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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

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

Case No. 2011-CP-40-6705

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

v.

CITY OF COLUMBIA, ...RESPONDENT.

RESPONDENT CITY OF COLUMBIA'S PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Respondent City of Columbia petitions the Court for a rehearing of its opinion filed September 9, 2015. The City respectfully submits that this Court overlooked or misapprehended the following points.

1. THIS COURT MISAPPREHENDED OR OVERLOOKED PROPER CONSTRUCTION OF S.C. CODE ANN. § 6-1-330(B).

S.C. Code Ann. § 6-1-300(6) defines "service or user fee" as "a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee," and "also includes 'uniform service charges.'" State law apparently recognizes two categories of revenue sources for local governments - fees and taxes. Utility

charges are not a tax. *Ruggles v. Padgett*, 240 S.C. 494, 510, 126 S.E.2d 553, 561 (1962); *Simons v. City Council of Charleston*, 181 S.C. 353, 358, 187 S.E. 545, 547 (1936). Since utility charges are not a tax and given the lack of existing law providing a clear distinction between a utility charge and a fee, the City had no alternative but to concede to their status as a "service or user fee" under Section § 6-1-300(6) in light of the posture of this case. Even so, this Court overemphasizes the City's concession that its utility charges for monthly water and sewer service falls under the statutory definition of a "service or user fee" under Section § 6-1-300(6) because simply meeting this definition is not conclusive as to whether S.C. Code Ann. § 6-1-330(B) applies to utility revenues. The City did not concede at all that Section § 6-1-330(B) applies to utility revenues.

S.C. Code Ann. § 6-1-330(B) states that "the revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid." This section creates a limitation on use of revenue derived from a service or user fee "imposed to finance the provision of public services." Yet in framing the issue, this Court left out this phrase entirely, stating that "the obvious question becomes: where section § 6-1-330(B) plainly states that revenues from service or user fees 'must be used to pay costs related to the provision of the service or program for which the fee was paid,' how does the City justify using service and user fee revenues for purposes unrelated to the provision of water and sewer fees?" Shearouse Advance Sheet No. 35 at 64 (September 9, 2015). The legislature could have crafted section § 6-1-330(B) to say that the revenue derived from a service or user fee must be used to pay costs related to the provision of the service or program, but it did not. The legislature included a qualifying phrase, making subsection (B) applicable to

those service or user fees "imposed to finance the provision of public services." This phrase must mean something, yet his Court's analysis reads the phrase out of the statute. "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplus age, or superfluous . . . ." *State v. Smith (In re Decker)*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). This Court did not construe S.C. Code Ann. § 6-1-330(B) in light of the complete sentence at issue, leaving the City without any real answer as to whether or how this statute applies to net revenues derived from its utility.[1]

2. THIS COURT OVERLOOKS AND MISAPPREHENDS THE EXISTING STATUTORY SCHEME AND CASE LAW GOVERNING MUNICIPAL UTILITIES AND FAILS TO CONSTRUE S.C. CODE ANN. § 6-1-330(B) IN LIGHT OF THIS LAW.

Notably absent from this Court's opinion is the legal scheme directly applicable to municipal utilities. The South Carolina Constitution grants municipalities and counties a specific right to acquire and operate a water and sewer utility. S.C. Const. art. VIII, § 16. In furtherance of this right, the General Assembly enacted statutes specifically relating to municipal utilities. Under S.C. Code Ann. § 5-31-670, "[a]ny city or town or special service district may, after acquiring a waterworks or sewer system, furnish water to persons for reasonable compensation and charge a minimum and reasonable sewerage charge for maintenance or construction of such sewerage system within such city or town or special service district." By its express language, S.C. Code Ann. § 5-31-570 states that sewer charges are intended to pay for maintenance and construction of a sewer utility. In *Simons*

[1] This Court dismissed out of hand the City's interpretation of the phrase "imposed to finance the provision of public services," rejecting the City's argument that the City does not "impose" its utility on people. This Court described the City's argument as an "unsupported premise" that water and sewer contracts are "freely entered into by resident and non-resident consumers." This Court cites to the International Property Maintenance Code adopted by section 5-151 of the Columbia City Code to refute the City's argument, but the International Property Maintenance Code, as well as the International Plumbing Code, only applies within the City's corporate limits, not outside its corporate limits, and simply requires household plumbing to be connected to a water and sewer utility where available, or to a well or septic tank. It does not require property owners to become customers of the City's utility.

v. City Council of Charleston, this Court extended the same common sense notion that revenues derived from water utilities go toward paying for the operation and maintenance of the water utility. 181 S.C. 353, 357, 187 S.E. 545, 547 (1936). In addition, any municipality issuing revenue bonds is required to charge rates "sufficient to provide for ... the payment of the expenses of administration and operation and such expenses for maintenance of the system ...." S.C. Code Ann. § 6-21-390. Consequently, this Court's sweeping assertion that, without the application of S.C. Code Ann. § 6-1-330(B), cities would be free to spend their utility revenues without regard for the upkeep of its utility, is unfounded.

