

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

NOV 12 2015

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas for the Fifth Judicial Circuit
G. Thomas Cooper, Circuit Court Judge
J. Ernest Kinard, Jr., Circuit Court Judge

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

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

Appellants,

vs.

CITY OF COLUMBIA,

Respondent.

**APPELLANTS' RETURN TO RESPONDENT'S
PETITION FOR REHEARING**

Appellants make Return to Respondent's Petition for Rehearing as follows:

BACKGROUND

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

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

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

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

Both parties made motions for summary judgment. The Circuit Court granted the City's Motion for Summary Judgment on the issue of liability and denied Appellants' Motion for Summary Judgment. Appellants' appealed. This Court reversed the Circuit Court's Order in a

unanimous 5-0 decision and remanded the case to the Circuit Court for further proceedings.

See Azar, et. al. v. City of Columbia, Opinion No. 27573, filed September 9, 2015.

The core issue in this case is whether or not the City of Columbia may legally and without any constraint whatsoever spend money it collects as water and sewer fees it for non-water and sewer purposes? Appellants' submit that this Court correctly answered that question in the negative in its September 9, 2015 Opinion in this case and, as such, for that reason Respondent's Petition for Rehearing should be denied.

1. THIS COURT CORRECTLY CONSTRUED S.C. CODE ANN. § 6-1-330(B).

S.C. Code Ann. § 6-1-330(B) (Supp. 2014) provides in relevant part as follows:

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

The City attempts to parse words in an apparent effort to exempt the water and sewer fees it charges from the category of "service or user fees" defined by S.C. Code Ann. § 6-1-330(B) (Supp. 2014).

Perhaps the clearest legislative example of why water and sewer fees are, in fact, "service or user fees" is found in S.C. Code Ann. § S.C. Code Ann. § 4-9-30 (2014), which sets out the general powers which counties may exercise under the Home Rule Act, and grants counties the power:

(5)(a) to assess property and levy ad valorem property taxes and uniform service charges ... and make appropriations for functions and operations of the county, including ... roads, ...; water, ...; sewage.... (emphasis added).

This subject was discussed by this Court in *Brown v. County of Horry*, 308 S.C. 180417 S.E.2d 565 (1992).

This Court has not misunderstood or overlooked the proper construction of S.C. Code Ann. § 6-1-330(B) (Supp. 2014). Water and sewer fees are a service or user fee and, as such, are subject to the statutory restrictions imposed by S.C. Code Ann. § 6-1-330(B) (Supp. 2014) mandating that they be “...used to pay costs related to the provision of the service or program for which the fee was paid.”

2. THIS COURT DID NOT OVERLOOK OR MISAPPREHEND THE STATUTORY SCHEME OR EXISTING CASE LAW GOVERNING MUNICIPAL UTILITIES.

To begin with the case law cited by the City in support of its argument that it is “...entitled to charge rates [water and sewer fees] that include a return on its investment, or “profit” all predates the enactment of S.C. Code Ann. § 6-1-330 in 1997 and thus has no relevance whatsoever in interpreting that statute. S.C. Code Ann. § 6-1-330 expressly restricts the purposes for which a “service or user fee” may be spent. S.C. Code Ann. § 6-21-440 (Supp. 2014) establishes a limited exception to that restraint and there is no evidence in this case the City has met the necessary preconditions to qualify for that exception.

The City argues that S.C. Code Ann. § 5-31-670 and § 5-31-1910 (Supp. 2014) grants it a right to operate municipal services (water, sewer, electricity) at or for a profit however these statutes significantly predate S.C. Code Ann. § 6-1-330 (Supp. 2014) and the longstanding rule that the “last legislative expression” controls where conflicting legislative provisions exist, the last in point of time or order of arrangement, prevails. *Ramsey v. County of McCormick*, 306 S.C. 393, 412 S.E.2d 408 (1991). S.C. Code Ann. § 6-1-330 (Supp. 2014) is the “last (and most recent) legislative expression” on this subject and should control any question concerning the purposes for which a “service or user fee” may be spent.

