THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal From York County
Court of Common Pleas
John C. Hayes, III, Circuit Court Judge

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Case No. 2009-CP-46-03360

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Robert K. Marshall, Jr., and
Donna Chapman Marshall,
doing business as "Rock Hill Property
Management," a South Carolina
general partnership, . . . . . Appellants,

v.

The City of Rock Hill, South Carolina,
a municipal corporation, Carey F. Smith,
in his capacity as City Manager, and
Lori Thomas, in her capacity as
Customer Services Manager . . . . . Respondents.

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# FINAL BRIEF OF RESPONDENTS

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## STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY ON APPELLANTS' EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS CLAIMS BROUGHT UNDER 42 U.S.C. § 1983?

## STATEMENT OF THE CASE

Appellants Robert K. Marshall and Donna Chapman Marshall d/b/a "Rock Hill Property Management" (collectively, "Appellants") filed this action against the City of Rock Hill, Carey F. Smith and Lori Thomas (collectively, "City").[1] Appellants filed this action for damages and injunctive relief under 42 U.S.C. § 1983 claiming that §§ 29-2 and 29-31 of the Code of Ordinances for the City of Rock Hill (collectively, the "Ordinance") violated Appellants' rights to substantive due process and equal protection under the Fourteenth Amendment of the United States Constitution. (Complaint, R. p. 4, ¶ 23.)

Appellants filed a Motion for Temporary Injunctive Relief seeking to enjoin the City from enforcing the Ordinance. On August 28, 2009, the lower court entered an order denying Appellants' motion for temporary injunctive relief. (Order Denying Injunction, R. p. 9.) No appeal was taken from the Order Denying Injunction.

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[1] Carey F. Smith and Lori Thomas were named in the action solely in their representative capacities on behalf of the City of Rock Hill.

On February 29, 2012, the City filed a Motion for Summary Judgment and a hearing on the motion was held on March 20, 2012. On April 18, 2012, the Honorable John C. Hayes entered an order granting the City's motion for Summary Judgment (the "Order").

## STATEMENT OF FACTS

As with any utility provider, the City is burdened by unpaid utility bills after a utility customer relocates. Unpaid utility charges have a material impact on the public fisc, amounting to over $ 1 million dollars in lost payments to the City per year. (Thomas Aff., R. p. 65, ¶ 3.) The City must choose among the following: 1) attempt to collect these delinquent accounts from the delinquent consumers who used the services; 2) attempt to recover these losses by surcharge to all utility consumers; or 3) charge off these losses against the general fund of the City.

In order to mitigate the losses from utility consumer delinquencies and to recover these losses from the specific consumers that benefitted directly from the consumption of City utilities, the City passed an ordinance requiring delinquent consumers to pay past due account balances prior to receiving utility service at a new location. Specifically, § 29-31(d) of the Code of Ordinances for the City of Rock Hill (the "Ordinance") provides as follows:

> Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered.[2]

The Ordinance provides an important method for the City to collect delinquent utility charges specifically from those customers that have failed or refused to pay for utility services. (Thomas Aff., R. pp. 65-66, ¶ 4, R. p. 66, ¶ 6.)

The Ordinance is patterned on other legal remedies allowed by South Carolina law and by other jurisdictions. Analogous rules can be found in the regulations promulgated by the South Carolina Public Service Commission as well as the statutes governing utility providers in North Carolina.

The Ordinance is enforced uniformly with respect to all persons applying for initial utilities. When a person applies for utilities services with the City for a specific location, that person is required to fill out an application and Customer Service Agreement ("Service Agreement"). (Thomas Aff., R. p. 66, ¶ 7.) The Service Agreement expressly provides that (i) the consumer agrees to pay for all services; (ii) the City may discontinue service if the consumer breaches the agreement; (iii) if service is disconnected for cause, the consumer agrees to pay all outstanding invoices for service to

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[2] "Family" is defined to include all persons living together in a dwelling unit. (Rock Hill Code of Ordinances, § 29-31(e), R. p. 226.)

be restored; and (iv) the agreement is effective at the new address if the consumer moves to another location.