In addition to use of utility revenues to pay for operation and maintenance of a utility, this Court has repeatedly held that municipal utilities are entitled to charge rates that include a return on investment, or profit. *Sossomon v. Greater Gaffney Metro Utilities Area*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960); *Simons v. City Council of Charleston*, 181 S.C. 353, 358-359, 187 S.E. 545, 547 (1936); *Green v. City of Rock Hill*, 149 S.C. 234, 264, 147 S.E. 346, 357 (1929). "Profit" is defined as "excess of revenues over expenditures in a business transaction." BLACK'S LAW DICTIONARY, p. 1404 (10th ed. 2014). In determining the needs of its utility, the City relies on rate studies, typically prepared every five years, that take into account operation and maintenance costs, capital improvement costs, and a return on investment.[2] *See* R. pp. 1382-1383, 1389-1390. Thus, municipal utility rates build in surplus revenues, assuming that revenue projections are accurate.

[2] For this reason, this Court's assumption that the City's budgeted transfer "does not seem to be impacted by any sort of periodic determination of the measurable, actual costs attributable to the water and sewer system" is incorrect. Shearouse at 69. Further, contrary to this Court's assumption that the City's transfer occurs without determining whether a surplus actually exists, the City has in the past reduced the transfer amount due to an insufficient surplus of revenues. R. p. 694, lines 2-14.

For utility customers residing within the corporate boundaries of a city, utility rates, including anticipated profits, must be reasonable. S.C. Code Ann. § 5-31-670. For nonresident customers, cities may "enter into a contract ... to furnish such person electric current or water from such water or light plant of such city or town and may furnish such water or light upon such terms, rates and charges as may be fixed by the contract or agreement between the parties in this behalf ...." S.C. Code Ann. § 5-31-1910. No rule of reasonableness applies to nonresident charges. If the City chooses to provide service to nonresidents, this Court has held that the City is obligated "to sell its surplus water for the sole benefit of the city at the highest price obtainable."[3] *Childs v. City of Columbia*, 87 S.C. 566, 571, 70 S.E. 296, 298 (1911); *Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 686 (2001). A city's rate to non-resident water customers that generates revenue greater than the cost of service for the purpose of raising revenue to meet increasing municipal needs is a legitimate governmental goal. *Sloan*, at 330, 687, fn. 10. The City's revenues derived from nonresident water and sewer customers totaled approximately $64.1 million dollars in FY 2008/2009, $66 million dollars in FY 2009/2010, and $65.7 million dollars in FY 2010/2011, which more than covers the expenditures Appellants complain of. R. p. 931, § 11.

Municipal utilities are treated the same as any other public utility, such as private wastewater utilities and South Carolina Electric & Gas Company. *Sossomon v. Greater Gaffney Metro Utilities Area*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960); *Simons v. City Council of Charleston*, 181 S.C. 353, 358-359, 187 S.E. 545, 547 (1936). Public utilities are entitled to a return on their investment in utility infrastructure; they exercise

[3] Pursuant to 1971 S.C. Acts 474, § 1, the City is prohibited from raising rates for water service to nonresident customers more than double that of residents' rates.

rights as a property owner, i.e., their proprietary interests in deriving a return on investment, or profit, from selling a commodity delivered through its infrastructure. *Sossamon*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960) (..."the operation of a water works system is a function undertaken by a municipality in its private or proprietary capacity."); *Simons*, 181 S.C. 353, 357, 187 S.E. 545, 546 (1936) ("The municipal corporation in its private proprietary and essentially business or commercial aspect acts as a property owner and may exercise its business powers very much in the same manner as a private individual or corporation."). While municipal utilities do not have shareholders like privately-owned public utilities, the citizens residing within cities are the beneficiaries of their municipal utilities. *See* S.C. Code Ann. § 5-31-610(A) ("Any city or town may: (1) Construct, purchase, operate and maintain waterworks ... for the use and benefit of such city or town and the inhabitants thereof."). (emphasis added). Recognizing this fact, cities, including the City of Columbia, commonly transfer a portion of their utility's net revenues to the general fund in order to avoid property tax increases, thereby conferring a benefit upon city residents realized through the city's business enterprise.

Moreover, a municipality is afforded broad discretion in how it chooses to operate its utility. *See Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 426, 593, S.E.2d 462, 468 (2004) (stating that "the decision whether to grant a sewer extension request generally must be left to the sound discretion of municipal leaders ...."); *Sossamon v. Greater Gaffney Metro Utilities Area*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960) (stating that cities have right to determine how to use their surplus water). City Council has the discretion to determine what expenditures it will need to make to keep its utility in working order. *See Green v. City of Rock Hill*, 149 S.C. 234, 262, 147 S.E. 346, 356 (1929) (stating that in

operating and maintaining its property, city "has discretion in the choice of means and methods."). Inextricably connected to the operation of a municipal utility is the City Council's legislative power to set rates and adopt budgets for its utility.[4] Adoption of budgets and their revenue generating mechanisms are quintessentially legislative functions generally left to the discretion of the local governing bodies. S.C. Code Ann. § 6-1-80; S.C. Code Ann. § 6-1-320. This Court "cannot casually insinuate itself into the legislative process." *Lurey v. Laurens*, 265 S.C. 217, 222, 217 S.E.2d 226, 228 (1975). Revenue streams derived from property taxes and fees are calibrated to meet the funding of annual budgets. In other words, local government cannot divorce decisions concerning the amount of fees to be charged from its budget determining how its revenues will be spent. This Court overlooks this plain reality by ignoring the relationship between the law specific to utility charges and how municipalities use revenues derived from utility charges.