The City argues that “[m]unicipal utilities are treated the same as any other public utility, such as private wastewater utilities and South Carolina Electric and Gas Company.” (Respondent’s Petition for Rehearing at page 5). The City’s argument completely overlooks that public utilities, such as South Carolina Electric and Gas Company must have their operations and rate increases approved by the South Carolina Public Service Commission. Generally see S.C. Code Title 58. The City of Columbia and other “local governments” face no such regulation thus the legislature imposed statutory restrictions governing the purposes for which local government could use monies collected as service or user fees.

The City apparently perceives itself as a modern day “Robber Barron” of the 21st century free to financially exploit those within its domain and in doing so amass financial wealth and power. Clear and unambiguous South Carolina statutory law says otherwise. The City does not have “discretion” or any other right to disregard valid statutory law enacted by the South Carolina legislature, nor does it have discretion to interpret those laws inconsistently with the decisions of the Judicial Branch of our State government. When the City expends monies it collects as water and sewer fees for purposes inconsistent with the statutory law of this State, it acts unlawfully and invites legal actions to constrain that unlawful conduct, as has occurred in this case.

The City argues that decisions concerning the amount of fees to be charged cannot be divorced from how revenues will be spent. (City’s Petition for Rehearing at page 7), yet that is precisely what S.C. Code Ann. § 6-1-330 mandates. That statute restricts the purposes for which “service or user fees” may be spent, not what rates may be charged. What is true is that local governments in this State, such as the City of Columbia, may not disregard or act in conflict with the statutory law of this State.

Appellants do not completely disagree with the concept that the City may in some sense “profit” from the operation of its water and sewer system. That possibility is expressly contemplated by S.C. Code Ann. § 6-21-440 (Supp. 2014), discussed previously, which provides for local governments to use “surplus revenues” derived from utility operations, after the establishment and full funding of four (4) separate required “special funds” necessary to sustain the financial future of the utility in question. Although the City’s Petition for Rehearing suggest that these funds exist, there is no evidence in the record to support that contention.

While as the City argues, S.C. Const. Art VIII, §17 does entitle the City “.....to have this Constitution and all laws concerning local government shall be liberally construed in their favor”, it does not make the City of Columbia or any other local government exempt from the duly enacted law of the State of South Carolina, specifically including S.C. Code Ann. § 6-1-330 and S.C. Code Ann. § 6-21-440.

As made clear by this Court in *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565, 568 (1992); *J.K. Const., Inc. v. Western Carolina Regional Sewer Authority*, 336 S.C. 162519 S.E.2d 561 (1999); and, *Ford v. Georgetown County Water & Sewer Dist.*, 341 S.C. 105, 32 S.E.2d 873(2000), revenue from fees destined for general fund indicates a tax. The City is unquestionably treating a significant portion of the water and sewer fees it collects as a tax by depositing those monies into its general fund.

In summary, South Carolina law does not grant the City a right to operate any utility, including water and/or sewer systems, with impunity or even for a “profit” without first meeting the statutory requirements established by South Carolina law, specifically including S.C. Code Ann. § 6-1-330 and S.C. Code Ann. § 6-21-440. The City of Columbia has operated its water and sewer

systems in disregarded these statutes for decades and has treated revenues from the operation of its water and sewer systems as a “tax”, to the financial detriment of the customers of its water and sewer system. Nothing in South Carolina law grants the City the right or discretion to act in this manner. Further, South Carolina law expressly prohibits the City from acting in this manner.

Sossamon v. Greater Gaffney Metro Utilities Area, 236 S.C. 173, 113 S.E. 2d 534 (1960), cited by the City in support of its argument is irrelevant to this case. The statutory legislation which challenged in *Sossamon* mandated that the City of Gaffney provide water and sewer service to geographic areas outside the corporate limits of the City of Gaffney, to which the City of Gaffney objected and ultimately prevailed.

