPENDITURES</u>			
CONVENTION & VISITORS BUREAU	1,140,547	1,000,000	1,000,000
HOPOLOGY	2,502	0	0
LAKE MURRAY TOURISM	200,000	150,000	150,000
CAPITAL SENIOR CENTER			15,000
PALMETTO PROJECT/CHALLENGE DAY			25,000
MISCELLANEOUS & COMMITTEE EXPENSES		50,000	10,000
TOTAL EXPENSES	1,430,583	1,200,000	1,200,000
<u>TRANSFERS OUT</u>			
TO GENERAL FUND	432,103	85,000	25,000
TOTAL OTHER FUNDS	432,103	85,000	25,000
TOTAL BUDGET	1,862,686	1,285,000	1,225,000
TOTAL SURPLUS/(DEFICIT)	(73,082)	0	0

8/17/2010

EXHIBIT 2



City of Columbia
FY 2011/2012
Proposed Budget Summaries

- Combined Funds Summary
- General Fund
- Enterprise
 - Water & Sewer Operating
 - Storm Water Operating
 - Parking Operating
- Special Revenue
 - Hospitality Tax
 - Accommodations Tax
 - CDBG/HOME/HOPWA

One Mission, One Message, One Columbia

COMBINED OPERATING FUNDS FY 11/12 PROPOSED BUDGET SUMMARY



	GENERAL FUND	WATER & SEWER	STORM WATER	PARKING	HOSPITALITY TAX	ACCOMM. TAX	CDBG, HOME & HOPWA	TOTAL
REVENUE								
GENERAL PROPERTY TAX	49,655,083							49,655,083
LICENSES AND PERMITS	27,107,600				7,700,000			34,807,600
FROM OTHER AGENCIES	11,221,481					1,200,000	3,505,121	15,926,602
CURRENT SERVICE CHARGES	9,045,837	108,483,499	4,853,280	4,842,600				127,025,216
FINES & FORFEITURES	995,700	200,000		2,100,000	14,000			3,309,700
MISCELLANEOUS REVENUE	25,000	10,500		37,000				72,500
INTEREST ON INVESTMENT	75,000	1,606,500	250,000	200,000				2,131,500
RENTS & SALE OF PROPERTY	179,050	100,000		95,850				374,900
TOTAL REVENUE	98,304,751	110,400,499	5,103,280	7,075,450	7,714,000	1,200,000	3,505,121	233,303,101
TRANSFERS IN								
FROM GENERAL FUND			1,000,000					1,000,000
FROM OTHER FUNDS	3,038,430							3,038,430
FROM WATER & SEWER OPERATING	4,500,000							4,500,000
FROM PARKING FUND	1,000,000							1,000,000
FROM ACCOMMODATIONS TAX	25,000							25,000
FROM HOSPITALITY TAX	1,000,000							1,000,000
FROM BOND PROCEEDS	5,333,073							5,333,073
FROM FUND BALANCE	2,000,000			326,482	0	25,000		2,351,482
TOTAL TRANSFERS IN	16,896,503	0	1,000,000	326,482	0	25,000	0	18,247,985
TOTAL REVENUE & TRANSFERS IN	115,201,254	110,400,499	6,103,280	7,401,932	7,714,000	1,225,000	3,505,121	251,551,086
DEPARTMENTS								
GENERAL GOVERNMENT	6,084,457	47,142						6,131,599
MUNICIPAL COURT	2,520,068							2,520,068
FINANCE	2,056,629	3,902,025		76,310				6,034,964
CUSTOMER SERVICE		1,749,241						1,749,241
COMMUNITY DEV & DEVELOPMENT CORPS	564,867	1,377,337					3,505,121	5,447,325
ECONOMIC DEV DEPARTMENT		988,441						988,441
DEVELOPMENT SERVICES	4,125,463							4,125,463
PUBLIC SAFETY	51,600,171	1,235,362						52,835,533
PARKS & RECREATION	9,275,097							9,275,097
PUBLIC WORKS	17,633,041	1,210,735	2,783,223	97,491				21,734,490
GENERAL SERVICES	1,657,736	1,727,874						3,385,610
INFORMATION TECHNOLOGY/IGIS	2,942,157	726,869						3,669,026
UTILITIES & ENGINEERING		56,045,365	964,515					57,009,880
PARKING GARAGE OPERATIONS				2,895,070				2,895,070
TOTAL DEPARTMENTS	98,459,686	69,010,391	3,757,738	3,068,871	0	0	3,505,121	177,801,807
NON-DEPARTMENTAL & MSC.								
NON-DEPARTMENTAL & MISC.	110,000	1,585,000	50,000	5,000				1,750,000
ECONOMIC DEVELOPMENT CONTINGENCY	0	540,000						540,000
COMMUNITY PROMOTION AGENCY FUNDING	0	70,000			4,631,600	1,200,000		5,901,600
HOMELESS SERVICES	1,000,000							1,000,000
OFFICE SPACE LEASE	505,000						0	505,000
DETENTION CENTER PER DIEM	375,000						0	375,000
ELECTRICITY & FUEL RESERVE	100,000							100,000
DEBT SERVICE		31,715,082		3,168,061				34,883,143
RESERVE	1,000,000	0			522,320			1,522,320
TOTAL NON-DEPARTMENTAL	3,090,000	33,910,082	50,000	3,173,061	5,153,920	1,200,000	0	46,577,063
TOTAL EXPENDITURES	101,549,686	102,920,473	3,807,738	6,241,932	5,153,920	1,200,000	3,505,121	224,378,870
TRANSFERS OUT & OTHER FINANCING USES								
TO GENERAL FUND		4,500,000		1,000,000	1,000,000	25,000		6,525,000
TO DEBT SERVICE	5,419,343				1,560,080			6,979,423
TO CAPITAL PROJECTS	246,433	2,160,526	2,295,542					4,702,501
TO STORM DRAIN	1,000,000							1,000,000
TO INTERNAL SERVICE FUNDS	1,652,719	819,500		160,000				2,632,219
TO CAPITAL REPLACEMENT	5,333,073							5,333,073
TOTAL TRANSFER OUT	13,651,568	7,480,026	2,295,542	1,160,000	2,560,080	25,000	0	27,172,216
TOTAL BUDGET	115,201,254	110,400,499	6,103,280	7,401,932	7,714,000	1,225,000	3,505,121	251,551,086
TOTAL SURPLUS/(DEFICIT)	0	0	0	0	0	0	0	0

COMBINED OPERATING FUNDS SUMMARY
excludes Capital Improvement Program and Internal Service Funds

5/13/2011

ROA-0247

**GENERAL FUND SUMMARY
FISCAL YEAR 2011/2012**

	ACTUAL FY 09/10	APPROVED FY 10/11	DEBITORS FY 11/12	INCREASE (DECREASE)
REVENUE				
GENERAL PROPERTY TAX	48,930,587	49,273,135	49,655,083	
LICENSES AND PERMITS	27,418,693	27,470,800	27,107,600	
FROM OTHER AGENCIES	11,961,867	11,087,058	11,221,481	
CURRENT SERVICE CHARGES	9,286,433	9,032,605	9,045,837	
FINES & FORFEITURES	853,871	913,611	995,700	
MISCELLANEOUS REVENUE	145,275	25,935	25,000	
INTEREST ON INVESTMENT	189,166	50,000	75,000	
RENTS & SALE OF PROPERTY	122,431	179,050	179,050	
TOTAL REVENUE	98,818,322	98,032,194	98,304,751	272,557
TRANSFERS IN				
FROM OTHER FUNDS	953,882	1,538,430	1,538,430	
FROM WATER & SEWER OPERATING	4,500,000	4,500,000	4,500,000	
FROM PARKING FUND	1,250,000	1,000,000	1,000,000	
FROM ACCOMMODATIONS TAX	25,000	25,000	25,000	
FM HOSPITALITY TAX	2,300,000	2,300,000	1,000,000	
FROM HYDRO	0	0	1,500,000	
FROM GO BOND PROCEEDS			5,333,073	
FROM PRIOR YEAR UN-APPROPRIATED SURPLUS			2,000,000	
TOTAL TRANSFERS IN	9,028,882	9,363,430	16,896,503	7,533,073
TOTAL GENERAL FUND REV & TRANS	107,947,204	107,395,624	115,201,254	7,805,630
DEPARTMENTS				
LEGISLATIVE - COUNCIL			264,821	
LEGISLATIVE - MAYOR'S OFFICE			321,807	
LEGISLATIVE	521,435	537,537	586,628	49,091
ADMINISTRATION - CITY MANAGER	414,100	568,848	957,011	388,163
GOVERNMENTAL AFFAIRS & COMMUNITY RELATIONS	389,003	421,537	424,851	3,314
ADMINISTRATION - ACM OPERATIONS	313,722	0	0	0
ADMINISTRATION - ADMINISTRATIVE SERVICES	400,561	420,650	0	(420,650)
ADMINISTRATION - SR. ASSISTANT CM	310,785	431,110	265,990	(165,120)
ADMINISTRATION - ACM PUBLIC SAFETY	0	228,467	227,900	(567)
HUMAN RESOURCES	788,356	795,484	784,138	(1,348)
TRAINING DEVELOPMENT	33,353	0	0	0
PUBLIC RELATIONS	436,552	467,389	471,765	4,376
COUNCIL SUPPORT SERVICES	397,896	310,258	405,603	95,345
LEGAL	1,555,146	2,054,907	1,950,571	(104,336)
MUNICIPAL COURT	2,264,445	2,515,924	2,520,068	4,144
FINANCE	1,953,991	2,087,909	2,056,629	(41,280)
HOMELESS SERVICES	581,788	0	0	0
COMMUNITY DEVELOPMENT/OFFICE OF BUSINESS OPP.	416,912	462,511	564,867	102,356
DEVELOPMENT SERVICES	3,898,246	4,007,140	4,125,463	118,323
POLICE	25,811,852	28,202,838	29,043,094	840,256
PUBLIC SAFETY/HOMELAND SECURITY	1,452,983	0	0	0
911 EMERGENCY COMMUNICATIONS	2,147,354	2,298,361	2,389,945	91,584
FIRE	18,983,614	19,666,640	20,167,132	500,492
PARKS & RECREATION	9,133,653	9,275,095	9,275,097	2
PUBLIC WORKS	17,038,160	17,439,980	17,633,041	193,061
GENERAL SRVCS/SUPPORT SERVICES	1,252,881	1,427,035	1,657,738	230,701
INFORMATION TECHNOLOGY	2,284,841	2,766,042	2,942,157	176,115
TOTAL DEPARTMENT	92,792,628	96,395,662	98,459,686	2,064,024
NON-DEPARTMENTAL & MISC.				
COMMUNITY PROMOTIONS COMMITTEE	643,200	100,000	0	(100,000)
COMMUNITY PROMOTION - AGENCIES	0	75,000	0	(75,000)
COUNCIL CONTINGENCY	11,117	0	0	0
SOLICITOR'S OFFICE	52,500	70,000	70,000	0
HOMELESS SERVICES	0	700,000	1,000,000	300,000
MIDLANDS HOUSING ALLIANCE	0	217,000	0	(217,000)
ELECTRICITY & FUEL RESERVE	0	0	100,000	100,000
RICHLAND SD# 1/TOGETHER WE CAN	25,039	25,000	0	(25,000)
DETENTION CENTER PER DIEM	364,850	350,000	375,000	25,000
SPECIAL EMERGENCY RESERVE	0	1,004,129	1,000,000	(4,129)
NON-DEPARTMENTAL & MISC.	38,637	80,000	40,000	(40,000)
OFFICE SPACE LEASE - 1225 LADY STREET	460,272	505,000	505,000	0
BAD DEBT/CASH OVER/SHORT/SALES TAX	21,487	0	0	0
TOTAL NON-DEPARTMENTAL	1,617,102	3,125,129	3,090,000	(36,129)
TOTAL EXPENDITURES	94,409,731	99,521,791	101,549,686	2,027,895
TRANSFERS OUT				
TO INTERNAL SERVICE FUNDS	1,537,552	1,652,719	1,652,719	0
TO DEBT SERVICE	3,665,659	5,421,114	5,419,343	(1,771)
TO GRANTS	19,867	0	0	0
TO CAPITAL IMPROVEMENTS	0	0	246,433	246,433
TO STORM WATER	1,000,000	800,000	1,000,000	200,000
TO CAPITAL REPLACEMENTS			5,333,073	5,333,073
TOTAL TRANSFERS OUT	6,223,078	7,873,833	13,651,568	5,777,735
TOTAL BUDGET	100,632,809	107,395,624	115,201,254	7,805,630
TOTAL SURPLUS/(DEFICIT)	7,314,396	0	0	

5/13/2011

WATER/SEWER OPERATING FUND SUMMARY

FISCAL YEAR 2011/2012

	ACTUAL FY 09/10	BUDGET FY 2011/12	PROPOSED FY 2011/12	INCREASE (DECREASE)
REVENUE				
WATER SALES	62,071,765	60,475,100	65,275,000	4,799,900
SEWER SALES	42,845,159	41,377,724	43,208,499	1,830,775
MISCELLANEOUS REVENUE	181,452	20,500	10,500	(10,000)
FINES AND FORFEITURES	262,846	250,000	200,000	(50,000)
TOTAL OPERATING REVENUES	105,361,222	102,123,324	108,693,999	6,570,675
NON-OPERATING REVENUE & TRANSFERS IN				
INTEREST	4,329,923	1,500,000	1,606,500	106,500
RENTS & PROPERTY	145,944	85,000	100,000	15,000
FROM OTHER FUNDS	0	0	0	0
FM PRIOR YEAR UN-APPROPRIATED SURPLUS	0	0	0	0
TOTAL NON-OPERATING REVENUES	4,475,867	1,585,000	1,706,500	121,500
TOTAL REVENUE & TRANSFERS IN	109,837,089	103,708,324	110,400,499	6,692,175
EXPENDITURES				
Operating Departments & Non-Departmental				
CUSTOMER SERVICE	1,569,075	1,736,140	1,749,241	13,101
FINANCE - COLLECTIONS	911,102	1,171,612	871,533	(300,079)
FINANCE/WATER ADMINISTRATION	2,877,468	3,678,224	3,030,492	(647,732)
FIRE HYDRANT MAINTENANCE	319,335	473,813	478,626	4,813
CSO/PUBLIC SAFETY	729,707	756,965	756,736	(229)
PUBLIC WORKS-STREET REPAIR	993,442	1,115,067	1,210,735	95,668
UTILITIES & ENGINEERING	41,912,962	45,236,100	56,045,365	10,809,265
GENERAL SERVICES PUBLIC BLDGS.	1,238,228	1,682,451	1,727,874	45,423
GIS MANAGEMENT	565,915	712,103	726,869	14,766
TOTAL OPERATING	51,117,234	56,562,475	66,597,471	10,034,996
Non-Operating Departments & Non-Departmental				
OFFICE OF BUSINESS OPPORTUNITIES	297,179	278,283	277,685	(598)
ECONOMIC DEV DEPARTMENT	768,407	805,418	988,441	183,023
PUBLIC RELATIONS	35,199	47,142	47,142	0
DEVELOPMENT CORPORATIONS	1,154,478	1,140,483	1,099,652	(40,831)
TOTAL NON-OPERATING DEPARTMENTS	2,255,264	2,271,326	2,412,920	141,594
DEPRECIATION	19,732,608	0	0	0
DEBT SERVICE	10,120,514	27,440,562	31,715,082	4,274,520
ECONOMIC DEV CONTINGENCY	660,857	540,000	540,000	0
CITY CENTER PARTNERSHIP	0	70,000	70,000	0
TECHNOLOGY REPLACEMENTS	0	0	1,500,000	1,500,000
NON-DEPARTMENTAL	8,710	85,000	85,000	0
BAD DEBT	664,553	0	0	0
TOTAL NON-DEPARTMENTAL OPERATING	31,187,242	28,135,562	33,910,082	5,774,520
TRANSFERS OUT				
TO GENERAL FUND	4,500,000	4,500,000	4,500,000	0
TO CAPITAL PROJECTS (STREETSCAPING)	1,857,821	1,857,821	0	(1,857,821)
TO WATER/SEWER CAPITAL IMPROVEMENT PROGF	48,240,646	9,561,640	2,160,526	(7,401,114)
TO INTERNAL SERVICE FUNDS	548,042	819,500	819,500	0
TOTAL TRANSFERS	55,335,115	16,738,961	7,480,026	(9,258,935)
TOTAL BUDGET	139,895,855	103,708,324	110,400,499	6,692,175
TOTAL SURPLUS/(DEFICIT)	(30,058,766)	0	0	

STORM WATER OPERATING SUMMARY
FISCAL YEAR 2011/2012

	ACTUAL FY 09/10	BUDGET FY 10/11	DEPT REC FY 11/12	INCREASE (DECREASE)
<u>REVENUE</u>				
<u>Operating Revenue</u>	4,796,246	4,801,396	4,802,280	884
STORM WATER SURCHARGE			29,000	29,000
STORM WATER INSPECTIONS	4,200		22,000	22,000
STORM WATER REVIEW	4,800,446	4,801,396	4,853,280	51,884
TOTAL OPERATING REVENUES				
<u>Non-operating Revenue & Transfers</u>	372,862	300,000	250,000	(50,000)
INTEREST & USE OF PROPERTY	142,993			0
TRANSFER FROM OTHER FUNDS	1,000,000	800,000	1,000,000	200,000
TRANSFER FROM GENERAL FUND		200,000		(200,000)
TRANSFER FROM LIQUOR REBATE	1,515,855	1,300,000	1,250,000	(50,000)
TOTAL NON-OPERATING REVENUES				0
TOTAL REVENUES & TRANSFERS IN	6,316,301	6,101,396	6,103,280	1,884
<u>EXPENDITURES</u>				
UTILITIES & ENGINEERING	995,711	1,053,917	964,515	(89,402)
PUBLIC WORKS	1,933,249	2,759,367	2,793,223	33,856
NON-DEPARTMENTAL EXPENSES	318,916		50,000	50,000
TOTAL EXPENDITURES	2,252,165	3,813,284	3,807,738	(5,546)
NET FUND BALANCE				
<u>TRANSFERS OUT</u>				
TO STORM WATER CAPITAL PROJECTS	7,806,148	2,288,112	2,295,542	7,430
TOTAL OTHER	7,806,148	2,288,112	2,295,542	7,430
TOTAL BUDGET	10,058,313	6,101,396	6,103,280	1,884
TOTAL SURPLUS/(DEFICIT)	(3,742,012)	0	0	

5/13/2011

**PARKING OPERATING FUND SUMMARY
FISCAL YEAR 2011/2012**

	ACTUAL FY 09/10	APPROVED FY 10/11	PROPOSED FY 11/12	INCREASE (DECREASE)
<u>OPERATING REVENUES</u>				
STREET PARKING METERS	1,855,102	2,050,000	2,150,000	100,000
PARKING GARAGES	2,058,350	2,174,100	2,198,100	24,000
PARKING LOTS	108,382	69,000	221,500	152,500
IN-OUT PARKING	50,405	60,000	58,000	(2,000)
PARKING METER BAG FEE	13,530	15,000	15,000	0
MISCELLANEOUS REVENUE	34,828	73,800	22,000	(51,800)
VALIDATIONS	19,510	25,000	15,000	(10,000)
NON-MOVING VIOLATIONS	1,567,774	1,900,000	2,100,000	200,000
TOTAL REVENUE	5,707,880	6,366,900	6,779,600	412,700
<u>NON-OPERATING & TRANSFERS IN</u>				
RENT	58,116	88,400	95,850	7,450
INTEREST REVENUE	351,441	280,000	200,000	(80,000)
FROM PRIOR YEAR UN-APPROPRIATED SURPLUS		676,096	326,482	(349,614)
TOTAL NON-OPERATING & TRANSFERS	409,557	1,044,496	622,332	(422,164)
TOTAL REVENUES & TRANSFERS IN	6,117,437	7,411,396	7,401,932	(9,464)
<u>EXPENDITURES</u>				
<u>Operating Departments</u>				
FINANCE - PARKING COLLECTIONS	94,271	120,049	76,310	(43,739)
PARKING ADMINISTRATION	476,512	477,357	480,546	3,189
PARKING ENFORCEMENT	813,380	837,108	897,103	59,995
PARKING MAINTENANCE	488,001	491,711	491,005	(706)
ARSENAL HILL GARAGE	30,660	37,571	31,400	(6,171)
LADY ST. GARAGE	137,041	138,052	139,184	1,132
RIVERFRONT GARAGE	19,832	22,779	22,700	(79)
SUMTER ST. GARAGE	162,198	167,197	170,751	3,554
TAYLOR ST. GARAGE	269,950	334,404	323,879	(10,525)
WASHINGTON ST. GARAGE	133,186	130,403	128,413	(1,990)
PARK STREET GARAGE	56,236	70,443	72,600	2,157
LINCOLN STREET GARAGE	100,759	108,903	111,489	2,586
PARKING OPERATIONS	2,687,756	2,815,928	2,895,070	79,142
TRAFFIC - SIGN SHOP	135,878	96,909	97,491	582
SOLID WASTE - STREET SWEEPING	246,692	0	0	0
PUBLIC WORKS	382,570	96,909	97,491	582
TOTAL OPERATING DEPARTMENTS	3,164,597	3,032,886	3,068,871	35,985
<u>Non-Departmental</u>				
DEPRECIATION	1,257,799	0	0	0
DEBT SERVICE	2,440,805	3,168,061	3,168,061	0
BAD DEBT	17,885	0	0	0
EMPLOYEE TUITION PROGRAM	0	5,000	5,000	0
RESERVE	0	45,449	0	(45,449)
TOTAL NON-DEPARTMENTAL	3,716,489	3,218,510	3,173,061	(45,449)
<u>TRANSFERS OUT</u>				
TO GENERAL FUND	1,250,000	1,000,000	1,000,000	0
TO OTHER FUNDS	429,637			0
TO INTERNAL SERVICE FUNDS	83,763	160,000	160,000	0
TOTAL TRANSFERS	1,763,400	1,160,000	1,160,000	0
TOTAL BUDGET	8,644,486	7,411,396	# 7,401,932	0
TOTAL SURPLUS/(DEFICIT)	(2,527,049)	0	0	0

5/13/2011

**HOSPITALITY TAX SUMMARY
FISCAL YEAR 2011/2012.**

	ACTUAL FY 09/10	APPROVED FY 10/11	PROPOSED FY 11/12	INCREASE (DECREASE)
<u>REVENUES</u>				
HOSPITALITY TAX	7,928,065	7,500,000	7,700,000	200,000
FINES & LATE FEES	13,640	15,000	14,000	(1,000)
MISCELLANEOUS	(8,730)	0	0	0
INTEREST	112,005	0	0	0
TOTAL REVENUES	8,044,979	7,515,000	7,714,000	199,000
<u>TRANSFERS IN</u>				
FM FUND BALANCE	1,752,439	975,180		
TOTAL REVENUE & TRANSFERS IN	9,797,418	8,490,180	7,714,000	(776,180)
<u>EXPENDITURES</u>				
HOSPITALITY TAX COMMITTEE	2,232,992	2,550,000	2,550,000	0
EdVENTURE	509,850	509,850	509,850	0
COLUMBIA MUSEUM OF ART	695,250	695,250	695,250	0
HISTORIC COLUMBIA FOUNDATION	451,500	451,500	451,500	0
COLUMBIA MUSIC FESTIVAL ASSOC.	260,000	225,000	225,000	0
STATE MUSEUM	86,684	200,000	200,000	0
RESERVE			522,320	522,320
TOTAL EXPENDITURES	4,236,276	4,631,600	5,153,920	522,320
<u>TRANSFERS OUT</u>				
TO GEN. FUND	2,300,000	2,300,000	1,000,000	(1,300,000)
TO DEBT SERVICE	3,261,142	1,558,580	1,560,080	1,500
TOTAL TRANSFERS OUT	5,561,142	3,858,580	2,560,080	(1,298,500)
TOTAL BUDGET	9,797,418	8,490,180	7,714,000	(776,180)
TOTAL SURPLUS/(DEFICIT)	0	0	0	

5/13/2011

**ACCOMMODATIONS TAX
FISCAL YEAR 2011/2012**

	ACTUALS FY 09/10	APPROVED FY 10/11	PROPOSED FY 11/12	INCREASE (DECREASE)
<u>REVENUES</u>				
ACCOMMODATIONS TAX	1,373,422	1,200,000	1,200,000	0
TOTAL REVENUES	1,373,422	1,200,000	1,200,000	
<u>TRANSFERS IN</u>				
FM FUND BALANCE		25,000	25,000	0
TOTAL REVENUE & TRANSFERS IN	1,373,422	1,225,000	1,225,000	0
<u>EXPENDITURES</u>				
CONVENTION & VISITORS BUREAU	1,000,000	1,000,000	1,000,000	0
LAKE MURRAY TOURISM	150,000	150,000	150,000	0
5% ALLOCATION, COMMITTEE EXPENSES	35,419	10,000	25,000	15,000
CAPITAL SENIOR CENTER		15,000		(15,000)
ACCESS LEISURE	3,000			0
PALMETTO PROJECT/CHALLENGE DAY		25,000		(25,000)
TOGETHER WE CAN			25,000	25,000
TOTAL EXPENSES	1,188,419	1,200,000	1,200,000	0
<u>TRANSFERS OUT</u>				
TO GENERAL FUND	25,000	25,000	25,000	
TO SPECIAL RESTRICTED	5,000			
TOTAL OTHER FUNDS	30,000	25,000	25,000	0
TOTAL BUDGET	1,218,419	1,225,000	1,225,000	0
TOTAL SURPLUS/(DEFICIT)	155,002	0	0	

5/13/2011

Code of Laws of South Carolina 1976 Annotated Currentness

Title 6. Local Government--Provisions Applicable to Special Purpose Districts and Other Political Subdivisions

Chapter 1. General Provisions

→ Article 3. Authority of Local Governments to Assess Taxes and Fees

→ § 6-1-300. Definitions.

As used in the article:

- (1) "Consumer price index" means the consumer price index for all-urban consumers published by the U.S. Department of Labor. In the event of a revision of the consumer price index, the index that is most consistent with the consumer price index for all-urban consumers as calculated in 1996 must be used.
- (2) "Intergovernmental transfer of funding responsibility" means an act, resolution, court order, administrative order, or other action by a higher level of government that requires a lower level of government to use its own funds, personnel, facilities, or equipment.
- (3) "Local governing body" means the governing body of a county, municipality, or special purpose district. As used in Section 6-1-320 only, local governing body also refers to the body authorized by law to levy school taxes.
- (4) "New tax" is a tax that the local governing body had not enacted as of December 31, 1996.
- (5) "Positive majority" means a vote for adoption by the majority of the members of the entire governing body, whether present or not. However, if there is a vacancy in the membership of the governing body, a positive majority vote of the entire governing body as constituted on the date of the final vote on the imposition is required.
- (6) "Service or user fee" means a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee. "Service or user fee" also includes "uniform service charges".
- (7) "Specifically authorized by the General Assembly" means an express grant of power:
 - (a) in a prior act;
 - (b) by this act; or
 - (c) in a future act.

§ 6-1-310. Prohibition on imposition of new local taxes.

A local governing body may not impose a new tax after December 31, 1996, unless specifically authorized by the General Assembly.

§ 6-1-315. Limitation on imposition or increase of business license and real estate professional and auctioneer fees.

(A) By ordinance adopted by a positive majority vote, a local governing body may impose a business license tax or increase the rate of a business license tax, authorized by Sections 4-9-30(12) and 5-7-30.

(B)(1) Notwithstanding any other provision of law, the governing body of a county or municipality may not impose a license, occupation, or professional tax or fee upon real estate licensees, except upon the broker-in-charge at the place where the real estate licensee shall maintain a principal or branch office. The license, occupation, or professional tax or fee shall permit the broker-in-charge and the broker's affiliated associate brokers, salespersons, and property managers to engage in all of the brokerage activities described in Chapter 57 of Title 40 without further licensing or taxing, other than the state licenses issued pursuant to Chapter 57 of Title 40 or pursuant to other provisions of law. No license, occupation, or professional tax or fee shall be required of the affiliated associate brokers, salespersons, or property managers of a broker-in-charge for such gross receipts upon which a license, occupation, or professional tax or fee has already been paid.

(2) Brokered transactions of real property in counties or municipalities other than those in which the broker-in-charge maintains a principal or branch office create a nexus for imposition of a license, occupation, or professional tax or fee only with respect to gross receipts derived from transactions of property located in that county or municipality.

(3) Notwithstanding any other provision of law, the governing body of a county or municipality may not impose a license, occupation, or professional tax or fee upon the gross proceeds of an auctioneer licensed under Chapter 6 of Title 40 for the first three auctions conducted by the auctioneer in the county or municipality, unless the auctioneer maintains a principal or branch office in the county or municipality.

§ 6-1-320. Millage rate increase limitation; exceptions.

(A) Notwithstanding Section 12-37-251(E), a local governing body may increase the millage rate imposed for general operating purposes above the rate imposed for such purposes for the preceding tax year only to the extent of the increase in the average of the twelve monthly consumer price indices for the most recent twelve-month period consisting of January through December of the preceding calendar year, plus, beginning in 2007, the percentage increase in the previous year in the population of the entity as determined by the Office of Research and Statistics of the State Budget and Control Board. If the average of the twelve monthly consumer price indices experiences a negative percentage, the average is deemed to be zero. If an entity experiences a reduction in population, the percentage change in population is deemed to be zero. However, in the year in which a reassessment program is implemented, the rollback millage, as calculated pursuant to Section 12-37-251(E), must be used in lieu of the previous year's millage rate.

(B) Notwithstanding the limitation upon millage rate increases contained in subsection (A), the millage rate limitation may be suspended and the millage rate may be increased upon a two-thirds vote of the membership of the local governing body for the following purposes:

- (1) the deficiency of the preceding year;
- (2) any catastrophic event outside the control of the governing body such as a natural disaster, severe weather event, act of God, or act of terrorism, fire, war, or riot;
- (3) compliance with a court order or decree;
- (4) taxpayer closure due to circumstances outside the control of the governing body that decreases by ten percent or more the amount of revenue payable to the taxing jurisdiction in the preceding year; or

(5) compliance with a regulation promulgated or statute enacted by the federal or state government after the ratification date of this section for which an appropriation or a method for obtaining an appropriation is not provided by the federal or state government.

(6) purchase by the local governing body of undeveloped real property or of the residential development rights in undeveloped real property near an operating United States military base which property has been identified as suitable for residential development but which residential development would constitute undesirable residential encroachment upon the United States military base as determined by the local governing body. The local governing body shall enact an ordinance authorizing such purchase and the ordinance must state the nature and extent of the potential residential encroachment, how the purchased property or development rights would be used and specifically how and why this use would be beneficial to the United States military base, and what the impact would be to the United States military base if such purchase were not made. Millage rate increases for the purpose of such purchase must be separately stated on each tax bill and must specify the property, or the development rights to be purchased, the amount to be collected for such purchase, and the length of time that the millage rate increase will be in effect. The millage rate increase must reasonably relate to the purchase price and must be rescinded five years after it was placed in effect or when the amount specified to be collected is collected, whichever occurs first. The millage rate increase for such purchase may not be reinstated unless approved by a majority of the qualified voters of the governmental entity voting in a referendum. The cost of holding the referendum must be paid from the taxes collected due to the increased millage rate; or

(7) to purchase capital equipment and make expenditures related to the installation, operation, and purchase of the capital equipment including, but not limited to, taxes, duty, transportation, delivery, and transit insurance, in a county having a population of less than one hundred thousand persons and having at least forty thousand acres of state forest land. For purposes of this section, "capital equipment" means an article of nonexpendable, tangible, personal property, to include communication software when purchased with a computer, having a useful life of more than one year and an acquisition cost of fifty thousand dollars or more for each unit.

If a tax is levied to pay for items (1) through (5) above, then the amount of tax for each taxpayer must be listed on the tax statement as a separate surcharge, for each aforementioned applicable item, and not be included with a general millage increase. Each separate surcharge must have an explanation of the reason for the surcharge. The surcharge must be continued only for the years necessary to pay for the deficiency, for the catastrophic event, or for compliance with the court order or decree.

(C) The millage increase permitted by subsection (B) is in addition to the increases from the previous year permitted pursuant to subsection (A) and shall be an additional millage levy above that permitted by subsection (A). The millage limitation provisions of this section do not apply to revenues, fees, or grants not derived from ad valorem property tax millage or to the receipt or expenditures of state funds.

(D) The restriction contained in this section does not affect millage that is levied to pay bonded indebtedness or payments for real property purchased using a lease-purchase agreement or used to maintain a reserve account. Nothing in this section prohibits the use of energy-saving performance contracts as provided in Section 48-52-670.

