

**STATE OF SOUTH CAROLINA**  
In the Court of Appeals

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**APPEAL FROM RICHLAND COUNTY**  
Court of Common Pleas for the Fifth Judicial Circuit  
G. Thomas Cooper, Jr., Circuit Court Judge

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Circuit Court Docket No. 2011-CP-40-6705  
Appellate Case No. 2016-02446

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**SC Court of Appeals**

**FRANK J. CUMBERLAND, JR., JENNIFER B. GARDNER.**  
**AND MICHAEL UGINO,**

Appellants,

vs.

**CITY OF COLUMBIA,**

Respondent.

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**RECORD ON APPEAL**

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## II.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. *Zurich Am. Ins. Co. v. Tolbert*, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010) ("Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence.") (citing *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009)). When reviewing a grant of summary judgment, this Court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRPC. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014).

## III.

### A.

The Legislature has directed that local governments must use revenue derived from service or user fees to pay costs related to the provision of the services for which the fee was paid:

(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. . . . A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.

(B) *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.* If the revenue generated by a fee is five percent or more of the imposing entity's prior fiscal year's total budget, the proceeds of the fee must be kept in a separate and segregated fund from the general fund of the imposing governmental entity.

S.C. Code Ann. § 6-1-330 (2004) (emphasis added).

The City admits the monies at issue fall within the definition of "service or user fee" as the term is statutorily defined. *See* S.C. Code Ann. § 6-1-300(6) (defining a "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"). Thus, 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 services?

Through an incorrect interpretation of the word "imposed," the trial court accepted the City's argument and found that section 6-1-330(B) does not apply to the water and sewer fees paid by the users. Specifically, the trial court found that because water and sewer customers must sign a contract agreeing to pay for water and sewer service, the service arrangement is therefore a voluntary one, in which the City acts in a "proprietary capacity." Following the City's lead, the trial court then reasoned the voluntary nature of the arrangement and the City's "proprietary capacity" somehow combine to allow these revenues to escape the limitations of section 6-1-330(B) and to permit the City to spend water and sewer revenues in any manner and for any purpose the City wishes. We reject this construction of section 6-1-330(B). *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 525–26, 642 S.E.2d 751, 754 (2007) ("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.") (citing *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

Moreover, we do not accept the unsupported premise that these contracts for water and sewer services are "freely entered into by resident and non-resident consumers."<sup>3</sup> Nor is the analysis of whether section 6-1-330(B) applies impacted

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<sup>3</sup> *See* International Property Maintenance Code § 505.1 (2012) ("Every sink, lavatory, bathtub or shower, drinking fountain, water closet or other plumbing fixture *shall be properly connected* to either a public water system or to an *approved* private water system.") (first emphasis added), *adopted by* City of Columbia Code § 5-151(a) (2013). Indeed, the City's own budget director testified in her deposition that "you can't live without water and sewer" and that these services are the "basis of life."

by whether the City is acting in a so-called "proprietary capacity."<sup>4</sup> Rather, the plain language of section 6-1-330(B) speaks in terms of whether revenues are "derived from a service or user fee," not whether the fee is charged pursuant to contract or ordinance or whether water and sewer customers voluntarily or involuntarily accept the imposition of such fees. Because the City has conceded that the source of the revenues is service or user fees, we find the statute requires that revenues *must* be spent on costs "related to" the City's provision of water and sewer services. Indeed, the plain and ordinary meaning of the language in section 6-1-330(B) requires some nexus—some commonality—between the underlying purpose of the expenditure and the City's provision of water and sewer services.

In light of the proper construction of section 6-1-330, there is a genuine issue of material fact as to whether the City's transfers and expenditures were lawful. As to the economic development expenses the City paid directly from the water and sewer Enterprise Fund, there is a genuine issue of material fact as to whether each of these expenditures has a sufficient nexus with the provision of water and sewer

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<sup>4</sup> Indeed, "proprietary capacity" is essentially an accounting concept that refers to governmental activities for which "a fee is charged to external users for goods or services," thus bearing closer resemblance to private businesses in terms of funding than to general governmental activities, which are funded primarily through tax revenues. *See* Codification of Accounting Standards and Procedures § 1300.109 (Gov'tl Accounting Standards Bd. 2014) (citing GASB Statement No. 34, ¶67 (Gov'tl Accounting Standards Bd. 1999)) (providing guidance on financial reporting for proprietary funds). According to the relevant Generally Accepted Accounting Principles, revenues derived from "proprietary" government activities must be segregated into a distinct enterprise fund and reported separately on financial statements if state "[l]aws or regulations require that the activity's costs of providing services . . . be recovered with fees and charges, rather than with taxes or similar revenues." *Id.* at § 1300.109(b). With no supporting authority, the City vastly overestimates the significance of its purported "proprietary capacity" in arguing that, when a county or municipality acts in a proprietary capacity to offer services by contract to residents and non-residents, section 6-1-330 does not constrain the local government's use of such funds. Nothing in the language of section 6-1-330(B) differentiates or depends upon whether the service or user fee revenues are deposited into a governmental fund or a proprietary or enterprise fund; rather, that statute simply speaks in terms of "revenue derived from a service or user fee imposed to finance the provision of public services."