The Service Agreement requires that the applicant identify all other persons residing at the location for which utilities are to be provided (collectively "Consumers"). (Thomas Dep., R. p. 164, p. 16, lines 9-12.) The City checks the designated Consumers for delinquencies. (Thomas Dep., R.p. 164, p. 16, lines 13-15.) If this search reveals a Consumer has a payment delinquency from a previous location, that Consumer is required to pay the delinquency before being permitted to receive utilities at the new location. (Thomas Dep., R. p. 168, p. 31, lines 21-25, p. 32, lines 1-8.)

Appellants commenced this civil action under 42 U.S.C. § 1983 in their collective capacity as "Rock Hill Property Management," a commercial enterprise engaged in the property rental business. (Robert Marshall Dep., R. p. 193, p. 6, lines 7-9.) Pursuant to 42 U.S.C. § 1983, Appellants challenge the Ordinance on equal protection and substantive due process grounds asserting that the Ordinance interferes with their right to rent property to Consumers with unpaid utility charges from a previous location. The tenant who is the subject of Appellants' action is Charles Willis ("Willis"). Willis signed a Service Agreement with the City. (Thomas Aff., R. p. 66, ¶¶ 7, 8.)

On or about May 29, 2009, Willis entered into a lease with Appellants to rent the property located at 1066 Cherokee Avenue in Rock Hill, South Carolina ("Cherokee Property"). (Robert Marshall Dep., R. p. 195, p. 15, line 9.) Willis requested City utilities at the Cherokee Property. (Thomas Aff., R. p. 66, ¶ 11.) Willis was delinquent on his utilities account with the City from his previous residence. (Thomas Aff., R. p. 66, ¶ 9; Robert Marshall Dep., R. p. 215, p. 93, lines 23-25, p. 94, lines 1-2.) Pursuant to the Ordinance, Willis was required to enter into a payment plan to satisfy his delinquencies prior to obtaining utilities at the new location. (Thomas Aff., R. p. 67, ¶ 12.) Willis did not agree to a repayment plan to address his delinquency, and pursuant to the express terms of the Ordinances, utility services were denied at the new location for Willis' occupancy. (Thomas Aff., R. p. 67, ¶ 15.)

Subsequently, Appellants sought to circumvent the Ordinance by requesting that utilities be provided for Willis in the name of Appellants. (Thomas Aff., R. p. 67, ¶ 16.) Pursuant to the Ordinance, Appellants were advised that Willis would have to satisfy the debt or agree to a payment plan to satisfy his debt prior to receiving utilities at the Cherokee Property. (Thomas Aff., R. p. 67, ¶ 17.) It is undisputed that the City did not attempt to hold Appellants liable for

the past due account of Willis, or any other tenant or potential tenant of Appellants. (Thomas Aff., R. p. 67, ¶ 18; Appellants' Answers to Interrogatories, R. p. 86, No. 8.; Robert Marshall Dep., R. p. 204, p. 49, lines 8-10.)

Willis ultimately satisfied his delinquency with the City and the City provided utilities to Willis at the Cherokee Property. (Robert Marshall Dep., R. p. 195, p. 16, lines 13-18.) Appellants evicted Willis for failure to pay rent. (Robert Marshall Dep., R. p. 195, p. 16, lines 24-25, R. p. 196, p. 17, lines 1-5.)

## ARGUMENT

**THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE CITY WITH RESPECT TO APPELLANTS' CONSTITUTIONAL CLAIMS BROUGHT PURSUANT TO 42 U.S.C. § 1983.**

### A. Standard of Review

Summary judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder. Bankers Trust of S.C. v. Benson, 267 S.C. 152, 226 S.E.2d 703 (1976).

"In reviewing the grant of summary judgment, this Court applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925

(2005). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998).