Furthermore, the City's operation of its utility in a business or proprietary capacity is more than an accounting concept as this Court mistakenly characterizes. Shearouse Advance Sheet at 65, fn. 4 (citing to Codification of Accounting Standards and Procedures 1300.109(b)). In footnote 4 of its opinion, this Court seems to dismiss the significance of enterprise funds and assume that they serve as nothing more than a repository for fees as opposed to taxes. Service or user fees are treated differently depending on whether they are intended to be treated as a proprietary activity. For example, in 2011, the City's general fund for government activities included $53,502,663.00 generated from charges for

[4] *See* R. p. 693 (Former City Finance Director testifying that "[b]y state law you would have to match your revenue to your expense. ... you work on your revenue and then you fit your line items within the sources of funds that you have available. R. p. 693, line 20 - p. 694, line 1. The $4.5 million transfer is made in monthly installments so long as the monthly transfer does not create any deficit in the water and sewer fund and complies with state law and the City's 1993 Resolution governing transfers. R. p. 689, line 22 – p. 690, line 24.

services. R. 953. This revenue was deposited in the City's general fund because the services the City provided in return for a fee did not involve a business-like activity. As the City's former Finance Director explained, "governmental funds are those that are not handled for profit." R. 697, lines 16-19. In contrast, the City's utility is treated like a business function because it sells a commodity or good with the intent to realize a return on its investment. R. 958 (City Comprehensive Annual Financial Report explaining that City's enterprise funds are used for business-like functions where City "sells" a good or service). Municipal utility charges are billed for a customer's consumption of a commodity with the expectation of revenues that exceed the costs of the utility, or profit. R. p. 733 line 22 – p. 734 line 13. Thus, the City has not "vastly overstated" the significance of the proprietary nature of municipal utilities; rather, this Court, with all due respect, does not understand municipal finance. This Court's mistaken view that municipal business activities are illusory would upend basic municipal accounting and budgeting practices to the detriment of municipalities, all of which rely on profits made from their utilities to partially fund their general government operations.

The City repeats and further explains the constitutional, statutory and case law governing municipal utilities because this Court failed to consider this law when it rendered its opinion in this case. The General Assembly is "presumed to enact legislation with reference to existing law, and there is a strong presumption it does not intend, by statute, to change common law rules." *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 483, 517 S.E.2d 235, 238 (Ct. App. 1999). "Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." *16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012). "If [a] statute is

in derogation of a common law right, it must be strictly construed and not extended in application beyond clear legislative intent." *Id.*

Read in light of existing municipal utility law, S.C. Code Ann. § 6-1-330(B) cannot be construed to eliminate the right of municipalities to operate their utility to make a profit. Notably, the plain language of S.C. Code Ann. § 6-1-330(B) simply requires that 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." Assuming for this purpose of this argument, but not conceding that S.C. Code Ann. § 6-1-330(B) applies to any or all utility charges, the City does use its utility revenues to pay costs related to its utility. S.C. Code Ann. § 6-1-330(B) says nothing about net revenues left after utility expenses are paid. In contrast, other provisions of the South Carolina Code which were enacted by Act 138 of 1997 used restrictive language. For example, under provisions within Act 138 authorizing a local accommodations tax and a local hospitality tax, the legislature directed that the revenue generated by these taxes "must be used exclusively for [certain specified] purposes." 1997 S.C. Acts 138, § 6-1-520 and § 6-1-730 (emphasis added). In the absence of any language within S.C. Code Ann. § 6-1-330(B) prohibiting use of any net revenues or profit remaining after the costs and obligations of the utility are paid, S.C. Code Ann. § 6-1-330(B) should be construed as not prohibiting the City's use of net revenues however it wishes. *See Thompson v. County of Horry*, 294 S.C. 81, 84, 362 S.E.2d 646, 648 (Ct. App. 1987) ("The Legislature could easily have restricted the use of county (C) funds in the manner argued for by the Community Associations. It need only have provided that the revenues be spent "exclusively" in the "unincorporated areas" of the county in which the proceeds of the tax are collected."). The South Carolina Constitution

requires this Court to construe S.C. Code Ann. § 6-1-330(B) liberally in the City's favor. S.C. Const. art. VIII, § 17. This Court did not do so.

