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 REPLY TO APPELLANTS' RETURN TO PETITION FOR REHEARING

Pursuant to Rule 240(f), SCACR, Respondent City of Columbia hereby replies to Appellants' Return to the City's Petition for Rehearing. Appellants' Return fails to make any meritorious argument against the City's stated grounds supporting rehearing of this matter. Instead, Appellants largely misstate municipal law and rules of statutory construction, without any real analysis. Appellants drift back to its argument that the City's utility charges are a tax, an argument contradictory to their position on appeal that utility charges are subject to S.C. Code Ann. § 6-1-330. Appellants veer into unreviewable questions of a political nature when they make wholly unnecessary assertions that supposedly the City is an exploitative "robber baron" squandering revenue and grossly mismanaging its utility. "Courts are not bodies for the resolution

of public policy and generalized grievances." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014). The question before this Court is not a value judgment as to whether the City's actions are good or bad, or to second guess the legislative decisions of City Council over the past decade, but rather, the fundamental question is whether the City of Columbia, as well as other municipalities across the State, is prohibited by Section 6-1-330 from continuing their long-held practice of operating their utilities at a profit, and using that profit within their sound discretion. The City respectfully asks that this Court not take lightly the issue at stake here. The City's Petition for Rehearing should be granted. Appellants' arguments to the contrary are unconvincing for the following reasons.

1. **Appellants are mistaken in arguing that the legislature intended to overrule a century of case law supporting the City's practices.**

The City's Petition reiterated this Court's well-established precedent that municipalities are entitled to generate a profit or return on investment from their utility, arguing that this Court overlooked or misapprehended its precedent in its opinion. Appellants argue that this precedent no longer matters because *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) predates Section 6-1-330, thus rendering these cases irrelevant. However, under article VIII, § 16 of the South Carolina Constitution, the legislature conferred to municipalities a property right to own and operate a utility, which includes the right to make a profit from its utility.[1] *Sossamon v.*

[1] Appellants take issue with the City's statement that municipal utilities are treated like any other public utility such as privately owned wastewater utilities and electric utilities. While true that municipal utilities differ from a private wastewater utility in that the latter is regulated by the Public Service Commission and the former is not, Appellants miss the point. The point here is that municipal utilities are entitled to charge a rate that yields a profit, just like a privately owned utility can. *Mims v. Edgefield County Water & Sewer Authority*, 278 S.C. 554, 556, 299 S.E.2d 484, 485-486 (1983); *Sossamon*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960); *Simons*, 181 S.C. 353, 357, 187 S.E. 545, 546 (1936). Both municipal utility rates for residents and private utility rates are governed by a rule of reasonableness. *See* S.C. Code Ann. 5-31-670 ("[a]ny city or town or special service district may, after acquiring a waterworks or

Greater Gaffney Metro Utilities Area, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960). Further, *Sossamon* holds that a municipality's property interest includes the revenue stream (i.e., personal property) derived from a utility.[2] *Sossamon*, 236 S.C. 173, 183, 113 S.E.2d 534, 539 (1960). A municipality's use of its utility profits is left to the sound discretion of the municipality. *Green v. City of Rock Hill*, 149 S.C. 234, 264, 147 S.E. 346, 357 (1929). These property rights cannot be withdrawn or limited by statute. *Sossamon*, 236 S.C. 173, 183, 113 S.E.2d 534, 539 (1960).

Whether this property right is viewed as a constitutionally-conferred property right or recognition of common law property rights inuring to municipalities, either way, Section 6-1-330 cannot be read in isolation from this right. *See 16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) (stating that courts must construe a statute in a manner that does not abrogate common law if such interpretation is reasonable); *Thompson v. Hofmann*, 263 S.C. 314, 319, 210 S.E.2d 461, 463 (1974) (stating that statutes must be construed in a manner that is consistent with constitutional provisions); *see also Hoogenboom v. City of Beaufort*, 315 S.C. 306, 318 n.5, 433 S.E.2d 875, 888 n.5 (Ct. App. 1992) (recognizing common law right of municipality to use real property owned by the municipality for any public purpose it finds proper, and rejecting application of statute that would allow divestment of such right).