**B. Unappealed Issues; Law of this Case**

"[I]ssues not argued in the appellate briefs are deemed abandoned." Abraham v. Palmetto Unified School Dist. No. 1, 343 S.C. 36, 45, 538 S.E.2d 656, 666 n.3 (Ct. App. 2000)(internal citations omitted). The trial court's unappealed rulings[3] become the law of the case and must be assumed correct as a matter of law. Continental Ins. Co. v. Shives, 328 S.C. 470, 475, 492 S.E.2d 808, 810 (Ct.App.1997).

In this matter, the lower court made the following rulings which have not been appealed and, thus, are the law of this case:

1. "Plaintiffs have failed to plead or identify any fundamental right implicated by the Ordinance." (Order, R. p. 2.)

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[3] Of course, a reply brief cannot be used to expand the issues being challenged in an appeal. Continental Ins. Co. v. Shives, 328 S.C. 470, 474, 492 S.E.2d 808, 811 n.2 (Ct.App.1997).

2. "Any right to utility services for commercial purposes, so far as such right exists, is not a fundamental right guaranteed by either the United States Constitution or that of South Carolina." (Order, R. p. 5.)

3. "[T]he only class regulated by Section 29-2 and 29-31 of the [Rock Hill Code of Ordinances] is the class of 'consumers'." (Order, R. p. 2.)

4. "[A]s Plaintiffs are not consumers, the Ordinance in question does not implicate any rights of Plaintiffs." (Order, R. p. 5.)

5. "[C]onsumers are not a suspect class." (Order, R. p. 2.)

6. "The Ordinance in question is facially neutral and applies equally to persons seeking utilities for a delinquent consumer." (Order, R. pp. 3-4.)

7. "[T]he ordinance in question receives rational basis review." (Order, R. p. 3.)

8. "[T]he Ordinance is rationally related to a legitimate governmental purpose . . . ." (Order, R. p. 4.)

**C. Claims brought pursuant to 42 U.S.C. § 1983**

Appellants filed the underlying action pursuant to 42 U.S.C. § 1983. "The essential elements to be proved in any section 1983 action are (1) that the defendant was acting under color of state law in the actions complained of; and (2) that the defendant deprived Appellants of a right, privilege or immunity secured by the Constitution or laws of the United States." Clark v. Link, 855 F.2d 156, 161 (4th Cir. 1988).

"Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal

rights elsewhere conferred. The first step in any such claim is to identify the specific constitutional right allegedly infringed." Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807 (1994). "If there is no violation of a federal right, there is no basis for a section 1983 action . . . ." Clark, 855 F.2d at 161.

As set forth in the Complaint and as argued to the lower court, Appellants articulated two specific constitutional rights to form the basis of their § 1983 claim. The two constitutional rights argued below and preserved for this appeal are equal protection and substantive due process under the Fourteenth Amendment of the United States Constitution.[4] The trial court properly determined that Appellants' § 1983 claims fail as a matter of law because the record was void of any evidence to establish that the City violated either of these rights, as more fully set forth herein.

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[4] Equal protection and substantive due process were the sole grounds raised to and ruled upon by the trial court. (Order, R. pp. 1-5.) Appellants did not file any post-trial motion. Therefore, the only grounds preserved for this appeal are equal protection and substantive due process. Chastain v. Hiltabidle, 381 S.C. 508, 514-15, 673 S.E.2d 826, 829 (Ct. App. 2009)(observing that "[i]t is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court" and that "[w]hen an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion").

## D. Summary Judgment was proper with respect to Equal Protection claim

The lower court correctly granted summary judgment as to the Equal Protection argument. "The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. This simply means that no person, or class of persons, shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." City of Beaufort v. Holcombe, 369 S.C. 643, 647-48, 632 S.E.2d 894, 897 (Ct. App. 2006). If a classification does not (1) implicate a "fundamental right" or (2) draw upon suspect classifications such as race, religion or alienage, an ordinance must only be rationally related to a legitimate governmental purpose. Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 820 (4th Cir. 1995).