(E) Notwithstanding any provision contained in this article, this article does not and may not be construed to amend or to repeal the rights of a legislative delegation to set or restrict school district millage, and this article does not and may not be construed to amend or to repeal any caps on school millage provided by current law or statute or limitation on the fiscal autonomy of a school district that are more restrictive than the limit provided pursuant to subsection (A) of this section.

§ 6-1-330. Local fee imposition limitations.

(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.

(C) If a governmental entity proposes to adopt a service or user fee to fund a service that was previously funded by property tax revenue, the notice required pursuant to Section 6-1-80 must include that fact in the text of the published notice.

(D) The governing body of a county may not impose a fee on agricultural lands, forestlands, or undeveloped lands for a stormwater, sediment, or erosion control program unless Chapter 14, Title 48 allows for the imposition of this fee on these lands; provided, that any county which imposes such a fee on these lands on the effective date of this subsection may continue to impose that fee under its same terms, conditions, and amounts.

END OF DOCUMENT

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NO. 2011-CP-40-6705

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

Plaintiff,)

vs.)

City of Columbia,)

Defendant.)

PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

BACKGROUND FACTS

This case involves a challenge by customers of the City of Columbia's water and sewer system to the practices of the City of Columbia of transferring monies collected by the City of Columbia as water and sewer fees to the City of Columbia's general fund where those monies are spent for purposes other than the water and sewer system and allowing other departments of the City of Columbia, particularly those within the City's Office of Economic Development, to spend money out of the account where water and sewer fees are deposited.

On a fiscal year basis the City of Columbia collects in excess of \$100,000,000.00 in water and sewer fees.¹ Water and sewer fees collected by the City of Columbia are approximately 48% to 49% of the City of Columbia's total annual budget. Each year, the City of Columbia transfers at least \$4.5 Million from monies collected as water and sewer fees to the general fund and has done so for many years. (See Exhibits 1 and 2 – City of Columbia Budget Summaries for Fiscal Year 2010-2011 and Fiscal Year 2011-2012.) Further, the City of Columbia funds the Office of Business

¹ Fiscal Year 2010-2011=\$103,708,234.00. Fiscal Year 2011-2012=\$110,400,499.00.

Opportunities, the Economic Development Department, the Public Relations Department, various development corporations, the Economic Development Contingency Fund, the City Center Partnership and Community Promotions by using money collected from water and sewer fees for those other uses. See Affidavit of Jeffrey Palen dated July 12, 2013 and paragraph 29 which states:

The City funds four development corporations from its Fund – the Columbia Development Corporation, the Eau Claire Development Corporation, the Columbia Housing Development Corporation and the TN Development Corporation. Collectively, the City expended \$1,053,522.00 in FY 2008/2009, \$1,154,478.00 in FY 2009/2010, and \$1,147,242.42 in FY 2010/2011 for these four development corporations. (Exhibit 4).

Plaintiffs' lawsuit and established South Carolina case law clearly provide that transfers of water and sewer fees for purposes other than use in the water and sewer system are illegal and a violation of established South Carolina statutory and case law.

Plaintiffs seek a declaratory judgment on behalf of all City water customers to require the City of Columbia to repay the utility fund those funds transferred to the General Fund of the City of for the last three years and to recover money expended by the City from water and sewer fees for purposes other than the water and sewer system. It should be noted that the City has numerous water and sewer customers who are not City residents. In fact, approximately 55% of all water and sewer customers live outside the City of Columbia and any water and sewer fees spent on city-only activities do not benefit them. Further, monies in the Water and Sewer Utility Fund are specifically designated for use for water and sewer services only and may not be used for any other purpose. See S.C. Code Ann. § 6-1-330(B) (Supp. 2011) (Exhibit 3).

The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid.

The essence of this case turns on whether or not the City of Columbia may use monies collected as water and sewer fees for purposes other than its water and sewer system. South

Carolina case law and S.C. Code Ann. § 6-1-330(B) (Supp. 2011) clearly prohibits the City of Columbia from using these monies for other than for the operation, repair, upgrade, maintenance and/or expansion of the water and sewer system of the City. S.C. Code Ann. § 6-1-330 and § 6-1-300(6) (Supp. 2011) define a service or user fee as follows:

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.

A number of South Carolina cases have held that a sewer service charge is a fee and cannot be used for any other purpose. See *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*, 519 S.C. 2d 561 (1999); *Campbell Construction Co. v. City of Charleston*, 481 S.E.2d 437 (1997); *Ford v. Georgetown County Water and Sewer District*, 532 S.E.2d 873 (2000); and *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992). (Attached as Exhibit 5).

It is well settled in South Carolina that service or user fees collected by a city for water/sewer service must be used solely to pay costs directly related to the service or program for which the fee was paid. In this case, the City of Columbia, in violation of South Carolina law, collected fees for services from the water and sewer service and transferred those monies each year to the City's general fund for use in other departments and for other uses not allowed by law.

This lawsuit seeks to require the City to return those monies within the three year statute of limitations before this case was commenced that were paid to the General Fund (about \$4.5 Million per year) which were used to fund other City departments. See *Brown v. County of Horry*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992) (South Carolina Supreme Court explained that "a service charge is imposed on the theory that the portion of the community which is required to pay the charge receives some special benefit as a result of the improvement made with the proceeds of the charge." The *Brown* Court characterized service charges as an alternative to increasing general

property taxes intended to reduce the tax burden which otherwise would have to be borne by taxpayers generally. Similarly, S.C. Code Ann. § 6-1-330 contemplates that "a service or user fee might be used to fund a service that was previously funded by property tax revenues."

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

On October 5, 2012, Plaintiffs moved for summary judgment as has Defendant. Plaintiffs' Motion for Summary Judgment has the following basis:

1. It is admitted that the City of Columbia takes money from the Utility Enterprise Fund and places those funds in the General Fund and not for water and sewer service.
2. It is admitted that the funds are transferred to the General Fund and such funds are used by other City departments and not for water and sewer purposes.
3. It is admitted the City of Columbia transferred at least \$4.5 million annually to the General Fund of the City to be used for other purposes than water and sewer related activities.

In support of the Motion for Summary Judgment, the Plaintiffs took the depositions of several City employees who verified that water and sewer funds were not used for water and sewer purposes solely.

A. Deposition of Steven A. Gantt (Exhibit 6).

The deposition of Steven Gantt, the City of Columbia Manager, was enlightening in that he testified the City collected water and sewer fees and transferred those to the general fund since at least 2001 (p. 6, lines 9-13); that it was based on a City resolution (p. 7, lines 11-13); that the City of Columbia needed at least \$500 Million of work on their water and sewer system (p. 18, lines 16-23); that a study had been performed by Black & Veatch which criticized the transfer of monies from the water and sewer utility enterprise fund to the general fund (p. 21, lines 21-22); that Gantt agreed that \$4.5 Million had been transferred each of the last three years from the utility enterprise

fund to the City of Columbia and that this practice dated back to 1993 (p. 17, lines 1-4; p. 26, lines 23-25); that the water and sewer utility enterprise fund helped pay for other services (p. 29, lines 1-4); that City Council transfers money as it sees fit (p. 30, lines 16-17); that lots of people do not live in the City but are customers (p. 31, lines 1-15); that according to the consultant's report (Black & Veatch) \$3.6 million transferred from the utility enterprise fund to the general fund for development companies was not justified (p. 36, lines 1-10); that an indirect transfer of \$3.2 Million from the utility enterprise fund to the City of Columbia was too much according to the consultants (p. 37, lines 1-4); that a building at Washington Square was bought with water and sewer funds and over half of the building is used for purposes other than for water and sewer (p. 38, line 18); that the City of Columbia has 130,000 water customers and 70,000 sewer customers and that 45% of the customers are in the City and 55% are out of the City (p. 51, lines 1-25); that the \$4.5 Million transfer from the utility enterprise fund to the general fund was for basic services such as police, fire, etc. (p. 105, lines 10-15); that further monies were transferred from the water and sewer utility enterprise fund to the general fund for economic development (p. 105, lines 19-23). (Exhibit 6 - Deposition of Steven A. Gantt).

B. Deposition of William H. Ellis (Exhibit 7).

That William Ellis was also called to testify and stated he is the Director of Finance for the City of Columbia (p. 3, lines 19-21); that \$4.5 million was transferred to the general fund from the water and sewer utility enterprise fund and was not used for a specific purpose (p. 7, lines 17-18); that there was no question that the ratepayers had \$4.5 million transferred from the utility enterprise fund to the general fund (p. 38, lines 20-25); and that some ratepayers did not live in the City (p. 39, lines 9-12); and that the \$4.5 million was not used for water/sewer (p. 39, lines 9-12). (Exhibit 7 - Deposition of William H. Ellis).

C. Deposition of Missy Caughman (Exhibit 8).

The final person called to testify was Missy Caughman who is the budget director for the City of Columbia (p. 3, line 25; p. 4, lines 1-5); as budget director and manages she manages the City's operating capital project funds (p. 5, lines 7-9); that \$4.5 million dollars comes from the utility enterprise fund and is money collected from people who pay the water and sewer fees (p. 5, lines 16-25); that once the money is transferred into the general fund it is not designated for a specific purpose of the general fund (p. 6, lines 11-15); that the money which is transferred from the utility enterprise fund to the general fund is not used for water and sewer purposes (p. 7, lines 4-11); that the general fund includes police, fire, public works, parks and recreation, municipal court, city management, city administration, development services, legislative, public relations, information technology and human resources (p. 7, lines 21-25).

The essence of the City's use of the water and sewer utility enterprise fund is found in the testimony of Missy Caughman at page 9, lines 1-25 as follows:

Q. Do you know why it is or when it was decided that money needed to be taken from the utility enterprise fund and put in the general fund?

A. The practice goes back well before my time at the city. The earliest information I have on it is from resolution from 1993. However, the transfers were occurring before that which is why the resolution was developed.

Q. And I'm assuming that one of the reasons why the money is transferred from the utility enterprise fund to the general fund is because if do you [sic] that you won't have to increase taxes; is that right?

THE WITNESS: That is -- I mean, if it -- if the general fund were to lose that source of revenue it would have to seek another form of revenue to replace it or it would have to cut services. We would either have to raise the revenue or cut the expenses.

Q. How many mills would you have to increase taxes to --

A. I think the last count I heard was approximately ten mills.

Q. To -

A. To replace the 4.5 million.

Further, Caughman recommended in a written memorandum (Exhibit 9) that a transfer from the water and sewer fund of 4.5 million to 5.2 million was recommended to move certain departments to the general fund and that those departments would need funding (p. 16, lines 1-25).

Caughman also testified that the methodology in hiring Black & Veatch to do a study of the utility enterprise fund was correct and accurate.(p. 21, lines 4-9); that closer to \$3 Million was being moved from the utility enterprise fund to the general fund (p. 25, lines 20-21); and that the indirect cost transfer amount was reduced by \$978,000 to \$2.2 Million (p. 27, lines 8-16); that there are currently line items in the enterprise operating fund that are not directly attributable to supply, treatment and distribution of water, collection, treatment and disposal of waste water and that those line items include economic development, public relations and public safety for security (p. 29, lines 1-18); that if the \$4.5 million was not directly transferred from utility enterprise fund to the general fund there would have to be a rate increase (p. 31, lines 4-11). (Exhibit 8 - Deposition of Missy Caughman).

ADDITIONAL EVIDENCE IN THE RECORD

In 1993, the City of Columbia adopted a City Council resolution approved by the Mayor and the City Manager (Exhibit 10) which provided for transfers from the City water and sewer fund to the general fund of the City. The resolution provided a general policy statement that:

1. No transfer of net revenues from the water and sewer fund to the general fund shall be made if such transfer would impair the ability of the City to operate and maintain the system in a sound and businesslike manner.

The City Council resolution clearly indicated the City's intent to continue to use monies from the water and sewer fund for purposes other than water and sewer.

In 2007 the City of Columbia, through its City Manager, Charles Austin, hired Black & Veatch to provide a review of the City water and sewer utility fund. On April 2, 2007, the consultant, Thomas Peterson wrote:

Based on our cost casual analysis, of the utilities 2006 budget of \$94.8 million in Exhibit 2a and 2b, approximately \$7.5 million of directly funded costs should not be funded by the utility enterprise fund and more appropriately funded through the general fund budget. This includes \$3.6 million for non-departmental capital improvements and component uses (development corporations). Our analysis is not intended to suggest the activities and functions provided by these departments is not of value to the City; rather, our analysis indicates no direct cost causation or benefit could be attributed to the utility for these services, and therefore no cost casual based justification for direct funding from utility was supported for purposes of this study.

Mr. Peterson went on to write in his April 7, 2007 report:

The estimated cost of services and associated benefit to the utility provided through the indirect transfer totals \$2.27 million as shown in Exhibit 1a and 1b. These costs are primarily associated with legal support, human resources, legislative offices and accounting. When compared to the budgeted indirect transfer level of \$3.2 million, our analysis supports a reduction in this transfer of \$930,000. It should be noted, based on the manner in which the utility budget is presented, this amount is included in the \$7.5 million noted above in Exhibit 2a and 2b.

(Exhibit 11).

The Black & Veatch report of April 2, 2007 was preceded by a draft report March 19, 2007 in which the conclusions of Thomas Peterson were echoed except at that time he wrote:

Approximately \$7.6 of directly funded costs should not be funded by the utility enterprise fund and are more appropriately funded through the general fund budget.

(Exhibit 12)

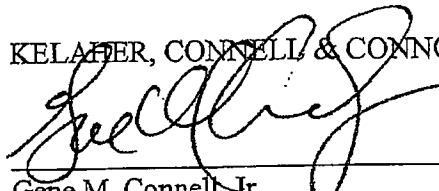
CONCLUSION

In sum, the City of Columbia has used the money it collected as water and sewer fees for purposes prohibited by state law or by case law. It is clear that ratepayers' monies cannot be used to fund other city general services and to do so violates South Carolina law. All monies paid by ratepayers must be used for "...the specific service or program for which the fee was paid" and that service was the City's water and sewer system, i.e., water and sewer construction, maintenance and

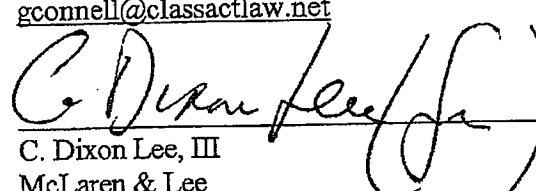
operation. The City of Columbia cannot flout the law and continue to use ratepayers' money for in-City services. To do so subjects ratepayers outside the City of Columbia to taxation without representation in violation of the law. Accordingly, Plaintiffs request the Court issue its order enjoining this practice by the City and further requiring the City of Columbia to return to the utility enterprise fund all monies which were transferred to the general fund by the City of Columbia since the date of this lawsuit.

Respectfully submitted.

KELAFER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



C. Dixon Lee, III
McLaren & Lee
1508 Laurel Street (29201)
Post office Box 11809
Columbia, SC 29211
(803) 799-3074 (phone)

Attorneys for Plaintiff

August 1, 2013

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

County of Richland)

2011-CP-40-6705

Joseph S. Azar, Michael A.
Letts, and Frank J.
Cumberland, Jr.,)

Plaintiffs,)

vs.)

TRANSCRIPT OF RECORD

City of Columbia)

Defendant.)

June 5th, 2012
Columbia, South Carolina

BEFORE:

THE HONORABLE J. ERNEST KINARD, JR., JUDGE.

APPEARANCES:

C. Dixon Lee, III, Esq.
Attorney for the Plaintiffs

Gene McCain Connell, Esq.
Attorney for the Plaintiffs

Thomas E. Lydon, Esq.
Attorney for the Defendant

Mullen Taylor, Esq.
Attorney for the Defendant

AMINAH R. HARDY, RPR
Official Court Reporter

EXHIBITS

(No exhibits were marked.)

P R O C E E D I N G S

THE COURT: Okay, so who wants me to do what? You know, I'm just a road warrior.

MR. LYDON: Your Honor, there's two motions before the Court. There's City of Columbia's motion to dismiss for lack of standing, and the plaintiffs' motion for class certification.

THE COURT: Okay. Who is moving first? You, Mr. Lydon?

MR. LYDON: I think our motion to dismiss has been pending quite some time; probably makes sense for that to be heard first.

THE COURT: Yeah, because if it's dismissed, then there's no reason to certify it.

MS. TAYLOR: I'm Mullen Taylor, counsel for City of Columbia along with Mr. Lydon. First name is M-U-L-L-E-N.

Your Honor, may it please the Court. The City of Columbia has brought this motion to dismiss all causes of action that the plaintiffs have brought against the City of Columbia based on lack of standing. This complaint, just to give you a quick background here, this complaint was filed on October 10, 2011, and then on October 14th, it was amended to add another plaintiff. Then in January of this year, plaintiffs filed a second amended complaint,

1 which defendant consented to under a consent order which
2 also added another plaintiff. We, of course, answered the
3 amended complaint and the second amended complaint. We
4 also filed this motion pursuant to 12(b)1, motion to
5 dismiss for lack of standing.

6 In considering a 12(b)1 motion, affidavits and other
7 evidence outside the pleadings may be used to challenge
8 plaintiffs' factual basis for standing, and the City of
9 Columbia has done this in this motion here. We have come
10 forward with evidence that's attached to our motion -- I
11 mean our memorandum in support of our motion. We've
12 attached an affidavit dealing with plaintiff Azar's status
13 as a customer, or noncustomer. We've also attached a
14 certified bond ordinance, and we've also attached
15 defendant's responses to -- plaintiffs' responses to
16 defendant's interrogatories.

17 The defendant moves to dismiss certain plaintiffs for
18 lack of standing, but not all. We contend that plaintiff
19 Cumberland does have standing to challenge the City's
20 actions under three of the four causes of action; however,
21 we argue that he lacks standing to bring his breach of
22 contract claim. As for the other plaintiffs, plaintiff
23 Azar resides within the City of Columbia; however, he is
24 not a fee payer. And plaintiff Letts is a nonresident and
25 he also does pay fees; however, we contend that he lacks

1 standing to bring the claims.

2 The causes of actions that the plaintiffs have
3 brought, the first one they seek an injunction, and the
4 basis for that cause of action is violation of what I'll
5 call for the rest of this argument the service fee
6 statute. It is South Carolina code 6-1-330, and also case
7 law C. R. Campbell versus City of Charleston, and they
8 seek an injunction to restrain the City from acting
9 unlawfully and requiring monies that the City has already
10 spent to be returned to its water and sewer fund.

11 They also bring a breach of contract between the
12 plaintiffs and the defendant in which the defendant
13 allegedly was obligated by some term under state law to
14 use water and sewer fees in a manner that complies with
15 state law, and they seek a refund of all fees collected
16 for the past five years to be returned to the water and
17 sewer fund.

18 They also allege unconstitutional collection of a tax
19 in violation of 6-1-330 and C. R. Campbell, and they also
20 want as a remedy for that a common fund of all water and
21 sewer fees collected over the past three years, and this
22 fund to be returned to the City's water and sewer fund.

23 Lastly they bring an unconstitutional rights tax
24 claim in violation of the C. R. Campbell case, and they
25 seek once again a common fund comprised of all the fees

1 collected in the past three years to be returned to the
2 City's water and sewer fund, and they also allege a taking
3 without just compensation.

4 Also, as part of their injunctive relief, they seek a
5 an injunction restraining the City from using any of its
6 monies returned to the water and sewer fund for any other
7 purpose than improvement of the water and sewer system.

8 Now, I have made arguments here for lack of standing
9 under constitutional tests as well as addressed taxpayer
10 standing, and the public importance exception. And if
11 it's all right with you, I'll just start with the
12 constitutional standing requirements. To establish
13 constitutional standing, the plaintiffs must show that
14 they have a legally protected interest that was injured in
15 a concrete and particular manner, and that injury was
16 caused by the defendant's actions and likely to be
17 redressed by a favorable decision by this Court.

18 They all, as I mentioned earlier center -- the causes
19 of action center on alleged violation of the service fee
20 statute and case law C. R. Campbell. And if you look
21 quickly at what those statutes require, they govern the
22 use of revenues that the City collects from fee payers.
23 And just by the very language of the statute as well as
24 the case law, they are attempting to protect the interests
25 of folks who pay those fees. So for -- each plaintiff

1 must establish standing in showing that they have paid
2 that fee and that the use of the revenues injured them in
3 some specific, concrete manner that's not hypothetical and
4 that a judicial decision is likely to redress it.

5 So plaintiff Cumberland, we are not arguing that he
6 lacks standing to pursue his cause of action for
7 injunction or the unconstitutional tax collection or the
8 illegal tax, but we do believe he lacks standing to bring
9 his breach of contract claim. He does have a service
10 contract with the City of Columbia, which is attached as
11 part of the defendant's memo in support. However, if you
12 look at the contract -- I think it's Exhibit B -- if you
13 look at the contract, Your Honor, there is no term or
14 provision that says anything about how the City intends on
15 using its water and sewer revenues.

16 If you look at the defendant's response --
17 plaintiffs' response to defendant's interrogatories, they
18 have responded in a manner that describes their breach of
19 contract claim as one in which there is an implied term or
20 the statute itself creates some sort of contractual
21 obligation on part of the City. We contend that they have
22 failed to meet their burden to establish either an implied
23 cause of action or that the statute itself has created
24 some sort of contractual obligation.

25 We think these are issues that are a matter of law

1 that's appropriate for this Court to decide pursuant to
2 the motion. There's no facts in dispute that I'm aware of
3 this. It's certainly a narrow question of law that we
4 think is fundamental for the plaintiffs to be able to
5 establish standing, or at least this particular plaintiff
6 to bring his breach of contract action.

7 Now, when an express written contract exists, such as
8 this one, and there's nothing in the contract that
9 incorporates state law, then they must overcome a
10 presumption that the state law does not create a
11 contractual right, and we contend that the plaintiff has
12 not shown that, and it is their burden to do so. As far
13 as plaintiff Azar, we are arguing that plaintiff Azar
14 since he does not pay water and sewer charges to the City
15 and the interrogatory responses he has stated that he
16 resides at the Hermitage condominiums and the Hermitage
17 pays the water/sewer fees and that he reimburses the
18 Hermitage on an occasional basis.

19 The defendant believes that that type of arrangement
20 where a plaintiff seeking to challenge the City's use of
21 water and sewer revenues under the statutes that are
22 intended to protect fee payers, that he is not a direct
23 fee payer, and that simply reimbursing someone else who
24 does pay the fee is really too remote to confer standing.
25 He lacks a sufficient stake in this litigation to bring

1 the claims.

2 He also raises some allegations regarding injury that
3 pertain to what we contend to be issues unrelated to the
4 service fee statute as well as C. R. Jackson. It's well
5 established in our case law that you've first got to
6 establish that legally protected interest and that the
7 injury flows from that legally protected interest. In
8 other words, it's got to be within the zone of interest
9 that the statute provides. And as I mentioned earlier,
10 the service fee statute in C. R. Jackson is intended to
11 protect fee payers, and I've already stated he does not
12 pay the fee, thus the other allegations of injury bear no
13 relation to the case law or the statute.

14 He has some allegations regarding what he contends to
15 be a state of disrepair of defendant's wastewater
16 treatment plant, as well as sanitary sewer overflows as a
17 result of the disrepair. These concern issues relating to
18 environmental impacts, not municipal finance law.
19 Therefore we believe it falls outside the zone of
20 interests that are protected by the statute and the case
21 law that he is bringing these claims under.

22 He also argues that he has standing dealing with
23 entries associated with the City's bond issuances that
24 were passed or enacted last year. Once again, for the
25 same reason, we feel those injuries are -- they're too

1 remote or speculative in order to confer standing upon
2 him. The allegations of injury don't have any relation to
3 the service fee statute, and his claims that had the City
4 not spent the money unlawfully, which he contended was in
5 violation of the case law and the statute, then the bond
6 issue wouldn't have been necessary is really hypothetical
7 and speculation.

8 He also argues, curiously, that he has standing under
9 the South Carolina Pollution Control Act, and that would
10 somehow suffice in term of his allegations of injury
11 dealing with the sanitary sewer overflows. However, Your
12 Honor, he has not brought a cause of action under the
13 South Carolina Pollution Control Act. And I believe if
14 you take a look at the statute that he refers to, which is
15 48-1-250, that the statute -- which I do have a copy of;
16 I'd be happy to bring -- that that statute applies only to
17 causes of actions brought under the Pollution Control Act.
18 He has not brought a cause of action under the Pollution
19 Control Act, therefore that particular justification does
20 not apply.

21 He has also thrown in as part of his unconstitutional
22 collection of tax and the unconstitutional taxation some
23 other constitutional claims, due process and equal
24 protection, as well as a takings claim. The defendant
25 contends that as far as the takings claim, since he has

1 not paid fees to the City of Columbia and he has a sort of
2 a protected property interest and the property interest is
3 fundamental in order to have standing to bring a takings
4 claim, and the same goes for due process. You must have
5 some property interest, and the obvious way to obtain that
6 is to pay the fee, which he has not done.

7 As far as equal protection argument, he has not
8 alleged anywhere here or failed to articulate what the
9 class that the legislation has created and how he has
10 experienced disparate treatment. For all those reasons,
11 we think that plaintiff Azar lack standing to bring any of
12 these claims.

13 As far as the third plaintiff, plaintiff Letts, he is
14 a nonresident, lives outside the corporate limits of the
15 city of Columbia, and he does pay water and sewer charges
16 to the City by virtue of an expressed contract which is
17 also attached to defendant's memorandum. There's
18 well-settled case law in South Carolina, notably Childs v.
19 City of Columbia, Sloan v. City of Conway, and Calcaterra
20 versus City of Columbia that -- in which our Supreme Court
21 has repeatedly held that entitled that nonresident water
22 and sewer utility customers lack any sort of protective
23 right outside of what is found within their contract.

24 The City contends that for this -- because of this
25 well-established precedent that there is no prospective

1 interest that plaintiff Letts can turn to in order to have
2 standing to bring his claims for cause of action for
3 injunction, the illegal tax, the unconstitutional
4 taxation. He does have a contract. However, the basis
5 for the plaintiffs' breach of contract claim is that state
6 law is somehow incorporated into that contract. And
7 because plaintiff Letts has no statutory protections, we
8 argue that it is not a possible outcome in the context of
9 Letts.

10 Also, I'd like to note under the case law dealing
11 with Letts as a nonresident that the other basis for him
12 asserting that the City has violated provisions related to
13 use of its revenues, C. R. Campbell, and if you look at
14 the C. R. Campbell case, it refers to the City's statute
15 that provides and authorizes the City to exercise general
16 police powers, and the statute does not protect
17 nonresidents. It only protects residents as far as
18 uniform service charges.

19 And also I think there is an argument to be made that
20 the service fee statute, which is 6-1-330, also does not,
21 on its face, serve to protect nonresidents. It refers to
22 adoption of a service fee by ordinance, and ordinances
23 adopted by local governing bodies have effect and
24 jurisdiction only within the corporate limits of the city.
25 Therefore it does not have effect outside the corporate

1 limits and it does not then afford any sort of protection
2 to nonresidents.

3 Those are the City's, in a nutshell, arguments that
4 these three plaintiffs lack constitutional standing to
5 bring their claims. Now, there is taxpayer standing, and
6 it could be that the plaintiffs will argue before this
7 Court that they have standing under the doctrine of
8 taxpayer standing. And there's a long line of cases
9 starting from 1890 that deal with taxpayer standing, but
10 they have not alleged they're taxpayers, and what we're
11 dealing with, Your Honor, is not taxpaying and taxes but
12 fees, and our courts have not conferred taxpayer standing
13 on fee payers. It would be unprecedented for this court
14 to grant taxpayer standing today to fee payers.

15 There's also case law -- which I've also got a copy
16 if you'd like to look at it -- that has rejected taxpayer
17 standing to plaintiffs who are challenging electric
18 utility fees. I think that's certainly comparable because
19 it's drawn from the same constitutional and statutory
20 authority as far as water and sewer utilities as far as
21 the public importance exception, and that is a complete
22 exception that allows plaintiffs to move forward with
23 litigating their claims without demonstrating the
24 constitutional standing requirements, we believe -- for
25 one, not every issue of public importance has been

1 conferred, this public importance standing. And that the
2 future need for guidance, it's -- I think that the, you
3 know, courts have not given a lot of guidance as far as
4 what that means, and the plaintiffs have brought forward
5 numbers of utility customers and not seen a case that uses
6 that as far as the public need for future guidance.

7 Our primary argument against public importance
8 exception, it's really based on the -- what the plaintiff
9 have sought as far as relief, which is not something you
10 will find in any other case in which the public importance
11 exception was granted. In all the other cases in which
12 the exception was granted, they certainly -- the plaintiff
13 sought injunctive and/or declaratory relief. And that's
14 what these plaintiffs have brought, but they do more than
15 than. They are seeking either common fund, refund,
16 essentially a return of three years worth of money that
17 the City has already budgeted, allocated, and spent to be
18 returned to a common fund or to the water and sewer fund
19 of the City, and then to be used only for wastewater or
20 water improvement, which I take to mean capital
21 improvement as opposed to maintenance or some other
22 equally legitimate means by which the City can use its
23 money in a lawful manner.

24 We believe that the posture that the plaintiffs have
25 brought is an -- upsets the careful balance that the

1 Supreme Court has emphasized in these public important
2 exception cases; that if a plaintiff, without having the
3 requisite injury, can bring claims against the City or any
4 other local government or government for the extent of
5 relief that they seek that has a huge impact of the
6 financial condition of the City, then we think that that
7 is a situation that falls outside the public importance
8 exception, and therefore the exception should not apply in
9 the case.

10 THE COURT: All right.

11 MR. LEE: Your Honor, I'm Dixon Lee along with
12 Mr. Connell represent Mr. Azar. Where I'd like to start
13 is the statute, because the statute is the law which makes
14 what the City is doing unlawful. In 1994, the legislature
15 passed the -- an act that was titled Authority of Local
16 Governments to Assess Taxes and Fees. Became effective, I
17 think, the first of 1995. And one of the things that
18 statute did is dealt with taxes one way and fees another.
19 And I'd like to just read a couple section of the statute.

20 6-1-310 says, "The local governing body may not
21 impose a new tax after December 31st, 1996 unless
22 specifically authorized by the general assembly." They
23 stopped local governments from enacting new taxes unless
24 the general assembly said they could do so. Now, this
25 does not apply to county governments. This is not talking

1 about counties. It's talking about municipalities.

2 Then they went on and they limited millage rate
3 increases tied into existing taxes, tied it to the CPI,
4 and then they enacted the specific statute we're talking
5 about, which is 6-1-330, which is titled Local Fee
6 Imposition Limitations. And in that, they said that --
7 section A says, in essence, that a local governing body
8 may, by ordinance, by -- approved by a positive majority,
9 charge and collect a service or user fee. In B, they
10 limited what those fees could be used for, and it says,
11 "The revenue derived from a service or user fee imposed to
12 finance the provision of public services must be used to
13 pay costs related to the provision of the service or
14 program for which the fee is paid."

15 Therein lies the essence of the lawsuit. What the
16 City has done and what we have alleged is that they
17 collect water and sewer fees, and then they take that
18 money and spend it on things other than the water and
19 sewer program. The City has acknowledged that over a
20 period of years -- and we've alleged in our complaint that
21 I think it was 80 to a 100 million dollars has happened,
22 but they acknowledge that it's roughly 4.5 million a year
23 that goes into the general fund from water and sewer fees,
24 and there are other monies spent out of this account,
25 which they call the enterprise account. But the point is

1 I don't think there's any dispute all the money collected
2 as water and sewer fees is not spent on the water and
3 sewer system, and that the monies go elsewhere.

4 Now, the plaintiffs -- there are three plaintiffs;
5 Joe Azar is one. We concede that Mr. Azar lived --
6 Mr. Azar lives in the city of Columbia. He lives in a
7 condominium. He lives in -- I think it's the Hermitage
8 condominiums, which is organized on -- I think it's the
9 Horizontal Property Act. He is an owner of that unit.
10 They have one meter there. He pays like every other
11 resident in there to the homeowner association, who then
12 in turns pays for the water and sewer. So he does not --
13 while he does not write a check to the City, he does write
14 a check every time they raise the rate. They have to get
15 the money from somewhere, and the only place it's coming
16 from, so we would submit he is a customer of the water and
17 sewer system, even though the bill does not come in his
18 name.

19 Mr. Cumberland, they concede is a resident of the
20 city and has water and sewer -- has two water and sewer
21 accounts and pays both of them. Mr. Letts is a customer
22 of the water and sewer system -- Columbia water and sewer
23 system, but lives outside the city limits. In fact -- and
24 I don't think they'll argue with this -- they actually
25 have more customers for the city water and sewer system

1 outside the city limits than they do inside. I believe
2 there's approximately 150,000 customers total.