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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.") (emphasis added); S.C. Code Ann. 58-5-290 ("Whenever the Commission shall find, after hearing, that the rates, fares, tolls, rentals, charges or classifications or any of them, however or whensoever they shall have theretofore been fixed or established, demanded, observed, charged or collected by any public utility for any service, product or commodity, or that the rules, regulations or practices, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law, the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to be thereafter observed and enforced and shall fix them by order as herein provide.") (emphasis added); 64 Am. Jur. 2d *Public Utilities* § 38 ("It is well settled that a public utility is entitled to a reasonable compensation in return for the service that it furnishes and that it may exact reasonable charges in accordance with the services provided or the rates established therefor.").

[2] It is this point that Appellants overlook in their Return. Appellants' Return, pp. 8-9. *Sossamon* did not only address legislation that forced the city to serve nonresidents, but also denied the "right to determine how its surplus revenues shall be used." *Sossamon*, at 184, 540.

Appellants go on to argue that statutes providing that municipalities may furnish water and sewer at a reasonable rate to city residents, and by contract at the highest amount obtainable to nonresidents, S.C. Code Ann. § 5-31-670 and S.C. Code Ann. § 5-31-1910 respectively, are superseded by Section 6-1-330 because it is the "last legislative expression" on the subject. Aside from this Court's admonition that the last legislative expression rule "is purely an arbitrary rule of construction and is to be resorted to only when there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted," *Eagle Container Co., LLC v. County of Newberry*, 379 S.C. 564, 572, 666 S.E.2d 892, 896 (2008), the problem with Appellants' argument is that there is no conflict between Section 6-1-330 and Section 5-31-670, nor between Section 6-1-330 and Section 5-31-1910. Section 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." Section 6-1-330(B) says nothing about net revenues left after utility expenses are paid. Appellants construe this statute to mean that revenue derived from a fee imposed to finance the provision of a public service must be used exclusively or solely to pay the costs of the service. Yet the word "exclusively" or "solely" or any other similar word is not found within Section 6-1-330. Appellants impermissibly read such words of restriction into Section 6-1-330. *See Berkeley County Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009) ("The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation."). Appellants' rebuttal to the City's arguments fall short.[3]

[3] Appellants then return to their argument below that the City's transfer of $4.5 million annually is a tax, an argument unpreserved for appellate review, and in any event, incorrect as a matter of law. It is well established that a utility charge is not a tax. *Simons v. City Council of Charleston*, 181 S.C. 353, 358, 187 S.E. 545, 547 (1936); *Green v. City of Rock Hill*, 149 S.C. 234, 264, 147 S.E. 346, 357 (1929). In addition, Appellants' impromptu tax argument is at odds with its contention that the City's use of its utility revenues violates Section 6-1-330, a statute that expressly applies to fees, not taxes.

Appellants assert, without any supporting rationale, that Section 6-1-330 severs a city's right to charge a utility rate that generates a profit from a city's budgetary decision-making concerning how that profit may be spent. Appellants' argument does not square with the meaning of the word "profit," defined as monies remaining after the City's budgeted expenditures are met. In other words, Appellants ask this Court to ignore well-settled law establishing the City's right to a profit by insisting that whatever profit is generated must be appropriated to fund the utility and its reserve funds, thus extinguishing altogether the right to generate a profit. In other words, to deny or ignore the complex decisions made by the City's administrators and legislators in determining the capital needs of the utility, the utility rates needed, utility personnel management, and utility debt management. By seeking to prohibit the transfer of net utility revenue to the general fund, Appellants expose City residents to the prospect of a property tax increase to make up the loss within the general fund. Such a result would improperly intrude upon the City's discretion in how it chooses to fiscally manage itself. *See Green v. City of Rock Hill*, 149 S.C. 234, 262, 147 S.E.2d 346, 356 (1929); *Werts v. Feagle*, 83 S.C. 128, 135, 65 S.E. 226, 229 (1909). Appellants obviously believe that the City has not exercised its discretion well, but Section 6-1-330 is not the appropriate avenue to remedy their grievance.[4]

Appellants Return is riddled with accusations and assumptions about the City that lack supporting evidence, or Appellants refuse to acknowledge uncontested evidence that refutes their accusations. More importantly, these value judgments are not at all necessary or appropriate to

[4] For example, City residents may challenge the City's rates as unreasonable, or challenge the City's utility management as a breach of its duty as trustee of property. *See Simons v. City Council of Charleston*, 181 S.C. 353, 187 S.E. 545 (1936).

determine whether rehearing is warranted.[5] This Court should not be swayed by Appellants' political opinions in deciding upon the City's Petition.