### 1. Burden of Proof; Failure to Appeal

The appropriate standard to be applied to the Ordinance is mere rationality. Appellants concede mere rationality is the correct standard. (Initial Brief of Appellants, p. 21.) Moreover, Appellants' have not challenged the trial court's finding that (1) that the Ordinance does not implicate a "fundamental right" or draw upon a suspect classification or (2) that the Ordinance is rationally related to a legitimate governmental purpose. (Order, R. pp. 2-3.) The Appellants

have the burden of proof as to these critical elements. Town of Hollywood v. Floyd, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). Not only did Appellants not satisfy their burden of proof in the lower court, but Appellants have not preserved these issues in this appeal. Therefore, the lower court's grant of summary judgment as to Equal Protection should be affirmed.

**2. No Fundamental Right**

Even if the foregoing were insufficient to warrant affirmation of the summary judgment, Equal Protection jurisprudence as applied to this record supports the lower court's Order. "[A] classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Armour v. City of Indianapolis, Ind., 132 S. Ct. 2073, 2080 (2012).

Appellants have articulated no basis or precedent for the proposition that utility service from a municipality in South Carolina to a delinquent consumer is a fundamental right under the Constitutions of the United States or South Carolina. Rights that qualify as "fundamental rights" are extremely limited by federal and state courts alike. Washington v. Glucksberg, 521 U.S. 702, 722 (1997)(stating the general rule

that a "fundamental right" is one that is "deeply rooted in this nation's history and tradition"); State v. Thompson, 349 S.C. 346, 354, 563 S.E.2d 325, 329-30 (2002)(stating that "[t]he fundamental rights which usually are protected by heightened scrutiny are personal rights such as the rights to vote, marry, procreate, etc., and these rights are very different from the right to protect one's property, which essentially is an economic right").

At no point in the proceedings below did Appellants specifically articulate or even loosely describe the nature of the right allegedly infringed by the Ordinance. Based on the record, the trial court classified the right asserted by Appellants as "a constitutional right to the unregulated provision of utilities to a delinquent consumer in order that Plaintiffs may rent their property to that delinquent consumer." (Order, R. p. 2.; see Robert Marshall Dep., R. p. 211, p. 79, lines 6-12 (stating that he believes he has a constitutional right to rent to any person except to an escaped convict or a person wanted for murder).) The trial court correctly ruled that the federal constitution does not provide Appellants with a substantive right to obtain utilities for commercial purposes. (Order, R. pp. 2, 5.)

Even looking beyond the commercial nature of the right at issue in this case, the right to utilities in any context is

not recognized as a substantive right. Courts have held that the expectation of utility services "does not transform that expectation into a substantive guarantee against the state in any circumstance." Ransom v. Marrazzo, 848 F.2d 398, 412 (3d Cir. 1988)(holding that "[t]he provision of water and sewer services, whether by a municipality or by a private utility company, is not, however, a federally protected right."); see also Mansfield Apartment Owners Ass'n v. City of Mansfield, 988 F.2d 1469, 1477 (6th Cir. 1993); Chatham v. Jackson, 613 F.2d 73 (5th Cir.1980).

**3. No Suspect Classification**

The trial court also properly determined that the Ordinance does not draw upon a suspect classification. (Order, R. p. 2.) "Courts traditionally apply strict scrutiny analysis for suspect classifications based on race, alienage, national origin, sex or illegitimacy." In re Treatment & Care of Luckabaugh, 351 S.C. 122, 148, 568 S.E.2d 338, 351 (2002)(holding that mental illness is not a suspect classification); City of Beaufort v. Holcombe, 369 S.C. 643, 647-48, 632 S.E.2d 894, 897 (Ct. App. 2006)(finding that a "landlord" is not a suspect classification).

In this case the class regulated by the Ordinance is that of consumers of utilities services. This classification does not fall within one of the enumerated categories entitling a

claimant to heightened constitutional scrutiny.[5] Moreover, Appellants have offered no argument at the trial court level or on appeal that Appellants should be entitled to heightened judicial review. Because the Ordinance does not implicate a fundamental right of Appellants or draw upon a suspect class, the Ordinance is subject to rational basis review. Town of Hollywood v. Floyd, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013).

