

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 30 2015

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

S.C. SUPREME COURT

Docket No. 2011-CP-40-6705

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

vs.

City of ColumbiaRespondent

**APPELLANTS' RETURN TO MUNICIPAL ASSOCIATION OF SOUTH
CAROLINA'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

Pursuant to Rule 213, the Appellants respectfully request an Order of this Court denying the Municipal Association of South Carolina's request to file and serve an Amicus Curiae Brief in this matter. The basis of the request denying the Amicus Brief is the following grounds:¹

¹ Appellants now understand why the City requested multiple extensions to file its Petition for Rehearing. Amicus offers a four corners attack on this Court's Opinion calling it an opinion that does not fit (Amicus, p. 3); that this Court's substantive discussion of the applicability of S.C. Code § 6-1-330 should be removed (Amicus, p. 8); is illogical and unworkable (Amicus, p. 12) and an irrational outcome (Amicus, p. 18). Clearly, Amicus wants to continue to allow its members to collect water and sewer fees and use them without regard to South Carolina law, i.e., a "slush fund" with those funds to be used for anything a municipality thinks is necessary. A result clearly not allowed under South Carolina law.

1. This Court issued a unanimous Opinion reversing this case and returning it to the trial court. The Municipal Association now attempts on a Petition for Rehearing to re-litigate all issues which this Court has already heard and ruled on.

2. Despite what Amicus argues, the Opinion of this Court in this case does nothing to restrict the Municipalities of South Carolina right under the Constitution to own and/or operate public utility systems in this state or to charge fees for services provided to customers of those public utility systems. The *Azar* Opinion only requires that the municipalities who do own and/or operate a public utility system comply with S.C. Code Ann. § 6-1-300 and S.C. Code Ann. § 6-1-330.

3. Municipalities have a right pursuant to the Constitution (Art. VIII, Sec. 16) to operate public utilities. They do not have the right under S.C. Code Ann. § 6-1-300 *et seq.* to use the fees collected from the operation of those public utility systems for any purpose other than for the public utility system for which the fee was collected. Despite the Amicus argument about case law from the early Twentieth Century, this Court has issued numerous opinions on the fee for services statute (S.C. Code § 6-1-300). Not one of the fee for services opinions this Court has issued are even addressed in the Amicus Brief.

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). 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.”)

4. The Amicus Brief goes even further in asking that the case be reversed. It requests that the Court disregard the City of Columbia’s concession that water and sewer services are fees for services. A fact clearly not in controversy in this case. Amicus in its Brief at p. 8 notes:

In its decision, this Court states that “[t]he City admits the monies at issue fall within the definition of ‘service or user fee’ as the term is statutorily defined.” *Azar*, 215 S.C. LEXIS 325 at *5. The Municipal association and its member municipalities, however, do not admit that utility charges are subject to S.C. Code § 6-1-330, strongly disagree with such application and would vigorously contest that conclusion in future cases. See Amicus at p. 8.

In effect, Amicus wants to relitigate every issue the City has already admitted because the Municipal Association disagrees with the City’s concession that this was a fee for services – which is the pivotal issue in this case.

5. The Amicus also argues the same warmed over arguments which have been presented to this Court by the City. What Amicus would like to do would have this Court issue an order allowing cities carte blanche to charge whatever a City may want for its water sewer service and allow those funds to be used by City Council at its whim. Amicus fundamentally misunderstands the application of the *Azar* Opinion in that this Court has not restricted the City of Columbia’s or any city’s right to charge or collect fees for services, it is only how the funds are used or spent that are important pursuant to S.C. Code Ann. § 6-1-

330(B). Otherwise, a city could charge exorbitant rates for its water service and use those monies to fund all of city services in lieu of taxes, i.e., a slush fund with no recourse since everyone is required to have water and sewer to function in society.

6. Amicus also suggests that municipalities in this state may stop using the Revenue Bond Act since they will have more flexibility with regard to the use of surplus funds. See Amicus at p. 18. In effect, Amicus signals to the Court that the municipalities of this state may try to circumvent this Court's ruling in regard to the use of surplus funds for purposes other than for the water and sewer system itself. In fact, Appellants believe that using the proceeds collected from water and sewer fees to fix and/or repair the system protects the bondholders who would expect those funds to be used for repair of the system and not for other city services such as police, fire, etc.

CONCLUSION

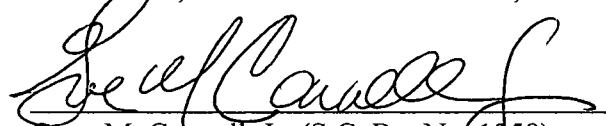
In conclusion, Amicus and the City cry wolf. All Appellants want is for the monies which were collected for water and sewer fees to be used for the purpose for which they were collected. Specifically to operate, repair, expand and/or improve public utility system from which the fees were collected. The Legislature enacted S.C. Code § 6-1-330(B) to protect those who paid fees for services and to make sure those individuals would not be funding other government functions and that the fees collected would be used only for the services which were being provided by the City for a fee. Contrary to what Amicus states in its brief, this Court only holds that water and sewer fees must be used for water and sewer purposes and not for other unrelated governmental functions. To hold otherwise is a tax plain and simple. Nothing in the South Carolina Constitution prohibits the legislature from requiring municipalities who collect fees for water and services to put those fees back into

the system and not to use it to fund other city services. The Opinion of this Court does not restrict or interfere in any way with the right of the City or municipality to operate a water and/or sewer system or any other public utility system. It only holds there must be sound statutory basis for a City or other municipality using any fees collected for water and sewer services for other services provided by the City.

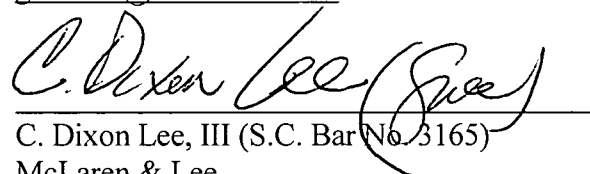
Accordingly, Appellants request that the Amicus request to file its brief at this late date be denied or in the alternative that if the relief is granted then Appellants have the opportunity to fully respond to the arguments.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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October 29, 2015

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served **Appellants' Return to Municipal Association of South Carolina's Motion for Leave to File Amicus Curiae Brief** on attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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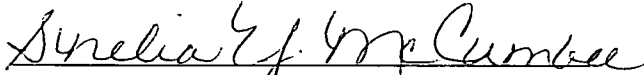
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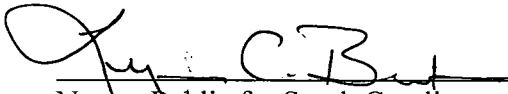
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DATE OF MAILING: October 29, 2015



Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 29th day of October, 2015



Notary Public for South Carolina
My Commission Expires: 2-17-19