2. Appellants fail to provide any basis to counter the City's argument that this Court misread S.C. Code Ann. 6-1-330(B).

In its Petition, the City asserted that this Court overlooked or misapprehended proper construction of Section 6-1-330(B) by reading the phrase "imposed to finance the provision of public services" out of the statute. In their Return, Appellants dismiss this argument as mere parsing of words. It is a well-established rule of statutory construction that a statute should be construed so that no word or phrase is rendered superfluous. *State v. Smith (In re Decker),* 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995); *State v. Graves*, 269 S.C. 356, 363, 237 S.E.2d 584, 587 (1977). The phrase "imposed to finance the provision of public services" cannot be treated as "useless baggage." *Graves*, at 363, 587. Appellants make no attempt to offer any reason, much less a sound reason, for this Court's omission of the phrase "imposed to finance the provision of public services" in its analysis.

3. Appellants fail to rebut the City's argument that this Court overlooked the lack of applicability of Section 6-1-330 to revenues derived from nonresidents.

In its Petition, the City asserted that this Court overlooked its argument that Section 6-1-330 does not apply to revenue derived from nonresidents because: 1) the statute does not expressly apply to nonresident revenue; or 2) the City does not impose water and sewer upon nonresidents due to the discretionary and contractual nature of the relationship between a nonresident and a

[5] See *Newman v. Richland County Historic Preservation Comm'n*, 480 S.E.2d 72, 76, 325 S.C. 79, 86 (1997). ("'Checks and balances' is not just an abstract phrase, but describes a set of concrete governmental arrangements allowing each branch of government to discharge its responsibilities without infringing on those of another branch. One of these arrangements is judicial review of certain executive and legislative actions. In determining when it is permissible to conduct such review, it is important to distinguish between matters of policy and matters of law. The courts are not in the business of reviewing the merits of legislative or executive policies; rather, our role is confined to determining whether a particular action is legal.").

municipality. Appellants' only discernable response is that the City is trying to "exempt itself from of [sic] 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 service." Appellants' Return, p. 7. The City's contractual arrangement with nonresident utility customers is not a tactic of avoidance as Appellants suggest. State law requires a contract between municipalities and nonresidents in the event that both parties choose to contract. S.C. Code Ann. § 5-31-1910. A contract is required because cities lack jurisdiction outside their corporate boundaries. *Childs v. City of Columbia*, 87 S.C. 566, 570, 70 S.E. 296, 298 (1911).

Appellants remaining suggestions are without logic or merit. Contrary to Appellants absurd suggestion that the City seeks to become an outlaw capitalist, the City is carrying out an obligation created in *Childs* to sell water to nonresidents "for the sole benefit of the city at the highest price obtainable." *Childs*, at 571, 298. The City is not "abandoning its role as a government entity," but rather carrying out a practice sanctioned by this Court to charge higher rates to nonresidents and use this revenue to offset the tax burden of City residents. *Sloan v. City of Conway*, 347 S.C. 324, 331, 555 S.E.2d 684, 687 fn. 10 (2001).

4. Appellants ignore the fact that the City's amendments to its pre-existing rate ordinances not "new fees."

In their Return, Appellants acknowledge that the City enacted its water rate ordinance in 1895, but failed to recognize that the City enacted its sewer rate ordinance in 1970, both of which were in place long before Section 6-1-330 was enacted in 1997. Appellants argue that amendments to these ordinances constitute new fees subject to limitations found in Section 6-1-330. However, Section 6-1-330 says nothing about amendments to pre-existing ordinances. 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). Further, Act 138, from which Section 6-1-330 was enacted, had a general effective date of July 1, 1997. Aside from the express language of the statute, "absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature." *Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). "A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability." *Id.* A statute is procedural in nature where it provides for a procedure in court or provides for a means to enforce a right. *Id.* Section 6-1-330 does neither of these; instead, it imposes new obligations or duties upon local governments. When a statute impairs pre-existing rights, or imposes new obligations or duties, that statute has prospective effect. *Id.* at 579, 466. The statute clearly has prospective effect only.