**4. Ordinance passes Rational Basis test**

The Order should be affirmed because the Ordinance passes the rational basis standard. There are three steps in determining whether an ordinance survives rational basis scrutiny under the Equal Protection Clause: (1) whether plaintiff was treated differently than others similarly situated; (2) whether defendant intentionally discriminated against plaintiff and had a rational basis for doing so; and (3) whether the discrimination/classification bears a rational relationship to a legitimate government purpose or goal. Bibco Corp. v. City of Sumter, 332 S.C. 45, 52-53, 504 S.E.2d

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[5] See Denene, Inc. v. City of Charleston, 359 S.C. 85, 93-94, 596 S.E.2d 917, 921 (2004)(citing the Supreme Court in describing a "suspect class" as a class "saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process")

112, 116 (1998). Moreover, the courts grant legislative bodies substantial deference with respect to this analysis:

> A legislative enactment will be sustained against constitutional attack if there is any reasonable hypothesis to support it. The Court must give great deference to a legislative body's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue. Furthermore, the classification does not need to completely accomplish the legislative purpose with delicate precision in order to survive a constitutional challenge. When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.

Sloan v. S. Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 480-81, 636 S.E.2d 598, 613 (2006).

In this case, the Ordinance is facially neutral and applies equally to all persons seeking utilities for a delinquent Consumer. All applicants for utility service have to complete the Customer Service Agreement and disclose the Consumers to reside at the location. Irrespective of the identity of the applicant, the Ordinance prevents a delinquent Consumer from receiving utilities at a new location without redressing the prior delinquency.

Moreover, the record is void of any evidence that persons similarly situated to Appellants received disparate treatment

under the Ordinance. Appellants do not dispute this point and have introduced no evidence to the contrary. (Appellants' Answers to Interrogatories, R. p. 86, No. 8; Robert Marshall Dep., R. p. 214, p. 89, lines 7-25, p. 90, line 1; Donna Marshall Dep., R. p. 222, p. 7, lines 3-8.)

Given this case invokes the lowest threshold of review (mere rationality), the governmental purpose need only be hypothetical to pass muster. The governmental purpose of the Ordinance easily exceeds this minimal standard. The rationale is manifest, and fair. Rather than forcing all utilities consumers or the general public fisc to pay or absorb unpaid delinquent utility accounts, the Ordinance focuses the burden on those individuals who are directly benefitted from the consumption of the utilities. Any notion that a municipality lacks such latitude is misplaced. See Sloan v. City of Conway, 347 S.C. 324, 331, 555 S.E.2d 684, 687 (2001)(rejecting claim of unconstitutional disparate treatment where higher rates were charged to non-residents because Court found reasonable hypothesis in government's attempt to improve the condition of the public fisc); S.C. Code Ann. § 5-7-30 (1976)(codifying Home Rule general police powers).

**E. Summary judgment was proper with respect to Substantive Due Process claim**

The Order should be affirmed because summary judgment is proper as to substantive due process. In a substantive due

process challenge to a legislative act, the following legal analysis applies:

> The first step in this process is to determine whether the claimed violation involves one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. The next step depends for its nature upon the result of the first. If the asserted interest has been determined to be 'fundamental' it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. If the interest is determined not to be "fundamental" it is entitled only to the protection of rational-basis judicial review.

Hawkins v. Freeman, 195 F.3d 732, 739 (4th Cir. 1999)(internal citations omitted).

**1. Material Findings unchallenged on Appeal**

The trial court properly ruled that Appellants' substantive due process challenge to the Ordinance fails as a matter of law. Important to the trial court's ruling was that Appellants failed to plead or identify any fundamental right implicated by the Ordinance and that the Ordinance was rationally related to a legitimate governmental purpose. (Order, R. pp. 4-5.) Appellants had the burden of establishing each of these elements in the record to overcome the presumption of the constitutionality of the Ordinance. Appellants have not challenged either of these findings by the

lower court. Accordingly, the trial court's grant of summary judgment should be upheld on these grounds alone.