Any concern this Court may have that the City's arguments, if accepted, would result in rendering S.C. Code Ann. § 6-1-330(B) meaningless is unfounded. Utility charges are unique among local government fees due to the constitutional grant of the right to own and operate a utility, the statutory scheme expressly pertaining to utilities, and a century of case law that entitles municipalities to generate more revenues than expenditures. No other type of fee shares the same characteristics as utility charges. And many fees are not enacted pursuant to S.C. Code Ann. § 6-1-330, but rather, from a myriad of other statutes delegating authority to adopt a particular fee to be used to pay the costs of the service.[5] Assuming that local governments would abuse their legislative discretion to enact fees and use those revenues irresponsibly conflicts with the long held presumption that local governing bodies obey the law. *Cox v. Bates*, 237 S.C. 198, 116 S.E.2d 828 (1960) ("It is presumed that the county authorities will observe the law."); *Stone v. City Council*, 113 S.C. 407, 102 S.E. 755 (1920) ("The discretion is vested in council by law, and they are not to be controlled in its exercise by the citizens, and not even by the Courts, provided they act within the law, and it will always be assumed that they will so act, until the contrary is made to appear.").

[5] *See e.g.* S.C. Code Ann. § 4-10-970 ("Except as provided in item (2) of this subsection, all revenues and interest of the fee must be used exclusively for tourism advertisement and promotion directed at non-South Carolina residents"); S.C. Code Ann. § 4-19-10 (j) (granting authority to "place into effect and to revise, whenever it so wishes or may be required, a schedule of rates and charges for the furnishing of fire protection services within each service area."); S.C. Code Ann. § 6-1-930(B)(2) ("The amount of the development impact fee must be based on actual improvement costs or reasonable estimates of the costs, supported by sound engineering studies."); S.C. Code Ann. § 6-1-630 ("The governing body of a qualified coastal municipality by ordinance, subject to a referendum, may impose a beach preservation fee not to exceed one percent.").

3. THIS COURT OVERLOOKED THE CITY'S ARGUMENT THAT S.C. CODE ANN. § 6-1-330(B) DOES NOT APPLY TO REVENUES DERIVED FROM NONRESIDENTS.

This Court overlooked or misapprehended clear authority and rationale supporting the City's argument that S.C. Code Ann. § 6-1-330(B) does not apply to revenues derived from nonresident customers. As explained above, nonresident water and sewer charges are governed solely by contract.[6] Nothing in the City's contract with nonresidents limits the City's discretion in how collected utility charges are used. A statutory limitation on how a municipality uses revenues derived from nonresident customers applies only if the statute expressly applies to fees paid by nonresident customers. *Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 686 (2001) (ruling that a statute "does not apply for the benefit of nonresidents unless expressly provided."). Nothing in S.C. Code Ann. § 6-1-330 states that it applies to nonresident utility charges. Therefore, it does not apply to nonresident water and sewer revenues.

Further, the language of Section 6-1-330(B) takes nonresident revenues out of the reach of its limitation on the use of fee revenues. As already explained, the legislature made the mandate within S.C. Code Ann. § 6-1-330(B) applicable to those service or user fees "imposed to finance the provision of public services." In its opinion, this Court rejected the proposition that utility charges were not imposed upon customers; however it failed to apprehend that the City does not impose its utility service upon people residing outside the City's corporate boundaries. The City is not obligated to run water and sewer

[6] This Court rejected the premise these contracts are voluntary, nonetheless, the Court cannot ignore the fact that the City must have a contractual relationship with a customer in order to provide that customer service. To do otherwise, would expressly violate the statutes which authorize extraterritorial service. *See* S.C. Code Ann § 5-7-60.

lines to provide service to nonresidents.[7] *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 426, 593 S.E.2d 462, 468 (2004) (... "the decision whether to grant a sewer extension request generally must be left to the sound discretion of municipal leaders, who are charged with considering all the various factors, including financial and economic implications, aesthetic and environmental concerns, feasibility of a particular plan, and the effect of an extension on the municipality's long-range zoning, planning, or organization."). The City's relationship with nonresidents is unquestionably contractual in nature with neither party under the compulsion to enter into a contract for water and sewer. Pursuant to S.C. Code Ann. § 5-31-1910, "[a]ny city or town in this State owning a water or light plant may ... enter into a contract with any person without the corporate limits of such city or town but contiguous thereto to furnish such person electric current or water from such water or light plant of such city or town and may furnish such water or light upon such terms, rates and charges as may be fixed by the contract or agreement between the parties in this behalf ...." *Also see* S.C. Code Ann. § 5-7-60 (stating that [a]ny municipality may perform any of its functions, furnish any of its services...and make charges therefore...outside the corporate limits of such municipality by contract....."). Under § 23-62(h) of the City's Code of Ordinances,

> provision of service to customers outside the corporate limits by the city is deemed to be a contract subject to all rate schedules, rules, regulations and ordinances of the city as may be amended from time to time. The contract does not create or impose upon the city any

[7] Returning to this Court's reference to the International Building Codes, structures located in unincorporated areas of counties must still be constructed in compliance with the International Plumbing Code, but again, the Code does not require structures to be connected to the City's water or sewer system. Nonresidents may construct homes with wells for drinking water and septic tanks for wastewater. Furthermore, the structure may be located within the service area of another water and/or sewer utility, such as Palmetto Utilities (sewer), Richland County (sewer), Alpine Utilities (sewer), East Richland Public Service District (sewer), City of Cayce (water and sewer), among others. Or, if located within the City's water and/or sewer service area, the City may not have the infrastructure, capacity, or desire to provide water and/or sewer to a particular location.

