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

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

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

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SC Court of Appeals

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

Appellants,

vs.

**CITY OF COLUMBIA,**

Respondent.

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# FINAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

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

II. The Circuit Court committed error by denying Appellant's class action status to sue the City of Columbia over its use of the water and sewer fees collected by the City of Columbia from operation of its water and sewer systems.

III. The Circuit Court committed error by denying standing to sue the City of Columbia over its use of the water and sewer fees collected by the City of Columbia from operation of its water and sewer systems to Appellants Letts and Azar.

IV. South Carolina Courts favor class actions in declaratory judgments.

## STATEMENT OF THE CASE

For decades the City of Columbia has used monies it collected as water and sewer fees to pay for non-water and sewer services and expenses, including by transferring millions of dollars to its general fund and by allowing the City's four economic development corporations to spend millions of additional dollars directly from the account where the City's water and sewer fees are deposited. At the same time the City neglected its water and sewer system which fell into a state of disrepair and ultimately resulted in the United States Environmental Protection Agency and the South Carolina Department of Health and Environmental Control successfully suing the City of Columbia to force repairs and improvements to the City's sewer system.

Appellants commenced this case to stop the City of Columbia's practice of using monies collected as water and sewer fees for purposes other than the City's water and sewer system and to recover, for the benefit of the City's water and sewer system, the monies previously misappropriated by the City in prior years.

The material facts in this are not disputed. Both parties made motions for summary judgment. The Circuit Court granted the City's Motion for Summary Judgment and denied Appellants' Motion for Summary Judgment. Appellants' have appealed.

The principal issue in this case is whether or not the City of Columbia may legally use water and sewer fees it collects for non-water and sewer purposes?" Appellants submit the answer to this question is a resounding no based on established case law and SC statutes.

## STATEMENT OF FACTS

The City of Columbia owns and operates a water and sewer system which provides water and sewer service to customers both within and outside the Columbia city limits. While the exact number of the City of Columbia's water and sewer customers can and does vary over time based upon newly added accounts and closed old accounts, as of June 28, 2012 the city provided water to 137,066 customers and sewer service to 69,910 customers. (R. Vol. I, p. 9, ll. 10-11; September 26, 2013 Order Granting Defendant's Motion for Summary Judgment).

Water and sewer fees collected by the City of Columbia generate approximately $110 million dollars per year in gross revenue. (R. Vol. I, p. 9, ll. 11-13; September 26, 2013 Order Granting Defendant's Motion for Summary Judgment). The City's water and sewer services produced gross revenues of $110,818,495.00 in FY 2008/2009; $113,389,385.00 in FY 2009/2010; and, $110,749,377.00 in FY 2009/2010. (R. Vol. II, p. 930, ¶ 8); Affidavit of Jeffrey M. Palen).

All water and sewer fees collected by the City of Columbia are deposited into the City's "Water and Sewer Enterprise Fund" account, from which the expenses of the City's water and sewer system are paid. (R. Vol. I, p. 9, ll. 14-20; Order Granting Defendant's Motion for Summary Judgment; R. Vol. II, p. 930, ¶ 7; Affidavit of Jeffrey M. Palen). The City does not have the means to nor does it segregate water and sewer revenues collected from non-residents of the City from those collected from residents of the City. (R. Vol. II, p. 931, ¶ 12; Affidavit of Jeffrey M. Palen). No other monies other than revenues from water and sewer fees and directly related operations such as water connection fees, water meter installation fees, sewer taps fees, sewer plant expansion

fees, interest income and miscellaneous income fees are deposited into the City's "Water and Sewer Enterprise Fund" account. (R. Vol. II, p. 930, ¶ 7; Affidavit of Jeffrey M. Palen).

From the City's "Water and Sewer Enterprise Fund" the City also funds its four development corporations, the Colombia Development Corporation, the Eau Claire Development Corporation, the Columbia Housing Development Corporation and the TN Development Corporation. Collectively, the City expended $1,147,242.42 in FY 2008/2009, $1,154,479.00 in FY 2009/2010, and $1,147,242.42 in FY 2010/2011 out of City's "Water and Sewer Enterprise Fund" the for these four development corporations. On an annual basis going back to at least 2001 the City has transferred $4,500,000.00 annually from the "Water and Sewer Enterprise Fund" where water and sewer fees deposited into the into the City's general fund where those monies are comingled with other City revenues subsequently spent for purposes not directly related to City's water and sewer system. Between 1999 and 2010 the City of Columbia transferred $78.6 Million from its water and sewer fund for other uses. (R. Vol. II, p. 567; Deposition of Stephen Gantt).

At the same time the City has been transferring money collected as water and sewer fees from the "Water and Sewer Enterprise Fund" to the City's general fund account and allowing various departments of the City's office of economic development to spend money collected as water and sewer fees and deposited into the Water and Sewer Enterprise Fund account for purposes other than the City's water and sewer system, the City has badly neglected to maintain, its water and sewer system.

Appellants' commenced this action alleging that the City of Columbia's expenditure of monies collected as water and sewer fees for purposes other than "...to pay costs related to the provision of the service or program for which the fee was paid" violated S.C. Code Ann. § 6-1-300, et. seq. (Supp. 2013), and, in particular, the restriction on use of revenue derived from service or user fees imposed under S.C. Code Ann. § 6-1-330(B) (Supp. 2013).

Appellants' Motion for class action status was heard by the Circuit Court on June 5, 2012 and denied by Order entered June 26, 2012. Appellant's Motion for Reconsideration of the June 26, 2012 Order was heard on September 13, 2012 and denied by Order entered September 20, 2012.