**2. No Fundamental Right**

The critical component of any substantive due process claim is that the claimant must set forth with specificity the liberty right or interest that is allegedly being violated.[6] If the right asserted by a claimant is not a "fundamental right" "deeply rooted in this nation's history and tradition, the legislative act must only be rationally related to a legitimate governmental purpose." Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

The discussion regarding the scope and treatment of a "fundamental right" in the realm of equal protection applies equally to this discussion regarding a claim grounded in substantive due process. Similar to equal protection, Appellants have failed to identify and introduce into the record any right that may be considered a fundamental right

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[6] As explained by the Fourth Circuit: "The first step in that fundamental-rights-based process is to make a careful description of the asserted liberty right or interest that avoids overgeneralization in the historical inquiry." Hawkins v. Freeman, 195 F.3d 732, 747 (4th Cir. 1999)(holding that plaintiff's description of fundamental right as one to "freedom from unjust incarceration" was overbroad and improper under the facts of the case). See also, Reno v. Flores, 507 U.S. 292, 302 (1993)(stating that "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field").

for purposes of substantive due process. Thus, the trial court properly held that any right to utility services for commercial purposes would not qualify as a fundamental right. Appellants have not set forth any authority to support a contrary finding. Hence, the Ordinance is subject to rational basis review.

**3. Ordinance passes Rational Basis Test**

The lower court properly determined that the Ordinance satisfies the mere rationality standard. Pursuant to the rational basis test for substantive due process challenges "legislation is not overturned unless the law has no rational relationship to any legitimate interest of government." Fraternal Order of Police v. S. Carolina Dep't of Revenue, 352 S.C. 420, 433-34, 574 S.E.2d 717, 724 (2002). "A municipal ordinance is a legislative enactment and is presumed to be constitutional." City of Beaufort v. Holcombe, 369 S.C. 643, 649, 632 S.E.2d 894, 897 (Ct. App. 2006). Accordingly the burden of proof was on the Appellants' to prove the Ordinance is unconstitutional. In re Treatment & Care of Luckabaugh, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002); Armour v. City of Indianapolis, Ind., 132 S. Ct. 2073, 2080-81 (2012)(stating "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it").

In this case Appellants have failed to offer any evidence suggesting that the Ordinance is not rationally related to a legitimate governmental purpose. Moreover, as specifically detailed in the City's discussion with respect to the equal protection claim, the record demonstrates a rational basis between the Ordinance and the economic burden which the Ordinance was designed to redress. Accordingly, the trial court's grant of summary judgment was appropriate.

**F. Appellants' arguments are unavailing**

Appellants' arguments are unavailing for multiple reasons. First, Appellants ignore constitutional principles which guide and control any judicial challenge to a legislative ordinance. Second, Appellants ignore authority from South Carolina and North Carolina. Third, Appellants' arguments lack any foundation in South Carolina law and the extraneous legal principles cited by Appellants have no bearing on this matter. Fourth, Appellants' citation to authority from the Fifth Circuit is misplaced and actually supports affirmation of the Order.

**1. Appellants' argument disregards constitutional jurisprudence**

Appellant's arguments ignore the constitutional legal principles which control any challenge to a legislative act. Attacks on legislative action are subject to constitutional guidelines. Sloan v. S. Carolina Bd. of Physical Therapy

Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006). The trial court properly applied these constitutional principles in its analysis of the Ordinance and in the granting of summary judgment. However, Appellants entirely disregard their burdens of proof and the elements necessary to warrant a judicial invalidation of a legislative act.

**2. Appellants' argument ignores parallel authority from South Carolina and North Carolina**

Appellants' arguments fail to account for South Carolina and North Carolina authority which support affirmation of the Order. Appellants claim repeatedly that there exists a general, enforceable proscription barring any refusal of utility service to a consumer on account of that consumer's unpaid prior debt. Appellants do not explain how their mantra reconciles with inapposite South Carolina and North Carolina law.