Nothing in this Court’s Opinion in this case restricts the right of the City of Columbia to own or operate a water and/or sewer system, either within or outside the corporate limits of the City of Columbia. Nothing in this case requires the City of Columbia to provide water and/or sewer service to any customer or geographic area not already receiving water and/or sewer service from the City of Columbia. This case is completely distinguishable from this Court’s decision in the *Sossamon* case.

3. THIS COURT DID NOT OVERLOOK THE CITY OF COLUMBIA’S ARGUMENT THAT S.C. CODE ANN. § 6-1-330(B) SHOULD NOT APPLY TO WATER AND SEWER FEES COLLECTED FROM NON-RESIDENTS.

To begin with, nothing in South Carolina law authorizes the City of Columbia or any other “local government” to exempt itself from of the statutory laws of this State by requiring that non-resident customers of its water and sewer system enter into a contract with the City in order to receive water and sewer services. In most instances both within and outside of the City limits the City is the sole provider of water and sewer services. If, in fact, the City has exempted itself from operation of the statutory laws of this State by requiring that non-resident customers

of its water and sewer system enter into a contract with the City in order to receive water and sewer services and is operating as a proprietary business, is the City subject to anti-trust and similar laws prohibiting monopolies? As a government entity, the answer to this question is clearly no. However, if the City abandons its role as a government entity and becomes a free market entrepreneur operating a capitalistic enterprise for profit in the free market, one can only wonder why the City, in that capacity, would be exempt from the laws that govern other “for profit” enterprises in the same market. A rhetorical question: Could the City of Columbia sell shares of stock in its ostensible free market for profit enterprises such as operation of its water and sewer system outside the its corporate limits?

The City does not and cannot escape its function as a government entity by providing public utility services inside or outside its corporate limits. While the City is not and cannot be required to provide any services, including water and sewer, outside its corporate limits, it may unquestionably do so voluntarily. At the same time, the City doing so voluntarily does not change the fact that the City is a local government organized and existing under the laws of the State of South Carolina and must operate consistently with the laws of the State of South Carolina.

4. THERE IS NO CONSTITUTIONAL RIGHT FOR THE CITY TO OPERATE ITS WATER AND SEWER SYSTEM AT A PROFIT.

While S.C. Constitution Art. VII, § 16 grants local governments, including the City of Columbia, the right to own and operate public utility systems, such as water and sewer systems, and S.C. Constitution Art. VII, § 17 provides that the S.C. Constitution and all laws concerning local government shall be liberally construed in of local governments, nothing in the S.C.

Constitution exempts local governments from the operation or effect of the statutory laws of this

State which have been duly and lawfully enacted by the South Carolina legislature. S.C. Code Ann. § 6-1-330 and S.C. Code Ann. § 6-21-440 are an integral part of the statutory law of this State and apply to the City of Columbia and every other local government in this State.

Sossamon v. Greater Gaffney Metro Utilities Area, 236 S.C. 173, 113 S.E. 2d 534 (1960), cited by the City in support of its argument is irrelevant to this case. The statutory legislation which challenged in *Sossamon* mandated that the City of Gaffney provide water and sewer service to geographic areas outside the corporate limits of the City of Gaffney, to which the City of Gaffney objected and ultimately prevailed.

Nothing in this Court's Opinion in this case restricts the right of the City of Columbia to own or operate a water and/or sewer system, both within and outside the corporate limits of the City of Columbia. Nothing in this case requires the City of Columbia to provide water and/or sewer service to any customer or geographic area not already receiving water and/or sewer service from the City of Columbia.

5. THE WATER AND SEWER FEES THAT THE CITY CHARGES ITS CUSTOMERS ARE NOT THE SAME WATER AND SEWER FEES WHICH EXISTED IN 1996 AND HAVE BEEN AMENED MULTIPLE TIME AND SUBSTANTIALLY INCREASED SINCE 1996 AND THUS ARE NOT EXEMPT FROM APPLICATION OF S.C. CODE ANN. § 6-1-330(A) UNDER THE "GRANDFATHERING" LANGUAGE OF THAT STATUTE.