3 The issue is on the motion to dismiss. What I'd like
4 to address are the three standing issues that opposing
5 counsel addressed. There are a number of cases, and we
6 cited them in our memorandum involving Edward Sloan from
7 Greenville --

8 THE COURT: Yeah, I'm very familiar. Conservatively
9 35 brought by him --

10 MR. LEE: Well, I was going say that I've got 12 that
11 were published, and I'd be willing to bet there are a
12 substantial amount that are unpublished. But in the 12
13 that were published, Mr. Sloan sued the various government
14 entities --

15 THE COURT: They give him standing 90 percent of the
16 time --

17 MR. LEE: Absolutely, they did, and most of his
18 lawsuits involve spending of government money. Most of
19 them did, and one of the things they pointed out and this
20 is in the -- I think it's the 2008 decision, was the
21 question that if -- that you have to have checks and
22 balances against out-of-control government spending,
23 government spending which is unlawful. Violates some law,
24 in this case the statutory law of the State of the --

25 THE COURT: Well, the bottom line of this case, isn't

1 it whether the City can impose charges and take those and
2 apply them to the general fund rather than --

3 MR. LEE: Yes, sir, that's exactly.

4 THE COURT: -- specifically water treatment.

5 MR. LEE: You got it. You got it. It's -- the issue
6 in this case is whether the City can collect money as
7 water and sewer fees, and then spend it somewhere other
8 than on the water and sewer system.

9 THE COURT: Why don't y'all do this. And I'm not
10 trying to get rid of you. I have -- you know, I've been
11 in here all day. They hand up briefs this thick. Even
12 though I'm a speed reader, you know, I'm just about burned
13 out from reading them, and people arguing all -- we came
14 in at 9:30. We didn't leave. It's just motion after
15 motion after motion.

16 Now, I have not read the briefs that y'all did
17 because I've got 75 other things that are already filed in
18 here. So y'all come in and I started to read it, but I
19 saw the complaint was 15 something pages. And it's not
20 like you arguing in front of the Supreme Court whether
21 they had six months and three law clerks to write memos
22 and so forth. If the case is not going away because
23 somebody --

24 MR. LYDON: Mr. Cumberland.

25 THE COURT: -- Mr. Cumberland has standing conceded,

1 then the case is not going away. Azar pays. He's not
2 going away. He pays to the regime, so he's in the record
3 paying to the City. And the other person doesn't live in
4 the city, but he pays. I'm just sorting out and
5 understanding what the issues are, all right?

6 MR. LEE: Yes, sir.

7 THE COURT: / So it looks like what y'all need to do is
8 just frame it so you get an issue and take it straight up.

9 MR. LEE: We have talked with opposing counsel.

10 THE COURT: Without all this stuff, just say yes, the
11 City can; no, the City can't, and then you can take it
12 from there rather than go piecemeal, because it's going to
13 cost a bundle to get to a point, and then you appeal and
14 then we three or four years down the line and nothing's
15 happened, and the City is still taking the money and
16 paying, as is every other city in the state.

17 MR. LEE: Well, your Honor, that's -- while that may
18 be true for some cities --

19 THE COURT: Well, it's true in Camden and that's
20 where I live.

21 MR. LEE: And I completely agree with you. There are
22 a number of municipalities. The larger ones, Greenville,
23 Charleston, Spartanburg, Rock Hill have separate water and
24 sewer authorities who are essentially standalone entities.
25 They collect their own money and they don't give the money

1 to anybody else. It's their money to control. We just
2 don't have that here in Columbia. So I agree there's a
3 number of other places, but there's also places that
4 doesn't.

5 THE COURT: Well, that looks like a simple thing to
6 frame, and it might be in your best interest if someone
7 rules that they can do it. Then you can appeal and the
8 Supreme Court can say they can't. We're talking political
9 opinion anyway. The Supreme Court is the policy court.
10 I'm not a policy court at all. I'm just a lower court, so
11 nothing -- nobody is going to win anything in front of me
12 today, you know, other than you have the right to proceed
13 with it, which doesn't help anybody on getting to the
14 bottom line.

15 MR. LEE: I think we have a trial in August. What is
16 it? The second week in August? Is that right?

17 MS. TAYLOR: Sometime in the second week.

18 THE COURT: Well, that's what you need to do, then.
19 Go ahead and try it and then take it up. I say they got
20 standing. I'm not going to certify the class. I haven't
21 even heard anything on that. You got enough people there
22 to frame the issue. You can come back later in if that's
23 the problem. I say they all have standing to go ahead,
24 named plaintiffs.

25 MR. LYDON: And the motion for class certification is

1 denied?

2 THE COURT: I hadn't heard anything on that. It's
3 denied if you're ready to go on August the 12th.

4 MR. LYDON: It's a declaratory class, Your Honor,
5 just like the Sloan cases, and it ought to be certified
6 just like any other declaratory class. I've given you a
7 brief with all the cases.

8 THE COURT: I know you've given me a brief and
9 normally I read them, but I'm burned out. You gave me a
10 brief by e-mail, didn't you?

11 MR. LYDON: Yes, sir.

12 THE COURT: Email -- I'm in Columbia. My office is
13 in Camden. I got it on a BlackBerry. The print is so
14 small, I can't read it. So there you go.

15 MR. LYDON: Your Honor, would you be inclined to hear
16 that on another day, then --

17 THE COURT: No. I'm willing to hear it today. Does
18 it matter to you?

19 MR. LYDON: Yes, sir, I think it does.

20 THE COURT: Does it matter to y'all?

21 MR. LEE: Matters to us that it not be granted. We
22 don't think it's appropriate for class certification and
23 it's not necessary, as you've just indicated.

24 THE COURT: I don't think it's necessary, but I have
25 not read anything. So the simplest thing on that, rather

1 than you argue, is just prepare an order granting it.
2 Send it to me. You prepare one denying it. Y'all get it
3 to me by the weekend, I'll rule on it next week while I'm
4 in Camden so you know where you stand on it.

5 MR. LYDON: All right, sir.

6 THE COURT: But not prejudging, because prejudging
7 you don't win.

8 MR. LYDON: I understand. I know the burden is on
9 me.

10 THE COURT: I'll read it. I'll give due
11 consideration.

12 MR. LYDON: All right, sir.

13 THE COURT: I might -- if you feel like arguing,
14 that's fine, but it's not going to do any good because I
15 haven't studied it.

16 MR. LYDON: I'm not going to belabor the point.
17 You've been here all day.

18 THE COURT: If y'all want to come to Camden next
19 week, we've got common pleas. We'll break down by
20 Thursday, probably. If you feel like you need to, I'll
21 give you some time next Thursday. But it's better if you
22 just send your order in. I might be able to read what you
23 say and make an informed decision on it. I can't make an
24 informed decision today.

25 MR. LYDON: I understand. Do you want me to -- I

1 made an extra copy or two. Y'all don't have any copies, I
2 take it?

3 THE COURT: Right.

4 MR. LYDON: Okay.

5 THE COURT: I mean, it's in my little BlackBerry.

6 MR. LYDON: That doesn't do anything for you.

7 THE COURT: Bottom line, Azar pays the regime.

8 That's at least indirectly paying taxes. Any time the
9 sewer charge goes up to the regime, his payment goes up in
10 proportion of the rest of it. That's the basis of that.
11 The other people that don't live in the city and pay but
12 they do pay taxes, they gives them standing. And then
13 what's his name is here anyway. All right.

14 MR. LEE: Yes, sir. You probably -- you probably
15 know this. One of the reasons why you heard this thing is
16 because we couldn't get any of the local circuit court
17 judges who were water and sewer customers. That's kind of
18 why you got the case.

19 THE COURT: No, it's because anything complicated if
20 I'm here, they give it to me.

21 (Whereupon, the proceedings were concluded.)

22

23

24

25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Aminah R. Hardy, RPR, Official Court Reporter
for the 16th Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the hearing of
the captioned case, relative to appeal, in the Court of
Common Pleas for Richland County, South Carolina, on the
5th day of June, 2012.

August 7th, 2012

Aminah R. Hardy

Aminah R. Hardy, RPR

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2014 FEB 27 07 10 45

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF RICHLAND) COURT OF COMMON PLEAS
3) 2011-CP-40-6705
4 Joseph S. Azar, et al.,)
5 Plaintiff,)
6 vs.) TRANSCRIPT OF RECORD
7 City of Columbia,)
8 Defendant.)

September 13, 2012
Columbia, South Carolina

13 B E F O R E:
14 THE HONORABLE J. ERNEST KINARD, JR., JUDGE.

17 A P P E A R A N C E S:
18 GENE M. CONNELL, JR., ESQ.
19 Attorney for the Plaintiff
20 THOMAS E. LYDON, ESQ.
21 Attorney for the Defendant

24 DEBORAH M. McCURDY, RPR
25 Official Court Reporter

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced
during these proceedings.)

1 SEPTEMBER 13, 2012

2 THE COURT: I don't know what transpired in
3 this case. My prior law clerk, you can only say,
4 to my knowledge, never misplaced any file. This
5 one, though, was jinxed. He lost it twice, I
6 think, didn't you?

7 And as far as not having a hearing in Camden,
8 I never talked to you about any of that. I mean,
9 you might have talked to him and I just said, set
10 it up with them if they can work it out; if not,
11 I'll decide it on the briefs, and my instructions
12 were, if y'all didn't work it out to come over
13 there. I hear things all the time like that.

14 MR. CONNELL: Yes, sir.

15 THE COURT: Since I do a disproportionately
16 large amount of non-jury.

17 MR. CONNELL: Yes, sir.

18 THE COURT: And I don't know what you cited in
19 that brief about me saying I had been hearing
20 motions all day. I elected to hear more non-jury
21 than anybody because in senior retired status it
22 counts as two weeks so you only have to work two
23 weeks a month instead of three.

24 MR. CONNELL: Yes, sir.

25 THE COURT: And we heard in Beaufort one --

1 well, I will say last week we were doing something
2 else, but I heard a motion that took about an hour
3 because it involved about \$4 million. When they
4 were arguing over some motion, I said, listen, it
5 is \$4 million involved, and I can't decide that in
6 ten minutes. Next time I'm back down here I will
7 do it.

8 Now, this is the first time I have been back.

9 MR. CONNELL: Yes, sir.

10 THE COURT: And, two, that morning -- I don't
11 have a transcript, I don't know what I said, but
12 the courthouse was -- all courtrooms were closed by
13 statute because it was the day of memorial
14 services.

15 I said, why did you put something in front of
16 me when the courthouse is closed?

17 They didn't know about it.

18 I said, well, I'll cancel them. So I looked
19 at them and I said, no, move everything to 9:30
20 because we have got to be out of there for the
21 memorial services that start at 12:00 and these
22 things need to be heard because, not even knowing
23 what the case was, the ones I heard were things
24 like versus the City of Columbia, we didn't want a
25 local judge to have to hear it. So that was it.

1 MR. CONNELL: And, Your Honor, my
2 remembrance -- and I'm not casting stones at what
3 you did or what didn't happen. My remembrance was
4 is I got over here, I came over here from Myrtle
5 Beach about 3:30 in the afternoon and it was the
6 end of the day. And this is a complicated case.
7 And my understanding was that you were going to
8 take the briefs and that we could argue it the
9 following week in Camden.

10 THE COURT: That suited me fine.

11 MR. CONNELL: And then I called the law clerk
12 the following week in Camden and he indicated that
13 you didn't have any time to do that.

14 So I don't know what transpired then. I know
15 afterwards I then got the ill-fated e-mail to do an
16 order on reconsideration, and I got your e-mail
17 that said that you didn't -- that wasn't the case.

18 And then of course then I got an e-mail last
19 week to be here on Friday. And then I called the
20 law clerk and indicated I should be here on
21 Thursday. So --

22 THE COURT: It is just like --

23 MR. CONNELL: It is jinxed.

24 THE COURT: -- once something gets jinxed, it
25 stays jinxed.

1 MR. CONNELL: Yes, sir.

2 THE COURT: And then all of those things --
3 like we heard 130 in the 14th Circuit and we didn't
4 have a problem with any of them.

5 MR. CONNELL: Yes, sir. Your Honor, I can't
6 get this thing to work, but I want to just point
7 out a few things about the Court's order.

8 And I do have a -- I will hand this up to you.
9 This is my PowerPoint presentation so you can look
10 at it.

11 THE COURT: All right.

12 (Complies.)

13 MR. CONNELL: And then I did put together a
14 notebook with everything that has transpired. I
15 would like to mark that an exhibit for Your Honor
16 to look at. This is the order certifying class, my
17 memorandum -- I mean, the order denying
18 certification of class, my memorandum, and then the
19 order that I sent out, and then the reconsideration
20 order.

21 THE COURT: Out of idle curiosity, since I had
22 them pick up the file Monday, it looks like the
23 case is first up for trial next Monday.

24 MR. CONNELL: It is, but I understand that
25 Mr. Lydon has a conflict, so it is not going to be

1 tried.

2 THE COURT: Mr. Lydon doesn't want to try the
3 case?

4 MR. CONNELL: Your Honor, this case is
5 significantly important to the Plaintiffs and the
6 Defendants. And it involves water and sewer rights
7 in the City of Columbia.

8 And as Your Honor knows I think from the
9 brief, the City of Columbia collects water and
10 sewer funds and then uses part of those water and
11 sewer funds not to service and/or maintain the
12 water and sewer system.

13 They actually take water and sewer funds and
14 transfer at least four and a half million dollars a
15 year to the general fund to be used for other
16 things such as the Economic Development Department,
17 the Office of Business Opportunities, the Public
18 Relations Department, various development
19 corporations, economic development contingency
20 funds, and those type of things.

21 And, Your Honor, our position is and has
22 always been that clear case law says that if you
23 are going to charge someone a user fee or a service
24 fee, you cannot use that money for anything else.

25 And I don't think the Defendants argue with

1 the case law, they argue with other issues about
2 the case.

3 The cases that I cite in the PowerPoint on
4 Page 2, J K Construction, Campbell Construction,
5 and Ford versus Georgetown County Water and Sewer,
6 all cases involving water and sewer monies and the
7 use of those in an improper method.

8 And, Your Honor, our class action in this case
9 is not to get money back for the individual
10 Plaintiffs as your order says. Our class action is
11 for an injunctive class action only. All we ask is
12 for a class-wide injunction to require the City of
13 Columbia to put that money back into the water and
14 sewer service, because we want to get that money
15 back so that that money will be used to repair the
16 system, which is in dire need of being repaired.

17 There is a statute too, South Carolina Code
18 Section 6-1-330 and 6-1-306, which says that if you
19 are going to charge a fee for water and sewer for
20 anything else, that fee is to be paid -- is to be
21 used only for that purpose and no other purpose.

22 We ask for class certification and we ask for
23 it on an injunctive and declaratory action and
24 declaratory relief only.

25 And as Your Honor knows being a longtime

1 circuit judge, there are several elements to the
2 class action. One is numerosity. Two is common
3 questions of law and fact. Three is typicality.
4 And then four is if you are asking for damages for
5 individual Plaintiffs over \$100.

6 And in this case we don't ask for damages for
7 individual Plaintiffs, we only seek a class-wide
8 certification for injunctive and declaratory relief
9 that their practice of taking four and a half
10 million dollars and putting that money into the
11 general funds to be used for other purposes is
12 illegal under the constitution and the Supreme
13 Court's rulings.

14 Your Honor I think briefly pointed out that
15 the Sloan cases -- I think there are 25, I looked
16 them up last night -- all were class actions on
17 injunctive relief. Every one of them.

18 The three water cases that we cite in the
19 PowerPoint -- that is J K Construction, Campbell
20 Construction, and Ford -- were all injunctive class
21 actions also. They were all brought as class
22 actions. And I can give you the case law if you
23 want to look at it. That all allowed for class
24 certification in this situation.

25 And the reason is, is because this is a common

1 issue for everybody in the City of Columbia. There
2 are a hundred thousand water and sewer customers in
3 the City of Columbia. There are 140,000 sewer
4 customers. So we know there are at least 140,000
5 people that would be affected by the ruling of the
6 Court in this matter.

7 Your Honor, it is always difficult to pick at
8 the Court's order after the Court has issued an
9 order and we are asking you to reconsider, but I
10 would ask you to look at a couple of things about
11 the order.

12 The order denying class certification cites a
13 couple of things that I respectfully don't believe
14 are correct.

15 South Carolina's class action rule is much
16 different than the federal rule. There are two
17 cases cited in the order for that -- for the
18 proposition that class certification should not be
19 offered in a water and sewer case.

20 And those cases have no efficacy in South
21 Carolina because the Supreme Court has consistently
22 said that when you have a lot of people and one
23 main issue, that that should be class -- you should
24 have class certification.

25 And there is a case right on point that is

1 contra to what is in Your Honor's order,
2 Littlefield versus Forestry Commission.

3 In Your Honor's order, Your Honor says that
4 they could presume -- that we can presume that the
5 City will act in good faith if it is not a class
6 action.

7 Well, that was the exact same argument that
8 was made in Littlefield versus South Carolina
9 Forestry Commission in which the State of South
10 Carolina said, you can presume that -- we don't
11 need a class action in this case, you can presume
12 that we will act in good faith as far as all
13 employees in regard to this employment matter.
14 They were suing for a wage and retirement issue.

15 And the Supreme Court specifically rejected
16 that idea and said, that is not an element of the
17 defense in the class action. The fact that you
18 would presume good faith by the government
19 officials is not an element.

20 And, Your Honor, that -- respectfully, that is
21 in the order. And the Littlefield case is not
22 cited at all for the proposition that you can't do
23 that.

24 So we would argue to Your Honor on that point
25 that the order is directly contra to the

1 Littlefield case.

2 And in the Littlefield case the Court said,
3 you know, South Carolina has got an expansive rule.
4 We don't have a federal rule. We believe that an
5 expansive reading of the class action rule allows
6 for a case where you have got one main issue and
7 you have got common issues of law or fact. And of
8 course that is what we have in this situation.

9 We also cite some cases in the order that are
10 in our brief and in the memorandum that were not
11 discussed. There is a case right on point that
12 says declaratory judgment class actions are
13 favored. There have been over 20 some cases
14 involving the Sloan person Your Honor talks about,
15 that all were declaratory class-wide judgments.

16 A judgment against one person or by one person
17 in this case when it would not bind the City to do
18 anything for that 140,000 other people.

19 So we would again ask Your Honor to revisit
20 that.

21 The order also cites the hundred dollar rule,
22 that we are trying to seek money damages for each
23 class member.

24 And I will make it clear, maybe I did in the
25 memorandum, we do not seek to get any money back

1 for any individual Plaintiff. We only seek to get
2 the City of Columbia to put that money back that
3 they should not have used for that purpose back
4 into the water and sewer -- or what is called the
5 enterprise fund.

6 And what is really interesting about this
7 case -- and I know you haven't heard a lot about
8 it -- back in 2007, the City of Columbia hired an
9 independent group of consultants. And those
10 consultants were asked whether or not this practice
11 was appropriate. And that is called the Black and
12 Veatch study. And that is in the materials I have
13 handed up to you. But they determined that that --
14 that this practice is not an appropriate practice
15 to be doing.

16 So that, again, shows that this is a
17 system-wide situation where the City of Columbia is
18 charging water and sewer fees and then not using
19 them for the appropriate purpose.

20 And one of the big reasons that you have the
21 statute and you have those cases is -- because this
22 is not a tax. This is a fee. This is a fee for
23 water. This is a fee for sewer service.

24 So we would ask Your Honor to look at that
25 also.

1 The common issues I have talked about in my
2 brief, and I know you have got to get out of here,
3 so I am only going to touch on a few of them.

4 The City takes out four and a half million
5 dollars a year. They have been doing it for many,
6 many years.

7 This case would only go back to the statute of
8 limitations. And the City's own consultants have
9 said that is too much. The City's consultants have
10 said in the documents produced to us that
11 \$7.6 million should not have been funded by the
12 water and sewer service and that there is no
13 justification for the practice.

14 The City of Columbia is currently under an EPA
15 order to fix the water and sewer system. And it
16 has been so for a number of years.

17 THE COURT: All that goes to the merits,
18 though, doesn't it?

19 MR. CONNELL: Well, I think Your Honor needs
20 to understand that what I'm pointing out is that
21 this is a common practice, it is system-wide across
22 the 140,000 plus people who are in this situation,
23 and a class action for injunctive and declaratory
24 relief only requires numerosity, a common question
25 of law or fact, typical claims. And we have met

1 the burden on all that on all those issues.

2 And, respectfully, Your Honor's order talks
3 about issues that are directly contra to South
4 Carolina's juris prudence, especially this
5 Littlefield case, which is kind of the granddaddy of
6 class actions against governmental entities, where
7 you can't presume that the government is going to
8 act in good faith for everybody else. And that is
9 not a defense to a class action.

10 I mean, I think they would be hard pressed to
11 argue that this case doesn't apply to all 140,000
12 people and the money that is being taken out every
13 year to fund other services.

14 Although I understand they are worthwhile
15 services, it is our position and belief that the
16 funding of those services is directly violative of
17 those Supreme Court cases that we have talked
18 about.

19 And I think that kind of gives you -- and I
20 don't want to belabor the point, but I think that
21 kind of gives you kind of a -- in a nutshell what
22 our position is about the order and why we believe
23 that Your Honor should reconsider the order under
24 Rule 59 and issue an order on injunctive and
25 declaratory class for the Plaintiffs.

1 MR. LYDON: Tommy Lydon, on behalf of the
2 Defendant.

3 First I point out, this is a Rule 59(e)
4 motion, not a -- we're not arguing back to square
5 one, but I will, but I'll keep it brief.

6 Your Honor, I think that it is important that
7 the Littlefield versus Forestry Commission case
8 that Mr. Connell cited is distinguishable from this
9 case.

10 In the Littlefield case, the Court was dealing
11 with the manner in which state agencies calculated
12 pay for unused annual leave of terminated and
13 retired state employees.

14 So in that case each terminated or retired
15 state employee had an individualized claim, an
16 individual remedy that the Forestry Commission was
17 going to have to adjust if they were not properly
18 calculating it.

19 So, you know, in a situation like that where
20 you have got specific employees that have personal
21 claims, certainly it makes sense for class
22 certification.

23 That is not what this is about, Your Honor.
24 This is a case of statutory interpretation. That
25 is all it is to it. How does this statute

1 governing the use of water and sewer revenues apply
2 and can the City of Columbia do what it has been
3 allowed to do.

4 The case law, Your Honor, is very clear that a
5 class should only be certified if there is a need
6 for the complexities and extra costs associated
7 with class suits and if the Court can presume that
8 city officials will comply with the ultimate ruling
9 in the case on how the revenues can be spent.

10 The Gardner case that is cited in the order
11 says that, the Court must apply a rigorous analysis
12 to determine whether each prerequisite is
13 satisfied. Failure to satisfy even one
14 prerequisite is failure for class certification.

15 And as stated in the order, we don't contest
16 the numerosity and common questions of law or fact,
17 but we don't think they meet the typicality
18 requirements. We don't think that they -- that the
19 Plaintiffs are adequate class representatives.

20 And he keeps talking about that they are just
21 asking for declaratory judgment, but, as pointed
22 out, there is four causes of action. The second
23 cause of action is a breach of contract. The third
24 cause of action alleges an unconstitutional
25 collection. The fourth cause of action alleges an

1 unconstitutional tax.

2 So only the first cause of action seeks the
3 declaratory and injunctive relief.

4 And finally, Your Honor, as far as the
5 adequacy of the class members -- and I don't want
6 to reargue something that was argued at the
7 previous hearing, but there was a lack of standing
8 issue that was argued.

9 THE COURT: I understand. I mean, I am
10 totally cognizant of the facts. He didn't live in
11 the City of Columbia.

12 MR. LYDON: The only one that lived in the
13 city, Your Honor --

14 THE COURT: Cumberland, yes.

15 MR. LYDON: -- was Mr. Cumberland.

16 THE COURT: I just said that.

17 MR. LYDON: Okay. I don't know if this has
18 made it to the court file or not. Can I approach
19 the bench? We received notice last week --

20 THE COURT: That is not in front of me. That
21 wasn't -- I didn't rule on that.

22 MR. CONNELL: No, sir.

23 THE COURT: That is not in front of me.

24 MR. LYDON: But the adequacy of class
25 representation is one of the issues that they must

1 establish in order to get a class certified.

2 And so far we have got Mr. Azar, who is not a
3 customer; Mr. Letts, who doesn't live in the city;
4 and now Mr. Cumberland, who has filed bankruptcy
5 and whose assets and claims, et cetera, are now
6 owned by Chapter 7 bankruptcy trustees in the State
7 of Virginia.

8 So I think that they have failed to meet the
9 rigorous standards of Rule 23. I think the order
10 that I prepared and presented and that you signed
11 is an accurate statement of law. I think the
12 Littlefield case they rely on is distinguishable.
13 The Sloan cases, I haven't read all 20 or whatever
14 of them, but I think I have read all the cases in
15 which whether a class should be certified is
16 analyzed. And I don't think that was an issue in
17 those cases. They were just -- they got to the
18 court, appellate courts, on other issues, but the
19 Court didn't address the issue of whether or not --
20 I don't know if anybody challenged it or not, but
21 in this case, Your Honor, we don't believe they
22 meet the rigorous analysis of Rule 23, the
23 Littlefield case is distinguishable, and we think
24 that the prior order is a correct statement of the
25 law and would ask that the motion for

1 reconsideration be denied.

2 THE COURT: Well, I don't understand, other
3 than attorney's fees, why he can't get the relief
4 he seeks without certifying the class. That is a
5 problem I have.

6 MR. LYDON: And I actually wrote, they can get
7 the same relief without the complexity of a class.

8 THE COURT: Without the complexity. That is
9 how it appears to me. And that is the fault that I
10 have with your whole thing.

11 I think if you take it, for instance, if you
12 took it Monday in front of Judge Barber, he could
13 say, yes, and I think, you know, in theory your
14 position is correct, they can't take those fees and
15 do that. But that is not in front of me, you know.

16 But then he can enjoin the City from doing
17 that without joining all that. And they don't have
18 any -- you are not seeking monetary compensation,
19 although you have got those other two or three
20 causes of action. So I don't see any benefits. I
21 mean, I don't see why you need it certified as a
22 class. Therein lies my problem.

23 I feel that if the judge rules with you and
24 enjoins the City, everybody benefits from it
25 without having to send out notices to all these

1 people, and so forth.

2 MR. CONNELL: Your Honor, can I respond to a
3 couple of things?

4 THE COURT: I'm listening.

5 MR. CONNELL: Thank you, Your Honor. We would
6 not send out any notice of injunctive class. The
7 issue that you raise about attorney's fees is not
8 part of the class action rule. The only --

9 THE COURT: I understand that. I'm just
10 saying other than but, you know, the practical
11 matter, I don't see anything for it.

12 MR. CONNELL: Your Honor, the fact that you
13 could presume that the City officials would act in
14 good faith has been decided in the Littlefield
15 case. They can take that -- if the Court can take
16 that opinion and just decide it for that one or two
17 Plaintiffs and not apply it as a class-wide basis
18 unless you had class-wide relief, what would be the
19 purpose of ever having an injunctive class?

20 I mean, they are done in racial
21 discrimination, they are done against governmental
22 entities, they are done in numerous cases for
23 system-wide relief. And that is what we seek in
24 this case.

25 And when you talk about common issues,

1 numerosity, typicality, everybody is the same. And
2 we're not seeking class certification on any cause
3 of action except the injunctive and declaratory
4 relief cause of action, exactly what was sought in
5 those three other water cases I cited to Your Honor
6 and which was cited and which has been used in all
7 the Sloan cases and is used continuously. You see
8 class action, declaratory class actions and
9 constitutional claims all the time. Bond issues.

10 One of the cases we cited was a bond situation
11 where the bondholders were trying to declare
12 something illegal.

13 The Court certified a class. I mean, the
14 reason for it is the cohesiveness of it and to make
15 sure that we have a binding ruling on everybody.
16 It also protects the City of Columbia to some
17 effect because if you have a ruling in this case
18 and somebody else came along later who was a member
19 of the 140,000 people and wanted to have -- want to
20 bring a case on another issue, they would be
21 estopped.

22 THE COURT: I think they would be collaterally
23 estopped anyway. And, of course, I was about --
24 that is the first time you have told me y'all are
25 seeking class certification on those two issues,

1 although that might have been your intent.

2 MR. CONNELL: We put that in our brief, Your
3 Honor.

4 THE COURT: I understand it is in the brief,
5 but you have still got the causes of action.

6 MR. CONNELL: I understand. And this is the
7 first time we have really had the ability to talk
8 to Your Honor about the case. And we only seek
9 class certification on those two -- on that narrow
10 cause of action, and based upon those three Supreme
11 Court cases that are about water and sewer, and
12 based upon the Littlefield case in which the
13 government argued exactly what they are arguing
14 here.

15 They said, look, we have got a situation where
16 we are going to make a good faith -- we'll follow
17 the rules.

18 We don't know that to be the case. And the
19 Supreme Court completely rejected that and said,
20 class actions are expansive, you are talking about
21 one main issue and thousands and thousands of
22 people. This is why you have a class action.

23 And, Your Honor, we attached -- I attached
24 Littlefield to --

25 THE COURT: I have read it.

1 MR. CONNELL: All right.

2 THE COURT: I read it whenever my clerk found
3 it, and then I read it Monday, and I read it again
4 today. I don't -- still don't understand, but
5 maybe it is my problem, that if you prevail in
6 front of Judge Barber, I think you get that relief
7 without certifying the case. Do you agree with
8 that?

9 MR. LYDON: Absolutely, Your Honor.

10 THE COURT: Well, then just prepare an order
11 denying it, and put that in there so that if I'm
12 wrong, I'm clearly wrong on that.

13 MR. CONNELL: All right.

14 THE COURT: If you couldn't get your relief,
15 you know, then I would -- if I felt you couldn't
16 get relief from the action as filed, I would
17 certify it. But I think they are going to be bound
18 by it. And that would just delay everything, and
19 the case is ready to go, looks like to me.

20 MR. CONNELL: All right, Your Honor.

21 THE COURT: Plus, if I ruled in your favor, I
22 would give you lots of attorney's fees anyway, but
23 it is not going to be in front of me.

24 MR. CONNELL: Thank you, Your Honor.

25 MR. LYDON: Thank you, Judge.

1 THE COURT: Copy him with it, but put in the
2 order that he is only seeking on those injunctive
3 relief, you know.

4 MR. CONNELL: Yes, sir.

5 THE COURT: And he concedes at the hearing
6 that he is not seeking the unconstitutional use and
7 the over charges, and what have you, the other
8 three causes of action.

9 And specifically say I feel he can get his
10 relief posthaste.

11 MR. CONNELL: Thank you, Your Honor.

12 MR. LYDON: Thank you, Judge.

13 THE COURT: It sounds to me like you should
14 win if they directly take money from X and do Y.
15 It is not quite as clear as if you get a million
16 dollar grant to use for early childhood development
17 and you use it for paying the air force.

18 MR. CONNELL: Yes, sir.

19 THE COURT: Similar. All right.

20 MR. CONNELL: Thank you, Your Honor. I
21 appreciate you listening to us today.

22 MR. LYDON: Do you want me to mail it to
23 Camden, or e-mail it to --

24 THE COURT: No, I don't want it e-mailed. I
25 want it mailed with a hard copy, self-addressed

1 stamped envelope.

2 MR. LYDON: To Camden?

3 THE COURT: To Camden. Copy him with it.

4 MR. LYDON: Okay.

5 THE COURT: But if it is coming up right
6 quick, you need to get it to me right quick.

7 MR. LYDON: Okay.

8 THE COURT: Anything I haven't addressed?

9 MR. CONNELL: No, sir.

10 THE COURT: I recognize you don't like it.

11 MR. CONNELL: Well, I appreciate that, Your
12 Honor. I mean, you know, you are the judge.

13 THE COURT: Yes, I know.

14 MR. CONNELL: I just wanted to make sure we --
15 I didn't feel like we really got our say. And I
16 appreciate you listening to me.

17 THE COURT: Well, I didn't totally grasp all
18 the consequences because you didn't have time to
19 explain it to me before because we had to get out
20 of there for other reasons. I understand.

21 MR. CONNELL: But I appreciate you taking the
22 time to listen to me.

23 THE COURT: All right. Sorry we didn't get to
24 it earlier, but -- it was a glitch, but those
25 things happen.

1 MR. CONNELL: Thank you, Your Honor.

2 MR. LYDON: Thank you, Judge.

3 THE COURT: Drive safely heading back.

4 MR. CONNELL: Thank you. I appreciate it.

5 (WHEREUPON, the proceedings were concluded.)