> obligation to provide service in the future. Service may be discontinued at any time in the sole and exclusive discretion of city council upon reasonable notice.

This Court misapprehended or overlooked the City's sound argument that S.C. Code Ann. § 6-1-330(B) does not apply to revenue derived from nonresident utility customers.

4. THIS COURT'S RULING IS IN CONFLICT WITH THE CITY'S CONSTITUTIONAL RIGHT TO OPERATE A WATER AND SEWER UTILITY AT A PROFIT.

This Court's construction of S.C. Code Ann. § 6-1-330(B) overlooks the City's constitutional right to own and manage its utility. Under article VIII, § 16 of the South Carolina Constitution, "any incorporated municipality may, upon a majority vote of the electors of such political subdivision who shall vote on the question, acquire by initial construction or purchase and may operate gas, water, sewer, electric, transportation or other public utility systems and plants." This provision must be liberally construed in favor of the City. S.C. Const. art. VIII, § 17. Municipal authority to operate water and sewer utilities cannot be restricted or limited by the legislature. *Sossomon*, at 181, 538. Once this right to own and operate a municipal utility is conferred by the Constitution, the legislature has no power to take away the property of the municipal utility, nor can it change how it uses utility revenue. *Id.* at 184, 539; *see also* 78 AM. JUR. 2D *Waterworks and Water Companies* § 7 ("Once this power has been conferred, without restriction, upon a municipal corporation by the legislature, the manner and extent of its exercise is within the discretion of the municipal authorities."); *see also Green v. City of Rock Hill*, 149 S.C. 234, 147 S.E. 346, 354 (1929) (ruling that the right to operate a utility system cannot be withheld or withdrawn by the General Assembly).

In *Sossomon*, the General Assembly enacted a statute that required the City of Gaffney to serve water to those residing outside its corporate boundary and stripped the

City's ability to derive a profit from these nonresident customers. 236 S.C. 173, 182, 113 S.E.2d 534, 538 (1960). This Court struck the statute for several reasons, including its conclusion that the statute violated the Constitution's grant to municipalities the right to acquire and operate a utility. *Id.* at 183-184, 539. This Court reasoned that:

> ... this [constitutional] right cannot be denied by the Legislature, neither do we think it may be restricted in the manner proposed by this legislation. ... When corporate powers are conferred, there is an implied compact between the state and the corporations that the property which they are given the capacity to acquire for corporate purposes ... shall not be taken from them and appropriated to other uses. It may also be admitted that corporations for mere public government, such as towns, cities, and counties, may, in many respects, be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcended that it may, at its will, take away the private property of the corporation or change the uses of its private funds acquired under the public faith. *Id.* at 184, 538.

As this Court has applied S.C. Code Ann. § 6-1-330(B) to utility charges, its ruling takes away the City's right to generate a profit from its utility and to use that profit within its sound discretion in contravention of article VIII, § 16 of the South Carolina Constitution. "Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." *Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E.2d 331, 333-334 (1977).

5. IRRESPECTIVE OF WHETHER UTILITY CHARGES ARE SUBJECT TO S.C. CODE ANN. § 6-1-330(B), THIS COURT OVERLOOKED THE CITY'S ARGUMENT THAT S.C. CODE ANN. § 6-1-330(B) DOES NOT APPLY TO THE CITY'S UTILITY REVENUE BECAUSE THE SERVICE FEE STATUTE APPLIES PROSPECTIVELY TO NEW "SERVICE OR USER FEES."

The Service Fee Statute was enacted as part of Act 138 of the South Carolina General Assembly, 112th Session (1997-1998), with an effective date of July 1, 1997, except as otherwise provided. Subsection (A) of Section 6-1-330 provides that "a fee adopted or imposed by a local governing body prior to December 31, 1996, remains in

force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section." S.C. Code Ann. § 6-1-330(A). The City adopted by ordinance its water and sewer charges long before the effective dates of Section 6-1-330. The City first enacted a water rate ordinance in 1895 and a sewer rate ordinance in 1970. R. p. 741, ¶ 4, ¶ 8. Since then, the City has not repealed its water and sewer rate ordinances. R. p. 741, ¶ 5, p. 742, ¶ 9, and ¶ 11; R. p. 1394, § 1-3. Thus, Section 6-1-330(B) does not apply to the City's utility charges, as Act 138 is intended to only apply to new fees.

Although the City has amended its water and sewer ordinances to increase the amount of utility charges, Section 6-1-330(B) does not apply to amendments. Section 6-1-330(A) provides that a fee "adopted or imposed by a local governing body prior to December 31, 1996 remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section." (emphasis added). Nothing in Section 6-1-330(B) refers to amendments to ordinances that adopted fees prior to the effective date of Act 138. Certainly the legislature could have added amendments to Section 6-1-330(B), as it did with other sections of Act 138.[8] This Court "has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy." *Kinard v. Moore*, 220 S.C. 376, 68 S.E.2d 321, *** 14 (1951).