While the City did enact its first Water Rate Ordinance in 1895, as argued by the City, that Ordinance did not include sewer fees or rates and the City has enacted numerous new water

and sewer Ordinances and new fees since then including in 2013, 2012, 2011, 2010, 2008, 2007, and 2006. (R. Vol. III, pp. 1298 - 1310).

S.C. Code Ann. § 6-1-330(A) provides:

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

The water and sewer fees imposed by the City of Columbia which existed in December 1996 no longer exist and have not existed for well more than a decade. As such, the City is not entitled to protection under the “grandfathering” language of S.C. Code Ann. § 6-1-330(A).

6. THIS COURT DID NOT “MISAPPREHEND” THE SCOPE OF REVIEW OR THE “MATERIALITY” OF THE EPA CONSENT DECREE.

To begin with the City’s contention that the \$4.5 million dollars it transfers annually from its water and sewer fund to the City’s general would be humorous if it were not for the state of disrepair existing in the City’s water and sewer system and the EPA Consent Decree mandating that City spend multi-millions of dollars to repair and upgrade its water and sewer system. There is no surplus money in the City’s water and sewer fund. There is a gigantic deficit between the money the City needs to repair and upgrade its water and sewer system and the money actually available to make those repairs and upgrades. The Plaintiffs look forward to seeing any evidence the City has, as it argues, documenting that it has funded the multiple accounts required by S.C. Code Ann. § 6-21-440.

The City's argument completely overlooks the fact that S.C. Code Ann. § 6-21-440 expressly requires that the four (4) funds to have "sufficient" monies in each fund to "pay" or "build up" the expenses covered by each of those funds. The fact that City may have put some monies in one of more such funds does not in and of itself meet the sufficiency requirement. If sufficient monies are not in those accounts then it is the customers of the City's water and sewer systems who will be called upon to pay increased water and sewer fees to replace the water and sewer fees which were unlawfully spent elsewhere by the City.

As stated previously by this Court, "a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom." *Newman v. Richland County Historic Preservation Com'n*, 325 S.C. 79, 480 S.E.2d 72 (1997). "If citizens were barred from bringing all lawsuits that concern governmental action, then there would be no opportunity to remedy governmental abuse." *Id.*

Here, the City of Columbia is collecting water and sewer fees and squandering the money for unlawful purposes while at the same time allowing its water and sewer system to fall in a bad state of repair, evidenced by the existence of EPA Consent Decree, which caused the City to increase water and sewer fees significantly to pay for the repairs mandated by that Decree.

Appellants clearly have the right to challenge the City's gross financial mismanagement of the monies collected as water and sewer fees.

7. THIS COURT DID NOT "MISAPPREHEND" OR "OVERLOOK" THE BLACK & VEATCH STUDY COVERING OPERATION OF THE CITY'S WATER AND SEWER SYSTEM.

To begin with the Black & Veatch Study is far from the only evidence that the City has badly neglected its water and sewer system and has unlawfully spent water and sewer revenues for purposes unrelated to its water and sewer system. The EPA Consent Decree is in and of

itself an independent condemnation of the City's mismanagement of its water and sewer system. EPA did not issue a commendation awarding the City for excellence in management of its water and sewer systems. The EPA Consent Decree required the City to make millions of dollars in badly needed repairs and upgrades to its water and sewer system and that occurred long after Appellant's commenced this lawsuit.

Clean water and properly functioning sewer systems are among the most basic needs of citizens. For decades the City has "milked" revenues from its water and sewer system to pay for other more publically visible but less essential projects. That practice "came home to roost" when EPA inspectors and officials descended upon the City. Yet the City continues its practice of unlawfully diverting water and sewer revenues for purposes other than its water and sewer system.