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(END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 13th day of September, 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 9, 2013

Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

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State of South Carolina
County of Richland

Court of Common Pleas

Joseph S. Azar	)	
	)	
Plaintiff,	)	Transcript of Record
v.	)	2011-CP-40-06705
	)	
City of Columbia	)	
	)	
<u>Defendant.</u>	)	

August 5, 2013
Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr.

A P P E A R A N C E S:

Gene McCain Connell, Jr., Esquire
Attorney for the Plaintiff

Charles Dixon Lee, III, Esquire
Attorney for the Plaintiff

Thomas Lydon, Esquire
Attorney for the Defendant

M. McMullen Taylor, Esquire
Attorney for the Defendant

Bethanie K. Patterson
Circuit Court Reporter

I N D E X

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WITNESSESDIRECT CROSSREDIRECTRECROSS

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(No witnesses.)

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E X H I B I T S

	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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2				
3	PLF. EXH. 1	Notebook	7	
4	PLF. EXH. 2	Statute	7	
5	DFT. EXH. 1	Notebook	21	
6	DFT. EXH. 2	Notebook	21	
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1 (The following proceedings were held on August
2 5, 2013.)

3 THE COURT: Mr. Connell, it's your motion.

4 MR. CONNELL: Your Honor, we have cross motions
5 for summary judgment.

6 THE COURT: All right.

7 MR. CONNELL: I think we've agreed that either
8 one or the other of us prevail on cross motions.
9 It's a mixed question of law and fact. We've got
10 depositions we're going to present to you and
11 they've got some evidence that we want to ask Your
12 Honor what your opinion is about the matter.

13 THE COURT: You just want an opinion?

14 MR. CONNELL: Well, a written opinion.

15 THE COURT: A written opinion?

16 MR. CONNELL: Yes, sir.

17 THE COURT: That's different.

18 MR. CONNELL: Yes, sir. Just what you want to
19 hear.

20 THE COURT: Okay. That's what it's all about.

21 All right. Why don't you give me a little
22 background on this case?

23 MR. CONNELL: All right. Your Honor, my name
24 is Gene Connell, this is Dixon Lee, and we represent
25 the plaintiffs in this case. And maybe a little

1 background will help you understand this case.

2 This case involves a challenge to the way that
3 the City of Columbia handles their water and sewer
4 fees. And, Your Honor, the reason why you're
5 hearing the case is because the other judges who are
6 residents of the City of Columbia have decided not
7 to hear it because of their potential involvement.

8 A little of factual background: The plaintiffs
9 are Mr. Cumberland, Mr. Azar and Mr. West.
10 Mr. Cumberland is an in-city resident and a water
11 and sewer customer, Mr. Letz is an out-of-city water
12 and sewer customer, and Mr. Azar is, according to
13 what Judge Kinard had found in his prior motion on
14 standing, he would qualify under what's called the
15 Public Exception Rule to have standing.

16 The case really involves this: There are
17 137,000 water and sewer customers -- or water
18 customers; there are 69,910 sewer customers. The
19 City of Columbia generates about \$110 million a year
20 from water and sewer revenues. That's about 45
21 percent of their total revenue. Every year the City
22 of Columbia transfers water and sewer monies to the
23 General Fund. And also, the City of Columbia also
24 funds a number of different economic development
25 corporations with water and sewer funds, and we take

1 the position, Your Honor, that they cannot do that
2 under well-established case law and under South
3 Carolina statute.

4 What we're asking Your Honor to do in this case
5 is not refund any money to the plaintiffs;
6 we ask the Court to grant us an injunction requiring
7 the City of Columbia to place those monies which
8 were put into the General Fund back into the Water
9 and Sewer Utility Enterprise Fund. And the reason
10 for that, Your Honor, is that the Statute 61330
11 provides, in pertinent part, that someone who's
12 paying for the service has the right to expect that
13 that money will only be used for the water and sewer
14 installation, maintenance, repair, and the like.
15 And we argue to the Court that under 61330(b) that
16 the only possibility for use of those funds is for
17 use by the water and utility, not for payment to the
18 General Fund.

19 And, Your Honor, we have, and I'd like to hand
20 up to Your Honor, two notebooks, if we can. They
21 have -- there are four depositions in them, there's
22 our brief, and there's the case law. You might mark
23 one, Your Honor, as Exhibit No. 1, if I can.

24 THE COURT: Go ahead and mark it.

25 MR. CONNELL: Yes, sir.

1 (WHEREUPON, Plaintiff's Exhibit No. 1 was
2 marked for identification only.)

3 MR. CONNELL: Your Honor, we take the position
4 that the case law in this matter is clear in that
5 the only possibility, when you're paying for water
6 and sewer fee, under 61330 (b): Public services
7 must be used to pay costs related to the provision
8 of the service.

9 Your Honor, we have the statute right here.
10 I'd like to put this in as number 2, if we could,
11 sir.

12 (WHEREUPON, Plaintiff's Exhibit No. 2 marked
13 for identification only.)

14 MR. CONNELL: Your Honor, this practice dates
15 back a long time, some 20 or 30 years, and it is
16 found -- the City decided, through a resolution,
17 that they were making money out of their water and
18 sewer fund and they wanted to transfer those profits
19 to the General Fund. The General Fund is for use
20 for any purpose; police, fire.

21 THE COURT: Isn't this a common practice in
22 South Carolina?

23 MR. CONNELL: Yes, sir, it is.

24 THE COURT: And it's never been challenged
25 under this statute?

1 MR. CONNELL: It has in a number of
2 circumstances, just the issue of water fees have not
3 been challenged.

4 And if Your Honor will see -- I've written a
5 little brief for Your Honor, it's about eight or
6 nine pages, and it talks about three cases: *Brown*
7 *vs. Horry County*, and that involved a case where
8 they wanted to charge the -- the County wanted to
9 charge a \$15 road maintenance fee. And the Court in
10 *Brown* said that was permissible, but the revenue
11 must be kept for this specific purpose allowed by
12 the ordinance; you could not use the money for other
13 purposes.

14 THE COURT: I'm familiar with that.

15 MR. CONNELL: And, Your Honor, our position is
16 that when you take the money out of the Water and
17 Sewer Utility Enterprise Fund and you use that money
18 to fund business opportunity, development
19 corporation, you want to use it for the Three Rivers
20 Festival, you can't do that with those specific
21 monies because those monies are designated for a
22 specific purpose and that's for water and sewer
23 construction, maintenance, and that kind of thing.

24 And one of the reasons why this lawsuit was
25 brought is the City of Columbia is currently under a

1 Justice Department review of their sewer and water
2 department. The EPA has found some violations and
3 they're negotiating with them. And our position is
4 that every dollar ought to be used for the water and
5 sewer service and it should not be transferred to
6 other departments.

7 Now we, of course, admit that the City's other
8 department are -- are laudable goals, but they are
9 not to be paid for by water and sewer service monies
10 that are paid out.

11 THE COURT: Cities do that with electric
12 services too.

13 MR. CONNELL: Yes, sir, they do. The Brown
14 case said that -- says in part that if you make a
15 profit, it must be spent on the system and not other
16 services.

17 The defendants argue in their brief that they
18 can make a profit and do with it as they see fit.
19 And we won't argue that they can't make a profit.
20 We don't have a problem with that. The problem we
21 have is the use by which it's made; it's got to be
22 made for that particular purpose. Several other
23 cases that the court -- the courts have ruled on,
24 one is called JK Construction and Western Carolina
25 Sewer Company. That involved a new account fee to

1 connect to the sewer service. And the Supreme Court
2 said it must benefit those people who pay for it,
3 the funds were for capital improvements only, and
4 they were not to be put in a General Fund. That's
5 probably the closest that we have to what we have
6 here.

7 *C.R. Campbell vs. The City of Charleston*, that
8 was a transfer fee on the sale of real estate to pay
9 for public parks. And the Supreme Court said once
10 again that you can use that revenue for a specific
11 improvement or purpose, but it must be uniformly
12 used and it cannot be used for any other purpose.

13 Then another case, *Ford vs. Georgetown Water &*
14 *Sewer* over impact fees, Hagley Estates down in
15 Pawleys Island had gone bankrupt. Georgetown Water
16 & Sewer Department wanted to come in and take over
17 and they wanted to charge an impact fee. The
18 Supreme Court said, yeah, that's special benefit to
19 those people, so you can charge that kind of fee.

20 Now, interestingly enough in your -- I tried to
21 make it as simple as possible as far as our
22 position. You have about ten exhibits in your
23 notebook and there are thousands of pages of
24 production between parties in regard to this case.
25 But we would submit to you that probably the two

1 most important exhibits are found in your notebook
2 at the end, and that would be Exhibits 12 and 11.

3 And what those exhibits are, Your Honor, back
4 in 2007, the City of Columbia asked a consultant to
5 discuss with them what to do about their water and
6 sewer fees and how to use them, and they hired a
7 company called Black & Veatch, which apparently is a
8 well-known company in Atlanta who comes out and does
9 an assessment of what you can do. The Black &
10 Veatch study, which is Exhibit 11, an April 2nd,
11 2007 report, found that there was about \$7.6 million
12 that was being taken out of the Utility Enterprise
13 Fund, they call it, for the water and sewer fees,
14 I'll say, had been used by the City of Columbia.
15 And of that, about four-and-a-half million dollars
16 was going to the General Fund. And the consultants
17 for the City found that there was no reason for
18 that, that those monies could not be funded by the
19 Utility Enterprise Fund, they were specifically
20 earmarked, and you could not use those monies for
21 nondepartmental capital improvements and development
22 corporations. The City went on to say, it's not our
23 intent to say these aren't laudable goals, you just
24 can't use those funds in this circumstance for those
25 purposes. And so they recommend that you -- that

1 they take some action not to --

2 THE COURT: How long has this practice been
3 going on, as far as you know?

4 MR. CONNELL: Well, I know the Service Fee
5 Statute was in 1997. And I think it went on that
6 there are some service fee statute allowed for a
7 period of time for the cities to, if you will,
8 reinvent themselves. So it's been going on -- it
9 was going on before 1997. It's probably been going
10 on 20 or 30 years, I would suspect.

11 THE COURT: So what are you seeking?

12 MR. CONNELL: What's that, sir?

13 THE COURT: What are you seeking?

14 MR. CONNELL: What we're seeking is this, Your
15 Honor: We're not seeking any monies back to the
16 plaintiffs; what we're seeking is an injunctive
17 relief requiring the City of Columbia to take those
18 monies back out of the General Fund.

19 THE COURT: What monies?

20 MR. CONNELL: The monies that were paid in for
21 the Utility Enterprise Fund.

22 THE COURT: Is there no limit to that?

23 MR. CONNELL: No, sir. We know what they are.
24 There is a four-and-a-half million dollar transfer
25 from the Water and Sewer Fund every year to the

1 General Fund.

2 THE COURT: Four-and-a-half million every year?

3 MR. CONNELL: Yes, sir. We'd like to stop that
4 practice. We'd like the Court to issue a ruling
5 that that's not an appropriate practice. Then
6 there's about \$2.3 million that are put out for
7 developing corporations, Business Opportunity Act,
8 and that kind of thing. And we'll show you those on
9 the screen in just a minute.

10 So what we want to do is we want the Court to
11 stop the practice and we want those monies to be
12 returned to where they should be. And, Your Honor,
13 one of the reasons for that is that the water and
14 sewer fees that are in the fund are not only paid
15 for by city residents, but they're also paid for by
16 out-of-city residents. So you have two separate and
17 distinct groups, if you will; those people out of
18 town -- and we don't -- Your Honor, I know there's
19 going to be an argument sooner or later about this.
20 We don't disagree that the out-of-town people can't
21 be charged more. The Supreme Court has said that,
22 unfortunately, in a case I was involved in called
23 *Sloan vs. City of Conway*. We don't dispute they can
24 do that. The problem is, once the money comes into
25 the Utility Enterprise Fund for water and sewer

1 purposes, that money cannot be used for any other
2 purpose except for that. They want to fix the water
3 mains, they want to repair the sewers, they want to
4 try to get the Justice Department off of them. We
5 say they can use it for those kinds of purposes. We
6 don't believe that they can use that money for any
7 other purpose; to build a library or to have public
8 parking in the city of Columbia because those
9 monies, under the Service Fee Statute, are just
10 specifically for that purpose.

11 So let me ask you to, if you would, turn on the
12 iPad and let's show him a couple of exhibits. Take
13 us to the budget, if you would, please, sir. Yeah,
14 Case No. 1.

15 Your Honor, this is -- some of the exhibits
16 are 2010, '11, proposed budget summaries.

17 THE COURT: Turn that screen a little bit.

18 MR. CONNELL: Can you see it?

19 THE COURT: Not really. Turn it just a little
20 bit. That's better.

21 MR. CONNELL: Is that good?

22 All right. Take us to the next page, please.

23 All right. Can you bring this up right here?

24 Your Honor, if you see, this is the city
25 budget. And included in that --

1 THE COURT: What year is this?

2 MR. CONNELL: This is 2010, '11. These are
3 monies that the City admits have been transferred
4 from the Water and Sewer Utility Fund to fund these
5 various businesses; Office of Business Opportunity,
6 Economic Development, Department of Public
7 Relations, development corporations -- there are a
8 bunch of those -- and Total Nonoperating Department,
9 about \$2.2 million. And again, we don't take
10 exception to them doing that, but we believe that
11 they can't do that with water and sewer utility
12 monies that are designated to specific purpose.

13 THE COURT: So those are not transfers from
14 water and sewer?

15 MR. CONNELL: Those are. They are transfers
16 from the Water and Sewer Department to the General
17 Fund for those specific purposes.

18 Now let's see here. All right. This transfer
19 out to General Fund, this is an additional
20 four-and-a-half million dollars that is transferred
21 out from the Water and Sewer Utility Enterprise Fund
22 to the General Fund for whatever the City wants to
23 do. And we maintain that that's not something they
24 can do.

25 If you'll take us to the next exhibit.

1 Your Honor, Exhibit No. 2 -- I won't bore you
2 with all the details. Exhibit No. 2 is the City of
3 Columbia budget for 2011-2012. And I submit it has
4 the same exact four-and-a-half million dollar
5 transfer and the \$2.2 million.

6 THE COURT: Are these in the notebook?

7 MR. CONNELL: Yes, sir. Those are Exhibits 1
8 and 2 in your book.

9 All right. Take us to the next one.

10 Your Honor, you've already seen this. This is
11 the Service Fee Statute. We've got it on here, but
12 it's up there if you want to -- take us to the next
13 one, please.

14 THE COURT: Got it.

15 MR. CONNELL: Take us to the next one, please.

16 This is in your notebook too, Your Honor. This
17 is an exhibit. This was a resolution. The City of
18 Columbia decided some years ago that if the Water
19 and Sewer Department was being maintained, that any
20 money that they got above the maintenance and didn't
21 affect the system, they would go ahead and agree to
22 put that in the General Fund. And that's the City's
23 resolution.

24 This is an inter-department memo, and that is
25 exhibit -- in the notebook --

1 THE COURT: 9.

2 MR. CONNELL: -- 9. And that specifically
3 explains how they're going to do that and why they
4 decided to do that.

5 Take us to the next one.

6 All right. This was an interesting -- in your
7 notebook, Your Honor, are four depositions of the
8 city manager, the budget director, the chief
9 financial officer. And everybody agrees this
10 process is going on and this has been done for a
11 number of years. But Ms. Kaufmann, in her
12 deposition, if you'll take up -- you asked this
13 question before. Let's see. Right here where it
14 says the witness. If the General Fund were to lose
15 that source of revenue --

16 THE COURT: What page?

17 MR. CONNELL: That would be --

18 THE COURT: I've got a deposition.

19 MR. CONNELL: You got it?

20 THE COURT: I've got a deposition, but I --

21 MR. CONNELL: Yes, sir. That would be page --

22 THE COURT: Nine?

23 MR. CONNELL: Page 90 -- page nine. I'm sorry;
24 page nine.

25 THE COURT: All right.

1 MR. CONNELL: And the witness says that if the
2 General Fund were to lose that source of revenue, it
3 would have to seek another form of revenue to
4 replace it, they would have to cut services. We
5 would either have to raise the revenue or cut the
6 expenses.

7 And again, Your Honor, we're not saying that
8 they can't make a profit. Our whole argument is
9 under the Service Fee Statute and the case law that
10 we provided you in the notebook, that you can't take
11 that money from the Utility Enterprise Fund and
12 place that in the General Fund for other purposes.

13 A couple other things and then I'll sit down:
14 Some of this -- and you're going to get a brief from
15 the defendants, it's about 50 pages. A couple of
16 points that they make in their brief, they say
17 something to the effect that we think that this
18 water and service fee -- or the service statute fee
19 is applicable to water and sewer, however, we think
20 we can spend the profit any way we want. That's
21 really the whole issue in this case: We can spend
22 that profit any way that we want. And they say if
23 you think this statute applies, then we think it's
24 unconstitutional as to the City, and, furthermore,
25 if you think the statute applies and you think it's

1 constitutional, we think it should be prospective
2 from today's date forward, should you decide that
3 the Service Fee Statute applies.

4 The issue though -- and this statute has been
5 around since the 1990s. The implementation of this
6 issue -- of this statute was considered by the
7 General Assembly, and it was kind of delayed. So we
8 can say to the Court that the prospectivity argument
9 really doesn't mean anything since the statute has
10 been around for 15 years already, and, furthermore,
11 that there's -- that it's not unconstitutional.
12 There's a reason for the Service Fee Statute,
13 there's a reason why we have the --

14 THE COURT: Have you looked at the legislative
15 district?

16 MR. CONNELL: We couldn't find any. So -- but,
17 Your Honor, that kind of answers the question. That
18 gives you our case in a nutshell. All the
19 depositions are in there. We copied all -- have
20 given you all the cases I know about.

21 I will tell you one thing so you'll -- fair
22 disclosure to you. There is 2012 Attorney General's
23 opinion, and it says that the Service Fee Statute
24 applies to in-city residents but not out-of-city
25 residents. And I've read that. Don't see how you

1 harmonize that with a statute that says if you're
2 paying a fee for services, it ought to go to the
3 services only.

4 THE COURT: Is that included?

5 MR. CONNELL: No, but I made a copy. I'll give
6 it to you. That's in the defendant's brief. I
7 don't know if they made a copy as an exhibit or not.
8 But...

9 THE COURT: Sometimes it depends on which
10 Attorney General wrote it.

11 MR. CONNELL: Yes, sir.

12 THE COURT: That's not --

13 MR. CONNELL: We would -- if you harmonize all
14 statutes together, this statute with the finance
15 statute in Title 5, it doesn't make any sense when
16 you're paying a fee for service that that fee for
17 service doesn't go to the system and not to be used
18 by city counsel because they don't want to raise
19 taxes. Thank you.

20 THE COURT: Thank you.

21 MR. CONNELL: Thank you, Your Honor.

22 THE COURT: Mr. Lydon?

23 MS. TAYLOR: Your Honor, we also have exhibits,
24 two notebooks.

25 THE COURT: You can just --

1 MS. TAYLOR: Deposition testimony and documents
2 that we decided to --

3 THE COURT: You obviously killed more trees
4 than Mr. Connell.

5 (WHEREUPON, Defendant's Exhibits 1 and 2 were
6 marked for identification only.)

7 MR. LYDON: And we provided a copy to other
8 counsel.

9 THE COURT: All right. Ms. Taylor?

10 MS. TAYLOR: Your Honor, I'm just going to make
11 a few opening comments, and then I'm going to hand
12 it over to Mr. Lydon to argue some of the claims,
13 and then I'm going to get up here and argue the
14 statute. But the outset --

15 THE COURT: It's like a jury argument.

16 MS. TAYLOR: Excuse me?

17 THE COURT: It's like a jury argument.

18 MS. TAYLOR: Right.

19 At issue here, as the plaintiffs have pointed
20 out, is whether the City has the authority to use
21 its water and sewer revenues in the manner that it
22 does. We, of course, contend that the City uses its
23 water and sewer revenues lawfully and it is within
24 the sound discretion as city counsel as a ratemaking
25 body, as a policy-setting body, to decide if and

1 whether it should use the revenues in the manner
2 that it does, including those that are challenged by
3 the plaintiffs in this case.

4 For over a century, the City has operated the
5 water and sewer utility. Under the power of the
6 constitution -- it's a particular section, Article
7 A, Section -- I can't talk -- Section 16 of the
8 South Carolina Constitution. This power is in
9 addition to its general pleas powers and pursuant to
10 Section 17 of the same article, eight, the City's
11 authority to operate and manage its utility must be
12 liberally construed in the City's favor.

13 We have several cases from the South Carolina
14 Supreme Court, as well as established in *Sossaman v.*
15 *Greater Gaffney Metro Utilities*, *Simon v. City of*
16 *Charleston*, and *Green v. City of Rock Hill* that
17 cites operating utility at a business enterprise as
18 opposed to its other government functions.

19 And the City, by statute, is authorized to
20 charge reasonable water and sewer rate. And our
21 courts have decided that a reasonable rate includes
22 a fair profit and that the City may use that profit
23 however it sees fit within its discretion.

24 THE COURT: Where do you see that? Where do
25 you find that?

1 MS. TAYLOR: These cases I've cited, *Green v.*
2 *City of Rock Hill* --

3 THE COURT: They all talk about profit?

4 MS. TAYLOR: They talk about the City is able
5 to generate a fair profit from its water and sewer
6 utilities.

7 THE COURT: Does it say they can use the profit
8 for anything they want?

9 MS. TAYLOR: Used within their sound
10 discretion, yes, Your Honor.

11 THE COURT: Which case is your leading case on
12 that issue?

13 MS. TAYLOR: I've cited three cases. The
14 earliest one is *Rock -- Green v. Rock Hill*, 1929.
15 I've just got the South Carolina order, 149-SC-234.

16 THE COURT: Is it in your brief?

17 MS. TAYLOR: Yes, it is.

18 THE COURT: All right.

19 MS. TAYLOR: And then *Simons v. City of*
20 *Charleston*, and then --

21 THE COURT: What's the year on that?

22 MS. TAYLOR: That is 1936.

23 THE COURT: All right.

24 MS. TAYLOR: And then *Sossamon* is 1960.

25 THE COURT: Do you have anything that's post

1 61330?

2 MS. TAYLOR: No, Your Honor.

3 THE COURT: Okay.

4 MS. TAYLOR: Like any private utility, the City
5 may charge a rate that yields a fair profit, as I
6 said. For customers living outside the city limits,
7 *Childs v. City of Columbia*, which is a 1915 case, I
8 believe, tells us that the City is obligated to
9 charge rates for the sole benefit of the city at the
10 highest price attainable, thus water and sewer rates
11 are treated differently than most other fees, they
12 have characteristics that set them apart from any
13 other fees.

14 And I have four points I'd like to make on
15 that: One, water and sewers rates are charges for
16 commodity, water, which is consumed by the customer;
17 two, water and sewer sold by the City in a
18 proprietary capacity; three, the sale of water and
19 sewer is governed by contract voluntarily entered
20 into between the City and the customer; four,
21 customers residing outside the city limits have no
22 statutory protection, any rights they may have are
23 governed by contract only.

24 The City operates the largest water and sewer
25 utility in the state. And I've given it a brief --

1 you know, the thousands of miles of water and sewer
2 lines, we've got multiple pump stations, we have a
3 waste-water treatment plant, we also have two water
4 treatment plants. The water and sewer rates along
5 with various other fees that the City charges, which
6 are not at issue here but I must point that out,
7 \$110 million in revenue each year not -- that's not
8 generated entirely from monthly water and sewer
9 charges that the plaintiffs take issue with. There
10 are sewer tap fees, there are other connection fees,
11 there's new-account fees, none of which have been
12 challenged by the plaintiffs in this case.

13 Most of the revenue that is derived from these
14 monthly water and sewer charges are from
15 nonresidents, those that live outside the city's
16 limits. And I think that's an important point to
17 make at this point.

18 The City puts its water and sewer revenues
19 within an enterprise fund consistent with generally
20 acceptable accounting principles applicable to local
21 governments. And from this fund the City pays for,
22 obviously, the operation of its utility, the
23 construction of improvements, maintenance and
24 repair; it builds reserve funds in order to pay debt
25 service on revenue bonds that are secured by this

1 revenue, and it also sets aside money for satisfying
2 bond grading agencies and its bondholders. There
3 must be a sufficient amount of money in order to
4 assure these bondholders that the debt service will
5 be paid.

6 In our brief, which I will not discuss here
7 today, we have raised a question of standing of two
8 of the three plaintiffs. And I just ask that you
9 address that in our brief. I really don't want to
10 spend the time talking --

11 THE COURT: Mr. Connell said Judge Kinard has
12 already ruled.

13 MS. TAYLOR: Yes. He ruled verbally that --

14 THE COURT: Verbally?

15 MS. TAYLOR: Yes, Your Honor. We just want to
16 preserve that argument.

17 So it's the position of the City, Your Honor,
18 that there really is only one plaintiff that has
19 standing, and that is Mr. Cumberland. And he claims
20 that they were brought into suit by a breach of
21 contract, and that would be the water and sewer
22 contract entered into between the City and the
23 customer, violation of *Brown v. Horry County* is
24 applied to the cities, and the case of *C.R. Campbell*
25 *Construction Company vs. City of Charleston*, and

1 violation of the Service Fee Statute, which would be
2 6-1330.

3 I'm now going to ask Mr. Lydon to argue about
4 the breach of contract claim and the *Brown v. Horry*
5 *County* case, and I'll be back.

6 THE COURT: Good. I look forward to it.

7 MR. LYDON: Your Honor, Mr. Connell really
8 didn't go into the breach-of-contract issue, which
9 is one of their causes of action they've alleged in
10 this, so I'll just kind of be brief and run through
11 our position as to why the transfer of the funds is
12 not really even a part of the contract between the
13 customer and the City.

14 First of all, the service contract for water
15 and sewer --

16 THE COURT: Hold on. What's the complaint say?

17 MR. LYDON: I think there's a second amended
18 complaint. Page 9 of their second amended complaint
19 is the second cause of action, Your Honor.

20 THE COURT: Do you have an extra? I mean, I'm
21 flipping through this file until I find it. Hold
22 on, I got something. I got second amended
23 complaint. And what are you referring to?

24 MR. LYDON: It's on page nine. The second
25 cause of action related to breach of contract.

1 THE COURT: Okay. What's the first cause of
2 action?

3 MR. LYDON: I think the first cause of action
4 was declaratory judgment.

5 THE COURT: What?

6 MR. LYDON: The injunction. The injunction.

7 THE COURT: The injunction. All right.

8 MR. LYDON: Right.

9 THE COURT: I understood that's all there was.
10 Go ahead.

11 MR. LYDON: If he's not -- if all he's seeking
12 is an injunction, denying the claim under a breach
13 of contract, then I don't need to waste anybody's
14 time.

15 THE COURT: Do you want to respond to that?

16 MR. CONNELL: I -- if --

17 THE COURT: I asked you at the beginning what
18 you're seeking, and you said an injunction.

19 MR. CONNELL: Yes, sir. We have four causes of
20 action, they all seek the same thing, which is you
21 can't -- you can't proceed with the practice, and
22 any monies that you collected for the past three
23 years have to be returned.

24 THE COURT: Okay.

25 MR. CONNELL: And so the breach of contract --

1 we don't ask for any money from the plaintiffs
2 themselves; we ask that it be returned to the
3 Enterprise Fund.

4 THE COURT: All right. Go ahead.

5 MR. LYDON: Thank you, Your Honor.

6 Your Honor, there is nothing in the contract
7 between the city's water and sewer customers and the
8 City that has any limitations or restrictions on how
9 the revenues collected from the water and sewer
10 charges can be spent. So we do not have an
11 expressed provision that deals with that, nor is
12 there any alleged in the complaint. There is
13 nothing in the expressed contract between the
14 parties that incorporates the Service Fee Statute as
15 a term of the contract, so the only way that you can
16 get to the breach of contract is if the service fee
17 contract is somehow an implied term of the water and
18 sewer contract. The law is well so and we cite the
19 cases in our brief that implied terms are not
20 favored by the law and are appropriate only when
21 necessary to effectuate the intent of the parties.

22 The South Carolina case, the most recent one, a
23 2011 case that sort of discusses this statute
24 creating contractual rights is *Aarons vs. South*
25 *Carolina Police Officers Retirement System*. And

1 2011's Supreme Court case states that the general
2 rule in South Carolina is the statutes do not create
3 contractual rights. The only way the legislature
4 can create contractual rights in a statute is
5 through the expressed language of the statute.

6 So to summarize, briefly, the breach of
7 contract issues, Your Honor, there is a written
8 contract between the parties that merely provides
9 for the payment in return for water and sewer
10 services. There is no expressed term that restricts
11 or limits in any way the manner in which the City
12 spends the revenues it receives from water and sewer
13 customers, there's no legal basis for making the
14 Service Fee Statute an implied term of the water and
15 sewer contract, and the law is well so in South
16 Carolina that the statute does not create
17 contractual rights except in various special
18 circumstances that are not present here.

19 The issue that Mr. Connell did spend some time
20 on is *Brown vs. Horry County* and how that applies to
21 the situation that we've got before the Court.
22 Plaintiffs contend that *Brown vs. Horry County* and
23 the related cases, *Ford vs. Georgetown County, J.K.*
24 *Construction, C.R. Campbell*, support their position
25 that the City cannot transfer profits from its water

1 and sewer operations to the General Fund in order to
2 defray the cost of other government services.
3 However, Your Honor, it's our position that the
4 situation in Brown dealing with road maintenance
5 fees and the other service fee contracts, the sewer
6 impact fee, the new account fee, do not apply to
7 this case.

8 Your Honor, in Brown -- I think you said you're
9 familiar with it -- the plaintiff challenged the
10 maintenance fee that was imposed on owners of all --
11 all owners of motor vehicles in Horry County. The
12 revenue derived from the fee were dedicated to
13 improving the county road system. And the issue in
14 Brown was whether the road maintenance fee was a
15 uniform service fee or a tax.

16 The question in Brown and *Ford vs. Georgetown*,
17 J.K. Construction, C.R. Campbell, concerned fees
18 that were imposed to specifically fund a future
19 improvement or benefit. The issue in those cases
20 being whether the payor of the charge, such as the
21 road -- such as the vehicle owner in Horry County
22 who was the paying the road maintenance fee, was
23 going to receive a benefit from the proceeds of the
24 charge.

25 Your Honor, this is a very different situation

1 from what we have here where we have payments that
2 are made by water and sewer customers to the City of
3 Columbia where they are paying charges based on
4 actual water and sewer usage. This transaction is
5 not like a road maintenance fee where every owner is
6 assessed the same fee regardless of usage and
7 there's a designated reason for the fee and
8 designated use for the fee. With water and sewer
9 charges, Your Honor, customers involved with a quid
10 pro quo transaction with the City of Columbia, and
11 the analysis of whether these customers are going to
12 receive a future benefit from what happens with this
13 money is irrelevant because the customers receive
14 the benefit when the bill is paid. The customer
15 uses the water and sewer, the charges are calculated
16 based on usage in conformity with the expressed
17 terms of the contract, an invoice is delivered, and
18 the bill is paid. At that point, the transaction is
19 complete. The consumer or customer has gotten --

20 THE COURT: You know, they're not challenging
21 the legality of the water and sewer fees. They're
22 challenging -- what I understand, they're
23 challenging the use of the funds.

24 MR. LYDON: Well, but they're relying on Brown
25 and the other cases, as well as the Service Fee

1 Statute, which Ms. Taylor is going to address in a
2 minute, for the proposition that those -- like the
3 road service fee in Horry County, which was held to
4 be legal, was appropriate as long as it was used for
5 road service fees. So it was a fee that a motor
6 vehicle owner paid.

7 THE COURT: Doesn't that defeat your argument?
8 Doesn't that defeat your argument that if the road
9 fee is used -- road maintenance fee is used for road
10 maintenance and only for road maintenance, should
11 the water and sewer fee be used for maintenance
12 of --

13 MR. LYDON: No, because -- because the person
14 that was paying the road maintenance fee may or may
15 not drive on those roads in Horry County; water and
16 sewer customers has -- depending on your family
17 circumstances and how many children you have -- but
18 has some control over how much water they consume.
19 And so they're buying water and sewer service from
20 Columbia at a contractually agreed-upon price. They
21 get a bill and they pay it. What the City does with
22 the money after that is irrelevant. I mean, it's
23 got to be used, obviously, for government purposes,
24 but it's not something that the water and sewer
25 customer has any say-so in or any involvement in

1 because they got what they bargained for; they got a
2 certain amount of water usage and a certain amount
3 of sewer usage and they paid for it, and that's the
4 end of the transaction.