The parties agreed that the relevant facts in this case were not disputed and the issue which the Court would be called upon to resolve was one of application of law rather than fact. Appellants and Respondent each made Motions for Summary Judgment. Those Motions were heard by the Circuit Court on August 8, 2013. By Order entered September 26, 2013 the Circuit Court granted the Respondent's Motion for Summary Judgment and, correspondingly denied Appellant's Motion for Summary Judgment. Appellant's Motion for Reconsideration of the September 26, 2013 Order was denied by Order entered November 27, 2013.

This appeal followed.

## ARGUMENTS

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

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 represent 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 R. Vol. II, p. 567; 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 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 as water and sewer fees for those purposes. (See R. Vol. II, p. 934, ¶ 29; Affidavit of Jeffrey Palen) 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. (R. Vol. II, p. 934; ¶ 29).

Well-established South Carolina case and statutory law clearly provide that transfers and expenditure of water and sewer fees for purposes other than the water and sewer system are illegal and a violation of established South Carolina statutory and case law.

[1] Fiscal Year 2010-2011=$103,708,234.00. Fiscal Year 2011-2012=$110,400,499.00.

Plaintiffs' Complaint sought 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. 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 collected as water and sewer fees and deposited into 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. 2013) which provides in relevant part:

> The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid. (emphasis added)

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. 2013) 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. § 6-1-300(6) (Supp. 2013) defines 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).

It is well settled in South Carolina that service charges 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.

Further, while the City attempts to distinguish its government functions from its proprietary functions and represent itself as a an entrepreneur doing business outside of city limits and thus be entitled to "profit" and use those "profits" as it sees fit, and not be restricted by the provisions of S.C. Code Ann. § 6-1-330 and § 6-1-300(6) (Supp. 2013) that argument was debunked by decision in *Calcaterra v. City of Columbia*, 315 S.C. 196, 432 S.E.2d 498 (1993) where the S.C. Court of Appeals held:

> "The furnishing of water to residents and non-residents is a governmental function, and the State makes no distinction between the proprietary and governmental functions of municipalities." citing *Looper v. City of Easley,* 172 S.C. 11, 172 S.E. 705 (1934). 432 S.E.2d at 499.

While the City is entitled to charge a higher rate for non-resident water and sewer customers[2], that fact does not exempt them from application of clear and unambiguous South Carolina statutory and case law governing the permissible uses of water and sewer fees.

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 (approximately $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(C) 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 Water and Sewer Enterprise Fund and places those funds in the General Fund and not for water and sewer service.

[2] *Childs v. City of Columbia,* 87 S.C. 566, 70 S.E. 296 (1911) (non-resident alleged a charge of four times that charged residents was excessive and exorbitant).

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 5).**

The deposition of Steven Gantt, the City of Columbia Manager, established the following: the City collected water and sewer fees and transferred a portion of those fees to the City's general fund every year since at least 2001 (R. Vol. I, p. 460, ll. 9-13; that occurring was based on a City resolution (R. Vol. I, p. 461, ll. 11-13); the City of Columbia needed at least $500 Million of work done on its water and sewer system (R. Vol. I, p. 472, ll. 16-23); a study performed by Black & Veatch criticized the practice of the City transferring monies from the Water and Sewer Enterprise Fund to the City's general fund (R. Vol. II, p. 579; ll. 21-22); Gantt agreed that $4.5 Million had been transferred each of the last three years from the Water and Sewer Enterprise Fund to the City of Columbia and that this practice dated back to 1993 (R. Vol. I, p. 479, ll. 8-17; Vol. I, p. 480, ll. 23-25); the Water and Sewer Enterprise Fund helped pay for other services (R. Vol. I, p. 483, ll. 1-4); City Council transfers money as it sees fit (R. Vol. I, p. 484, ll. 4-17); lots of people who do not live in the City but are water and sewer customers (R. Vol. I, p. 485, ll. 1-15); that according to the consultant's report (Black & Veatch) $3.6 million transferred from the

Water and Sewer Enterprise Fund to the general fund for development companies was not justified (R. Vol. I, p. 490, ll. 1-10); that an indirect transfer of $3.2 Million from the Water and Sewer Enterprise Fund to the City of Columbia was too much according to the consultants (R. Vol. I, p. 491, ll. 1-4); a building at Washington Square was purchased with water and sewer funds and over half of the building is used for purposes other than for water and sewer (R. Vol. I, p. 492, l. 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 (R. Vol. II; p. 505, ll. 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. (R. Vol. II, p. 559, ll. 10-15); that further monies were transferred from the Water and Sewer Enterprise Fund to the general fund for economic development (R. Vol. II, p. 599, ll. 19-23).

**B. Deposition of William H. Ellis (Exhibit 6).**

William Ellis, the Director of Finance for the City of Columbia (R. Vol. II, p. 687, ll. 19-21); that $4.5 million was transferred to the general fund from the Water and Sewer Enterprise Fund and was not used for a specific purpose (R. Vol. II, p. 691, ll. 17-18); that there was no question that the ratepayers had $4.5 million transferred from the Water and Sewer Enterprise Fund to the general fund (R. Vol. II, p. 722, ll. 20-25); and that some ratepayers did not live in the City (R. Vol. II, p. 723, ll. 9-12); and that the $4.5 million was not used for water/sewer (R. Vol. II, pp. 739-740 - Deposition of William H. Ellis).