6. IN REMANDING TO THE TRIAL COURT FOR FURTHER DEVELOPMENT OF THE FACTS UNDER THE REVENUE BOND ACT, THIS COURT MISAPPREHENDED THE SCOPE OF REVIEW AND THE MATERIALITY OF THE EPA CONSENT DECREE.

A municipality is authorized to issue revenue bonds for the acquisition, construction, improvement, enlargement, and repair of its water and sewer utility under a

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

number of different statutory schemes authorized by the legislature.[9] S.C. Code Ann. § 6-21-5 *et seq.* (known as the "Revenue Bond Act for Utilities"); S.C. Code Ann. § 6-17-10 *et seq.* (known as the "Revenue Bond Refinancing Act of 1937"). Municipalities may pledge their water and sewer revenues to secure such bond issues. S.C. Code Ann. § 6-17-30; S.C. Code Ann. § 6-21-340. Revenue bonds of a municipality may be issued under a bond ordinance or (master bond indenture ordinance relating to multiple series of bonds), which serves as the governing contract between the issuing municipality and its bondholders under the authority of one or more of the statutory schemes provided by the General Assembly. The City's general bond ordinance is authorized by both the Revenue Bond Act for Utilities and the Revenue Bond Refinancing Act.

Water and sewer rates shall be sufficient to provide for the payment of the principal of and interest on all such bonds, to provide the payment of the expenses of administration, operation and maintenance of the system "as are necessary to preserve it in good repair and working order," to build up a reserve for depreciation of the existing system, and to build up a reserve for improvements, betterments and extensions to the existing system. S.C. Code Ann. § 6-21-390; *see also* S.C. Code Ann. § 6-21-440; *see also* S.C. Code Ann. § 6-17-180(2) and (3). Any surplus funds remaining after application of revenues to payments of principal and interest, operation and maintenance, and reserves "shall be disposed of by the [City] as it may determine from time to time to be for the best interest of the [City]." S.C. Code Ann. § 6-21-440. This statutory authority cannot be impaired, as evidenced by the legislature's use of the word "shall" in conferring such power. These provisions "shall

[9] S.C. Const., art. X, § 14(10) provides that "Indebtedness payable from solely from a revenue-producing project or from a special source, which source does not involve revenues from any tax or license, may be issued upon such terms and conditions as the General Assembly may prescribe by general law."

be liberally construed." S.C. Code Ann. § 6-21-570; *see also* S.C. Const., art VIII, § 17. As an alternative argument, in the event the City's other arguments were rejected, the City argued that its transfer of $4.5 million from its utility enterprise fund to its general fund was lawful as surplus funds of the utility to be used as the City sees fit.

In its order, this Court found there was "a genuine issue of material fact as to whether the City adequately funded the ongoing operating and maintenance expenses and satisfied the specific set-asides commanded by Section 6-21-440 (including setting aside 'sufficient' sums in the depreciation fund and the contingent fund) as a precondition to diverting $4.5 million into the General Fund each year." Shearouse Advance Sheet at 69. The City is prepared to produce evidence at trial that the City has complied with the funding requirements of the Revenue Bond Act for Utilities; however, this Court has misapprehended the proper scope of review.

The reviewable issue here is simply whether the City has in fact funded the expenses of administration, operation and maintenance of the utility, debt service and redemption of bonds, a reserve for depreciation and a reserve for contingencies.[10] Yet this Court directs the trial court to examine whether the City's funding of operation and maintenance was "adequate" and the set-asides were "sufficient." Shearouse Advance Sheet at 69. In so doing, this Court is assuming that a private right of action exists under the Revenue Bond Act for Utilities under which the Appellants could actually challenge the adequacy and sufficiency of the City's funding. There is no private right of action for

[10] Even the Appellants only raised the argument that "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." Appellants' Final Brief, p. 16. In the City's Brief and at oral argument, the City identified several documents showing that the funds existed. City Final Brief, p. 38, fn. 31.

the Appellants under S.C. Code Ann. § 6-21-440 to challenge whether the City's financial management of its utility was adequate and sufficient.

In determining whether a statute creates a private cause of action, the main factor is legislative intent. *Doe v. Marion*, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007). The defining relationship established under the Revenue Bond Act for Utilities is that between the borrower and bond holder. S.C. Code Ann. § 6-21-10; S.C. Code Ann. § 6-21-290; S.C. Code Ann. § 6-21-330; S.C. Code Ann. § 6-21-350; *see also* S.C. Code Ann. § 6-17-250 (under the Revenue Bond Refinancing Act, a right of action is limited to only bondholders as well). "Any holder of any of such bonds or of any of the coupons representing interest accrued thereon may, either at law or in equity, by suit, action, mandamus or other proceedings, protect and enforce such statutory lien and may, by suit, action, mandamus or other proceedings, enforce and compel performance of all duties of the officials of the borrower, including the fixing of sufficient rates, the collection of revenues, the proper segregation of the revenues of the project or combined system and the proper application thereof." S.C. Code Ann. § 6-21-350. The Revenue Bond Act for Utilities does not indicate an intent that anyone other than a bond holder may challenge the City's fiscal management of its utility. Appellants have not identified themselves as holding bonds issued by the City; they state their interests as rate payers or water consumers. R. 166-171. Therefore, directing the trial court to determine anything other than whether the City has funded the operation and maintenance of the utility as well as the reserves identified under S.C. Code Ann. § 6-21-440 is improper.