5 Your Honor, the distinction that we're trying
6 to make here was made by the South Carolina Supreme
7 Court in the case of *Bellsouth vs. City of*
8 *Orangeburg*. It's a 1999 case. In that case,
9 Bellsouth challenged a franchise fee as an illegal
10 tax. The franchise fee was imposed on Bellsouth in
11 exchange for its use of the city's streets for
12 telephone equipment. The Supreme Court held that
13 where the benefit to the payor derives not from the
14 use of the revenue by the municipality but is a
15 benefit given directly and solely to the payor in
16 consideration for the fee, the *Brown vs. Horry*
17 *County* test is irrelevant. We would suggest that
18 that's what you have here. You'd have -- just as in
19 the BellSouth case they were paying to use the road
20 right-of-way to construct the telephone equipment,
21 they were getting a specific benefit in return for
22 the fee they were paying, the water and sewer
23 customers in the city of Columbia and outside the
24 city of Columbia are getting a specific benefit for
25 the fee that they're paying for water and sewer

1 usage.

2 As applied in this case, Your Honor, the
3 plaintiff and other city customers and out-of-city
4 customers received the direct benefit of access to
5 and use of water and sewer infrastructure in
6 exchange for monthly payments that are based on the
7 customer's actual consumption. And the fact that
8 the City generates a profit from these transactions,
9 Your Honor, does not change the analysis. As
10 Ms. Taylor stated, the municipality may charge a
11 utility rate that will yield a profit just as any
12 other utility. There is no legal basis for a Court
13 to interfere with the City's determination as to how
14 to spend those profits. Furthermore, Your Honor,
15 and Mr. Connell alluded to this and I think it's
16 important and it relates to this Attorney General's
17 opinion that he cited, 2012, even if the Court
18 determines that *Brown v. Horry County* somehow
19 applies to the municipal water and sewer rates in
20 the city of Columbia, it would not apply to
21 nonresident customers, those that live outside the
22 city. The Supreme Court has held that a city's
23 relationship with its nonresident utility customers
24 is governed solely by contract.

25 According to a 2008 Attorney General's opinion,

1 absent a contract provision to the contrary, the
2 municipality is not limited as to how revenue is
3 derived from nonresident water revenues may be
4 expended.

5 In this case, Your Honor, and the facts are in
6 the brief, the revenues derived from the non-city
7 customers is significant and it's significant in
8 more than the four-and-a-half million dollars and
9 the other fund transfers that the plaintiffs are
10 complaining about. In 2008, 2009, the revenues
11 generated from out-of-city customers was
12 \$64 million; in 2009, 2010, it was \$66 million;
13 in 2010, 2011, it was \$65.7 million. So every year
14 the money generated by non-city resident customers
15 was significantly more than the amounts of money
16 that they are complaining about being transferred
17 from the Water and Sewer Fund to the General Fund.

18 THE COURT: Have you challenged the standing of
19 the out-of-city plaintiff?

20 MR. LYDON: That's correct. Because the
21 out-of- --

22 THE COURT: You do challenge the standing?

23 MR. LYDON: No, no. The-out-of-city --

24 THE COURT: Plaintiff.

25 MR. LYDON: -- plaintiff, his only claim,

1 potential claim, would be breach of contract. We
2 contend that he is not -- correct me if I'm wrong on
3 this. But he does not have standing to assert a
4 violation of the Service Fee Statute. Ms. Taylor is
5 going to talk about the Service Fee Statute here in
6 a second. His only relationship with the City of
7 Columbia is a contract for water and sewer services.
8 And that was the first part of my argument as to why
9 there is no -- there is no -- the Service Fee
10 Statute is not part of the water and service
11 contract, therefore there could be no breach of the
12 contract. So we -- he has standing to assert a
13 breach-of-contract claim -- that's the only claim --
14 but there is no breach of contract.

15 Your Honor, just to summarize and I'll let
16 Ms. Taylor speak to the statute itself, the
17 plaintiff's contract with the City for water and
18 sewer services, they pay for what they use. It's a
19 quid pro quo transaction based on usage. It's not a
20 tax and the City is not restricted from using the
21 surplus water and revenue for the ordinary municipal
22 purposes for what it's governed. Thank you.

23 THE COURT: All right.

24 MS. TAYLOR: Actually, I would like to make one
25 point of correction in what Mr. Lydon said about the

1 standing arguments we brought. We do -- actually,
2 we challenged the standing of Mr. Letz, who is the
3 nonresident customer, and we argue that he lacks
4 standing because the contract, as Mr. Lydon
5 explained, gives him no protected interest in how
6 the City uses its water and sewer rates. So --

7 THE COURT: How did Judge Kinard grant the
8 standing to Mr. Azar --

9 MS. TAYLOR: You know --

10 THE COURT: -- if Mr. Letz is not similarly
11 situated?

12 MS. TAYLOR: I don't have the transcript in
13 front of me. My recollection is that he believed
14 that there was public interest -- the public
15 importance exception, Your Honor --

16 THE COURT: Sure.

17 MS. TAYLOR: -- applied, but he wasn't specific
18 as to each or every plaintiff in that regard.

19 THE COURT: And Mr. Letz would have the same?

20 MS. TAYLOR: Under public importance.

21 THE COURT: Maybe.

22 MS. TAYLOR: Maybe. I don't know.

23 Now we do argue in our memo, briefly, that we
24 filed relating to this summary judgment hearing, but
25 also filed a memo in support of Motion to Dismiss

1 For Lack of Standing that explains why we believe
2 that the public importance exception would not apply
3 in this situation, especially since we have not
4 contested the standing of Mr. Cumberland. So we
5 don't -- one of the reasons that -- and this, I
6 guess, is a new argument I'm making right now is,
7 you know, Mr. Azar and Mr. Letz, there is no need
8 for them to pursue this under the public importance
9 exception.

10 One of the reasons for that exception was to
11 bring those challenges before the Court that may not
12 otherwise be before the Court. And since there is
13 Mr. Cumberland when we're not contesting his
14 standing, then we see no need for there to be two
15 additional plaintiffs.

16 THE COURT: Can that plaintiff speak for the
17 other two? I mean, do they have the same interest?

18 MS. TAYLOR: Well, Mr. Cumberland is a customer
19 of the City of Columbia.

20 THE COURT: So is Letz.

21 MS. TAYLOR: Mr. Letz is a customer of the City
22 of Columbia.

23 Mr. Azar -- see, he is not customer of the City
24 of Columbia. He's --

25 THE COURT: He's got a well?

1 MS. TAYLOR: Excuse me?

2 THE COURT: He has a well.

3 MS. TAYLOR: Well, actually, he lives in a
4 condominium. He does not pay water and sewer. He
5 have does not get a bill.

6 THE COURT: That's all right.

7 MS. TAYLOR: And also, one final point on
8 Mr. Lydon's argument relating to *Brown v. Horry*
9 *County*: I think the focus here is, what is the
10 benefit that the fee payor receives? You know,
11 there is case law in South Carolina that makes
12 general distinctions between what is a tax and what
13 is a fee. A fee is something that -- a charge that
14 a payor pays and receives a benefit, particular or
15 special to that fee payor as opposed to, you know,
16 some benefit general to the public.

17 And what we're arguing here is that the benefit
18 in this situation is the benefit of water and sewer
19 where they turn on the faucet, you know, in their
20 home, they pay for that as a commodity, they receive
21 it as an immediate benefit. And these other cases
22 that Mr. Lydon was talking about, you know, what the
23 Supreme Court was looking at, were situations that
24 were not that type of fee. The cases that
25 Mr. Connell cites deal with like a sewer impact fee

1 or a sewer connection fee that was intended --
2 expressly intended to provide for future agreements
3 or benefits to the sewer system. It's not the same
4 as a monthly water and sewer bill in which they
5 receive a bill for water and sewer they actually
6 consumed the month before, they received the
7 benefit.

8 So the City's position is that the water and
9 sewer fees are -- it's a fee, it's not a tax, and
10 that *Brown v. Horry County* and these other cases
11 deal with situations in which there is not that type
12 of quid pro quo immediate benefit, but the situation
13 there is you're paying a fee -- for example, for a
14 road maintenance fee, you're not getting an
15 immediate benefit; you are getting the future
16 improvements that occur in the future.

17 And that's why the Court in those cases looked
18 at whether or not the revenue derived from the fee
19 was being used to pay for a benefit, that it was
20 being used to pay for what it was intended to pay.

21 THE COURT: I doubt that any municipality or
22 governmental body in South Carolina derives any
23 profit from the road maintenance fees.

24 MS. TAYLOR: Well, there's another distinction
25 that we make here today is that utilities operate

1 under, as I said before, a particular constitutional
2 provision and particular statutory authority dealing
3 with utilities. And it's been longstanding in South
4 Carolina that utilities operate much like any other
5 utility, AT&T or SCE&G.

6 THE COURT: How does the City of Columbia
7 operate its electrical utility?

8 MS. TAYLOR: We don't operate electrical
9 utility.

10 THE COURT: So the customer buys directly
11 from a --

12 MS. TAYLOR: SCE&G.

13 THE COURT: The City has no --

14 MS. TAYLOR: We have no electric utility, Your
15 Honor. I think the City of Rock Hill has
16 electric utility --

17 THE COURT: The City of Camden does.

18 MS. TAYLOR: The City of Camden, yes.

19 THE COURT: They buy it wholesale, retail it
20 out to me.

21 MS. TAYLOR: So anyway, I'm here to talk mainly
22 about --

23 THE COURT: And they make money that way.

24 MS. TAYLOR: Well, and they are allowed to do
25 it. I mean, E&G or any other electric utility or

1 AT&T, they are entitled when they go before the
2 Public Service Commission, you know, to seek a rate
3 that includes a fair rate of return. And our courts
4 have recognized that of municipal utilities, whether
5 that be water and sewer or electric.

6 THE COURT: Let's move on to the statute.

7 MS. TAYLOR: Yes. The Service Fee Statute --

8 THE COURT: Let's get to the heart of the
9 matter.

10 MS. TAYLOR: Yes. What I'm calling is a
11 short -- it's the Service Fee Statute, which is
12 6-1-330. And that was enacted as part of Act 138 of
13 the General Assembly, as Mr. Connell said, in 1997.
14 The act's general effective date was July 1, 1997,
15 except as otherwise provided.

16 Now, within the Service Fee Statute under
17 Subsection A, there is a particular effective date
18 that provides that a fee adopted or imposed by a
19 rural governing body prior to December 31, 1996
20 remains in force and effect until appealed by the
21 enacting local governing body notwithstanding the
22 provisions of the statute. Further, aside from that
23 statutory language, there is common law that states
24 that statutes are to be applied respectively rather
25 than retroactivity unless they're remedial in

1 nature. We contend that this ordinance is not
2 remedial in nature; it imposes a lot on cities that
3 were not otherwise required, therefore it should be
4 applied to any fees enacted, created, after at least
5 July 1, 1997 or the other specific provision of
6 December 31, 1996.

7 And as we have included in the materials, the
8 notebooks, and filed as an affidavit of the city
9 clerk, Eric War, the step has established its water
10 and sewer rates and water and sewer rate ordinances
11 long before 1996 and 1997.

12 THE COURT: Hadn't that changed?

13 MS. TAYLOR: They haven't changed?

14 THE COURT: Okay. That's a question.

15 MS. TAYLOR: Well -- and I'm about to get to
16 that, Your Honor, actually. What the -- how the
17 City has -- they enacted the water and sewer rate
18 or -- well, let's just start with the water
19 ordinance first, the rate ordinance in 1895. And
20 that's what the affidavit and the attached
21 ordinances and codifications show is that the City
22 has continued that ordinance in force and effect
23 throughout. What they have done is amended that
24 rate ordinance to increase the water and sewer rates
25 and how the City's ordinances are adapted and

1 recognized. Ordinances that are amended are not new
2 ordinances, they're not repealing past ordinances,
3 they're actually continuing, they're amending the
4 existing ordinances. So we do not contend that
5 amendments are what the statute requires or applies
6 to, because they're talking about imposed or adopted
7 unless repealed.

8 So our position is that the City's water and
9 sewer ordinances -- sewer ordinances adopted in 1970
10 has been continued in effect since then, the water
11 ordinance since 1895, that they do for that reason,
12 the Service Fee Statute does not apply.

13 And another little additional point dealing
14 with ordinance amendments, there is authority that
15 states that an amendatory ordinance does not operate
16 to repeal the ordinances amending and specifically
17 within the -- I think it's Tab No. 19, the city
18 ordinance that describes repeal versus amendments,
19 Section 1-8 (c) and (f), the City treats repeal
20 differently than amendments and it sets out the
21 process for how the City does either. We think that
22 the General Assembly knows what the difference
23 between repeal and amendments are, and if they had
24 wanted this ordinance to apply to amendments, they
25 would have added the term amendment.

1 And, actually, it's apparent too when you look
2 at Act 138. The act dealt not just with the Service
3 Fee Statute, but it also imposed limitations on
4 cities or local governments' ability to create
5 accommodations taxes and hospital taxes and business
6 license taxes.

7 THE COURT: What was that?

8 MS. TAYLOR: Act 138. I do have a copy, if
9 you'd like a copy.

10 THE COURT: The tax is a purpose.

11 MS. TAYLOR: I'm sorry.

12 But when we look at that act, there are other
13 provisions of the act dealing with business -- I
14 think it's the business license tax. And the
15 business license tax in that section, you know, did
16 refer to imposing or amending or increasing. And so
17 our position here is that the language of the
18 particular Service Fee Statute, since it does not
19 include the word amend, it should not apply to
20 amendments.

21 And actually as a policy matter, if you look at
22 the Service Fee Statute applying to amendments, I
23 mean, it really kind of upsets, you know, a city's
24 ability to operate with any sort of stability, I
25 would suggest. A water and sewer utility, for

1 example, if every time there is an amendment, there
2 must be some sort of adjustment in terms of how it's
3 accounted for and how it's used. I think if this
4 ordinance was interrupted to mean that every time an
5 amendment or a water and sewer rate increase is
6 made, it really would upset a lot of expectations
7 that the City has, you know, made in terms of the
8 operation of its water and sewer utility.

9 Now also the City contends that if you look at
10 the plain language of the Service Fee Statute that
11 it does not apply to water and sewer charges.
12 There is a definition of service of user fee within
13 the act, and that's found in 6-1-330. And it is
14 defined as a charge required to be paid in return
15 for a particular government service or program made
16 available to the payor that benefits the payor in
17 some manner different from the members of a general
18 public not paying the fee. It also includes uniform
19 service charges. Now, that is a broad definition,
20 however, when you look at Subsection B of Section
21 6-1-330, which is the section that the plaintiffs
22 contend is what applies to the City's water and
23 sewer rates, that Subsection B narrows the
24 definition. It does not apply to this broad
25 definition of the service fee that I just stated to

1 you. Subsection B applies -- states that revenue
2 derived from a service or user fee -- which I just
3 stated the definition -- imposed to finance the
4 provision of public services must be used to pay
5 costs related to the provision of the service or
6 program for which the fee was paid.

7 The legislature could have simply said that the
8 revenue from a service and user fee, based on the
9 definition, must be used to pay the cost related to
10 the provision of the service or program. That's not
11 what the General Assembly did; they qualified that
12 service or user fee definition with this phrase
13 imposed to finance the provision of public services.
14 And we believe this qualification takes water and
15 sewer fees out of application of Subsection B.

16 The first reason is the word impose, and as
17 what Mr. Lydon has pointed out earlier, no one is,
18 you know, commanded or required to purchase water
19 and sewer from the City. If they wish to receive
20 water and sewer from the City, they submit an
21 application for water and sewer contract -- and that
22 that contract is voluntary -- and they're also
23 paying for water actually consumed. As a result,
24 that fee may be controlled by the customer to the
25 extent that they use water more or less. So in

1 other words, there is no predetermined water and
2 sewer charge that is unilaterally imposed on anyone.

3 Secondly, the phrase that I'll refer to applies
4 to a fee imposed to finance public services. We
5 believe that the fact that this service fee is
6 agreed to by a customer pursuant to a contract that
7 is voluntarily entered into by the city and the
8 customer that the contract, which is a -- governs
9 private transactions between parties, is not what
10 the Service Fee Statute contemplates. It is not a
11 public service in the sense of police and fire, but
12 is a contractual relationship. It is a sale of a
13 commodity under the terms of the contract. And we
14 believe that this particular phrase renders the
15 Subsection B of the Service Fee Statute applicable
16 to the type of fees that we're talking about here
17 today.

18 Now, even if you disagree with our reasoning --

19 THE COURT: The City is not a for-profit
20 entity, is it?

21 MS. TAYLOR: Well, there is -- no. But there
22 is case law to the effect that talks about how the
23 water and sewer utility, municipal utility, is
24 operated in a project capacity. That is something
25 that we have said before they're entitled to make a

1 profit on and they -- in fact, from an accounting
2 standpoint, if you look at the exhibits that we have
3 submitted in the comprehensive angle financial
4 reports of the city of Columbia, they operate it as
5 a business-type Enterprise Fund. So it is accounted
6 for separately than the General Fund in which you
7 have other general-type government sources.

8 THE COURT: And the government sources of
9 revenue.

10 MS. TAYLOR: Right. I mean, property taxes
11 would go into the General Fund to provide funding
12 for police, fire, whatnot.

13 The water and sewer fees including the monthly
14 charges are placed into the water and sewer
15 Enterprise Fund that is accounted for separately
16 from the rest of the City's budget.

17 Now, we also -- similar to what Mr. Lydon
18 talked about in *Brown v. Horry County*, we assert
19 that nonresident water and sewer charges are not
20 subject to the Service Fee Statute. As we've
21 already stated, the City's relationship with its
22 nonresident utility customers is governed solely by
23 contract. And in *Sloan v. City of Conway* as well as
24 *Childs v. City of Columbia*, there's authority for
25 our position that there is no -- no statutory

1 provision governs the relationship between the City
2 and a nonresident customer; it is only by contract.
3 That is the sole authority in which that
4 relationship is governed.

5 Now I believe it's *Sloan v. City of Conway* that
6 says that, you know, there is a statute governing,
7 you know, water and sewer fees. I believe the one
8 that was referenced there was the statute that
9 authorizes a reasonable rate. Now, even that
10 statute does not say in-city versus out-of-city,
11 however the reasoning that Sloan stated that in
12 order for a statute to actually apply to nonresident
13 customers it must expressly state that it does. And
14 there is no statute that expressly states that it
15 applies to nonresident customers.

16 Now, the *Childs v. City of Columbia* tells us
17 that if the City chooses to provide service to
18 nonresidents, it's obligated to sell its surplus
19 water for the sole benefit of the City at the
20 highest price attainable. Absent any certain
21 contract provision, cities are not limited in how
22 they -- revenues derived from nonresident water
23 rates may be extended. There's nothing, as
24 Mr. Lydon stated, that the contracts with the
25 plaintiffs dictate what the City can or can't do

1 with the charges it collects from the nonresidents.
2 The only thing that those contracts require to do is
3 to provide the water and sewer supply, which it
4 does, as I mentioned earlier, when the plaintiffs
5 turn on their faucets. So nonresident utility rates
6 are not subject to the limitations of the Service
7 Fee Statute.

8 That leaves the City's in-city or resident
9 charges as potentially the only category of water
10 and sewer charges subject to the statute.
11 Even so, as Mr. Lydon has stated, the City's
12 accounting practices do not provide a means to
13 ascertain whether nonresident or resident revenues
14 were used for the expenditures challenged by the
15 plaintiffs, therefore, we don't see how the
16 plaintiffs can prove that City's use of revenues
17 derive from water and sewer customers living within
18 the city's corporate boundaries even violates the
19 Service Fee Statute. And it's also what Mr. Lydon
20 said, I'll reiterate here, the nonresident water and
21 sewer fees range from 60- to \$65 million per year,
22 which is far more than what the plaintiffs are
23 complaining of.

24 Now, even if this Service Fee Statute governs
25 the City's use of its water and sewer revenues,

1 certain uses that the plaintiffs complain of, we
2 contend, nonetheless, meet the requirement that
3 revenue generated from the service fee imposed to
4 finance the provision of public services must be
5 used to pay costs related to the provision of the
6 services or program for which the fee was paid.

7 Now, Plaintiffs have focused on the City's
8 transfer or charge of 2.27 million annually to pay
9 for indirect costs of city services provided to the
10 utility, then they also challenge the expenditure of
11 water and sewer revenues on economic development
12 activities including its development corporation the
13 City operates for development corporations. There's
14 also an Office of Economic Development, there is an
15 Economic Development Special Projects Fund, and
16 there is also an Office of Business Opportunities.
17 So I'm just -- I go through it in our memo, but for
18 the interest of time, I will only focus on these
19 particular ones that Mr. Connell has raised. But I
20 do go through other uses that the plaintiffs have
21 apparently challenged.

22 Now, as I said before --

23 THE COURT: Have they challenged the specific
24 uses -- the specific uses?

25 MS. TAYLOR: They're challenging categories of

1 uses, and please correct me if I'm wrong. So for
2 example, the plaintiffs are arguing that the City's
3 use of water and sewer revenue to pay for its
4 economic development activities is unlawful.

5 THE COURT: Correct. I thought they were
6 challenging all uses above and beyond the cost of
7 maintenance in the system.

8 MS. TAYLOR: And I have described some of those
9 other uses in the memorandum that was filed --

10 THE COURT: You keep referring to a memorandum.

11 MS. TAYLOR: You don't have it? We filed it on
12 Wednesday and I e-mailed it as well on Wednesday.

13 THE COURT: I'm sorry. What you handed up is
14 all deposition excerpts.

15 All right. Thank you. Sometimes it's just a
16 fact of life that things that get filed the week
17 before --

18 MS. TAYLOR: I understand.

19 THE COURT: -- seldom make it into the file.
20 It's just what we deal with. If it's down there,
21 I'll make sure --

22 MS. TAYLOR: Well, that's your copy. I don't
23 think I've made any notes on it.

24 THE COURT: Thank you.

25 MS. TAYLOR: As I said, Subsection B of the

1 Service Fee Statute refers to provision or -- or
2 service or user fee imposed to finance the provision
3 of public services must be used to pay costs related
4 to the provision of the services or program for
5 which the fee was paid.

6 Now, we contend that these particular
7 expenditures that I just referenced are indeed
8 related to the provision of services or program for
9 which the fee was paid. Words must be given their
10 plain and ordinary meaning without resort to subtle
11 or forced construction to limit or expand the
12 statute's operation.

13 THE COURT REPORTER: I'm sorry. Can you slow
14 down? I understand you're reading from something,
15 but it's hard for me to follow.

16 MS. TAYLOR: I'm sorry. I do tend to talk fast
17 anyway.

18 Let me -- as I said, the key word here is
19 related. And case law, *Sloan v. Hardy*, among many
20 other cases, state that words must be given their
21 plain and ordinary meaning without resort to subtle
22 or forced construction to limit or expand the
23 statutes through operation.

24 We believe that the plaintiffs take an overly
25 narrow view of what related means, because all laws

1 concerning local government shall be liberally
2 construed in their favor. We believe the City's
3 determination of what the expenses are related to
4 the provision of water and sewer service should be
5 given deference.

6 Related -- and I just looked up on the
7 dictionary to define the word related -- is defined
8 as connected by reason of an established or
9 discoverable relation. And relation is also further
10 defined as an aspect or quality that connects two or
11 more things or parts as being or belonging or
12 working together or as being of the same kind.

13 So in terms of the challenged expenditures that
14 the City makes here, we believe that the particular
15 economic development activities and the \$2.27
16 million used to redirect expenses are, in fact,
17 related to water and sewer utility.

18 THE COURT: What about the General Fund
19 transfer?

20 MS. TAYLOR: I'll got that in a moment.

21 THE COURT: Okay.

22 MS. TAYLOR: Now I'm going to start with the
23 \$2.27 million indirect transfer. And I guess let me
24 say this before I get into that: I think it's
25 somewhat confusing. A transfer is -- from my

1 understanding, based on the documents and the
2 deposition testimony, a transfer is when the City
3 actually moves money from the Water and Sewer
4 Enterprise Fund into the General Fund. A charge is
5 when there -- the money remains in the Enterprise
6 Fund, the Water and Sewer Enterprise Fund, yet the
7 expenditures, such as the economic development
8 expenditures, are simply charged out of that fund.
9 It's not moved from the General Fund. The City
10 treats economic development expenditures such as
11 Office of Economic Development as a component within
12 its Water and Sewer Enterprise Fund, if that makes
13 sense.

14 THE COURT: It makes sense.

15 MS. TAYLOR: Okay. Now because --

16 THE COURT: That's not what I understood it
17 early on, but I'll take your word for it.

18 MS. TAYLOR: Okay. The City's utility is not a
19 standalone entity; in other words, it doesn't have
20 its own separate lawyer, it doesn't have its own
21 separate payroll functions, it doesn't have its own
22 billing and collection functions. Other departments
23 in the city of Columbia provide that service to the
24 utility, and that's what this \$2.27 million that is
25 transferred is concerning. It is -- the amount of

1 money was determined by an outside consultant, the
2 engineering firm Black & Veatch, and that is an
3 estimation of the value of these services to the
4 utility provided by other components of the city
5 government.

6 So what the City does is it charges to the
7 utility this amount on an annual basis to pay the
8 utility's share to administrative services. So
9 certainly we believe that there is no question that
10 this \$2.27 million is related to the division of
11 water and sewer; it goes to pay direct costs
12 associated with the utility such as legal services,
13 such as payroll of employees of the utility, such as
14 the billing and collection of water and sewer.

15 Now --

16 THE COURT: 2.7?

17 MS. TAYLOR: 2.27 million per year.

18 Now, the City also uses its water and sewer
19 revenue to fund its Office of Economic Development,
20 its Office of Business Opportunity, four development
21 corporations and economic development special
22 projects. The City contends these expenditures are
23 also related to the provision of water and sewer
24 service.

25 In *Green v. City of Rock Hill* as well as

1 *Ancrum v. Camden Water* and *Babb v. Green*, all of
2 which are cited in our memorandum, there is very
3 broad-stated purposes of a municipal water and sewer
4 utility. These cases state that the purpose of a
5 municipal water and sewer utility is as
6 comprehensive as the public interest which its
7 supply of water tends to promote. The general
8 purpose of water supply is to promote the prosperity
9 of the city. A water and sewer utility promotes
10 prosperity by lowering the rate of insurance,
11 increasing the general sense of security and,
12 therefore, the general happiness, diminishing the
13 risk of numbers of persons being thrown out of the
14 employment and generally in giving steadiness and
15 confidence to the life and enterprises of the city.
16 And I'm quoting there from *Green v. City of Rock*
17 *Hill*.

18 Another important function of a --

19 THE COURT: Too bad they don't write opinions
20 like that these days.

21 MS. TAYLOR: We like *Green*, Your Honor.

22 Another important function discussed in *Green*
23 is to serve the needs of industry upon which the
24 prosperity of sending modern urban communities
25 likely depend. We have testimony and deposition

1 testimony from the former city manager as well as
2 the budget director who state that the City takes
3 its utility as an engine of economic development
4 that attracts businesses to the Midlands region and
5 that adequate water supply is an important economic
6 development tool.

7 So we believe the utility and the City's
8 economic activities are related. The economic
9 development activities that the City undertakes
10 serve to attract businesses into the region. It is
11 a regional utility, therefore it's not just looking
12 at bringing business within the corporate limits,
13 but within the greater metropolitan area. And, of
14 course, new customers, new businesses, new people
15 that locate within the service area of the utility
16 bring more revenue to the utility. It also services
17 the benefit of the region in terms of having
18 consistent stable water supply. It is something
19 that businesses look for when they seek to locate in
20 a new area.

21 So it's undisputed within this deposition
22 testimony that the office of economic development,
23 the office of business opportunity and these
24 development corporations and the economic
25 development special projects help the City promote,

1 revitalize and grow the regional economy, and these
2 activities serve the interest of the utility,
3 therefore we believe that the City's economic
4 development activity is indeed related to the
5 provision of the water and sewer service.

6 Now, the transfer of four-and-a-half million
7 dollars from its Water and Sewer Enterprise Fund to
8 its General Fund we also contend is lawful. And
9 I'll start by noting that the Service Fee Statute
10 prohibits the City -- well, let me back up.

11 Nothing in the Service Fee Statute prohibits
12 the City from using surplus remaining after the
13 costs of the utility are met. Compared with other
14 provisions of Act 138 that I've handed up that
15 enacted the Service Fee Statute, it's clear that the
16 legislature knows how to employ more restrictive
17 language. For example, the act directed that
18 accommodations tax and hospitality tax revenue must
19 be used exclusively for certain specified purposes.
20 The same language is not in the Service Fee Statute.

21 So first-off, I think it's important that there
22 is no particular conflict. And further, when you
23 look at other statutes relating to water and sewer
24 utilities, specifically relating to the municipal
25 water and sewer utilities such as 5-31-670 and other

1 statutory provisions within Title 5, Chapter 31, as
2 we said, the City may charge a reasonable water and
3 sewer rate, and that reasonable rate includes a fair
4 profit, and what the utility does with that profit
5 is within discretion of the City.

6 Also we point out in our memorandum that the
7 City is using its water and sewer revenue to pay for
8 more secure revenue bonds that are issued pursuant
9 to the Revenue Bond Acts. And those bond acts
10 require that the City's water and sewer charges
11 generate more revenue than the operating expenses.
12 So we believe that the Revenue Bond Acts read with
13 the particular --

14 THE COURT: Which type of revenue bond? I
15 mean, which type of bond are you talking about?

16 MS. TAYLOR: Revenue bonds secured by the water
17 and sewer revenues.

18 THE COURT: For?

19 MS. TAYLOR: For improvements to the water and
20 sewer repairs, maintenance.

21 THE COURT: Those have to be used exclusively
22 for improvements of the system.

23 MS. TAYLOR: They're issued for that purpose,
24 yes, Your Honor.

25 So if you read the Service Fee Statute in

1 conjunction with these other statutes that I've
2 referred to, we believe the rule is, in terms of
3 statutory construction, that they must be all read
4 together and harmonized, if at all possible. So we
5 believe that the --

6 THE COURT: There's no limitations on the
7 General Fund expenditures, these funds, or any
8 other -- I mean, they're commingled with other
9 taxes, aren't they, other funds, other taxes,
10 revenue --

11 MS. TAYLOR: They're placed into the General
12 Fund.

13 THE COURT: So there's absolutely no limitation
14 on what they can do with the funds once they go into
15 the General Fund?

16 MS. TAYLOR: They use them for general
17 government purposes. Right. It is --

18 THE COURT: Same thing.

19 MS. TAYLOR: They use it to defray the cost of
20 general services so that they are avoiding a tax
21 imposing a property tax increase on folks who live
22 within the city of Columbia.

23 THE COURT: Because municipalities are somewhat
24 limited.

25 MS. TAYLOR: That's right. That's right.

1 So the argument I'm making --

2 THE COURT: At least with the General Assembly.

3 MS. TAYLOR: So the argument I'm making here is
4 using the --

5 THE COURT: A member of the General Assembly is
6 present, although he's not paying attention.

7 Mr. Hart? Mr. Hart?

8 MR. HART: Sir?

9 THE COURT: You just got zinged and you didn't
10 know it.

11 MR. HART: Oh.

12 MS. TAYLOR: So the argument I'm making here is
13 applying the principle of pari materia, where you
14 look at particular statutes that bear on the same
15 subject matter, and that these statutes that are
16 referred to within Chapter 31 of Title 5 as well as
17 the Revenue Bond Acts that require water and sewer
18 charges generate more revenue. But also a
19 particular section of the Revenue Bond Acts,
20 6-21-440, states that any remaining surplus funds
21 may be used by the City as it determines to be in
22 the best interest of the City.

23 So we believe that this four-and-a-half million
24 dollar transfer which the resolution that's in
25 evidence that establishes the City's policy on when

1 and how it may transfer surplus funds is lawful;
2 that it is provided for under the Revenue Bond Acts,
3 as well as the City's revenue bond ordinance, and
4 that's pursuant to state law, as well as this
5 resolution.

6 Additionally, there is case law to the effect,
7 *Cox v. Bates*, it's another old case, 237 SC 198.
8 It's from 1960 that states that where surplus money
9 remains after payment of appropriations that may be
10 appropriated to other purposes. There's also
11 authority cited in Am. Jur., as well as *McLewins*
12 *Corporate Municipal Corporations* that provides that
13 any sort of surplus revenue from water and sewer
14 charges that remain after the costs of the utility
15 are paid, that the revenue debt -- I mean, the debt
16 service for the revenue bonds are paid, the reserve
17 funds are properly funded and so forth, that they
18 may use water and sewer surplus revenue in a manner
19 that the City Counsel believes is in the best
20 interest of the City. So the City Counsel has the
21 discretion to determine how it will use these.