**C. Deposition of Missy Caughman (Exhibit 7).**

Missy Caughman, the Budget Director for the City of Columbia (R. Vol. II, p. 603, l. 25 – p. 604, l. 5); as budget director and manages she manages the City's operating capital project funds (R. Vol. II, p. 605, ll. 7-9); that $4.5 million dollars comes from the Water and

Sewer Enterprise Fund and is money collected from people who pay the water and sewer fees (R. II, p. 605, ll. 16-25); once the money is transferred into the general fund it is not designated for a specific purpose of the general fund (R. Vol. II, p. 606, ll. 11-15); money which is transferred from the Water and Sewer Enterprise Fund to the City's general fund is not used for water and sewer purposes (R. Vol. II, p. 606, ll. 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 (R. Vol. II, p. 607, ll. 21-25).

The essence of the City's use of the Water and Sewer Enterprise Fund is found in the testimony of Missy Caughman is 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. (R. Vol. II, p. 609, ll. 1-25).

Further, Caughman recommended in a written memorandum (See R. Vol. II, p. pp. 739-740) 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 (R. Vol. II, p. 616, ll. 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.( R. II, p. 621, ll. 4-9); that closer to $3 Million was being moved from the utility enterprise fund to the general fund (R. Vol. II, p. 625, ll. 20-21); and that the indirect cost transfer amount was reduced by $978,000 to $2.2 Million (R. Vol. II, p. 627, ll. 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 (R. Vol. II, p. 629, ll. 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 (R. Vol. II, p. 631, ll. 4-11).

## ADDITIONAL EVIDENCE IN THE RECORD

In 1993, the City of Columbia adopted a City Council resolution approved by the Mayor and the City Manager (R. Vol. II, pp. 569-571) 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 clear 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. In that Exhibit dated 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.

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.

At the same time City of Columbia was plundering water and sewer fees to pay for non-water and sewer expenses, by transferring money to the City's general account and by allowing multiple City economic development departments to pay their expenses out of the City's Water and Sewer Enterprise Fund, the City did not keep its water and

sewer system in a state of good repair. That fact is evidence by two independent pieces of evidence. One, the City hired Black & Veatch, a consulting firm, to conduct and study and report on the condition of its water and sewer system. The Black & Veatch report, issued in 2007, was highly critical if the City's practice of using water and sewer monies for purposes other than its water and sewer system.

As previously stated, S.C. Code Ann. § 6-1-330(B) (Supp. 2013) which provides in relevant part:

> The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid. (emphasis added)

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Eagle Container Co, LLC v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (2011); *Garvin v. State,* 365 S.C. 16, 21, 615 S.E.2d 451, 453 (2005); *Georgia–Carolina Bail Bonds, Inc. v. County of Aiken,* 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct.App.2003); *Knotts v. S.C. Dept. of Natural Resources,* 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Hodges v. Rainey*, **341 S.C. 79,** 533 S.E.2d 578 (2000).

The above statutory language is "plain and unambiguous".

In 2013 the United States of American (Environmental Protection Agency) and the State of South Carolina (Department of Health and Environmental Control) sued the City of Columbia over numerous Sanitary Sewer Overflows from the City of Columbia's sewer system. That case was ultimately settled by Consent Decree in which the City of

Columbia agreed to make extensive repairs and upgrades in its sewer system and pay civil penalty of $476,400.00 to the Plaintiffs in that action and implement a large scale program to upgrade and improve its sewer system. (R. Vol. III, pp. 1077 – 1180 - Consent Decree).

While the City did enact its first Water Rate Ordinance in 1895, as noted by the Circuit Court, that Ordinance did not include sewer rates and the City has enacted numerous new water and sewer Ordinances and new fees since then including in 2013, 2012, 2011, 2010, 2008, 2007, and 2006. (R. Vol. III, pp. 1298 - 1310).

The Circuit Court's reliance upon S.C. Code Ann. § 6-21-5 et. seq. (Supp. 2013) to justify the City's spending water and sewer revenue for purposes other than its water and sewer system is badly misplaced. S.C. Code Ann. § 6-21-5 et. seq. (Supp. 2013) is the South Carolina "Bond Revenue Act". While it does allow a municipality to pledge revenues of its water system for water and sewer for construction, improvements and enlargement of its water and sewer system (see. S.C. Code § 6-21-340 (Supp. 2013)), it does not authorizes expenditure of water and sewer revenues for purposes other than the water and sewer system unless certain specific preconditions are net, none of which existed in this case..

S.C. Code Ann. § 6-21-440 (Supp. 2013), relied upon by the Circuit Court in reaching its decision, requires segregation of revenues into multiple categories of funds. One, "Out of the revenues there shall be set aside a sum sufficient to pay the principal of and the interest upon the bonds as and when they become due and payable. If the revenues of any calendar, operating, or fiscal year shall be insufficient to pay the principal of and interest on the bonds maturing in any such calendar, operating, or fiscal

year, an additional amount sufficient to pay the principal of and interest on such bonds outstanding and unpaid shall be set aside out of the revenues of the next succeeding calendar, operating, or fiscal year and applied to the payment of the principal of and interest on such outstanding and unpaid bonds. This fund shall be designated the "bond and interest redemption fund"." Two, "Out of the revenues there also shall be set aside a sum sufficient to provide for the payment of all expenses of administration and operation and such expenses for maintenance as may be necessary to preserve the system, project or combined system in good repair and working order. This fund shall be designated the "operation and maintenance fund"." Three, "Out of the remaining revenues there shall be next set aside a sum sufficient to build up a reserve for depreciation of the existing system or combined system. This fund shall be designated the "depreciation fund"." Four, "Out of the remaining revenues there shall be next set aside a sum sufficient to build up a reserve for improvements, betterments, and extensions to the existing system, project, or combined system, other than those necessary to maintain it in good repair and working order as herein provided. This fund shall be designated the "contingent fund". Fifth and finally, "Any surplus revenues thereafter remaining shall be disposed of by the governing body of the borrower as it may determine from time to time to be for the best interest of the borrower."