In light of the Appellants' lack of a right to challenge the City's fiscal management of its utility, this Court's finding that the EPA consent decree created a genuine issue of

material fact is not relevant. 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. *Bd. of Trs. for the Fairfield County Sch. Dist. v. State*, 409 S.C. 119, 124, 761 S.E.2d 241, 244 (2014). The EPA consent decree is not material if Appellants cannot root into the internal financial decision-making of the City's utility.

What is more, the trial court clearly did not find the EPA consent decree to be relevant or material to the issues presented below. Appellants claim that the City's alleged failure to comply with municipal finance law allegedly caused the City's wastewater system "to fall into a state of disrepair and ultimately resulted in the United States Environmental Protection Agency and the South Carolina Department of Health and Environmental Control successfully suing the City of Columbia to force repairs and improvements to the City's sewer system." Appellants' Brief, p. 7. Appellants "may not rely on mere allegations to resist summary judgment but must present some evidence in the form of affidavits or otherwise in support of its proposition." *Bd. of Trs. for the Fairfield County Sch. Dist. v. State*, 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014). Appellants provided no evidence showing that inadequate funding of the utility was the reason for the EPA consent decree. To the contrary, uncontested evidence exists in the record showing that the City has, over the past decade, proactively dedicated considerable financial resources to its sewer utility in response to the City's first experience with significant sewer overflows in 2006. R. p. 472, line 12 – p. 473, line 2; R. p. 504, line 10 – p. 515, line 13. As a result, the City's sewer overflow problem has improved. R. p. 515, lines 11-12. This Court assumes that the EPA consent decree was the result of inadequate funding of repairs and improvements, even though the requirements within the consent

decree are primarily concerned with better planning, protocol, and training.[11] *See* R. pp. 1093-1140. Inadequate funding is not the only problem that could garner enforcement actions by the EPA or DHEC.

7. THIS COURT MISAPPREHENDS OR OVERLOOKS THAT THE BLACK & VEATCH INDIRECT COST STUDY DOES NOT CREATE SUFFICIENT REASON TO REMAND.

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). Appellants contended below that the City's economic development expenditures included within the utility's budget is unrelated to the utility, and thus, violated Section 6-1-330(B). In an effort to overcome long-standing case law finding that municipal utilities serve economic development purposes and testimony from City officials describing how its economic development expenditures are related to the City, Appellants turned to an Indirect Cost of Service Study dated April 2, 2007 in which an engineering consulting firm gave its opinion that the economic development functions had "no direct cost causation or benefit" to the utility. R. p. 579. The trial court correctly disregarded this study as failing to sufficiently contest the City's evidence.

The City is not bound by the recommendation of a consultant. *See e.g. Tucker v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 131, 133, 442 S.E.2d 171, 173 (1994) (holding that recommendations from a legislative delegation to a county transportation committee are not binding upon the county); *F.B.R. Investors v. County of Charleston*, 303

[11] The capital improvement plan referenced under section 10(a) of the consent decree merely incorporated the City's plan previously adopted by the City. R. 1092; *see also* R. p. 471, line 14 – p. 472, line 7 (stating that City had begun work to address sewer overflows well before the EPA got involved).

S.C. 524, 528, 402 S.E.2d 189, 191 (Ct. App. 1991) (holding that County Council is not bound to follow recommendations from its boards and committees). The City, in its discretion, may adopt or discard opinions of consultants or advisors. In reviewing the legality of the City's use of a small fraction of its utility revenue for economic development functions, the trial court, as it should, gave deference to the City Council's legislative decision-making and limited its review to whether the City's proffered rationale was reasonable. *See McSherry v. Spartanburg County Council*, 371 S.C. 586, 590, 641 S.E.2d 431, 433 (2007) ("[i]n reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions should not be upset on appeal unless [they are] arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power."); *McKinney v. Greenville*, 262 S.C. 227, 247, 203 S.E.2d 680, 690 (1974) (" ... courts will not interfere with legislatively declared policy and legislatively approved functions of government unless the judicial mind is convinced that action by the legislative body is without reasonable relation to the public interest or welfare and is beyond the scope of legitimate government activity ...."). This Court erroneously abandoned deferential review.

8. WITH ALL DUE RESPECT, THIS COURT'S RULING AMOUNTS TO JUDICIAL OVERREACHING TO THE DETRIMENT OF THE CITY.

In its order, this Court found that summary judgment was inappropriate because further inquiry into the facts of the case was needed to clarify the application of law. Shearouse Advance Sheet at 66-67 and 68-69. This Court remanded back to the circuit court for further development of the facts. But in its analysis, this Court went further than simply ruling that genuine issues of material fact precluded summary judgment. The opinion's characterizations and assumptions relating to the facts give the impression that

this Court, even prior to the further development of the facts, disapproves of the City's actions. "[T]he judge does not weigh conflicting evidence with respect to a disputed material fact . . . nor does the judge make credibility determinations with respect to statements made in affidavits, . . . or depositions." *L & W Wholesale v. Gore*, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991). Put another way, this Court appears to have already signaled its view of the merits of this case, to the detriment of the City.