22 I also must point out that the resolution that
23 the City Counsel has adopted sets out limitations
24 including the limitation that they will not transfer
25 water and sewer surplus funds if that would impair

1 the utility's ability to operate in a sound and
2 businesslike manner. So they have taken on this
3 responsibility of establishing a responsible policy,
4 and the net effect to them in terms of the amount of
5 profit or surplus, whatever you want to call it,
6 that the City transfers to its General Fund is far
7 less than what the City could take out. I mean, it
8 is certainly returning some of its profit back for
9 uses of, you know, additional construction projects
10 and our -- Mr. Palin's affidavit that we have filed,
11 he talks about how there is approximately 15- to
12 \$20 million worth of water and sewer construction
13 projects that are paid not from revenue bonds but
14 directly as part of the expenditures. So certainly
15 the City is not deciding this issue likely as a
16 policy that the City has enacted.

17 So we believe that the City has the discretion,
18 City Counsel has the discretion, to decide how it
19 uses these surplus funds; City Counsel has the
20 ability to make this determination based on what is
21 in the best interest of the city. And we believe
22 that the plaintiffs essentially want to second-guess
23 the City's judgment in terms of how to best manage
24 its utility and to ask this Court to impermissibly,
25 and through the power of the City Counsel's

1 legislative authority, to adopt budgets for its
2 utility and provide its operation. The solution
3 here is a political one, not any sort of backdoor
4 attempt to force the hands of a legislative body
5 through judicial means.

6 Now lastly I'm going to touch on -- and I'm not
7 sure, maybe we need some clarification. But the
8 plaintiffs have brought some constitutional claims.
9 And I have also raised the defense that should the
10 Service Fee Statute apply, that it is
11 unconstitutional as applied to the city of
12 Columbia's water and sewer revenues. And if you
13 don't mind, I'll just leave that for your review
14 later.

15 But the plaintiffs also argue that the City's
16 use of water and sewer revenues somehow constitute a
17 taking without just compensation to the extent that
18 the plaintiffs are continuing to argue that. And as
19 I've said earlier, they have a contractual
20 relationship in which a customer of the city's
21 utility receives the service in return for payment.
22 And what it appears to be, the plaintiffs argument
23 is that they have not received the benefit of the
24 bargain. And we believe that there is no taking
25 here because they have received the benefit of the

1 bargain and there's nothing in the contract that
2 includes the term concerning use of proceeds,
3 therefore there is no property interest in the
4 City's use of proceeds. And without a property
5 interest, there's no taking without just
6 compensation. Mere acceptance of the plaintiff's
7 payment for service does not constitute a taking of
8 the plaintiff's property.

9 There is -- also in my memoranda I address
10 equal protection argument. I will refer you to that
11 argument. And one last point I'd like to make that
12 was raised in the plaintiff's memorandum of law but
13 was not discussed here today was this notion of
14 taxation without representation. And the plaintiffs
15 seem to argue that the City's water and sewer
16 charges payable by nonresidents somehow constitute
17 taxation without representation. But in order to
18 violate a particular constitutional provision that
19 is called taxation without representation -- I think
20 it's Article 10, Section 5 -- the nonresident
21 charges must be deemed a tax levy without having the
22 consent of the people or those elected to represent
23 their interests.

24 But the City's nonresident charge is not a tax
25 levy, and in order for the plaintiff's argument to

1 make any sense, this Court has got to determine that
2 the City's fees are, in fact, a tax. And I don't
3 believe that the law here supports the plaintiff's
4 contentions.

5 In *Hagley Homeowners Association vs. Hagley*
6 *Water, Sewer and Fire Authority*, the Supreme Court
7 held that the imposition of a charge in exchange for
8 a service does not constitute taxation for
9 constitutional purposes. Here, the water and sewer
10 charges are paid by nonresidents according to the
11 contractual arrangement that we have mentioned
12 several times already this morning.

13 Also we have argued that the nonresident
14 charges are not subject to the *Brown v. Horry County*
15 test, because the case dealt with uniform service
16 fees that are established under 5-7-30, which
17 addresses in-city fees, not out-of-city fees. And
18 I'm not aware of any South Carolina case where the
19 Court considered taxation without representation
20 theory where the plaintiffs lived outside the city
21 limits and therefore could not be taxed by the City.

22 Further, the guaranty in this constitutional
23 provision is representation, and because there can
24 be no elected representatives for areas outside the
25 corporate limits, I'm not sure how the plaintiffs

1 claim makes any sense. I think, Your Honor, that
2 covers it.

3 THE COURT: Thank you very much.

4 Mr. Connell?

5 MR. CONNELL: Your Honor, just shortly,
6 briefly. You heard enough, I'm sure.

7 Your Honor, we would just -- we would point out
8 that the City's own consultants said -- and those
9 are Exhibits 11 and 12 -- based on our cost causal
10 analysis of the utilities, 2006 budget of
11 \$94.8 million in Exhibits 2A, B, approximately
12 \$7.5 million of directly funded costs should not be
13 funded by the Utility Enterprise Fund and are more
14 appropriately funded through the General Fund
15 budget. This includes \$3.6 million for
16 nondepartmental capital improvements and component
17 units including development corporations.

18 And, Your Honor, that -- they are Exhibits 11
19 and 12, two consultants that the City hired asked
20 these questions that they chose not to follow. And
21 to argue to the Court cases from 1929, 1932 and 1946
22 that have no application when the Service Fee
23 Statute was enacted in 1997, those cases have
24 nothing to do with what the General Assembly decided
25 in 1997. They wanted to protect people to make sure

1 that if you were paying fees -- and when I say water
2 and sewer fees, I'm talking about tap fees, impact
3 fees, base charges, all of those fees. If you were
4 going to be required to pay those, the General
5 Assembly wanted to make sure that everybody was
6 going to be protected. And they didn't say in the
7 statute, oh, if you're out-of-city, we can keep
8 those monies for some other purpose. That statute
9 applies to everybody across the board. And the
10 City's contract couldn't exclude that; that would be
11 a violation of the Public Purpose Doctrine. I mean,
12 you cannot make a contract that violates state law.

13 And all you have to do, Your Honor, is look at
14 the statute. And it says: "Services must be used
15 to pay costs related to provision of the service for
16 a program for which the fee was paid."

17 And, Your Honor, we would submit that your
18 plain, ordinary, unambiguous language has to be
19 followed in this case. And those service fees,
20 those tap fees, those water fees, there was a reason
21 why this was done; it was to make sure there was
22 some protection out there just for what we have
23 here, the City of Columbia relying upon these other
24 monies to -- or these water and sewer monies to
25 build libraries, public parks, whatever they want to

1 do, rather than raising taxes on the people in the
2 city, if that's what they wanted to do.

3 So -- and I knew you wanted the 2012. I'll
4 hand that to you.

5 THE COURT: Oh, the Attorney General's opinion.

6 MR. CONNELL: I wanted to make sure you have
7 that because we raised that.

8 Your Honor, the 2012 Attorney General's opinion
9 did not say anything about how the money was to be
10 spent. It doesn't say a thing about that. And
11 that's what our complaint is in this case; not that
12 they're using the money for maintenance or
13 expansion -- if they want to expand the system, make
14 it better, any of those things they can do, but we
15 maintain that those monies have to be used for that.
16 And we don't complain, Your Honor, about the payroll
17 or the use of the city's legal department.

18 THE COURT: You know, at that point it becomes
19 an accounting function. And you're not asking this
20 Court to pick and choose which expenditures are or
21 are not covered by this statute. I mean, how would
22 you ask the Court -- and Ms. Taylor argues there's
23 several -- she argues that many of the uses of the
24 money is put to enhance the system or enhance
25 development which enhances the system and, you know,

1 a better way of life for everybody.

2 But, I mean, how do you -- you just hit on
3 that. I made a note. What do I do with that 2.27?
4 Are we picking and choosing -- are they asking the
5 Court to pick and choose or are they asking the
6 Court to pick and choose which of the expenditures
7 come under the umbrella of the statute, the
8 language, provision of public service? That is
9 pretty broad.

10 MR. CONNELL: Your Honor, we're not -- we're
11 not asking -- things that are related directly to
12 the utility are certainly expenditures they can take
13 out. But other things that are not directly related
14 to the maintenance, the repair, the expansion, those
15 type of things would not be available under the
16 Service Fee Statute or under the case law currently
17 in effect.

18 They couldn't -- for instance, they couldn't --
19 they can't use those monies to build a park in
20 downtown Columbia. I mean, that is not -- they can
21 certainly argue, well, that's business development
22 and because we got a new park, we'll get a new water
23 customer. But that goes way beyond the Service Fee
24 Statute which is, those monies are being paid for a
25 specific reason. They're not being paid as a tax.

1 And, you see, that's the problem we have with
2 it that Your Honor is struggling with. The City can
3 only do one of two things in this case: They can
4 either have a tax or they can have a fee. And --

5 THE COURT: They --

6 MR. CONNELL: They want a fee from out-of-city
7 residents that they can charge and not have to raise
8 taxes. And the Service Fee Statute, if anything, is
9 designed to protect those people and city residents
10 to make sure that those monies are used.

11 You know, the water and sewer fees -- what I
12 hear from Defendants is that the water and sewer
13 fees, that they can just pick and choose. Well,
14 that's not the case. The water and sewer is in a
15 contract; you can't choose from five or six or ten
16 water and sewer companies. You want water and
17 sewer, you've got to go to them.

18 And just for that reason, the Service Fee
19 Statute protects those people's money to make sure
20 that it's being used for that purpose and not being
21 used to fund business opportunities and downtown
22 development corporations and all those things that
23 are not directly related to water and sewer.

24 And the only other thing I'd point out, Your
25 Honor, is the *Sloan vs. City of Conway* case, that

1 was a case I had, unfortunately. And that case --

2 THE COURT: I have had a lot of experience with
3 Mr. Sloan myself.

4 MR. CONNELL: No. This is a different Sloan.

5 THE COURT: Okay. Not Edward Sloan.

6 MR. CONNELL: Not Edward Sloan. This Sloan was
7 a professor at Coastal Carolina.

8 THE COURT: I'm sorry.

9 MR. CONNELL: And he complained because he was
10 paying five times the water and sewer fees that
11 in-city residents were paying. And he didn't
12 complain about where the money was being used, he
13 thought the five times was too much. And the
14 Supreme Court said, under the circumstances, he was
15 an out-of-city resident and he can be charged five
16 times. But there was no indication about what the
17 money could be used for. And that was not the issue
18 in the case. It was whether or not -- that was a
19 due process argument, whether or not he could be
20 charged so much more than other people in the city.

21 And so we don't have the same issue we have
22 here which is, what can the money be used for and
23 under what circumstances can it be used? And, Your
24 Honor, we simply point out that the Service Fee
25 Statute says must, and we think it must be clear and

1 ambiguous and that Your Honor should find that an
2 injunction should lie and should give us the relief
3 we requested.

4 THE COURT: All right. How do you wish to
5 proceed, Counsel? Obviously I'm going to require
6 some proposed orders. How much time do you need?
7 Ten days or more?

8 MS. TAYLOR: Fifteen days, Your Honor.

9 THE COURT: That's fine.

10 MR. CONNELL: Fifteen would be fine, Your
11 Honor.

12 THE COURT: Five and 15 would equal --

13 MR. CONNELL: Twenty.

14 THE COURT: August the 20th.

15 All right. Thank you very much, Counsel.

16 MR. CONNELL: Thank you, Your Honor.

17 END OF PROCEEDINGS

18

19

20

21

22

23

24

25

C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

I, the undersigned, Bethanie Patterson, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the captioned cause, relative to appeal in the Common Pleas Court for Richland County, South Carolina, on the 5th of August, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 26, 2014


Bethanie Patterson
Circuit Court Reporter

State of South Carolina)
County of Richland)

In The Court of Common Pleas
Fifth Judicial Circuit
2011-CP-40-6705

Joseph A. Azar, et al.,)
Plaintiffs,)
vs.)
City of Columbia,)
Defendant.)

Transcript of Record

September 13, 2013
Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr., Judge

A P P E A R A N C E S:

C. Dixon Lee, III, Esquire
Gene M. Connell, Jr., Esquire
Attorneys for the Plaintiffs

Thomas E. Lydon, Esquire
M. McMullen Taylor, Esquire
Attorneys for the Defendant

Elizabeth B. Harris, CVR-M
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>I.D.</u>	<u>Ev.</u>
P-1	Consent Decree		17
P-2			22

1 THE COURT: First off, I want to thank you for coming.
2 I know this is somewhat of an imposition since we've
3 already argued this case, but as I indicated in the email,
4 I've now had an opportunity to review your submissions much
5 more thoroughly and frankly had some questions about both
6 orders, and I thought this would be a good way to resolve
7 those issues hopefully.

8 Mr. Connell, the first thing I want to start with is
9 the issue of standing, and you both have completely
10 different opinions or positions on standing. You say in
11 the proposed order the Judge Kinard ruled on this issue and
12 to quote you:

13 Judge Kinard ruled on these issues denying
14 plaintiffs' motion for class action certification
15 and denying the City of Columbia's motion to
16 dismiss for lack of standing, ruling that all
17 three plaintiffs have legal standing to bring the
18 subject action.

19 Other than you saying that, I don't have -- there no
20 indication in the record that that's true. So, I see the
21 city in their proposed order grants, basically grants
22 standing to Mr. Cumberland but would have me deny
23 standing to Michael Letts and Joseph Azar. So, where,
24 where are we?

25 MR. CONNELL: Well, Your Honor, he did it on the

1 bench. We had those two motions argued sometime before
2 this. He did not give a -- write a written order. He kind
3 of threw up his hands and said, you know, they've got
4 standing and denied the motion.

5 THE COURT: How can an appellate court review that? I
6 mean, I know what you're talking about. I've been around
7 Judge Kinard long enough to know that he does: Okay.

8 MR. CONNELL: Yes, sir.

9 THE COURT: Without at least the transcript.

10 MR. CONNELL: They, I think they would have -- they
11 have the transcript. They would -- that would be an
12 appealable issue that would be in the transcript of Judge
13 Kinard's ---

14 THE COURT: Does anybody of a transcript? I mean,
15 it's certainly not -- never has come before me.

16 MR. CONNELL: You know, we don't have a transcript.
17 We could get that for Your Honor. I don't think there's
18 any argument that he denied the motion in regard to the
19 standing by other parties. The question is he just didn't
20 write anything down.

21 THE COURT: Well, the city doesn't even take the
22 position that they're challenging -- I mean, that they're
23 appealing from his order in a sense.

24 MR. CONNELL: Yes, sir.

25 THE COURT: You know, I'm in a position where I can't

1 overrule another circuit judge.

2 MR. CONNELL: Yes, sir.

3 THE COURT: What's the city's position?

4 MR. LYDON: Your Honor, our -- Mr. Connell is correct
5 that Judge Kinard did deny the motion to dismiss for lack
6 of standing. However, it was on a Rule 12 motion, and you
7 know what? The Rule 12 motion is based just on the
8 pleadings, and it doesn't preclude you from raising the
9 issue later in the case when the record is fully developed
10 and you've got, you know, everything in the record.

11 So, it's our position that even if he -- you know, and
12 he did deny it. We agree with that, but that in order for
13 us to preserve it for appeal, we've got to make sure we
14 raise it again with the fully developed record before the
15 court that we have as far as who's customers and who's not
16 customers and where they live and where they don't live.
17 So, it's our position that even if he denied it based on
18 the Rule 12 motion, that doesn't preclude us from bringing
19 it up again and, and more importantly we feel compelled to
20 bring up again in order to make sure that it's preserved on
21 appeal.

22 THE COURT: Well, why don't, why don't you or Ms.
23 Taylor make that a part of your proposed order? In other
24 words, I don't think you even reference Judge Kinard's
25 ruling and state what you just stated. In other words,

1 that it was a 12(b) motion. I assume 12(b) motion and
2 that ---

3 MR. LYDON: And that we're not precluded from ---

4 THE COURT: From arguing, and you say in your proposed
5 order that Cumberland's standing is not challenged. So,
6 the case can go forward in any other event.

7 MR. LYDON: That's correct.

8 MR. CONNELL: Yes, sir, and we agree that they
9 protected their right to appeal any issue made. He's made
10 that clear to me since the beginning that that was an issue
11 that he was going to take up, so.

12 MR. LYDON: We had it paragraphed in our proposed
13 order to clarify that.

14 THE COURT: I think that would be helpful that you now
15 challenge ---

16 MR. LYDON: It's in the full record.

17 THE COURT: --- the standing of Letts and Azar.

18 THE COURT: To make it a record. Okay. Now, Ms.
19 Taylor or Mr. Lydon. I didn't mean to preempt you, Mr.
20 Lydon. I'm going to hit you kind of below the belt. Can
21 you take a look at -- you furnished in your memorandum -- I
22 mean, your exhibits the 2010 Comprehensive Annual Financial
23 Statement, correct, from the city, and I'm looking for this
24 transfer of 4 and a half million dollars to the city
25 general fund. Can you show it to me?

1 MS. TAYLOR: Yes, Your Honor.

2 THE COURT: You can?

3 MS. TAYLOR: I don't, I don't have it, though.

4 THE COURT: I'm going to give it to you, and I assume
5 you want only the section about the proprietary funds. Is
6 that ---

7 MS. TAYLOR: I believe that's where it would be
8 located, Your Honor.

9 (A PAUSE.)

10 MS. TAYLOR: We also have the affidavit of Jeffrey
11 Palin, who I believe also addresses the 4 and a half
12 million.

13 COURT REPORTER: Excuse me. I need you to keep your
14 voice up, please.

15 MS. TAYLOR: Sure. I said we also have the affidavit
16 of Jeffrey Palin, who I believe also addresses the 4 and a
17 half million in his affidavit.

18 THE COURT: Take a few minutes.

19 MS. TAYLOR: Okay.

20 THE COURT: I'll go back to Mr. Connell.

21 Mr. Connell.

22 MR. CONNELL: Yes, sir.

23 THE COURT: You rely on 6-1-330. I mean, that's the
24 thrust of your case, and I think it's a pretty strong case.
25 And the city takes the position that 6-21-440, that is the

1 Revenue Bond Act, gives them some wiggle room. In other
2 words, if they are able to, if they are able to identify
3 surplus funds, they say that -- or surplus revenues:

4 Any surplus revenues thereafter remaining shall
5 be disposed of by the governing body of the
6 borrower as it may be determined from time to
7 time to be for the best interest of the borrower.

8 That's -- I don't know if it could be shown from the
9 financial statements that there are -- that maybe this 4
10 and a half million is being used as residual money in the
11 bond funds. But maybe they, maybe they got a point. In
12 other words, it seems to me that we got two statutes that's
13 somewhat in conflict here, 1-330 and 21-440. You looked at
14 that issue?

15 MR. CONNELL: Yes, sir. You want to hear what I have?

16 THE COURT: Sure.

17 MR. CONNELL: Your Honor, my position, our position
18 would be that 330(b) is a directatory statute. It says
19 must. Those monies must be kept, and there are at least
20 five cases that have looked at this issue, and I think the
21 reason is pretty clear.

22 The reason is, Your Honor, the City of Columbia wanted
23 to take all the money from the water and sewer and just
24 apply it to taxes so that city residents wouldn't have,
25 wouldn't have to pay taxes. Then they would get all this

1 money from the property and be using it in a manner which
2 is not consistent with the statute, which the general
3 assembly clearly wanted to make sure that those people who
4 were paying those rates got what they were paying for. And
5 that money was not used for parks, recreation, development
6 corporations, and other things of that ilk.

7 So, Your Honor, we would argue that there would be no
8 limit to what they could do with the water and sewer money,
9 if Your Honor gets where I'm going with that. They can
10 increase the amount of the ratepayers' price to such an
11 amount, the city residents wouldn't have to pay the taxes,
12 and they'd just get all the money from the water and sewer.
13 That 330(b) is designed to protect the ratepayers from just
14 that happening. They're going to use that money and use it
15 for the system.

16 THE COURT: You see no conflict in those statutes?

17 MR. CONNELL: No, sir.

18 THE COURT: Ms. Taylor.

19 MS. TAYLOR: Yes, sir.

20 THE COURT: I don't mean to make you multi-task.

21 MS. TAYLOR: Since I was reviewing some of those while
22 you posed the questions, I want to make sure I understood
23 the question, the question being is there a conflict
24 between the subsequent statute 6-1-330 and the Revenue Bond
25 Act provisions that allow for a surplus and for the city to

1 be able to use that surplus in the manner in which it finds
2 in the best interest of the city.

3 THE COURT: That's correct.

4 MS. TAYLOR: Well, I don't see a conflict in that. I
5 think it's what we have in our memo in support as well as
6 in our proposed orders ---

7 THE COURT: Mr. ---

8 MS. TAYLOR: --- that those two statutes must be read
9 together and that this court must ---

10 THE COURT: Hold on. Hold on.

11 BAILIFF: Quiet, please.

12 THE COURT: I can't hear her.

13 MR. CONNELL: I'm sorry, Your Honor.

14 THE COURT: Y'all talk quietly.

15 Go ahead, Ms. Taylor.

16 MS. TAYLOR: That this court must construe those two
17 statutes in a way that harmonize those two. That the
18 preference would be to find a way in which those two
19 statutes can be operative without conflicting with one
20 another. And I think that there is a way which that can be
21 done because the service fee statute, as I read it, doesn't
22 expressly state that there cannot be a surplus of water and
23 sewer revenues.

24 THE COURT: It just says the money's got to be used
25 for the system. Simply.

1 MS. TAYLOR: So, if the city is indeed, which they
2 are, using the money or revenue for the system and they're
3 recovering their costs -- the city council establishes a
4 budget; they establish a capital improvement plan each year
5 for its utility, and those are adapted legislatively. They
6 are providing for the cost of the utility. So, if there is
7 surplus, which their rates are created under a rate study
8 and have built-in profit, then at what stage -- provide for
9 the cost of utility if there is a surplus -- and there not
10 necessarily is a surplus every year. Then they can use
11 that money in a manner in which they find to be in the best
12 interest of the city.

13 (COURT IS INTERRUPTED BY A CELL PHONE.)

14 THE COURT: Take that out, please.

15 (A PAUSE.)

16 THE COURT: Well, the revenue generated is more than 5
17 percent of the entity's total budget, correct?

18 MS. TAYLOR: That's correct.

19 THE COURT: What about the provision that says
20 proceeds of the fee must be kept in a separate and
21 segregated fund from the general fund?

22 MS. TAYLOR: The city segregates those water and sewer
23 revenues into a water and sewer enterprise fund.

24 THE COURT: All right, and you've looked at that now?

25 MS. TAYLOR: This -- I believe that I can tell you

1 what -- this particular where it's got transfers out, Your
2 Honor, that's the 7 point something million.

3 THE COURT: Yes.

4 MS. TAYLOR: The 4 and a half is included in that.
5 This just does not break out the 4 and a half.

6 THE COURT: The rest goes in the various enterprise
7 operations and development corporations? Is that ---

8 MS. TAYLOR: That, that's right. The 4 and a half
9 million is the transfer into the general fund, and then
10 there is also what's \$2.27 million. That's a transfer from
11 the enterprise fund to the general fund in order to pay for
12 what the city calls indirect costs, and that would be
13 things like legal, the city attorney, the city manager,
14 other things that the Black and Veatch indirect cost study
15 that was prepared in 2007 identified as trivial services
16 that other units or department of the city provided to the
17 utility that wasn't -- they found a way in which to measure
18 it by percentage of time that these other departments spent
19 on the utility as distinguished from the other expenditures
20 that were raised such as the GIS system or procurement in
21 which there was some measurable way in which to account for
22 the charges that, for example, the procurement department
23 made to the utility to cover for construction bids that the
24 utility was issuing.

25 THE COURT: Okay. You follow that, Mr. Connell?

1 MR. CONNELL: Yes, sir.

2 THE COURT: Okay. Another, another question I had or
3 have is, Mr. Connell, is your request that the prior three,
4 years' transfers into the city general fund be refunded,
5 paid back to the water and sewer fund. What gives this
6 court the authority to do that, to tell them that they've
7 got to put money back in that they took out and perhaps in
8 the good faith felt they had the right to do?

9 MR. CONNELL: Your Honor, section 330(b) that you just
10 talked about says that funds must be used to pay costs
11 related to the utilities. All Your Honor would be doing
12 would be enforcing the statute as it was written back in
13 1997 that requires they put the money back in. And it, and
14 it even becomes more important now, as Your Honor has
15 probably read the newspaper, but I'm going to give you a
16 copy of this. The EPA -- I see you have this in your hand.
17 We got a copy.

18 THE COURT: Figured it might be relevant.

19 MR. CONNELL: Yes, sir.

20 THE COURT: Or at least it might be argued.

21 MR. CONNELL: Your Honor, we would like to offer as an
22 exhibit the consent decree between the City of Columbia and
23 the EPA in regard to the dilapidated condition of the sewer
24 system as evidence of just why 330(b) should be followed.
25 It's about 200-some pages. It's not been signed by the

1 court, the district court, but it's been signed by the City
2 of Columbia. It's a settlement agreement that we think
3 Your Honor ought to consider as part of the reason why
4 330(b) was enacted to begin with.

5 THE COURT: Any objection?

6 MS. TAYLOR: I don't have an objection, but I would
7 like to address it if I may, Your Honor.

8 THE COURT: Absolutely. Go ahead.

9 MS. TAYLOR: This is a consent decree that I think
10 actually the U.S. Attorney's Office has entered into by
11 now. I think this is a distraction, Your Honor; I think
12 that this is a different issue. This is EPA and DHEC
13 pursuing action against the City of Columbia under the
14 Clean Water Act in which there are violations or penalties
15 imposed for violating the national permit, the NPDES
16 permit.

17 This -- the consent decree here, the City of Columbia
18 does not and, and the EPA, Department of Justice does not
19 require that the city admit any liability. As a matter of
20 fact, I think this particular consent decree is an example
21 of how the problem is solved.

22 This is an agreement in which the city has agreed to
23 perform capital improvement plans. And I'd like to point
24 out on page 16 where the first capital improvement plans --
25 that what this consent decree does is actually incorporate

1 capital improvement plans and projects that the city has
2 already adopted prior to the EPA consent decree. They had
3 already started implementing it, and this merely
4 incorporates certain capital improvement projects into this
5 to assure that the deadlines which the city made for itself
6 are, in fact, kept.

7 This does not identify, as the plaintiffs would have
8 you to accept, that the city has been negligent in allowing
9 its wastewater treatment plant to be falling down around
10 itself. It is taking into account what the city is already
11 required to do and requiring them simply to comply with a
12 certain debt limit.

13 THE COURT: Well, I think what the plaintiffs would
14 argue is that the system would not have been in the shape
15 that it is had the city, I don't know, had the city not
16 used the funds for other purposes for many years.

17 MS. TAYLOR: I think that's an oversimplification,
18 Your Honor, and I'm not sure if there's facts in the record
19 that support what the plaintiffs contend. There is facts
20 in the record, deposition testimony from the former city
21 manager that talks about how expensive the water and sewer
22 infrastructure is, how it's difficult for the city to be
23 able to maintain aging infrastructure over time. The
24 expense of the infrastructure increases over time. There's
25 always repairs being made to the water and sewer utility

1 every year; the city does that every year. They have
2 dedicated and spent millions of dollars each year towards
3 its utility. To me, that indicates the city is not, you
4 know, neglecting or ignoring its utility.

5 The problem is bigger than simply throwing more money
6 at the utility. The city manager testified to the most
7 common cause of sewer overflows which the plaintiffs
8 complain of are grease that is blocking pipes and tree
9 limbs that are blocking pipes. And there's also issues
10 with infiltration of stormwater into the sewer system. The
11 city has a separate system.

12 So, I think the point I'd like to make to you today,
13 Your Honor, is that it's a bigger, more complicated problem
14 than what the plaintiffs would, would like and than what
15 they are asserting here today.

16 THE COURT: All right, you're asking this be made a
17 part of the record?

18 MR. CONNELL: Yes, sir, if we might have that made a
19 part of the record?

20 THE COURT: All right, without objection.

21 MR. CONNELL: You want me to put an exhibit sticker on
22 it, Your Honor?

23 THE COURT: Well, the court reporter can. I want to
24 make sure it gets filed; I want to make sure it gets in the
25 hands of the appellate court.

1 (CONSENT DECREE MARKED INTO EVIDENCE AS PLAINTIFFS'
2 EXHIBIT NUMBER 1.)

3 THE COURT: Ms. Taylor, address the refund issue the
4 plaintiffs say is just a simple following of the statute,
5 compliance with the statute that's necessary.

6 MS. TAYLOR: Well, I don't think there's anything in
7 the statute that requires a refund. I think the
8 appropriate remedy, should the court rule in the
9 plaintiffs' favor, would be with respect to refunding. We
10 can talk about that more; I believe Mr. Lydon can talk
11 about that more.

12 I think what's problematic with the remedy that the
13 plaintiffs have asked for is they're seeking for the city
14 to, you know, reach back in time three years and find money
15 that they have previously spent. This is not money that's
16 sitting around readily available for a refund. This is
17 money that the city has already budgeted for, has already
18 spent over the past three fiscal years. That is imposing a
19 real, dire financial condition on the city to ask for this
20 common fund to be established based on revenues that the
21 plaintiffs think have been expended wrongfully over the
22 past three years.

23 We also think that the law we argued earlier, you
24 know, doesn't really lend itself to that remedy. I think
25 that, you know, the prospective nature of the *Brown vs.*

1 Horry County and how that's been applied in others. I
2 think it's that *C.R. Campbell* that talks about how orders
3 are -- or should be applied or decisions should be applied
4 respectively. I think the fact that nonresident revenues
5 versus resident revenues, you know, the nonresident
6 revenues generated, you know, are not subject to *Brown* or
7 the service fee statute. I'm just not sure how the
8 plaintiffs can even establish -- follow the residents'
9 revenues, those revenues derived from folks who live within
10 the City of Columbia, can be attributed to what the
11 plaintiffs find to be unlawful. I find problems all over
12 the place with the, with the remedy, Your Honor.

13 THE COURT: Well, my thought was that it probably
14 should be applied prospectively and not retroactively.

15 Did you want to comment on that, Mr. Lydon?

16 MR. LYDON: We just cited -- we had made that same
17 observation in our memorandum in opposition to their motion
18 for summary judgement, Your Honor. It's not in -- it
19 wasn't briefed. It wasn't put in our summary judgment memo
20 -- I mean, summary judgement order because obviously we
21 were saying that the remedy should be, should be denied.

22 But there's page 26 of our motion that we filed that
23 under state law, it's the usual decision to create new
24 liability where none formerly existed is applied
25 prospectively only. We cite the *Davenport vs. Cottenwood*

1 case and *Hardaway vs. Lexington County*. So, you know, if,
2 in fact, the court determines that 6-1-330 precludes the
3 city from transferring this money out of the water and
4 sewer fund, then that should be prospective only.

5 And as Ms. Taylor mentioned, it's not only a legal --
6 we not only feel the law supports that, but the practical
7 effect of having to try to do that, and we're talking about
8 a municipal government that, you know, is on a year-to-year
9 budget and budgets and spends their money, and then there's
10 zero at the end of the year. Not sure how that would even
11 be practical to be accomplished if you could somehow go
12 back and find money from three years ago and put it back
13 into an account.

14 So, I think both from a legal standpoint and a
15 practical standpoint, if the court determines that the
16 plaintiffs should prevail, that it should be prospective
17 only.

18 THE COURT: Any comment?

19 MR. CONNELL: Yes, sir. As Your Honor knows, the
20 prospectivity doctrine only applies to new principles of
21 law, and the City of Columbia has known since the late
22 1990s that statute required that that money be paid for
23 that purpose. Not only that, they have also had knowledge
24 of all the case law, including *Brown vs. Horry County* that
25 was decided way back years and years ago. And to further

1 point out to the court that the city's been taking millions
2 of dollars from the ratepayers since the 1980s, and I would
3 suggest they've probably taken over \$100 million which
4 they've already gotten.

5 So, Your Honor, we would suggest to you that the
6 doctrine of prospectivity, it really doesn't apply in this
7 case because this isn't a new principle of law. The
8 Supreme Court has on at least five occasions warned
9 special-purpose districts and cities about ratepayers and
10 what they can use that money for. So, they knew full well.