The Circuit Court relied upon the fifth category as allowing the City to spend water and sewer fees "....as it may determine from time to time to be for the best interest of the borrower (the City)". That argument fails for a number reason. First and foremost, there is a complete paucity of evidence that the City has established or funded any of the four preceding funds required by S.C. Code Ann. § 6-21-440 (Supp. 2013) as a

prerequisite to ever reaching the fifth category. The statute's language is clear and unambiguous, "Any surplus revenues", meaning any money remaining after funding of the preceding four categories, could be spent as authorized by category five. As the City has not funded any of the first four categories, it has no "surplus revenues", nor is there any evidence or finding that any such "surplus revenues" exist as defined by category five of the subject statute to be spent in the manner advocated by the City.

For the reasons set for above, Appellants' respectfully submit that the decision of the Circuit Court granting summary judgment to the Respondent City of Columbia should be reversed; that the Circuit Court's decision denying Plaintiffs' Motion for Summary should be reversed; and, that this case should be remanded to the Circuit Court for entry of summary judgment in favor of the Appellants and further proceedings to determine the amount of money the City of Columbia should be required to repay to its Water and Sewer Enterprise Fund and an award of attorneys' fees, costs and expenses to Plaintiffs.

## II. THE COURT ERRED IN DENYING CLASS CERTIFICATION TO THE PLAINTIFFS.

### A. Background Facts as to Class Certification.

This is a putative class action which involves a challenge by customers of the City of Columbia's water and sewer system to the fiscal practice 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.

On a fiscal basis, the City of Columbia collects in excess of $100 Million in water and sewer fees (see fiscal year 2010-2011 equals $103,708,234.00) from over 100,000

customers. 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. Further, the City funds the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, various Development Corporations and the Economic Development Contingency Fund from this account. The City also uses money from this account for Community Promotions and for the City Center Partnership. The Plaintiffs assert that such transfers are illegal and in violation of established South Carolina Supreme Court case law and statutory authority.

Plaintiffs in this lawsuit seek a declaratory and injunctive classwide judgment on behalf of all City water and sewer customers to require the City of Columbia to repay the utility fund those monies illegally transferred to the General Fund of the City for the last three years and to recover all money expended by the City from water and sewer fees for purposes other than the water and sewer service. 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. 2013) ("The revenue derived from a service or user fee imposed to finance the provisions 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 and the central legal issue turns on whether or not the City of Columbia may use monies collected as water and sewer fees for other purposes. The Plaintiffs assert that South Carolina law prohibits the City of Columbia from using

those monies for other than the operation, repair, upgrade, maintenance and/or expansion of the water and sewer system of the City. S.C. Code § 6-1-330 and § 6-1-300(6) (2013) 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 by the governmental entity. See *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*, 519 S.C.2d 561 (1991); *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). (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.").

It is against this backdrop that Plaintiffs filed a motion to certify class on behalf of all water and sewer customers.

**B. <u>The Court refused to hear the Motion to Certify Class</u>.**

At a hearing before the Honorable Ernest J. Kinard on June 5, 2012 to hear the Motion to Certify, the Court noted:

> I am not going to certify the class. I haven't even heard anything on that. (R. Vol. I, p. 287, ll. 19-22).

Plaintiffs' counsel then told the Court:

> It's a declaratory class, Your Honor, just like the Sloan cases, and it ought to be certified just like any other declaratory class. I've given you a brief with all the cases. (R. Vol. I, pp. 288, ll. 4-7)

The Court then stated:

> I know you've given me a brief and normally I read them, but I'm burned out. You gave me a brief by e-mail didn't you? (R. Vol. I, p. 288, ll. 8-10)

The following questions/answers occurred between counsel and the Court:

> Counsel: Your Honor, would you be inclined to hear that on another day, then— (R. Vol. I, p. 288, ll. 15-16)
>
> The Court: No. I am willing to hear it today, does it matter to you? (R. Vol. I, p. 288, ll. 17-18)
>
> Counsel: Yes, sir, I think it does. (R. Vol. I., p. 288, l. 19)
>
> The Court: Does it matter to y'all? (R. Vol. I, p. 288, l. 20)
>
> Mr. Lee: [3] Matters to us that it not be granted. We don't think it's appropriate for class certification and it's not necessary as you've just indicated. (R. Vol. I, p. 288, ll. 21-23)
>
> The Court: I don't think it's necessary, but I have not read anything. So the simplest thing on that, rather than you argue, is just prepare an order granting it. Send it to me. You prepare one denying it. Y'all get it to me by the weekend, I'll rule on it next week while I'm in Camden so you know where you stand on it. (R. Vol. I, p. 288, l. 24 – p. 289, l. 4)

Further, the Court noted:

> If y'all want to come to Camden next week, we've got common pleas. We'll break down by Thursday, probably. If you feel like you need to, I'll give you some time next Thursday. But it's better if you just send your order in. I might be able to read what you say and make an informed decision on it. I can't make an informed decision today. (R. Vol. I, p. 289, ll. 18-25).

[3] The Court reporter made an error in naming Mr. Lee as the speaker. It was actually Defendant's counsel, Mr. Lydon.

Thereafter, counsel for Appellant and Respondent both sent proposed orders to the Court. Appellants' counsel's order granted class certification. Respondent's counsel's order denied certification. Appellants received a copy of the order denying class certification despite the fact that Appellants tried to schedule a hearing in Camden the Thursday after the argument before the Court on June 5, 2012. Appellants' counsel argues that the process by which the court denied class certification denied Appellants the right to hearing (and due process) and to argue his position on the record before the trial court issued an order denying class certification.