At the outset, this Court frames the issue as a question of "how does the City justify using service and user fee revenues for purposes unrelated to the provision of water and sewer services?" Shearouse Advance Sheet, at 64 (emphasis added). In so doing, this Court seems to shift the burden of proof to the City as opposed to the Appellant, and pose the question in a manner that deems its economic development expenditures as unrelated to the utility. Addressing the City's economic development expenditures from utility revenues, this Court "acknowledg[ed] the testimony of former City Manager Steven A. Gantt, in which Gantt testified that the 'overriding goal' of the City's economic development expenditures was 'to bring new business within the [C]ity limits so that they can and do indeed become water and sewer customers." *Id.* at 66. However, this Court placed greater emphasis on the Black & Veatch report by quoting an entire paragraph from the report and characterizing its recommendations as "caution[ing] the City against the very practice that led to this lawsuit." *Id.* These factual accounts appear to weigh the evidence and draw inferences that the City's actions were wrongful.

Regarding the City's transfer of utility revenue to its general fund, Appellants flatly admitted that they had no case if the City had produced evidence that the City had established and funded any of the funds required under the Revenue Bond Act for Utilities.

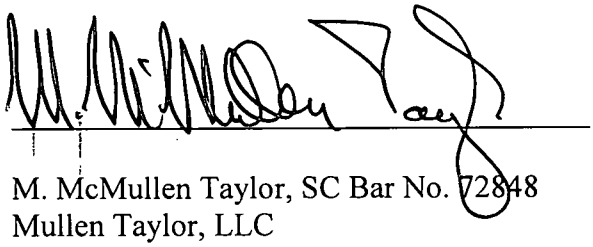
The City pointed to several documents in the record showing that these funds indeed existed and were funded. However, this Court turned to the EPA consent decree which this Court characterized as requiring the City "to make necessary repairs and improvements to the water and sewer system – maintenance projects that should have been, but apparently were not, readily funded by the revenues from the set-aside funds required by section 6-21-440." (emphasis added). Shearouse Advance Sheet at 69. This Court made a negative assumption that the City had not complied with the Revenue Bond Act for Utilities, in spite of a long held presumption that municipalities abide by the law unless proven otherwise. *Cox v. Bates*, 237 S.C. 198, 116 S.E.2d 828 (1960) ("It is presumed that the county authorities will observe the law."); *Stone v. City Council*, 113 S.C. 407, 102 S.E. 755 (1920) ("The discretion is vested in council by law, and they are not to be controlled in its exercise by the citizens, and not even by the Courts, provided they act within the law, and it will always be assumed that they will so act, until the contrary is made to appear."). This presumption is appropriate to honor at this stage of the case, where this Court has simply remanded back to the lower court for further development of the facts.

Finally, this Court concluded its opinion by stating, "[s]imply put, the statutes do not allow these revenues to be treated as a slush fund." Shearouse Advance Sheet, at 70. A "slush fund" is commonly defined as: "1) a fund raised from the sale of refuse to obtain small luxuries or pleasures for a warship's crew; 2) a fund for bribing public officials or carrying on corruptive propaganda; or 3) an unregulated fund often used for illicit purposes." MERRIAM WEBSTER DICTIONARY at http://www.merriam-webster.com/dictionary/slush%20fund; *see also* BLACK'S LAW DICTIONARY, p. 1602 (10th ed. 2014) (defining "slush fund" as "money that is set aside for undesignated purposes,

often corrupt ones, and that is not subject to financial procedures designed to ensure accountability."). In using the term "slush fund," this Court implied that the City's expenditures were indeed unlawful and perhaps even corrupt, an uncalled for implication unnecessary to the disposition of this case.

The City anticipates a lengthy trial with every intention of explaining and defending its actions as lawful. Should this Court reject the City's above-stated arguments for rehearing, the City nonetheless respectfully asks that this Court amend its opinion to make its language more neutral, such that the City (and all other municipalities that may be affected by this Court's ruling) is not left with the possibility of closed minds and foregone conclusions at trial and subsequent appellate review.

Respectfully submitted,



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October 19, 2015

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

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

Case No. 2011-CP-40-6705

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

V.

CITY OF COLUMBIA, ...RESPONDENT.

CERTIFICATE OF SERVICE

I certify that Respondent City of Columbia has served upon Appellants' counsel Respondent's **Petition for Rehearing** by depositing a copy of it in the United States Mail, postage prepaid, and by electronic mail, on October 19, 2015, addressed to counsel of record, as follows:

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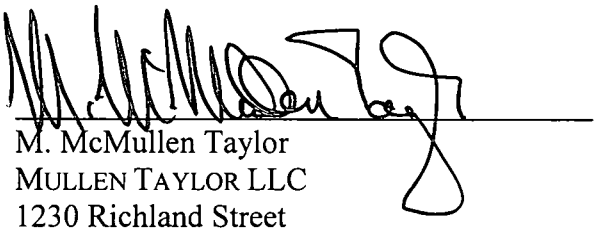

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