Section 6-1-330(A) explicitly states that fees "adopted or imposed by a local governing body prior to December 31, 1996 remains in force and effect until repealed by the local governing body." (emphasis added). The City has not repealed its water and sewer rate ordinances. As already stated, the City enacted its water rate ordinance in 1895 and its sewer rate ordinance in 1970. In each new codification of the City's ordinances in 1907, 1917, 1933, 1943, 1956, 1969, 1979, and 1998, the City's water and sewer rate ordinances continued in effect without repeal. The 1998 Codification only repealed ordinances that were not included in the new Code, and the City's water and sewer ordinances unquestionably were included in the new Code.[6] R. p. 838, 841-850.

[6] Further, each City codification contained a provision stating that ordinances enacted prior to a particular codification were to be considered as continuations thereof and not as new enactments. *See* Section 1-3, Columbia Code of Ordinances (1998) ("The provisions appearing in this Code, so far as they are the same as those of the 1979 Code and all ordinances adopted subsequent to the 1979 Code and included herein, shall be considered as continuations thereof and not as new enactments.").

Thus, the 1998 codification of the City's ordinances did not repeal the City's water and sewer rate ordinances.

Appellants argue that amendments to the City's water and sewer ordinances enacted after the effective date of Section 6-1-330 to increase rates constitute a "new service or user fee" subject to the limitations found in Section 6-1-330(B). In 1998, 2000, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2010, 2011, 2012 and 2013, the City amended its Water and/or Sewer Rate Ordinances. (R. p. 742, ¶ 6, ¶ 10); (R. pp. 1298-1300). The City's ordinance amendments clearly served to amend the existing water and sewer rate ordinances. *See e.g.* R. p. 907 ("Be it ordained ... that the 1998 Code of Ordinances of the City of Columbia ... is amended to read as follows ...."). (emphasis added). Section 6-1-330 does not apply to amendments. No mention is made in Section 6-1-330 of its applicability to subsequent amendments to a pre-existing ordinance that already established a fee. This Court cannot read the word "amendment" into the statute. *See Kinard v. Moore*, 220 S.C. 376, 68 S.E.2d 321, ***14 (1951) ("The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy"). The General Assembly could have added the word "amend" or "amendment" to this section but chose not to do so.[7] The City's amendments to its long-standing water and sewer rate ordinances are not subject to the limitations found in Section 6-1-330(B).

5. Appellants fail to overcome the City's argument that the Revenue Bond Act for Utilities does not provide a means by which Appellants can seek and obtain judicial review of the City's covenants with its bondholders.

Appellants state that they "clearly have the right to challenge the City's gross financial mismanagement of the monies collected as water and sewer fees," citing to *Newman v. Richland County Historic Preservation* Commission, 325 S.C. 79, 84, 480 S.E.2d 72, 75 (1997), for their

[7] Compare § 6-1-330 with § 6-1-315 within 1997 S.C. Acts 138, in which local governments are authorized to "impose a business license tax or increase the rate of a business license tax." (emphasis added).

assertion that presumably Appellant Cumberland, and not the remaining Appellants who were adjudged to lack standing, cannot be denied the right to challenge the City's financial decisions under the Revenue Bond Act for Utilities. Appellants' Return, p. 11. However, they offer no basis from which they may intrude upon the City's covenants with its bond holders. Appellants have never asserted standing based upon the Revenue Bond Act for Utilities. It was the City that brought forth S.C. Code Ann. § 6-21-440 as an alternative defense to Appellants' claim that the City's transfer of $4.5 million from its utility enterprise fund to its general fund was unlawful. Appellants made no argument on appeal that it had the right under the Revenue Bond Act for Utilities to question the sufficiency or adequacy of the City's funding of its operation and maintenance and reserve funds. They simply asserted that the City allegedly failed to establish or fund any of these accounts. Appellants' Final Brief, pp. 16-17; *see also* R. pp. 432, line 21 – p. 434, line 12. It was only when this Court instructed the trial court on remand to explore the "adequacy" and "sufficiency" of the City's funding of the accounts described under S.C. Code Ann. § 6-21-440 that Appellants have suddenly claimed that merely placing monies in these funds "does not in and of itself meet the sufficiency requirement." Appellants' Return, p. 11. The Revenue Bond Act for Utilities does not confer a private right of action for citizens to challenge whether the City's utility funding is "sufficient" or "adequate."