It is axiomatic in our system of justice that parties be heard by the court. Appellants assert it is a violation of due process because the Court failed to hear Appellants and instead accepted briefs on the subject matter without oral argument. Appellants fully understand when the trial court is tired. However, Appellants had a right to have a hearing before the court and argue their reasons for granting class certification. Because Appellants were denied such right, the order denying class certification should be reversed for a new hearing.

### C. The trial court erred in citing *Craft v. Memphis Light, Gas and Water Div.*, 534 F.2d 684 (6th Cir 1976) as a reason for denying class certification.

The trial court in denying Appellant's motion for class certification stated in its Order:

> ... regardless of whether the elements of Rule 23 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 F2d 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 plaintiff would inure to the benefit of others similarly situated. (R. Vol. I, p. 2, ll. 9-16).

Appellants believe that the above statement by the trial court is erroneous as a matter of law. South Carolina's class action rule is expansive and is vastly different from the Federal Rule of Civil Procedure 23. In *Littlefield v. S.C. 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 783. The Court further found that the trial court should only look at the prerequisites of Rule 23 for deciding whether to certify a class.

In another seminal case on SCRP 23, the Supreme Court reversed denial of class certification in *Kennedy v. S.C. Retirement System*, 549 S.E.2d 243 (2000). The Court stated: "The adoption of the new Rule 23 in 1985 signaled the end of our restrictive view of class certification. This court will not read into the class action rules requirements based on federal law." *Kennedy* at 549 S.E.2d at 244. *Kennedy* was reaffirmed in *Guaiza v. S.C. State Plastering LLC*, 703 S.E.2d 197 (2010). In that case the Supreme Court held that class actions are favored in this state and we have a more expansive view of class actions here than our federal counterparts. The Court again reversed the trial court for denial of class certification. Here, Appellant argues that the circuit court erroneously held that there was no need for the complexities and extra costs associated with class

actions. This is not part of South Carolina's class action rule and the trial court erred in using such a standard in denying this class action certification status.[4]

### D. The trial court erred in holding that the third element of SCRCP 23(a) had not been met.

The trial court in its order also wrote that the Plaintiffs cannot "establish the third and fifth elements 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 member wishes to assert a claim. (Order of Judge Kinard 6/22/2012). 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." (R. Vol. I, p. 3, l. 21- p. 4, l. 3 Order of Judge Kinard dated June 22, 2012).

Appellants assert that the South Carolina's class action rule does not require Plaintiffs to show that other citizens have presented similar complaints. Rule 23(a)(3) requires that claims or defenses of representative parties must be typical of the claims or defenses of the class. There is no requirement that plaintiffs show other citizens presented similar claims. The class representative's claim must be typical of all class members. The tenants of commonality and typicality are most often dealt with as one in terms of class certification. Typicality requirements of Rule 23(a)(3) require a claim or defenses of the class be similar. To satisfy the typicality requirements the named class members must be similar enough to those of the class to ensure that the class's interests are vigorously prosecuted. *7a Charles Allen Wright and Arthur R. Miller, Federal Practice Procedure 2nd Ed.* 1986.

[4] In *Littlefield*, the Supreme Court also found that the good faith of the governmental entity had nothing to do with the prerequisites of SCRCP 23(a) and should not be considered by the trial court.

Here, the record establishes as follows:

- The City provides water service to 114,000 customers (numerosity established under SCRCP 23(a)). (R. Vol. II, p. 577).
- The City provides wastewater services to 59,000 (numerosity under SCRCP 23(a)). (R. Vol. II, p. 577).
- Black & Veatch, a consultant firm, was hired by the City of Columbia to review its direct funding and indirect transfers to the City for services provided by these non-utility departments. The Black & Veatch Study found the current transfer of $4.5 million to the general fund is relatively high compared to industry averages. (Black & Veatch 2007 Indirect Cost of Service Study) (R. Vol. II, pp. 577 - 592).
- It is recommended that the transfer be reduced to $3 Million to be consistent with the estimated tax liability utilities would experience if they were a private entity. (Black & Veatch 2007 Indirect Cost of Service Study) (R. Vol. II, pp. 577- 592).
- The most defensible level of transfer would not exceed $3 Million (evaluation of general fund transfer Black and Veatch Study (Black & Veatch 2007 Indirect Cost of Service Study) (R. R. Vol. II, pp. 577-580).
- Based on our analysis of the utilities 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 budget (Black & Veatch 2007 Indirect Cost of Service Study) (R. Vol. II, p. 579, ¶ 3).

- 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. 2007 indirect cost of service study by (Black & Veatch 2007 Indirect Cost of Service Study) (R. Vol. II, p. 579, ¶ 3).
- 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 2007 Indirect Cost of Service Study) (R. Vol. II, p. 580, ¶ 1).

In sum, Plaintiff and over 114,000 water service customers and 59,000 sewer service customers have the identical claim. The monies the Plaintiff and others similarly situated are paying into the water and sewer utility fund are not being used for the water and sewer repair or maintenance, but are being used by the City of Columbia for other nonwater and sewer purposes. The fact that no other water and sewer customer had made a complaint is irrelevant to whether or not Plaintiff had claims that were typical of all other water and sewer customers. Accordingly, the trial court erred in finding that Plaintiff as class representative was not typical of all other water and sewer service customers of the City of Columbia in regard to the use of water and sewer fees collected.

### E. The court erred in holding the Plaintiff failed to meet the fifth element of the class certification rule.

The trial court in its ruling held that the Plaintiff did not meet SCRCP 23(a)(5) which provides in pertinent part:

> (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 may exceed $100 for each class member or for each member of the class.

The trial court erroneously found that SCRCP 23(a)(5) had not been met. However the record reveals that on numerous occasions Appellants' counsel had indicated to the court that they were only seeking class certification for injunctive and declaratory relief.