8. THIS COURT'S DECISION IN THIS CASE DOES NOT AMOUNT TO "JUDICIAL OVERREACHING" TO THE DETRIMENT OF THE CITY".

Nothing in this Court's Opinion in *Azar, et. al. v. City of Columbia*, Opinion No. 27573, filed September 9, 2015, amounts to inappropriate or impermissible "judicial overreaching" by this Court as argued by the City of Columbia.

The core issue in this case is and remains whether the City of Columbia improperly spent monies it collected as water and sewer fees for purposes not authorized by South Carolina law. Contrary to the City's assertion otherwise, there is no evidence in the existing record that City has established or funded, fully or otherwise, any of the four (4) "separate" reserve funds required by S.C. Code Ann. § 6-21-440 (Supp. 2014) necessary to enable the City to reach the exception in that statute authorizing "Any surplus revenues thereafter remaining shall be disposed of by the governing body of the borrower as it may determine from time to time to be

for the best interest of the borrower.” The only evidence on the issue of the existence of financial accounts established by the City, “separate” or otherwise, is that the City has a “General Fund” and a “Water and Sewer Enterprise Fund”. There is no evidence in the record that City has any other “separate” financial accounts or funds. At the same time, nothing in this Court’s decision precludes the City from offering evidence on remand, if such evidence actually exists, that these four required separate reserve funds actually exist and/or have been fully funded as mandated by S.C. Code Ann. § 6-21-440 (Supp. 2014). This Court’s decision in this case is crystal clear that this case has been “.....remand[ed] to the trial court for further development of the factual circumstances under which these transfers were purportedly justified and for a determination of whether these transfers complied with the law.” (Opinion at page 9). Those issues, and others, will ultimately be heard and determined by the Circuit Court on remand.

Further, while the City continues to argue that “overriding goal” of its economic development corporations was to bring new business to the City so they can become water and sewer customers, the City’s own 2007 Black & Veatch report, cited by this Court in its Opinion, clearly states:

Our analysis is not intended to suggest the activities and functions provided by these departments is not of value to the City; rather, our analysis indicates no direct cost causation or benefit could be attributed to the Utility for these services, and therefore no cost causal based justification for direct funding from the Utility was supported for purposes of this study. (emphasis added) (Opinion at page 6).

On remand this subject can clearly be addresses further. However, if, in fact, the City’s “overriding goal” of its economic development corporations is to bring new business to the City so they can become water and sewer customers, the evidence in the record thus far strongly suggest that the City has abjectly failed to achieve any actual

financial benefit for its water and sewer services from the multi-millions of water and sewer fee dollars it has thus far “invested” in its economic development corporations.

As best the undersigned can determine, the phrase “judicial overreaching” has never previously been used in any published Opinion in the history of this Court or the S.C. Court of Appeals. Nothing in this Court’s Opinion in this case indicates that this Court has in any way “overreached” anything. To the contrary, the City won its Motion for Summary in the Circuit Court. Appellant’s appealed that ruling. This Court has reversed the Circuit Court’s determination that the City was entitled to summary judgment correctly citing the facts and applicable law which support that reversal. The City has presented no reason for this Court to alter, amend or reconsider that determination.

CONCLUSION

For the reasons set forth hereinabove, both individually and collectively, Appellants' respectfully submit that this Court should deny Respondent's Petition for Rehearing.



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

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

ATTORNEYS FOR APPELLANTS

Columbia, South Carolina

Dated: November 9, 2015

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, Jr.

Case No. 2011-CP-40-6705

RECEIVED

NOV 12 2015

S.C. SUPREME COURT

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

Appellants,

vs.

CITY OF COLUMBIA,

Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the 9th day of November 2015 she did serve one (1) copy of the *Appellants' Return To Respondent's Petition For Rehearing* in this case on counsel for the Respondent by depositing a copy of same in the United States Mail, postage prepaid, to the law office of opposing counsel at the following street address:

M. Mullen Taylor
Mullen Taylor, LLC
1230 Richland Street
Columbia, SC 29201

Dated this 9th day of November, 2015 at Columbia, South Carolina.


Sharon R. Barkley