The Ordinance is analogous to the regulations promulgated by the South Carolina Public Service Commission, which provide as follows:

> No electrical utility shall be required to furnish its service or to continue its service to any applicant who, at the time of such application, is indebted or any member of his household is indebted, under an undisputed bill to such electrical utility for service previously furnished such applicant or furnished any other member of the applicant's household. However, for the purposes of this regulation, the electrical utility may not consider any indebtedness which was incurred by the

applicant or any member of his household more than six years prior to the time of application.

26 S.C.Code Ann.Regs. 103-342(k). Additionally, the regulations provide regulated utilities even greater rights in that an "electrical utility may terminate a consumer's service should the consumer be in arrears on an account for service at another premise." 26 S.C.Code Ann.Regs. 103-342(l).[7] See Haynsworth v. S. Carolina Elec. & Gas Co., 488 F. Supp. 565, 566 (D.S.C. 1979)(finding that denying wife's application for utility services at new location on account of arrearage in husband's name at previous location did not constitute unlawful discrimination under Equal Credit Opportunity Act).

The South Carolina Supreme Court has considered this general issue and did not create a common law duty described by Appellants. De Pass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325 (1934). Rather, De Pass supports the City's denial of service to a former consumer at a new location when that consumer has a delinquent account from a prior location.[8]

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[7] Similar provisions for water and sewer utilities are set forth at 26 S.C.Code Ann. Regs. 103-735(M),(N) and 26 S.C.Code Ann.Regs. 103-535(L), (M).

[8] By way of preface, it should be noted that courts have upheld the right to terminate utility service for nonpayment. See Gilbert v. Duke Power Co., 255 S.C. 495, 500, 179 S.E.2d 720, 722 (1971)(holding a "public service company has the right to discontinue its service to the consumer upon the nonpayment by the consumer of recent and just bills for the service furnished him, and has, also, the right to refuse a further supply of electricity until those bills are paid").

In De Pass, the supreme court ruled that a utility company may discontinue utility services for past due bills regardless of the address at which rendered. The consumer in De Pass applied for utility service at his residence but was refused service until he paid a prior balance at two other locations. The Supreme Court stated that "we see no real difference between the right of a utility company to discontinue service of a certain kind or type, on account of the consumer's failure to pay a past-due bill which is just and undisputed . . . and its right to refuse, for the same reason, *to furnish at another place*, and under a similar contract, upon demand of such consumer, the same kind or type of service." Id.

South Carolina is not alone on this issue. Likewise, North Carolina statutes permit a city to "suspend or disconnect service to a consumer because of a past-due and unpaid balance for services incurred by another person who resides with the consumer [where] the consumer and the person were members of the same household at a different location when the unpaid balance for service was incurred" or "the person was a member of a consumer's current household at a different location when the unpaid balance for service was incurred." N.C. Gen. Stat. § 160A-314.

### 3. Appellants' arguments lack foundation

Appellants' arguments lack proper foundation in controlling legal principles, which perhaps might be expected given the purpose and biased perspective of the source from which these arguments were drawn.[9] Appellants' arguments are not based on South Carolina law. Appellants' arguments are not based on Federal Constitutional law. Appellants' arguments are not based on the persuasive law from any sister jurisdiction. Rather, Appellants parrot the flawed premise that a utilities provider has a common law duty "to provide service for all who request service and are willing to pay for it." (Appellants' Initial Brief, p. 10.) Appellants' repeatedly refer to this "duty to serve" as if it were a hoary legal principle recognized by the courts of South Carolina. However, there is no South Carolina authority supporting, clarifying, or even discussing Appellants' legal theory.

In their sole reference to South Carolina authority for this issue, Appellants incorrectly cite Gwynette v. Myers, 237 S.C. 17, 115 S.E.2d 673 (1960), *overruled by* R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 338 S.C. 475, 527

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[9] Appellants' concede that the sole authority used for their brief is Access to Public Utilities, a text published by the National Consumer Law Center. (Appellants' Initial Brief, p. 8, fn. 1). See National Consumer Law Center, Access to Utility Service (5th ed. 2011). This secondary source appears to be the sole source of Appellants' legal theory.