At the motion for reconsideration of the trial court's order denying class certification Appellant's counsel stated: [5]

> We do not seek to get any money back for any individual. We only seek to get the City of Columbia to put that money back that they should not have used for that purpose back into the water and sewer or what is called the enterprise fund. (R. Vol. I, p. 304, l. 25 – p. 305. l. 5).

Appellant again pointed out to the trial court that it reconsider its order under Rule 59 and issue an order for injunctive and declaratory class to the plaintiff. (R. Vol. I, p. 307, ll. 24-25)

Further, the trial court showed a basic misunderstanding of the class action rule when it stated as follows:

> Well I don't understand other than attorney's fees why he can't get the relief he seeks without certifying the class. That is a problem I have. (R. Vol. I, p. 312, ll. 2-5).

Later in the same hearing, the court stated:

> And they don't have any they you are not seeking monetary compensation although you have got those other two or three class causes of action. So I don't see any benefits. I mean, I don't see why you need to certify this class therein lies my problem I feel that if the judge rules with you and enjoins the City everybody

[5] Counsel never got to argue the Motion for Certification before the lower court.

> benefits from it without having to send out notices to all those people and so forth. (R. Vol. I p. 312, ll. 16-25).

Finally it should be noted that the court directed respondent's counsel to place the following in the order denying reconsideration:

> And he concedes at the hearing that he is not seeking the unconstitutional use and the overcharges and what have you, the other three causes of action specifically say I feel he can get this relief post haste. (R. Vol. I, p. 317, ll. 5-10).

Appellant respectfully points out to this court that this was not placed in the order on reconsideration and that respondent's counsel placed in the order issues about causes of action which did not seek injunctive or declaratory relief and which were contra to the court's instructions to respondent's counsel at the hearing. Accordingly, respondent's preparation of the trial judge's order did not comply with the court's instruction when the order was prepared. In fact, the Court's opinion stated:

> However, a review of plaintiff's second amended complaint indicates that the relief primarily sought is not injunctive or declaratory as required by Rule 23(a)(5) SCRCP. (R. Vol. I, p. 4, ll. 9-11 - Order of Kinard dated June 22, 2012).

## F. The record establishes that Appellant was entitled to class certification on injunctive and declaratory relief.

The South Carolina Supreme Court has held that proponents of class actions bear the burden of proving five prerequisites under South Carolina law unless the class action seeks injunctive of declaratory relief. Those prerequisites are as follows: the class must be so numerous that joinder of all members is impractical; there must be questions or law or fact common to the class; claims and defenses of the representative party must be typical of the claims or defenses of the class; representative parties must fairly and adequately protect the interest of the class; and 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 $100 for each member of the class.

At the outset appellants only sought an injunctive and declaratory class and accordingly Rule 23(a)(5) (the amount in controversy) was not applicable to plaintiff's motion for class certification. Appellants now address each of the prerequisites of SCRCP which were met in this case.

**(1) The Plaintiffs meet the numerosity requirement of the class action rule.**

In order to prove that this matter should be certified as a class, the Plaintiffs must first 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. First, Defendant's Brief admits that numerosity has been satisfied. Also, the documents presented by Plaintiffs' counsel and attached to Plaintiffs' brief clearly indicate that the City of Columbia has over 114,000 water customers and 59,000 wastewater customers. 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 72 (S.C. App. 1984). Here, the vast number of water and sewer customers proves 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 has been easily proven.

**(2) This case involves a common question of fact and law.**

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 in seeing that the service fees are being used to improve and/or maintain the water and sewer service. All class members have this common interest and want their service fees to be used only to repair and/or maintain the system. The central common legal issue in this case involves 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 legal question pervades this case and applies equally to all class members as do the claims and defenses of the Defendants.

*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) is authority for a class action 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.

This line of judicial reasoning was adopted from *Littlefield v. S.C. Forestry Commission*, 337 S.C. 348, 521 S.E.2d 781 (1999). In fact, *Littlefield* is on point because the Defendant argues exactly what the Court in *Littlefield* decided was not a defense to class actions. In this case, the City of Columbia states that the Court should assume the City "will comply with an injunction if the Court determines it appropriate to enter such relief, thus, no useful purpose will be served by class treatment." (Defendant's Brief at page 3). In *Littlefield*, the Circuit Court ruled that state agencies should be afforded an opportunity to comply voluntarily with any final judgment invalidating certain agency rules. (*Littlefield*, 521 S.E.2d at 782.) The Circuit Court relied on two federal cases for adopting this proposition. The Supreme Court noted that this was error because the drafters of South Carolina's Rules of Civil Procedure intentionally omitted from South Carolina's rule the additional requirements found in the federal rule. By admitting these additional requirements, the *Littlefield* Court found that South Carolina endorsed a more expansive view of class action availability than its federal counterpart. In sum, based on *Littlefield*, the City cannot argue that the class action rule (SCRCP 23) does not apply since it will voluntarily comply with any injunctive relief ordered by a court.

Appellants further point to the voluminous discovery which has been produced in this matter supports class certification on these common issues. In at least two documents presented to the Court by Plaintiffs' counsel as exhibits to their motion to certify, it was pointed out by consultants of the City that transfers of monies by the City from the water and sewer utility fund to the General Fund was problematic. The "2007 Black & Veatch Indirect Cost of Service" study recommends that monies collected in the utility enterprise fund be used for the water and sewer system only which is exactly what

the issue is in this case. (R. Vol. II, p. 580, ¶ 1- Black & Veatch corporate study for City of Columbia dated March 19, 2007).