11 And as Your Honor has already mentioned a couple of
12 times, the statute clearly says it's got to be used for
13 that purpose, and this isn't something that happened a few
14 days ago. The statute's been in effect for many years.
15 So, Your Honor, we think that the prospectivity doctrine
16 would not apply based on Your Honor's looked at *Campbell*
17 and *Brown* and all these other cases, at least for the past
18 three years. The other years they certainly got those.
19 Can't go back and get them, and they used the money for
20 whatever they used it. They didn't use it right, in our
21 opinion.

22 THE COURT: All right. Do you want to argue the
23 standing of your two clients who the city says have no
24 standing?

25 MR. CONNELL: Your Honor, I think ---

1 THE COURT: I mean, in other words, not just reliance
2 upon Judge Kinard's verbal order.

3 MR. CONNELL: I think we have to rely on his order
4 because as Your Honor has already pointed out, he made a
5 ruling and I don't, I don't think Your Honor can go back
6 and make a decision. That's already, that's already done.
7 So, I think arguing it to Your Honor would...

8 THE COURT: Well, again it's fodder for the appellate
9 courts.

10 MR. CONNELL: Yes, sir. Everything in this case is
11 going to be fodder for whoever decides it.

12 THE COURT: All right. Well, basically, gentlemen and
13 ladies, those were my questions. All right, anything you
14 wish to add?

15 MR. CONNELL: Your Honor, we did -- one of the things
16 that was brought up before that I assumed you were going to
17 ask about was the city water and sewer budgets since 2000
18 -- since the statute was enacted, since 330(b) was enacted.
19 There's some argument that that reenacted the water and
20 sewer code back in the 1890s and we just simply amended it
21 and that kind of thing.

22 And, Your Honor, we have gone back and looked through
23 the ordinances, and actually the ordinances have been
24 recodified since then. So, I think we probably ought to
25 put that in as exhibit.

1 THE COURT: All right.

2 MR. CONNELL: For purposes of the record, and that's
3 the 2010, 11, 12, 13 ordinances with the rates.

4 Y'all have seen these?

5 THE COURT: All right, any objection?

6 MS. TAYLOR: There has not been a recodification since
7 1998.

8 MR. CONNELL: That's ---

9 MS. TAYLOR: So, you already have admitted into
10 evidence an update of your -- many, many ordinance -- the
11 rate amendments. We just did not include 2012 and 2013
12 simply because those were enacted after this lawsuit was
13 filed.

14 MR. CONNELL: But we'd put them in, Your Honor. We'd
15 like to do that.

16 THE COURT: That's fine.

17 (ORDINANCES MARKED INTO EVIDENCE AS PLAINTIFFS'
18 EXHIBIT NUMBER 2.)

19 MR. CONNELL: Your Honor, in light of your questions,
20 do you want us to address the issue of prospectivity in the
21 order, or do you want us to give you some ---

22 THE COURT: Well, if I signed your proposed order, I
23 would just have to delete those provisions calling for the
24 refunds.

25 MR. CONNELL: Yes, sir.

1 THE COURT: Which is one way to do it, but if you wish
2 to address it.

3 MR. CONNELL: Only if Your Honor wants us to address
4 that in some fashion. We certainly can do that.

5 Your Honor, we're not asking that the money, as you
6 know, be paid to the rate bearers. We're just asking that
7 they put it back into the enterprise fund, which is the
8 City of Columbia putting it back in the fund, the water
9 fund it was supposed to be in to begin with. So, we're not
10 asking that they ---

11 THE COURT: Well in that case, to have an adequate
12 record, I think you'd better do it.

13 MR. CONNELL: All right.

14 THE COURT: And just modify your proposed order.

15 And the city wish to make any changes to the proposed
16 order?

17 MR. LYDON: I was going to ask you if you wanted us to
18 add a paragraph to ---

19 THE COURT: Yes.

20 MR. LYDON: --- Judge Kinard's ---

21 THE COURT: Yes, I do.

22 MR. LYDON: Okay. All right. We can do that.

23 MS. TAYLOR: And I'd like to make a few other points,
24 if I may?

25 THE COURT: Yes, ma'am.

1 MS. TAYLOR: A couple of points I'd like to address in
2 the proposed order presented by plaintiffs. First of all,
3 they were referring to certain cases, *Ford vs. Georgetown*
4 *Water and Sewer*. It's ---

5 THE COURT: Where are you? I have the order.

6 MS. TAYLOR: Let me see, it's, I think it's paragraph
7 13.

8 THE COURT: All right.

9 MS. TAYLOR: And they're citing certain cases such as
10 *J.K. Construction, C.R. Campbell, and Ford vs. Georgetown*
11 *County Water and Sewer District*.

12 THE COURT: Yes.

13 MS. TAYLOR: In support for their argument that the
14 city's water fees are subject to *Brown*, and I think these
15 cases can be distinguished easily.

16 The *J.K. Construction* case, the fee at issue was a new
17 account fee. It was not the same type of fee that is at
18 issue in this case. There is a one-time fee paid expressly
19 for future capital improvements, and so the court applied
20 that *Brown* case that does address situations, as the city
21 is arguing, in which the benefit that the city or the local
22 ordinance, general argument is the -- how the future
23 revenues are expended.

24 Plaintiffs also cite *C.R. Campbell*. That does not
25 involve sewer charge. That involves a real estate transfer

1 fee. And *George Ford vs. Georgetown County Water and*
2 *Sewer*, that's similar to the C. -- *J.K. Construction*
3 because what that dealt with was two fees: a connection fee
4 and a sewer impact fee. The sewer impact fee was designed
5 to fund future capital improvements. The connection fee
6 was similar to a new account fee, but it appears that the
7 court in that case did not apply the *Brown* test to the
8 connection fee because they believed that the connection
9 itself provided access to the service itself. At least
10 that's how I read it. Therefore, they did not really look
11 at how revenue was spent.

12 So, the point I'd like to make is that the plaintiffs'
13 repeated cites to these cases, I just think they're
14 distinguished from what we're talking about. What we're
15 talking about is monthly water/sewer fees that folks pay
16 who are customers of the city for water and sewer actually
17 consumed the month before based on the volume of the water
18 in use. It is something that is an immediate benefit that
19 is obtained when they turn off the faucet, as we have
20 argued before.

21 Also I'd like to point out in the plaintiffs' proposed
22 order they address a constitutional defense that the city
23 raised, and they misstate the constitutional defense. What
24 I was arguing in our memo of summary judgment was if this
25 court finds the service fee statute to apply to the city's

1 water and sewer revenues, then it would be unconstitutional
2 as applied to the city's water and sewer revenues.

3 And the provision, I think I may have misstated this,
4 and I apologize, at some point in my memo. The
5 constitutional provision I'm referring to, Your Honor, is
6 Article A, Section 16, which is the constitutional
7 provision that empowers and authorizes local governments,
8 cities to operate utilities, water and sewer utilities.

9 The plaintiffs' proposed order addresses a
10 constitutional argument dealing with Section 17(a), which
11 is merely direction to courts that courts must construe
12 statutes liberally for those statutes that apply to local
13 governments.

14 I certainly do make that argument in the proposed
15 order and the memo that we submitted that asserts the
16 service fee statute should be interpreted by this court
17 liberally as required by the constitution, but that is not
18 the nature of the constitutional argument that I was
19 making. I just wanted to correct that.

20 Also, the plaintiffs in their proposed order talk
21 about the service fee statute, what I take to be a policy
22 argument that how the city has argued the meaning of
23 "related to" may be so broad that it renders that
24 particular subsection meaningless, and I think that that --
25 a line can be drawn and that our arguments show that, where

1 that line can be drawn, because I certainly understand that
2 the statute must be interpreted in a way that has meaning.

3 At the same time, as I mentioned before, the
4 constitution requires that courts interpret local
5 government statutes liberally. So, the line or the balance
6 that is struck, and I'd like to clarify -- I think it's in
7 our proposed order Your Honor is reading -- is that the
8 cases that I cited to you dealing with economic
9 development, the *Green vs. City of Rock Hill* case, I think
10 that stands for the proposition that utilities benefit a
11 region. I guess in the modern day it would be region 19,
12 whatever it was. It was the city. But nonetheless the
13 proposition is that utilities provide a stable water supply
14 for an urban area, and that is good for business. That
15 provides continuity, stability, enables the city to further
16 attract new businesses or expand existing businesses.

17 There is evidence in this record of the city, former
18 city manager and others talking about how they view utility
19 as an economic development tool and that they use their
20 economic development activities in order to attract
21 businesses to the region so that they can build their
22 customer base. So, I think that is a point to be made
23 that ---

24 THE COURT: Well, I'm not sure that the plaintiff is
25 arguing -- although they may be -- that. I'm not sure it's

1 not just the 4.7 million as opposed to those other expenses
2 that the -- or enterprises that the water and sewer fund
3 supports.

4 MS. TAYLOR: Well, what they had raised, as I read the
5 proposed order, they're saying that if you follow the
6 city's logic, then any expenditure ---

7 THE COURT: Yes, I understand that.

8 MS. TAYLOR: --- could be justified as a utility, and
9 that's not what the city's position is. I think if you
10 look at the case law and the arguments that we made and the
11 particular expenditures identified in this case, they all
12 are related to water and to the utility because they serve
13 to benefit the utility.

14 THE COURT: Well, how about this? The transfer to the
15 general fund.

16 MS. TAYLOR: Well, we have argued that that transfer
17 of 4 and a half million dollars into the general fund, that
18 is not subject to the "related to" language because the
19 revenue bond statutes that do allow the city to use surplus
20 funds as it sees fit.

21 THE COURT: Are you telling me that that 4 and a half
22 million dollars is the revenue bond surplus?

23 MS. TAYLOR: It is part of the revenue bond surplus.
24 If you look at the 1993 resolution that the city has
25 enacted and has abided by until they enacted the new

1 resolution, it talked about net revenues and how they use
2 it. That is what the city uses as a guide and a policy in
3 terms of when it transfers that 4 and a half million.

4 THE COURT: But it comes out of the bond fund or the
5 bond revenues or the bond ---

6 MS. TAYLOR: Your Honor, I ---

7 THE COURT: --- account?

8 MS. TAYLOR: Your Honor, I can't -- I don't know. I
9 don't know the answer to that. I think they -- the city
10 obviously has a means in which to determine what is net
11 revenue or surplus or profit, whatever you want to call it,
12 you know, and to determine based on the guides ---

13 THE COURT: Perhaps if it had been so identified, we
14 wouldn't be here. I don't know.

15 MR. CONNELL: In fact, Your Honor, the statute says
16 that it's got to be put in a reserve account and it hasn't,
17 and there isn't -- there's no reserve. The account is
18 zero. If you look at that section right in the middle ---

19 THE COURT: I'm looking at it and it says:

20 Any surplus revenues thereafter remaining shall be
21 deposited [verbatim] by the governing body as it may
22 determine from time to time for the best interest of
23 the borrower.

24 (A PAUSE.)

25 MR. CONNELL: And section before: Out of remaining

1 reserves -- out of remaining revenues.

2 THE COURT: Section what?

3 MR. CONNELL: The section, the paragraph before in
4 that same section.

5 THE COURT: Oh.

6 MR. CONNELL: Out of remaining revenues.

7 THE COURT: In the event, starts with in the event?

8 MR. CONNELL: It starts with...

9 THE COURT: I only see two paragraphs.

10 MR. CONNELL: I'm looking at, I'm looking at 6-21-440.

11 THE COURT: So am I.

12 MR. CONNELL: Okay.

13 THE COURT: I'm looking at a book.

14 MR. CONNELL: Out of the remaining revenues, there
15 shall -- it next says:

16 Some sufficient to build up a reserve
17 depreciation of existing system or a combined
18 system.

19 THE COURT: I understand that, but look at the whole
20 thing.

21 MR. CONNELL: I see it, and our point is there is no
22 -- they haven't taken that 4 and a half million dollars as
23 Your Honor pointed out and put that into a reserve fond.
24 That would be a different issue. What they did was they
25 took the 4 and a half million dollars, and all the

1 depositions of the city employees are that they use that
2 money for whatever they need it for.

3 THE COURT: Come here.

4 (A PAUSE.)

5 THE COURT: That's what I'm talking about; that's what
6 I'm referring to my. Am I off base?

7 MS. TAYLOR: I'm not sure what you're looking at, Your
8 Honor.

9 THE COURT: I'm looking at the statute.

10 MS. TAYLOR: Okay, your question being?

11 (A PAUSE.)

12 MR. CONNELL: I think Your Honor is asking about
13 whether or not the money should -- goes in a contingent
14 fund, then we wouldn't even be here? Is that right?

15 MS. TAYLOR: No. As I read this, the contingent fund
16 is not related to the surplus revenue. It says:

17 The fund will be designated as contingent. Any
18 surplus revenues thereafter remaining shall be
19 disposed by the governing body as it may
20 determine from time to time to be in the best
21 interest ---

22 THE COURT: And that's your position, isn't it?

23 MS. TAYLOR: Yes.

24 MR. LYDON: Yes.

25 THE COURT: That's what I thought.

1 MR. LEE: Your Honor, excuse me. Your Honor, I think
2 the way I'm reading the statute is that you only get to
3 that point after you've established this depreciation fund.

4 THE COURT: That's correct.

5 MR. LEE: And that bonding interest redemption fund.

6 THE COURT: That's correct.

7 MR. LEE: Which to my knowledge there are no such
8 funds. Those funds have never been established; therefore,
9 you can't get to the bottom line of using it for other
10 purposes until you have funded those other funds. The city
11 is skipping from the top of the statute to the bottom and
12 conveniently omitting the middle.

13 MS. TAYLOR: And I, I disagree. I think the
14 deposition testimony establishes that the city does set
15 aside reserve funds and depreciation funds.

16 THE COURT: I would assume that -- well, I'm not a
17 CPA.

18 MR. LEE: Well, ask them if they have enough money in
19 the reserve fund to pay for all the repairs that are
20 required by the settlement because the answer is they are
21 woefully short.

22 MS. TAYLOR: I think that's speculation on the part of
23 opposing counsel.

24 THE COURT: It's more complex than that.

25 MR. LEE: I don't disagree with that, but I'm saying

1 that ---

2 THE COURT: Because I don't know. Maybe you do.
3 When revenue bonds were issued and there's probably a
4 series A, B, C, D, and E and when they were issued, how
5 those funds were treated with regard to revenues from the
6 system. So, I don't think it's as easy as saying now they
7 don't have -- because it would have to apply to each bond
8 issue.

9 MR. LEE: And I would agree with that.

10 THE COURT: All right.

11 MR. LEE: I don't, I don't disagree with that. I'm
12 just saying that what -- the way I'm reading this is
13 they've got to go through a step process.

14 THE COURT: I agree you; I agree with you.

15 MR. LEE: And when they get at the end, if there is
16 excess money ---

17 THE COURT: Right. Well, that's why I asked the
18 question.

19 MR. LEE: They can use that excess money for the ---

20 THE COURT: General welfare.

21 MR. LEE: Yes, Your Honor.

22 THE COURT: And that's why I asked if Ms. Taylor knew
23 if that residual, we'll call it, could be transferred to
24 the general fund, if that's what was -- what the 4 and a
25 half million was, and again ---

1 MS. TAYLOR: And ---

2 THE COURT: --- she says it is, or at least part of it
3 is.

4 MS. TAYLOR: And also I'd like to point -- we have
5 submitted the 1993 revenue bond ordinance as part of our
6 exhibits last time. That does, in fact, establish the
7 various bonds that the Revenue Bond Acts require.

8 MR. CONNELL: Your Honor.

9 MS. TAYLOR: Whether the ---

10 THE COURT: I can't imagine the city would just ignore
11 the ---

12 MS. TAYLOR: Right.

13 THE COURT: --- Revenue Bond Act. I don't think that
14 certifying agencies would allow them to do that. That rate
15 the bonds; in other words.

16 MR. CONNELL: Your Honor, the deposition testimony of
17 Ms. Kaufman, I believe one of the budget directors, is that
18 if the 4 and a half million dollars is not transferred
19 every year, that the city residents would have to have an
20 increase in taxes because that money's being used.

21 THE COURT: I don't think they -- nobody argues that.

22 All right, anything further?

23 MS. TAYLOR: Just give me a moment, Your Honor. One
24 issue I'd just like to raise. I don't want to belabor the
25 point, but the plaintiffs in their proposed order talk

1 about how -- talk about -- address the city's argument that
2 the city is entitled to make a profit off of its
3 water/sewer lease and that, according to the plaintiffs,
4 that, you know, the city is entitled to make a profit.

5 We concede that point, but they argue that the city is
6 required to use that profit exclusively for its water and
7 sewer utility, and I would like to make a couple of points
8 about that.

9 Profit by its very nature is the revenues that exceed
10 costs. And as I've said before, the city council
11 establishes a budget for its utility as well as its general
12 fund. It determines the costs that can be reasonably
13 incurred.

14 There is some evidence in the record from the city
15 manager that, you know, the city has a certain limited
16 capacity in order to oversee construction projects for its
17 utility based on its manpower: its own folks, its number of
18 employees. They are comfortably going to handle a certain
19 number of millions of dollars per year, and I believe it's
20 around 7, 8, \$9 million a year. So, they're being
21 constrained to some degree in terms of what they can
22 actually accomplish, you know, as far as the ability to
23 raise -- to incur debt and the ability of the, the human
24 resources within the city to oversee the construction
25 projects.

1 So, they -- I'm digressing a little bit, but they
2 establish what they, in their understanding and their
3 legislative discretion, what those costs are. And so if
4 there is built into the rates, as it is here under that
5 Black and Veatch rate study, a return on investment, which
6 I also describe as profit, the city is entitled to that.
7 It's well settled in the law that they're entitled to use
8 that money to establish rates that provide for a profit.
9 And I think that, you know, the city is allowed to be able
10 to, in its discretion, determine how to use it.

11 But I think the evidence in this case shows that it
12 does, in fact, use its profit to -- for the utility in
13 terms of paying debt service for other issues. So, it's
14 not as if the city is, you know, claiming that it doesn't
15 -- should or doesn't, you know -- its own capacity as a
16 property owner, holding property in trust for the public to
17 determine what's best for managing its property because it
18 does.

19 But it also has the discretion to be able to use that
20 profit for other purposes that are, and we believe
21 nonetheless, are in a way that benefits the utility and
22 transfer the 4 and a half million dollars into its general
23 fund in order to defray, you know, the cost of government
24 services such that the people, the citizens of the City of
25 Columbia, derive benefit from its utility by keeping its

1 own property taxes down. I don't think there's anything
2 wrong with the city doing that. I think that's an entirely
3 legitimate reason for the city to use its profit, so to
4 say.

5 So, the point I want to make is that I think it's
6 error for the plaintiffs to contend that the city lacks all
7 discretion or ability to determine how it plans on using
8 the profit, and I think the city uses its profits
9 responsibly. I think you see that in the budgets, in the
10 financial reports, in its capital improvement planning.
11 And the city has set a policy in that 1993 resolution on
12 how it plans on spending -- or when it transfers I guess is
13 the best way to put it, when, under what conditions. It
14 places limitations on the city council and the city when it
15 plans on or if it can transfer 4 and a half million.

16 One of those limitations is it will not transfer that
17 4 and a half million into the general fund unless it -- if
18 it appears whether the utility's willing to operate that
19 utility in a businesslike manner. There's other, you know,
20 imitations.

21 THE COURT: Constraints? Other constraints?

22 MS. TAYLOR: Other constraints, Your Honor.

23 Oh, and one last thing. I'm sorry. I just want to
24 point out a couple of issues that I found in the proposed
25 order that they're not disputed facts. I think that the

1 plaintiffs are misreading facts, and I just want to be able
2 to get that into the record. I think we, we've made this
3 point before.

4 THE COURT: Where are you? Just tell me where you
5 are.

6 MS. TAYLOR: Okay. In paragraph 9, Your Honor, the
7 plaintiffs refer to \$2.27 million as some total amount,
8 including development, corporations ---

9 THE COURT: Hold on. Paragraph 9 or page 9.

10 MS. TAYLOR: Oh, I'm sorry. I meant -- no, I said
11 paragraph 9.

12 THE COURT: Paragraph 9 refers to the, to me, the EPA,
13 and DHEC issue.

14 MR. CONNELL: Paragraph 8.

15 MR. LEE: Paragraph 8?

16 MR. CONNELL: Page 4 of 14, is that what you're
17 referring to?

18 THE COURT: 2.27?

19 MS. TAYLOR: Yes. Yes, sir, paragraph 8. It refers
20 to various expenditures and that they average approximately
21 2.27 million annually. That -- as I explained earlier,
22 there's really essentially three different categories of
23 expenditures that seem to be at issue in this case. One,
24 we've got the 4 and a half million transfer from the
25 enterprise fund to the general fund. The second category

1 is those listed identified expenditures such as the GRS
2 system, procurement department, street repair, all the
3 Economic Development Officer, the Office of Business
4 Opportunities, all those things. Those are another
5 category.

6 Then there's a third category which the city describes
7 an indirect costs and as I explained earlier, those are
8 costs that can't be as easily measured as say, you know,
9 procurement, number of bids being charged to the utility,
10 the costs associated with that. There's things like city
11 manager's time, the city attorneys' time, other type of
12 support services, and that is a lump sum that was
13 recommended by Black and Veatch in 2007, and that is what
14 \$2.27 million is.

15 So, I just want to -- if you look at paragraph 8, it
16 suggests that all these other expenditures like Office of
17 Business Opportunities, that total, that 2.27, that's not
18 what the facts indicate.

19 THE COURT: Okay.

20 MS. TAYLOR: And, you know, also there is -- I guess
21 it's in this paragraph 9 where it talks about the Black and
22 Veatch study the states there's some need of the Black and
23 Veatch, which is an engineering firm -- there's some study
24 that they refer to here that states that the utility's in
25 need of significant repair.

1 I'm not aware of any statement in any Black and Veatch
2 study that's in the record here that states that. But
3 there is a -- two studies by Black and Veatch in the
4 record. There's one that's the indirect cost study I just
5 referred to. There's another study which is the rate study
6 that determines what the appropriate rates of the city
7 should be over the next five years, and it's actually --
8 those five years have expired by now. So, I just wanted to
9 point that out as well.

10 Finally, and you may have addressed this earlier, but
11 the plaintiffs state that Mr. Azar is a customer of the
12 water and sewer utility, and I think the evidence in this
13 case shows that Mr. Azar is not a customer of the water and
14 sewer utility. We have an affidavit of Angela Adams of the
15 city that states that there is no account in the name of
16 Mr. Azar.

17 In the plaintiffs' responses to our interrogatories,
18 the plaintiffs state that he does not pay water and sewer
19 with a bill to the City of Columbia. He lives in a
20 condominium, and the arrangement there is his condominium
21 association is the customer. They are the account holder
22 for the City of Columbia. They pay the water bill to the
23 city, and then as part of a regime fee, Mr. Azar reimburses
24 the condominium association. So, I just want to point that
25 out for the record as well.

1 THE COURT: Let me ask both of you. What happens if I
2 deny both motions for summary judgment?

3 MR. CONNELL: Well, I got a trial, I guess, on --
4 before somebody about indirect costs and direct costs.

5 Your Honor, I don't think we have to go to all of that
6 issue. I mean, the real issue is that -- I think they
7 would agree with me on this point at least -- is can they
8 do this. I mean, can they do -- can they take money.

9 THE COURT: Well, they've got an argument that they
10 can.

11 MR. CONNELL: Right, and I think ---

12 THE COURT: And that maybe, that maybe defy summary
13 judgment.

14 MR. CONNELL: Yes. Well, that, that's the defining
15 legal issue in this case. If they can, if they can do it,
16 we don't have to worry any cost issues. It's over, but
17 they can't do it.

18 THE COURT: I guess you -- you don't even have to
19 answer this, but one of -- the both of you would prefer
20 that one or the other be granted summary judgment so you
21 could get this matter to appellate court. Is that fanciful
22 on my part?

23 MR. CONNELL: I think we agree one of us is entitled
24 to summary judgment. Aren't we agreed? I think that's
25 what we ---

1 MR. LYDON: The only thing that would be presented at
2 a trial is what's already in the record.

3 THE COURT: That's right, but that's my devious ---

4 MR. LYDON: Might be someone else's problem.

5 THE COURT: --- my devious mind.

6 MR. LEE: Your Honor, the only other thing I was going
7 to add to that, I don't think you -- if whoever heard it at
8 trial would hear no different evidence on the issue of
9 liability. We may wind up presenting more detailed
10 accounting.

11 THE COURT: Oh, yeah.

12 MR. LEE: But that's not the issue.

13 THE COURT: Well, (a) you'd spend a lot more money,
14 and you'd hire experts, and you've have testimony that
15 lasted -- extensive testimony, so.

16 MR. LEE: That's why we're here today: so we can get a
17 ruling one way or the other.

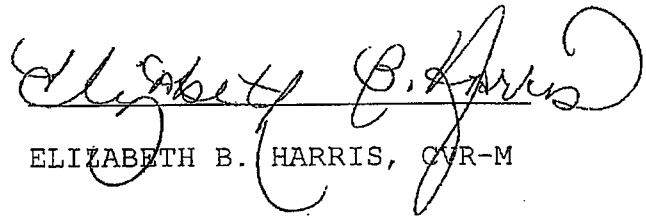
18 THE COURT: Just throw it out. It's always a
19 possibility. All right, thank you very much, counsel.

20 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 13TH DAY OF SEPTEMBER, 2013.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



ELIZABETH B. HARRIS, CWR-M

COLUMBIA, SOUTH CAROLINA

MARCH 30TH, 2014

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

JOSEPH S. AZAR and FRANK J.
CUMBERLAND, JR., INDIVIDUALLY
AND AS CLASS REPRESENTATIVES,

Plaintiffs,

vs.

CASE NO. 2011-CP-40-6705

CITY OF COLUMBIA,

Defendant.

DEPOSITION OF: ANGELA ADAMS

DATE: July 31, 2012

TIME: 12:30 p.m.

LOCATION: Law Offices of
McLaren & Lee
1508 Laurel Street
Columbia, South Carolina

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: ANGELA D. ZUVER,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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Charleston, SC (843) 722-8414	Hilton Head, SC (843) 785-3263	Myrtle Beach, SC (843) 839-3376
Columbia, SC (803) 731-5224	Greenville, SC (864) 234-7030	Charlotte, NC (704) 573-3919

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFFS

3 JOSEPH S. AZAR and FRANK J. CUMBERLAND,
4 JR., INDIVIDUALLY AND AS CLASS
5 REPRESENTATIVES:

6 KELAHER, CONNELL & CONNOR
7 BY: GENE M. CONNELL, JR.
8 1500 US Highway 17 North, Suite 209
9 Surfside Beach, SC 29575
10 (843) 238-5648
11 gconnell@classactlaw.net

12 and

13 MCLAREN & LEE
14 BY: C. DIXON LEE, III
15 1508 Laurel Street
16 Columbia, SC 29201
17 (803) 799-3074
18 dlee@mclarenandlee.com

19 ATTORNEYS FOR THE DEFENDANT
20 CITY OF COLUMBIA:

21 MCANGUS GOUDELOCK & COURIE
22 BY: M. MCMULLEN TAYLOR
23 THOMAS E. LYDON
24 1320 Main Street
25 Meridian, 10th Floor
Columbia, SC 29201
(803) 779-2300
mullen.taylor@mgclaw.com
tlydon@mgclaw.com

(INDEX AT REAR OF TRANSCRIPT)

STIPULATIONS

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

* * * * *

ANGELA ADAMS

being first duly sworn, testified as follows:

EXAMINATION

BY MR. CONNELL:

Q. All right, ma'am. What do you do for the City of Columbia?

A. I'm the customer service administrator.

Q. And what is that exactly?

A. I monitor and supervise the employees that assist customers with inquiries referencing water and sewer bills.

Q. How long have you been in that job?

A. I've been the administrator for five years.

Q. All right. And you have in front of

1 you a document with your hand on it; is that right?

2 A. Yes.

3 Q. What document is that that you have in
4 front of you?

5 A. It is our water and sewer analysis that
6 prints after ten bill cycles for water and sewer
7 bills.

8 Q. And what is contained on the document
9 that you have in front of you?

10 A. It tells us the number of customers
11 that were billed for that ten cycles and also the
12 number of sewer customers that were billed for that
13 ten cycles.

14 Q. All right. How many water customers
15 were billed -- and when did the cycle end? I
16 should ask that.

17 A. June 28th.

18 Q. Of 2012?

19 A. Yes.

20 Q. How many water customers were billed
21 for that cycle?

22 A. A total of 137,066 customers.

23 Q. All right. And how many sewer
24 customers were billed during that cycle?

25 A. 69,910.

1 Q. And do you have any information about
2 how much money was collected by the water and sewer
3 department during those periods?

4 A. No.

5 Q. All right. Do you know how many water
6 and sewer customers the city had in 2011?

7 A. No.

8 Q. Do you know how many water and sewer
9 customers the city had in 2009?

10 A. No.

11 Q. Do you know anything about the
12 transfers of any monies from the water and sewer
13 authority to the general fund?

14 A. No.

15 Q. So your sole purpose for being here
16 today is to tell us how many water and sewer
17 customers the City of Columbia has currently on the
18 roles?

19 A. Yes.

20 Q. And you can't speak to anything about
21 how much money the City of Columbia has collected
22 from the water and sewer customers for the
23 2011/2012 era?

24 A. No.

25 Q. Okay. You don't know anything -- you

1 have no other information about the consultant's
2 reports, anything of that nature; is that right?

3 A. That's correct.

4 Q. And the document you have in front of
5 you, is that a copy?

6 A. Yes.

7 MR. CONNELL: Let's mark that as an
8 exhibit to her deposition.

9 (PLF. EXH. 5, Water/Sewer Analysis
10 Report, was marked for identification.)

11 BY MR. CONNELL:

12 Q. Tell us about -- do the numbers vary at
13 all?

14 A. They do because you have customers
15 connecting and disconnecting. So they will vary.

16 Q. All right. But as of June 28th the
17 numbers on the exhibit are the true and accurate
18 numbers of water and sewer customers?

19 A. Correct.

20 MR. CONNELL: Okay. Thank you, ma'am,
21 for coming.

22 (The deposition was concluded at
23 12:33 p.m.)

24

25

1 CERTIFICATE OF REPORTER

2
3 I, Angela D. Zuver, Court Reporter and
4 Notary Public for the State of South Carolina at
5 Large, do hereby certify that the foregoing
6 transcript is a true, accurate, and complete
7 record.

8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.

11 Witness my hand, I have hereunto
12 affixed my official seal this 17th day of August,
13 2012 at Lexington, Lexington County, South
14 Carolina.

15
16
17
18
19
20
21
22
23
24 Angela D. Zuver, Court Reporter
My Commission expires
25 July 2, 2014

I N D E X

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(No Information Requested)

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Analysis Report		

UN-2012

City-Columbia DR - 01

P:

16:19
/SAN

Water/Sewer Analysis Report

Class	Water Meters In City/ Meters Outside City	Water Billed Cons	Water Amount	Sewer Meters In City/ Meters Outside City	Sewer Billed Cons	Sewer Amount
	0	0.000	0.00	2004	70165.000	270935.80
	0	0.000	0.00	793	32675.000	223408.33
	0	0.000	0.00	2797	102840.000	494344.13
Total	0	0.000	0.00			
	5330	371165.893	637860.45	3760	1195631.194	562386.98
	6529	291132.295	916488.14	1523	94787.984	473190.84
Total	11859	662298.188	1554348.59	5283	1290419.178	1035577.82
	0	0.000	0.00	0	0.000	0.00
	2	634.000	1959.54	0	0.000	0.00
Total	2	634.000	1959.54	0	0.000	0.00
	44	10444.000	18409.58	43	10935.000	40899.98
	40	9005.000	26634.58	4	518.000	3731.22
Total	84	19449.000	45044.16	47	11453.000	44631.20
	19	730.000	2257.42	0	0.000	0.00
	1	0.000	15.76	0	0.000	0.00
Total	20	730.000	2273.18	0	0.000	0.00
	35156	353833.654	756177.80	26921	157110.000	571155.09
	89945	934147.000	3069347.69	34862	221399.000	1424646.16
Total	125101	1287980.654	3825525.49	61783	378509.000	1995801.25
City Total	40549	736173.547	1414705.25	32728	1433841.194	1445377.85
Outside City Total	96517	1234918.295	4014445.71	37182	349379.984	2124976.55
Grand Total	137066	1971091.842	5429150.96	69910	1783221.178	3570354.40

Rate Code

Total Charges



1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF RICHLAND

3 JOSEPH S. AZAR and FRANK J.
4 CUMBERLAND, JR., INDIVIDUALLY
AND AS CLASS REPRESENTATIVES,

COPY

5 ~~vs.~~ Plaintiffs,

6 vs.