As to whether the City has funds or accounts for utility operation and maintenance, and reserves for depreciation, and improvement (contingency), Appellants insist that the City presented no evidence whatsoever that these funds exist. Their assertion is patently untrue. On page 1010 of the record, the City's Comprehensive Annual Financial Report states that the City has complied with its bond covenants. The City's Resolution establishing its transfer policy states that the City has met the covenants of its bond ordinance. R. p. 653. The Resolution includes as a condition

that the transfer can't happen if the transfer would cause the City to fail to maintain all reserve funds at their required levels. R. p. 654. Page 1067 of the record shows the Utility operating expenses, debt service, and net revenue of the Utility for the past 10 years. The City's Chief Financial officer testified that the City's utility enterprise fund pays for operation, maintenance, capital improvements, and debt service. R. p. 931, §§ 13-15. The City's financial reports show money designated on annual basis for depreciation costs. *See* R. pp. 973 and 1005. The City's Comprehensive Annual Finance Report for fiscal year 2010/2011 shows the City's coverage of its Utility revenue bonds and its reserve cash required to be kept pursuant to its Bond Ordinance. R. p. 1406. The utility's cash flow analysis shows the City's building of cash reserves for contingencies. R. p. 972-973. Mr. Gantt testified that the Utility maintains a "fairly substantial" fund balance after all obligations have been met. R. p. 515, line 24 – p. 517, line 23. The Budget Director testified that the utility almost always has surplus revenue. R. p. 615, lines 5-18.

Appellants make numerous other assertions about "gigantic deficits" in the utility enterprise fund and the utility being in a "state of disrepair," that reflect a real misunderstanding of the operation and management of the City's utility in particular, and of municipal finance in general. Not only that, a Petition for Rehearing is not the appropriate forum to refute Appellants hyperbolic characterization of factual matters that the City has not raised as being overlooked or misapprehended. Further explaining of these and other unsupported conclusions[8] are better left to the trial court should this Court maintain that remand is proper.

[8] However, the City can make quick work of Appellants' assertion that "the record thus far strongly suggest that the City has abjectly failed to achieve any actual financial benefit for its water and sewer services" derived from its economic development activities. The Columbia Development Corporation was instrumental in transforming the Vista, a declining warehouse district, into a vibrant entertainment district, which brought new businesses, and thus new water and sewer customers, to the utility. R. p. 538, lines 6-23. The City's economic development activities were instrumental in redevelopment of Main Street, including the construction of new office buildings such as the Meridian Building, which are "fairly significant" new water users. R. p. 540, line 10 – p. 541, line 5. Moreover, Section 6-1-330(B) does not require any local government to prove that its use of fee revenue must meet any sort of performance standard.

Respectfully submitted,

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Nov. 16, 2015

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CERTIFICATE OF SERVICE

I certify that I have served Respondent's Reply to Appellants' Return to Respondent's Petition for Rehearing upon Appellants' counsel by depositing a copy of it in the United States Mail, postage prepaid, and by electronic mail, on the 16th day of November, 2015, addressed to counsel of record, as follows:

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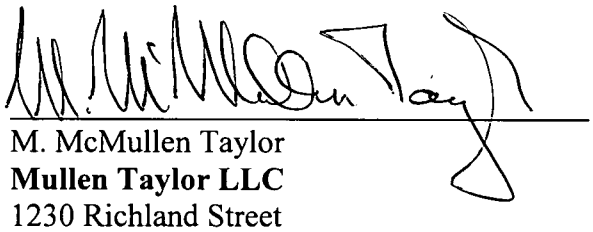

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