Accordingly, common legal and factual issues abound in this case and all water and sewer customers have a united interest in resolution of this matter as a certified class.

**(3) 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. See *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 Plaintiffs are typical of the claims and defenses of the class. Each Plaintiff asserts his or her claim based on payment of water and sewer fees and that these monies are paid into the City's water and sewer utility fund but are not used for water and sewer repair and/or maintenance. Instead the monies are being used by the City of Columbia for other unrelated purposes. Thus, all class members (water and sewer customers) have the same claim. This common set of facts applies uniformly to all class members just as it did in the *Littlefield* and *Kennedy* cases cited above.

Further, Defendant City of Columbia, through its discovery including the Black & Veatch Study committed its acts uniformly with regard to each of the class members and

admits that it takes monies from the water and sewer utility fund and uses those monies for other unrelated purposes. Accordingly, by virtue of the acts committed, if the act is illegal or inappropriate as to the named Plaintiff, it is also illegal as to all water and sewer customers of the City of Columbia. 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 duplicitous. The class action device resolves those issues in a single action. Accordingly, because all water and sewer customers have the same interests as the class representatives, the typicality provision of the class action rule has been met.

**(4) 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 *Waller v. Seabrook Island Property Assn.*, 300 S.C. 465, 388 S.E.2d 799 (1990).

Here there is no argument that Azar, Cumberland or Letts will not fairly and adequately protect the interest of the class. All are Columbia water and sewer customers and all have identical interests in making sure that the fees they paid go towards water and sewer utility repairs, maintenance and upgrades. Each class Representative has the identical claim to the claim of every water and sewer customer for the City of Columbia.

There are no conflicts between class members and the class representatives. Each class representative 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 each class representative's claim is exactly like all other water and sewer customers, the class representatives have satisfied the requirement that they are adequate representatives.

### G. The court erred in relying on the good faith of City officials.

In its order on reconsideration the court again denied class certification and noted: "the court may presume the good faith of government officials to respect such a ruling without the necessity of making a class action." (R. Vol. I, p. 5, ll. 3-4). Appellant submits that this is not the law in South Carolina and that the good faith rule espoused by the court is not part of the South Carolina's class action rule. Further this exact issue was decided by the Supreme Court in *Littlefield v. S. C. Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1991) wherein the lower court used similar logic in denying a class action. The Supreme Court went on to note this was not appropriate and that class actions are to be expansively used in this state.

For these reasons Appellant requests that the class certification order for declaratory and injunction class relief be granted and that the order of the trial court be reversed

## III. THE CIRCUIT COURT ERRED IN HOLDING THAT PLAINTIFF'S HAD NO STANDING TO BRING THIS LAWSUIT.

Appellant appeals the Order of the Honorable Thomas Cooper dated September 26, 2013 granting Defendant's motion for summary judgment. In that order Judge

Cooper found that 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 of the City and has no personal or property interest at stake in this action. (Vol. I, p. 9, ll. 3-15; Order of Cooper 9/26/13)

As to Mr. Letts, Judge Cooper found that he lacked standing to bring a breach of contract claim when the contract at issue affords him no protective interest in how the City uses its water and sewer revenues. The Court went further and found a nonresident water and sewer customer has no rights against the City. (R. Vol. I, p. 9, l. 16 – p. 12, l. 2- Order of Cooper 9/26/13)

Appellants argue that Judge Cooper had no authority to issue such a ruling when this issue had previously been brought before Judge Kinard on June 5, 2012. At that hearing the City argued the three plaintiffs lacked constitutional standing to bring their claims. (R. Vol. I, , p. 279, ll. 3-5 - Trans. p. 13, Hearing of June 5, 2012 before Judge Kinard).

Further, the court issued an oral bench ruling on June 5, 2012 and stated: "I say they got standing…I say they all have standing to go ahead, named Plaintiffs. (R. Vol. I, p. 287, ll. 18-24 - Trans. June 5, 2012, p. 21, lines 18-24.)

Appellants point out to the Court that Judge Cooper in his order attempts to overrule Judge Kinard's ruling on standing. Appellants believe that the settled rule in this state is that one circuit judge cannot overrule another and as a result Judge Cooper had no authority to overrule Judge Kinard's decision that all the plaintiffs have standing to bring this suit. (Transcript of June 5, 2012 before Judge Kinard indicates that

Respondents vigorously argued no standing and the court disagreed.) (See R. Vol. I, p. 269, ll. 16 – p. 281, l. 9)

The rule is well settled that the prior order of a circuit judge may not be modified by a subsequent order of another circuit judge except in cases when the right to do so has been reserved to the succeeding judge. (See *Charleston County Dept. of Social Services, v. Father, Stepmother & Mother*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995)); (see also *Tisdale v. American Life Ins. Co.*, 216 S.C.10, 13, 56 S.E.2d 580, 581 (1941) (holding that it is "axiomatic that a circuit judge does not have the power to reverse the ruling of another circuit judge")); (See also *Cooper Tire and River Co. v. Perry*, 261 S.C. 538, 201 S.E.2d 245 (1973) (in the absence of a proper exception, question of whether early orders by another judge reached correct conclusion could not be considered on appeal)).

In sum, Judge Cooper's Order could not address the issue of standing as this had been addressed by Judge Kinard's oral ruling from the bench. Respondent's only alternative would have been to appeal that order at the conclusion of the case. Respondent has not appealed that order and thus it is the law of the case and Judge Cooper could not overrule Judge Kinard who issued his decision at the previous hearing on June 5, 2012.