S.E.2d 763 (2000). However, Gwynette does not stand for the proposition for which it is proffered by Appellants.[10] Appellants' citation to Gwynette is misplaced and Gwynette has no application to this matter.

**4. Appellants' reliance on precedent from the Fifth Circuit Court of Appeals is misplaced**

Appellants' attempt to rely on Davis v. Weir, 497 F.2d 139, 144 (5th Cir. 1974), *distinguished by* Chatham v. Jackson, 613 F.2d 73, 80 (5th Cir. 1980), is misplaced. As aptly conceded by Appellants, (Appellants' Initial Brief, p. 17), the Davis decision is limited to the particular facts of that case and then curtly distinguished by the Fifth Circuit in Chatham v. Jackson, 613 F.2d 73, 80 (5th Cir. 1980). The Davis court adjudicated what it described as "[a] collection scheme . . . that divorces itself entirely from the reality of legal accountability for the debt involved . . . ." Davis, at 144-45.

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[10] The fleeting reference to public utilities in Gwynette was set forth in the context of the, now expressly overruled, "public interest" test that the courts previously used to determine when the state could regulate the price of the sale of goods or services in private business. Gwynette v. Myers, 237 S.C. 17, 115 S.E.2d 673 (1960)(finding that the state could not regulate the price of milk). This "public interest" test for price regulation was expressly overruled in R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000)(holding that all substantive due process challenges are subject to rational basis review).

However, when presented facts more similar to the facts in this matter, the Fifth Circuit rejected the Davis holding. In Chatham, the issue before the court was "whether the city may terminate water service to a landlord when the tenant's bills are delinquent." Chatham, 613 F.2d at 75. The Chatham court found that no fundamental right of the landlord was implicated. The court found "constitutional the City of Atlanta's policy of terminating water services to a property owner whose tenant has become delinquent in paying its water bill." Chatham, 613 F.2d at 81. See also Ransom v. Marrazzo, 848 F.2d 398(3rd Cir.1988)(requiring that new occupants of location be responsible for prior utility services at that location); DiMassimo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1986) (requiring landlord acknowledgment and responsibility for tenant utility services); Mansfield Apartment Owners Association v. City of Mansfield, 988 F.2d 1469 (6th Cir. 1992)(requiring landlord to satisfy past due services rendered to tenants prior to obtaining new service).

The Ordinance before this Court has less reach and more readily passes the low constitutional threshold of mere rationality than the ordinances at issue in Davis or Chatham. Unlike the ordinance upheld as constitutional in Chatham, the Ordinance in this case does not seek to hold the landlord (Appellants) liable for any tenant delinquency. Rather,

liability under the Ordinance affects and follows only Consumers with delinquencies. In this way, the Ordinance is narrowly tailored to link the burden to the benefit in that only those consumers with delinquencies are affected. Moreover, the Ordinance does not shift or expand liability beyond the actual consumers of the utility for which the debt was incurred.

## CONCLUSION

For the reasons stated above, the Order should be affirmed and this appeal dismissed with prejudice.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal From York County
Court of Common Pleas
John C. Hayes, III, Circuit Court Judge

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Case No. 2009-CP-46-03360

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Robert K. Marshall, Jr., and
Donna Chapman Marshall,
doing business as "Rock Hill Property
Management," a South Carolina
general partnership, . . . . . Appellants,

v.

The City of Rock Hill, South Carolina,
a municipal corporation, Carey F. Smith,
in his capacity as City Manager, and
Lori Thomas, in her capacity as
Customer Services Manager . . . . . Respondents.

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## CERTIFICATE OF COUNSEL

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The undersigned counsel hereby certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

Date: 3/11/14

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**PROOF OF SERVICE**

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I certify that the foregoing Final Brief of Respondents and Certificate of Counsel have been served by depositing copies thereof in the United States Mail, postage prepaid, on March 11, 2014, addressed to:

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