CASE NO. 2011-CP-40-6705

7 CITY OF COLUMBIA,

8 Defendant.

9
10 DEPOSITION OF: STEVEN A. GANTT

11 DATE: July 31, 2012

12 TIME: 9:56 a.m.

13 LOCATION: Law Offices of
14 McLaren & Lee
15 1508 Laurel Street
Columbia, South Carolina

16 TAKEN BY: Counsel for the Plaintiffs

17 REPORTED BY: ANGELA D. ZUVER,
Court Reporter

18 A. WILLIAM ROBERTS, JR., & ASSOCIATES

19 Fast, Accurate & Friendly

20 Charleston, SC Hilton Head, SC Myrtle Beach, SC
21 (843) 722-8414 (843) 785-3263 (843) 839-3376

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23 (803) 731-5224 (864) 234-7030 (704) 573-3919

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17 (803) 799-3074
18 dlee@mclarenandlee.com

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23 THOMAS E. LYDON
24 1320 Main Street
25 Meridian, 10th Floor
Columbia, SC 29201
(803) 779-2300
mullen.taylor@mgclaw.com
tlydon@mgclaw.com

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1 you became city manager?

2 A. I came to the city to be the
3 construction manager for the convention center. I
4 worked on that for about three months. I became an
5 assistant city manager, served in that capacity
6 about 18 months and then was promoted to senior
7 assistant city manager. I worked in that position
8 I guess for five or six years and then became city
9 manager.

10 Q. All right. As the construction manager
11 I'm assuming we're not talking about construction
12 in the water and utility services. Would that be
13 right or not?

14 A. Not in that position, no.

15 Q. Prior to you becoming the city manager,
16 which of your jobs involved any interaction with
17 the water and sewer fees and construction and that
18 kind of thing?

19 A. In the city of Columbia?

20 Q. Yes, sir.

21 A. None.

22 Q. When did you first become aware or when
23 did you first become involved in any interaction
24 with the water and sewer department or the
25 construction of water and sewer facilities?

1 A. I believe when I became the assistant
2 city manager for operations, which was sometime in
3 2002.

4 Q. What involvement in 2002 did you have
5 with the water and sewer department? What were
6 your duties in that?

7 A. I was an assistant city manager who had
8 responsibility for certain departments within the
9 City of Columbia and engineering and utilities was
10 one of those departments.

11 Q. And can you tell me exactly what
12 interaction you had with the water and sewer
13 department starting in 2002?

14 A. I managed that department or managed
15 the department head for that department and I was
16 involved with what their -- whatever was going on
17 from a day-to-day basis.

18 Q. You have to kind of explain to me.
19 What does -- what do you mean by you managed that
20 department?

21 A. Well, we have about 18 departments in
22 the City of Columbia. We have three assistant city
23 managers. Each one of those has a certain number
24 of departments that they handle, disciplinary,
25 budgetary, any items that flow from the department

1 head to the assistant city manager to the city
2 manager.

3 Q. Okay. And what specifically did you --
4 was your involvement starting in 2002 with the
5 collection of water and sewer fees and the
6 determination of what monies should be sent to the
7 general fund versus what monies should not?

8 A. None.

9 Q. When did you first become aware that
10 the City of Columbia was collecting monies that
11 were being used in the general fund?

12 A. That was happening when I came to work
13 in 2001.

14 Q. Okay. Tell me, if you would, your
15 understanding as to -- when you first understood
16 that that was happening and in what context and how
17 it was happening.

18 A. Well, in the budget process it shows as
19 a revenue into the general fund.

20 Q. And you learned that in 2002 or you
21 said when you first came to the city?

22 A. I came in November of 2001. I would
23 not have been involved in the budgetary process
24 until January or February or March of 2002.

25 Q. And did you have any input as to what

1 monies were being transferred from the water and
2 sewer -- the enterprise fund to the City of
3 Columbia's general fund?

4 A. No, sir.

5 Q. Were you privy to any discussions in
6 2002 in that regard?

7 A. I don't recall.

8 Q. Do you know by what authority the City
9 of Columbia transfers money from the enterprise
10 into the general fund of the city?

11 A. There's a resolution or something that
12 was passed I think maybe in the '90s or approved by
13 council in the '90s that authorized the transfer.

14 Q. All right. Do you know what this
15 lawsuit is about?

16 A. Not specifically, no.

17 Q. Okay. The lawsuit alleges that monies
18 were spent or were transferred from the water and
19 sewer fund, utility enterprise fund, to the general
20 fund of the City of Columbia and that those funds
21 were used for purposes other than for construction
22 and maintenance, infrastructure purposes from the
23 water and sewer fund.

24 A. Okay.

25 Q. Did you have any understanding of that

8

1 before I talked to you about that today?

2 A. That's the general understanding I
3 think we have.

4 Q. Okay. Mine too. Do you -- are you
5 familiar with any of the state statutes that either
6 prohibit or do not prohibit the use of fees
7 collected for other services other than what the
8 fees were collected for?

9 A. No.

10 Q. We just got this and I'll ask you to
11 look at it. I've got an extra copy. Here's the --
12 I think that's the resolution you were talking
13 about.

14 A. Yes, sir. I believe that's it.

15 MR. CONNELL: And when did you first --
16 let's mark that as Exhibit Number 1, please, ma'am.

17 (PLF. EXH. 1, Resolution, Adoption of
18 Policy on Water and Sewer Fund Transfers to General
19 Fund, was marked for identification.)

20 BY MR. CONNELL:

21 Q. It sounds like you had seen that
22 resolution before.

23 A. Yes.

24 Q. When did you first become aware that
25 the city council had passed a resolution allowing

1 monies to be transferred from the utility
2 enterprise fund to the general fund of the city?

3 A. I really don't recall. It's been some
4 years ago.

5 Q. I got the impression it had been going
6 on for a number of years even prior to when you got
7 here; is that right?

8 MR. LYDON: Object to the form. You
9 can answer the question.

10 THE WITNESS: I'm not sure how long
11 prior to my coming at this time.

12 BY MR. CONNELL:

13 Q. But when you came in 2001 that was
14 apparently something that was being done; is that
15 right?

16 A. I think so, yes, sir.

17 Q. Did you ever voice any concerns about
18 that policy?

19 A. No, sir.

20 Q. Had you worked at other city
21 governments where that was being done in other
22 parts of the state?

23 A. This is my first governmental body I've
24 worked for.

25 Q. Did you ever hear of any concerns being

10

1 voiced by any of the city councilmen or any of the
2 other administrative officials at the city in that
3 regard?

4 A. There's been discussion amongst council
5 over the last several years, probably last five
6 years, in regard to that.

7 Q. Can you tell us what those discussions
8 were?

9 MR. LYDON: I'm going to object to
10 discussions by the actual council members as
11 legislative privilege.

12 BY MR. CONNELL:

13 Q. Okay. You have to go ahead and answer
14 if you --

15 MR. LYDON: No, not if it's privileged.
16 We're asserting legislative privilege.

17 MR. CONNELL: Not unless -- my
18 understanding is unless it was done in some sort of
19 closed-door executive session that whatever
20 discussions he had with any city councilmen outside
21 of that would be something that we would be
22 entitled to know the answer to.

23 MR. LYDON: No, I don't think so. I
24 don't think -- because the reason that any -- the
25 thought process of any individual city council

1 member is not relevant. I mean, it's -- they act
2 as a body collectively and what city council's
3 intentions are and what their beliefs are is
4 reflected in their resolutions and statutes and
5 ordinances.

6 MR. CONNELL: Are you going to instruct
7 him not to answer?

8 MR. LYDON: I'll instruct him not to
9 answer and we'll file a motion. Why don't you,
10 just so we have a clear record, restate your
11 question.

12 BY MR. CONNELL:

13 Q. All right, sir. Have you had
14 discussions with city council members about the
15 water and sewer utility fund and how the monies are
16 transferred to the general fund?

17 MS. TAYLOR: You can answer whether
18 you've had discussions.

19 THE WITNESS: Yes.

20 BY MR. CONNELL:

21 Q. Without telling me the context of those
22 discussions, have those discussions been
23 discussions you've had with city council members
24 outside of executive session?

25 A. Yes.

1 Q. All right. And have those discussions
2 been one-on-one with you or with a group of city
3 council members?

4 A. A group.

5 Q. And have members of city council or
6 members of the city administration, i.e., paid
7 officials, have they also been at those meetings?

8 A. Yes.

9 Q. All right. And can you tell me who
10 those people were who were at those meetings?

11 A. No, sir.

12 Q. And about how many discussions have you
13 had in regard to this policy?

14 A. Over the last five or six years?

15 Q. Yes, sir.

16 A. Probably half a dozen.

17 Q. And I didn't go over the deposition
18 rules in the beginning because I figured that you
19 had been through this process before, but unless
20 Tommy objects, of course, any question that I have
21 you need to answer. And I'll try to -- if I don't
22 state the question right or I don't do something
23 you understand, just let me know.

24 A. Yes, sir.

25 Q. All right. So you think you've had a

1 number of discussions with city council members
2 about the issue in this case, the transfer of money
3 from the water and sewer enterprise fund to the
4 general --

5 A. Yes.

6 Q. What year period are we talking about,
7 if you can tell me approximately? - - - - -

8 A. I really -- I would say from 2009
9 forward.

10 Q. All right. Now, have you had
11 discussions with outside -- not with city council
12 elected officials, but with other administrative
13 officials in the City of Columbia regarding this
14 particular issues; that is, the transfer of money
15 from the water and sewer enterprise fund to the
16 general fund?

17 A. I'm sure during budget time we've had
18 discussions on that.

19 Q. All right. But you can't discuss any
20 one or more particular discussions you might have
21 had with other city officials? Not city council
22 officials, but other nonelected employees.

23 A. I'm not sure I understand your
24 question.

25 Q. I guess what I'm asking is: As city

1 manager have you had discussions with other city
2 employees about the issues in this case, not with
3 city council members?

4 A. The issues of transferring the money?

5 Q. Yes, sir.

6 A. No. I'm still not a hundred percent
7 sure I understand the question. Yes, I've
8 discussed transferring of the money. I haven't had
9 any discussion about the particulars of this
10 lawsuit.

11 Q. All right. Or about the legality of
12 it?

13 A. No, sir.

14 Q. It's my understanding that the City of
15 Columbia is currently under some EPA order
16 regarding the water and sewer system; is that
17 correct?

18 A. No, sir, it isn't.

19 Q. It is not. Was it under a court order
20 at one point from the EPA?

21 A. No, sir.

22 Q. It's never been under a court order
23 from the EPA?

24 A. We are presently in discussions with
25 the EPA about a judicial consent decree, but it has

1 not been issued.

2 Q. Can you tell me exactly what the
3 problem is that the EPA sees with the water and
4 sewer system?

5 A. I'm not sure that I can. We have a
6 confidentiality agreement with the EPA. I'm not
7 sure exactly what I can discuss with you.

8 Q. All right. Well, let me ask this: Can
9 you tell us in general terms what the problems are
10 with the water and sewer system that the EPA seems
11 to think at this point?

12 MR. LYDON: I'm just going to caution
13 him we don't represent the city in that matter.

14 MR. CONNELL: I understand.

15 MR. LYDON: And we are aware that there
16 is a confidentiality agreement between the EPA and
17 the city and I don't want to do anything that would
18 breach that agreement.

19 MR. CONNELL: Can we agree to this,
20 that -- I mean, one of the defenses, it looks like
21 to me, is that the money that is used is used
22 because you don't need it for other maintenance
23 and/or repairs, and of course our position is going
24 to be that the Environmental Protection Agency has
25 asked that certain things be done to the water and

16

1 sewer system and we ought to be able to present
2 that at a trial, if need be. So, I mean, he ought
3 to be able to talk about in general terms what's
4 going on between the City of Columbia and the EPA
5 in regard to what their concerns are.

6 MR. LYDON: I don't know because,
7 again, all I'm aware of -- all we've been told is
8 that there is a confidentiality agreement between
9 the EPA and the City of Columbia with respect to
10 that EPA matter.

11 MS. TAYLOR: And, Gene, I would also
12 think that the content of those discussions would
13 directly be what you're asking, and since there has
14 not been any sort of conclusion to that I'm not
15 sure how that can be answered.

16 MR. CONNELL: Well, certainly, I mean,
17 he ought to be able to talk about what enforcement
18 issues the EPA is trying to get against the City of
19 Columbia in regard to the water and sewer system.
20 That's one of the major --

21 THE WITNESS: I can give you -- I can
22 define it a little further down for you. It really
23 has nothing to do with the water system at all. It
24 has to do primarily with the excessive numbers of
25 sanitary sewer spills that we've had over the last

1 five or six years.

2 BY MR. CONNELL:

3 Q. All right. And can you kind of address
4 those concerns for us as to the water and sewer --
5 as to the sewer spills?

6 A. Anytime we have a sewer spill, be it a
7 two-gallon spill or a 200,000-gallon spill, we
8 self-report. We self-report every sewer spill that
9 we have in the city, and we have since at least
10 2007. And we've had a higher rate of sanitary
11 sewer spills than we probably should have over the
12 last seven years. Those have been caused by a
13 number of different issues.

14 And I think I can tell you this. The
15 reason the EPA is involved is that seven or
16 eight years ago the legislature removed the ability
17 from DHEC to permit sanitary sewer operations.
18 There was about an 18-month period where they could
19 not issue a permit and we were one of the 22 lucky
20 municipalities and counties and special purpose
21 districts in South Carolina that had to get an EPA
22 permit instead of a DHEC permit. That's the whole
23 reason they're involved in this whole scenario.

24 And we have been actively addressing
25 their concerns even though there's not a consent

18

1 decree for the last five years. As a matter of
2 fact, we had -- in our permitting with DHEC we had
3 allowed DHEC to include all of those improvements
4 that we were going to make in their permit which we
5 didn't have to do. So, actually, the work that
6 needed to be done to address the issues was well
7 underway before the EPA got involved.

8 Q. All right. And I'm assuming that those
9 issues required money to be paid from the water and
10 sewer enterprise fund to do some repair work?

11 A. Yes, sir.

12 Q. Do you have any idea as to what that
13 cost of the repair work is going forward or do you
14 have an estimate of that?

15 A. What is it, two thousand -- in 2005 and
16 '6 we had a Black & Veatch study done that
17 indicated that there was about, over that five-year
18 period, a need to do about \$500 million worth of
19 work in water and sewer. In the last three years
20 we have spent in excess of \$125 million just on the
21 sewer system and we'll probably spend another
22 hundred million this fiscal year on both water and
23 sewer.

24 Q. Is the plan to spend -- to follow the
25 Black & Veatch study and spend \$500 million?

1 A. We have completed the Black & Veatch
2 study. We have done -- just finished a new rate
3 study, and we plan do another five-year plan of
4 \$1 million per year on water and sewer.

5 Q. All right. So is it fair to say that
6 \$500 million has already been spent pursuant to the
7 Black & Veatch study or is that still --

8 A. \$250, thereabouts. Actually, because
9 of the economy we've probably done \$500 million
10 worth of work with about 350 million.

11 Q. But in dollars and cents, you haven't
12 actually spent the \$500 million?

13 A. We'll spend 350 million, which is --
14 probably through this fiscal year, but we will
15 issue another \$1 million bond issue sometime in
16 this fiscal year.

17 Q. The Black & Veatch study, was that
18 something that you were involved in regard to the
19 commission?

20 A. Yes, sir. Yes, sir. Right.

21 Q. And what did you understand that study
22 to do in regard to specifically the transfer of
23 money from the enterprise fund to the City of
24 Columbia?

25 A. That had nothing do with the transfer.

1 It just indicated what the rate increases needed to
2 be in order to cover the capital costs that we need
3 to incur over the next five years and helped us
4 identify what the priorities were on a yearly
5 basis.

6 Q. Am I wrong about -- didn't the study
7 have some discussion about what monies were being
8 transferred from the water and sewer enterprise
9 fund to the City of Columbia that were not being
10 used for water and sewer purposes?

11 A. I don't recall anything in the Black &
12 Veatch -- the big study -- the five-year study that
13 spoke to that.

14 Q. All right. Are you aware of the study
15 that speaks to the issue I just asked you about?

16 A. There was a very preliminary draft I
17 think you may have gotten a copy of that was not
18 very factual, and there's been a subsequent -- a
19 final revision of that which I don't think you've
20 received yet, but I think they plan to make that
21 available to you.

22 Q. All right. When are you all going to
23 give us that?

24 A. We didn't know we had it until
25 yesterday.

1 MS. TAYLOR: Yeah. I wasn't aware that
2 there was anything but a draft until yesterday.

3 MR. CONNELL: Do you have that to give
4 to us or are you going to --

5 MS. TAYLOR: I still don't have it.

6 BY MR. CONNELL:

7 Q. All right. Well, let's talk about the
8 one that I've got, and that's the preliminary one.
9 There was apparently some discussion in that study
10 about monies there were transferred from the water
11 and sewer enterprise fund to the City of Columbia
12 for non-water and sewer expenses; is that right?

13 A. Yes, sir.

14 MS. TAYLOR: I'm sorry to interrupt.
15 Do you have the document so we can make sure we're
16 talking about the same thing?

17 THE WITNESS: From a draft standpoint.

18 MS. TAYLOR: I don't want to -- if I'm
19 going to tell you -- I want to make sure I'm
20 telling you right when I'm saying something.

21 MR. CONNELL: That's Document Number
22 4633.

23 MS. TAYLOR: Oh, yes. You do have a
24 final. This has draft at the bottom..

25 MR. CONNELL: Okay.

1 MS. TAYLOR: I did produce the final.
2 I think I may have it.

3 MR. CONNELL: All right.

4 MS. TAYLOR: I think I may have it.
5 That was dated March something?

6 MR. CONNELL: This was dated March 19th
7 of '07.

8 MS. TAYLOR: Let's look and see if this
9 is the same thing. It's Bates Number City-0000001.

10 MR. CONNELL: All right. This is dated
11 April 2nd.

12 MS. TAYLOR: Is that the same thing?

13 MR. LEE: Is this the final one?

14 MS. TAYLOR: There's no draft on it.

15 MR. CONNELL: I'm not sure I've ever
16 seen this. Let's make a copy of this and we'll
17 make it as an exhibit, if we can.

18 MR. LEE: Is this the same as that?

19 MS. TAYLOR: I believe that's the same
20 one. One of them says draft. I really have not
21 made comparisons as to what differences there may
22 have been.

23 MR. CONNELL: And this is the one I
24 have, Dixon, if you'll make a copy of this one. A
25 couple copies of it.

1 MS. TAYLOR: This was produced the
2 first time around under the request to produce.

3 MR. CONNELL: Okay. I looked at the
4 documents last night, but ...

5 MS. TAYLOR: It's Number 1.

6 MR. CONNELL: Yeah. That one was
7 attached to my ...

8 MS. TAYLOR: Are we taking a break?
9 Can we just --

10 MR. CONNELL: Yeah.

11 (Off-the-record conference.)

12 (PLF. EXH. 2, 2007 Indirect Cost of
13 Service Study dated April 2, 2007, was marked for
14 identification.)

15 (PLF. EXH. 3, 2007 Indirect Cost of
16 Service Study dated March 19, 2007, was marked for
17 identification.)

18 BY MR. CONNELL:

19 Q. Just for purposes of the record, we've
20 shown the witness Exhibits 2 and 3. Exhibit 2 is a
21 study of April 2, 2007; is that right, Mr. Gantt?

22 A. Exhibit 2 is April 2nd.

23 Q. 2007, yes, sir.

24 A. Yeah.

25 Q. And Exhibit 3 is a March 19, 2007 draft

1 copy?

2 A. Yes, sir.

3 Q. Have you had an opportunity to look at
4 these prior to today?

5 A. No, sir.

6 Q. Let me ask this question: Do you agree
7 that monies are transferred from the water and
8 sewer enterprise fund to the general fund that are
9 used for purposes that are not water and sewer
10 related?

11 A. Yes, sir, I do.

12 Q. Okay. And do you -- what are those
13 monies used for?

14 A. Fire, police, public works. They're
15 used for other city services.

16 Q. All right. I've seen Office of the
17 Economic or Business Development. Are they used
18 for that?

19 A. Anywhere general fund money is used
20 there's a likelihood that some of that money may be
21 used there. It's used the same way we use general
22 fund money.

23 Q. Those monies are used through the
24 general fund pursuant to the resolution which
25 you've shown me as Exhibit Number 1?

1 A. That's correct.

2 Q. All right. And do you know how much
3 money is used through the general fund that is
4 collected from the water and sewer enterprise fund
5 that is not used for water and sewer purposes? Do
6 you understand my question?

7 A. No, sir.

8 Q. You indicated that there is money from
9 the water and sewer --

10 A. Transferred from the water and sewer to
11 the general fund.

12 Q. Yes, sir. And that there is money that
13 is transferred to the general fund that is not used
14 for water and sewer purposes?

15 A. Correct.

16 Q. Do you know how much that is?

17 A. 4.5 million.

18 Q. All right. And how long has
19 \$4.5 million been transferred from the water and
20 sewer fund to the general fund and used for other
21 purposes not related to water and sewer?

22 A. I don't know. I don't know how long
23 that's been going on.

24 Q. You've been city manager how many years
25 now?

26

1 A. Three.

2 Q. Has it been going on the past three
3 years?

4 A. Yes, sir.

5 Q. All right. And can you break down for
6 me of the \$4.5 million how much is used per
7 department?

8 A. No, sir.

9 Q. You just know that \$4.5 million is
10 transferred on a yearly basis?

11 A. Yes, sir.

12 Q. And have you gone back to look at the
13 city records to see if that \$4.5 million was
14 transferred prior to the three years you were city
15 manager?

16 A. As a -- yes.

17 Q. All right. And so how many years total
18 do you think that money's been transferred?

19 A. I can't -- I don't know.

20 Q. Have you had any institutional
21 knowledge of when is the earliest point it started
22 happening?

23 A. Well, there was a resolution passed in
24 1993. I would assume that there was some transfer
25 taking place if they passed a resolution in '93.

1 Q. All right. Are you familiar with any
2 of the South Carolina Supreme Court cases that
3 discuss the collection of fees and how those monies
4 are to be spent when you collect fees?

5 A. No, sir.

6 Q. Are you familiar with Title 6-1-330 of
7 the South Carolina Code of Laws relating to the
8 collection of fees?

9 A. No, sir.

10 Q. Have you had discussions with other
11 city managers about the transfer of money from the
12 water and sewer fund to the general fund for use
13 for other purposes besides water and sewer?

14 A. Not directly.

15 Q. How about indirectly?

16 A. Yes.

17 Q. Tell me about those discussions, if you
18 would, and with who, please, sir.

19 A. I can't tell you the fellow's name
20 because I can't remember it. We just did another
21 rate study, as I told you. It's in draft form and
22 should be available shortly. The question was
23 asked of the consultant about transfers and his
24 response was that it is a pretty common practice in
25 the Southeast for municipalities and counties that

1 have utilities to use some portion of those funds
2 for operation of their general fund. I think some
3 of the examples he gave are Rock Hill, Orangeburg,
4 Charleston and some others in the state.

5 Q. Other than the resolution that's
6 Exhibit Number 1 are you aware of any other
7 authority that allows the City of Columbia or any
8 other municipality in South Carolina to use --

9 A. No, sir.

10 Q. Are you aware of the practice ever
11 being declared illegal in any city or county in
12 South Carolina?

13 A. No, sir.

14 Q. And the \$4.5 million that is
15 transferred on a yearly basis, if the City of
16 Columbia did not have that money available from the
17 water and sewer fund to be transferred to the
18 general fund what would happen?

19 A. If you were a resident of the City of
20 Columbia your millage rate would go up nine mills.

21 Q. And you seem to be specific about nine
22 mills. How do you know that?

23 A. I know one mill equals about \$500,000.

24 Q. Okay. That's what I thought, but I
25 wanted to make sure I understood what you're -- so,

1 in other words, the water and sewer fund is helping
2 to pay for other city level services; is that
3 right?

4 A. Yes, sir.

5 Q. Do you know who came up with the idea
6 that the money should be transferred or some money
7 should be transferred from the water and sewer fund
8 to help with other city services?

9 A. No, sir, I do not.

10 Q. Are there other fees from the City of
11 Columbia that are collected that are charged that
12 are used by the general fund or sent to the general
13 fund?

14 A. The parking fund also. It did not this
15 past year because of some depreciation they had to
16 catch up on with some of our parking facilities,
17 but they normally transfer a million dollars a year
18 to the general fund from parking.

19 Q. The number \$4.5 million that's being
20 transferred, do you know why that specific number
21 was chosen?

22 A. No, sir.

23 Q. Does it have something to do with how
24 much money the city needed for other services or --

25 A. I don't believe so. I think possibly

1 they used the calculations from this resolution.
2 That was where the number came from and it's just
3 been that number that has been used annually.

4 Q. Does the City of Columbia or the city
5 officials, the city councilmen, do they believe
6 that they're entitled to a profit from the water
7 and sewer collection fees to be used by the city?

8 A. I don't know that I can speak for
9 council. There are certainly some members of
10 council who believe that is the case, as do I.

11 Q. So you believe that if the City of
12 Columbia is collecting water and sewer fees and
13 there is leftover money, if you will, that the City
14 of Columbia ought to be able to transfer that money
15 into the general fund for use as it sees fit?

16 A. On behalf of the residents of the City
17 of Columbia, absolutely.

18 Q. Does that mean that any money that's
19 collected that's in excess of what the water and
20 sewer enterprise fund needs can be used for say
21 parks and recreation or business development or
22 festivals or anything of that nature?

23 A. I wouldn't say festivals. I would say
24 basic city services.

25 Q. You're talking about police, fire?

1 A. Picking up your trash, streets, those
2 kinds of things.

3 Q. Now, the fees that are collected from
4 the water and sewer customers, a lot of those water
5 and sewer customers do not live in the city; is
6 that right?

7 A. That's correct.

8 Q. And it's true, is it not, that they're
9 already being charged a premium, if you will,
10 because they don't live in the City of Columbia for
11 their water and sewer rates?

12 MR. LYDON: Object to the form. You
13 can answer.

14 THE WITNESS: I don't believe it to be
15 a premium. If you look at the -- if you look at
16 the annual survey that's done on the water and
17 sewer rates in about 28 municipalities and special
18 purpose water and sewer authorities in South
19 Carolina and parts of North Carolina, we're number
20 26 on one list and 27 on the other both in city and
21 out of city. So our rates are very, very, very
22 reasonable.

23 BY MR. CONNELL:

24 Q. Okay. But the out of city water and
25 sewer fees, are they double the rate or --

32

1 A. No, sir, they're not. They're about
2 1.7, I think.

3 Q. So 1.7 versus an in-town resident?

4 A. Yes, sir.

5 Q. Let's look at Exhibit Number -- let's
6 look at Exhibit Number 3 first. That's the
7 March 19, 2007 Black & Veatch study. Have you read
8 this prior to today?

9 A. No, sir.

10 Q. Would you like to take a minute to read
11 it through before I ask you some questions about
12 that?

13 A. Do you want me to read it all or just
14 some specific areas?

15 Q. I can point some things out, but I
16 didn't want you to feel like I was ambushing you.

17 A. That's fine.

18 Q. Let me ask you this: In Number 3 the
19 City of Columbia hired Black & Veatch to do the
20 2007 indirect cost of service study; is that right?

21 A. That's what this says, yes, sir.

22 Q. Do you believe that to be the case or
23 do you take issue with that?

24 A. No, I think we. I think we did employ
25 them to did that.

1 Q. And the draft was addressed to Missy
2 Caughman, and she's here, I understand, to testify?

3 A. Yes, sir.

4 Q. And to Mr. Dooley. Who is he?

5 A. He was the director of engineering
6 utilities at the time. He has since retired.

7 Q. Okay. And prior to today you haven't
8 actually had a chance to sit down and read this; is
9 that right?

10 A. That is correct.

11 Q. What I want to point out or what I want
12 to focus on is page -- if you'll look at Page 2.
13 It's the first full paragraph. In addition to the
14 indirect transfer of \$3.2 million and the direct
15 cost \$15 million, the utility transfers an
16 additional \$4.5 million to the city's general fund.
17 I think we've talked about the \$4.5 million
18 already. What is the \$3.2 million indirect
19 transfer for?

20 A. That is a transfer for services
21 provided by the city on behalf of the utility
22 department. For instance, they get legal services
23 from our legal department. They get payroll run
24 through our payroll department. They get accounts
25 payable, accounts receivable. They get HR, human

1 resources. They get collections. There are a lot
2 of things the city does on behalf of the utility
3 and that's that 3.2 million.

4 Q. Let me ask you this: Is that kind of a
5 soft number or is that a -- could you itemize the
6 \$3.2 million or could Ms. Caughman point to me and
7 say it's exactly \$3.2 million?

8 A. And it may be less than that now, but I
9 think she could --, she could give you a specific
10 number and show you specifically where those costs
11 are incurred.

12 Q. Let's look over, if we could, at the
13 findings and recommendation section.

14 A. Okay.

15 Q. And if you look down at the -- let's
16 see -- based on our analysis of the utilities 2006
17 budget. Do you see that?

18 A. Uh-huh.

19 Q. I'm sorry. You've got to say yes or no
20 for the record.

21 A. Yes, I do. Yes.

22 Q. It says: Approximately 7.6 million of
23 directly funded costs should not be funded by
24 utility enterprise and are more appropriately
25 funded by the general fund budget. Do you know

1 what that \$7.6 million represents?

2 A. No, sir.

3 Q. Is there anything in the document that
4 would tell you what that represents?

5 A. Looks like \$3.6 million from
6 nondepartmental capital improvements.

7 -Q.- I have to understand what that means by
8 \$3.6 million for nondepartmental capital
9 improvements.

10 A. I'm not sure what that means.

11 Q. And it says, parentheses, development
12 corporations?

13 A. Yes.

14 Q. What are development corporations?

15 A. They are corporations created by the
16 city for economic development within certain areas
17 of the City of Columbia.

18 Q. All right. Would it be fair to say
19 that the \$3.6 million for nondepartmental capital
20 improvements are not improvements to the water and
21 sewer system?

22 A. I don't think you can go -- I don't
23 think you could say that. You know, the economic
24 development in the city certainly provides
25 additional customer base for water and sewer.

1 Q. So you're saying that if \$3.6 million
2 was used for economic development that it
3 indirectly helps the water and sewer system?

4 A. It's affects the water and sewer
5 system, yes, sir.

6 Q. All right. Do we know whether or not
7 this entire \$3.6 million is for development
8 corporations, or is it for other things, or do you
9 know?

10 A. I do not know.

11 Q. Okay. It goes on to say: Our analysis
12 indicates no direct cost causation or benefit could
13 be attributed to the utility for these services and
14 therefore no justification for direct funding for
15 any utility was supported for purposes of this
16 study.

17 I take it from what you just said that
18 you disagree with the consultants?

19 A. That's correct.

20 Q. Then if you look down at the next full
21 paragraph there's a discussion about \$2.2 million
22 in indirect transfers, and I think you've indicated
23 that's for support, human services, human
24 resources, that kind of thing?

25 A. Yes. Yes, sir.

1 Q. And apparently the indication is that
2 \$3.2 million was too much, that it should be
3 reduced by \$978,000. Do you see that?

4 A. Yes, sir, I do.

5 Q. Do you disagree with that or do you
6 take issue with that or do you know?

7 A. I don't. That would not be something I
8 could respond to.

9 Q. I didn't think you were doing the
10 number crunching.

11 All right. The next full paragraph on
12 the next page. It says something to the effect
13 that it was determined that some buildings that
14 were purchased with utility funds were being used
15 and occupied by departments other than the utility
16 itself. Do you see that in this first full
17 paragraph?

18 A. Yes, sir.

19 Q. Do you know what building were
20 purchased with utility funds and were used by other
21 departments?

22 A. Washington Square was purchased with
23 water and sewer money.

24 Q. What is that?

25 A. That's our primary office building for

1 our city, a large portion of which is used by
2 engineering utilities.

3 Q. So am I hearing you say that that
4 building is used by water and sewer?

5 A. Yes, sir. Not exclusively, but used.

6 Q. What percentage do you think is used by
7 it?

8 A. I don't know. Our water customer
9 service is on the first floor and then I think
10 engineering utilities has two or three floors in
11 that building.

12 Q. All right. How many floors is the
13 building?

14 A. It may be five, but it's incrementally
15 smaller as you go up.

16 Q. So it sounds like at least half of the
17 building is being --

18 A. I would think at least half, yes, sir.

19 Q. And then apparently it goes on to say
20 that: Because these assets were purchased with
21 utility funds it is reasonable to expect a return
22 on investment that could be recouped through rent
23 or other charges applied to the city departments
24 that currently use the space. Has that
25 recommendation been followed by the City of