At the hearing before Judge Kinard on June 5, 2012, respondent's counsel argued the Plaintiffs lacked standing to sue the city. (R. Vol. I, p. 269, ll. 20-23); filed a motion in support (R. Vol. I, p. 270, ll. 10-22); filed an affidavit as to Azar's status as a non-customer (Tr. p. 4, lines 11-13); that Azar is not a fee payer (R. Vol. I, p. 270. ll. 23-24); that Letts is a nonresident who pays fees (Vol. I, p. 270, ll. 24-25) and that there is a lack

of standing under constitutional tests, taxpayer standing and the public importance exception (R. Vol. I, p. 272, ll. 7-10).

The respondent's argument on standing was fully argued before Judge Kinard and is found in the Transcript, pages 3-15. At the conclusion of the argument Judge Kinard clearly and unequivocally held that the Plaintiffs have standing. (See R. Vol. I, p. 290, ll. 7-13): "I say they all have standing to go ahead, named Plaintiffs" (R. Vol. I, p.287, ll. 18-24). Accordingly, Judge Cooper was prohibited from passing on the same arguments and reading a different conclusion. Further, the respondent has not appealed Judge Kinard's Order of June 5, 2012 and thus are prohibited from arguing it now as it is the law of the case. Thus, Judge Cooper's Order page 8-15 on standing should be reversed as a matter of law.

## IV. SOUTH CAROLINA COURTS FAVOR CLASS ACTIONS IN DECLARATORY JUDGMENTS.

Plaintiffs' counsel advised the circuit court that the class does not seek monetary damages. This is a class action for injunctive and declaratory relief that seeks an order of this Court that funds collected for water and sewer charges cannot be used by the City of Columbia for any other purposes. South Carolina Rule 23(a)(5) makes it clear that equitable or declaratory relief is permitted in state court class actions and that the One Hundred Dollar rule does not apply. SCRCP 23(a)(5) provides as follows:

> (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.

Here, Plaintiffs' claims are injunctive and declaratory only. Plaintiffs do not seek a return of monies to any class member. The State Supreme Court has consistently

affirmed certification of a class action for declaratory judgment actions. 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.

Appellants are aware of the many cases involving Edward D. Sloan, a Greenville County resident who has brought declaratory class actions concerning the spending of public monies. Each of those cases was a class action. See *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *Sloan v. Greenville Hospital Systems*, 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 Hunley*, 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.2nd 299 (Ct.App. 2006).

Ten of the twelve *Sloan* cases involve challenges concerning the expenditure of public monies by government or quasi-governmental entity. In each of those, Sloan was granted class action status. Similar to the *Sloan* cases, Plaintiffs' 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. Plaintiffs 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. Accordingly, Appellants believe that class certification is appropriate in this case especially in light of the large number of people involved, the fact there is one main legal issue, that the issues are identical for all water and sewer customers and that all injuries result from misapplication of the same South Carolina statute

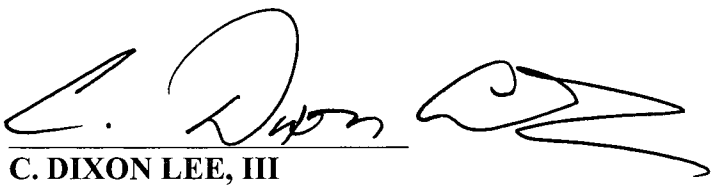
## CONCLUSION

In summary, for decades the City of Columbia has repeatedly used money it collected as water and sewer fees for purposes specifically prohibited by both South Carolina statutory law and by multiple decisions of the appellate courts in this State. That law is unequivocally clear that monies collected as user fees or service charges "....must be used to pay costs related to the provision of the service or program for which the fee was paid...." Monies collected as user fees or service charges cannot be used to fund other government services and to do so violates South Carolina law. All such monies paid by ratepayers must be used for "...the specific service or program for which the fee was paid" and, in this case, that service or program is the City of Columbia's water and sewer system, i.e., water and sewer operations, upkeep, maintenance, repair and expansion. This is particularly true when, at the same time the City is spending water and sewer revenues elsewhere, it is neglecting badly needed repairs and upgrades to its water and sewer system. The City of Columbia should not be permitted to flout the law and use ratepayers' monies, many of whom are not residents of the City, for in-City services. To do so effectively subjects those ratepayers outside the City of Columbia to taxation without representation in violation of the law.

Accordingly, Plaintiffs request this Court (1) reverse the decision of the Circuit Court in this case; (2) issue its order enjoining this practice by the City of Columbia; and, (3) require the City of Columbia to return to the City's "Water and Sewer Enterprise Fund" account all monies which were transferred from that account to the City's general fund by the City of Columbia and all monies used by the City's various development corporations who directly spent money out of the City's "Water and Sewer Enterprise Fund" for the

time period three (3) years prior to commencement of this lawsuit, the applicable statute of limitations, through date of return of those monies.

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



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**ATTORNEYS FOR APPELLANTS**

Columbia, South Carolina

Dated: October 30, 2014

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

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

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

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

Appellants,

vs.

**CITY OF COLUMBIA,**

Respondent.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on the 4th day of November 2014 he/she did serve one (1) copy of the Final Brief of Appellants in this case on counsel for the Respondent by hand delivering the same to the law office of opposing counsel at the following street address:

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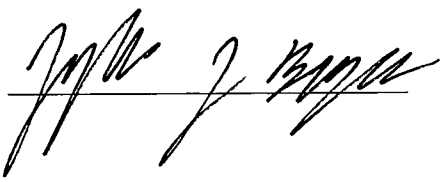
SC Court of Appeals

Dated this 4th day of November 2014 at Columbia, South Carolina.



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## CERTIFICATE OF COMPLIANCE

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The undersigned counsel for Appellants hereby certifies that the Final Brief of Appellants in this case compiles with the provisions of Rule 211(b), *SCACR*.

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