services such that the requirements of section 6-1-330(B) are satisfied.<sup>5</sup> We acknowledge the deposition of City Manager Steven A. Gantt, in which Gantt testified that the "overriding goal" of the City's economic development expenditures was "to bring new businesses within the [C]ity limits so that they can and do indeed become water and sewer customers." However, the record also includes an April 2007 report completed at the City's request by independent consulting firm Black & Veatch, in which the consulting firm cautioned against the very practice that led to this lawsuit:

Based on our cost causal analysis, of the Utility's 2006 budget of \$94.8 million . . . approximately \$7.5 million of directly funded costs should not be funded by the Utility Enterprise Fund and are more appropriately funded through the general fund budget. This includes \$3.6 million for non-departmental, capital improvements, and component units (development corporations). 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.

Based on this conflicting evidence about whether these economic development expenditures are sufficiently "related to" the provision of water and sewer services, summary judgment was premature and further factual development is warranted upon remand to evaluate the nexus, if any, between these economic development costs and the provision of water and sewer services. *See Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 575–76, 757 S.E.2d 399, 404 (2014) (stating "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment" (quotations and citations omitted)).

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<sup>5</sup> The record reveals that since 1999, the City has budgeted more than \$29 million in water and sewer funds on various economic development expenditures.

**B.**

As to the City's transfers of water and sewer fees into the General Fund, including the City's long-standing practice of annually budgeting a \$4.5 million blanket transfer of water and sewer revenues into its General Fund, we similarly find a genuine issue of material fact rendered summary judgment inappropriate.<sup>6</sup> In this regard, the parties concede the applicability of section 6-21-440 of the Revenue Bond Act. Section 6-21-440 of the Revenue Bond Act sets forth in detail the order in which service or user fees are to be expended in paying related costs, directing that revenues must be set aside for certain purposes other than debt service and operating costs, and allows for the disposition of any surplus funds. Specifically, section 6-21-440 provides:

Out of the revenues there shall be set aside a sum sufficient to pay the principal of and the interest upon the bonds as and when they become due and payable. . . . This fund shall be designated the "bond and interest redemption fund." Out of the revenues there also shall be set aside a sum sufficient to provide for the payment of all expenses of administration and operation and such expenses for maintenance as may be necessary to preserve the system, project or combined system in good repair and working order. This fund shall be designated the "operation and maintenance fund." . . . Out of the remaining revenues there shall be next set aside a sum sufficient to build up a reserve for depreciation of the existing system or combined system. This fund shall be designated the "depreciation fund." Out of the remaining revenues there shall be next set aside a sum sufficient to build up a reserve for improvements, betterments, and extensions to the existing system, project, or combined system, other than those necessary to maintain it in good repair and working order as herein provided. This fund shall be designated the "contingent fund." 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.

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<sup>6</sup> The record reveals that certain monies within the Enterprise Fund may be derived not from service and user fees, but from other revenue sources (such as unrestricted interest income). However, the City has conceded that all the funds at issue are derived from service and user fees, and therefore, this analysis necessarily assumes that all monies transferred from the Enterprise Fund are derived from service or user fees. This issue may be further explored on remand.

S.C. Code Ann. § 6-21-440 (2004). It is only after the utility system's operating and maintenance expenses and bond principal and interest expenses have been paid and the statutorily required set-asides have been made in the depreciation and contingent funds that "[a]ny surplus revenues thereafter remaining" may be used for unrelated purposes at the local government's discretion.<sup>7</sup>

We find the "surplus revenues" provisions of the Revenue Bond Act can be reconciled with the requirement of section 6-1-330(B) that all service or user fees must be used to pay for "related" costs. *See Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) ("Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.") (citing *Butler v. Unisun Ins.*, 323 S.C. 402, 408, 475 S.E.2d 758, 761 (1996)). Specifically, we find the "surplus revenues" provision of section 6-21-440 is a limited exception to the general rule in section 6-1-330(B)—an exception that allows disposition of surplus funds *if* the specific preconditions set forth in section 6-21-440 have been met. *See Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) ("The general rule of statutory construction is that a specific statute prevails over a more general one.") (citing *Mims v. Alston*, 312 S.C. 311, 313, 440 S.E.2d 357, 359 (1994)).

Turning to the facts of this case, there is a genuine issue of material fact as to whether the transfers into the City's General Fund are properly considered either "related" costs under section 6-1-330 or characterized as "surplus revenues" under section 6-21-440.

As to the \$4.5 million diverted from the Enterprise Fund into the General Fund each year, the record reveals this City practice has been longstanding<sup>8</sup> and the amount of the budgeted transfer does not seem to be impacted by any sort of

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<sup>7</sup> *See also* S.C. Code Ann. § 6-21-480 (disposition of surplus in operation and maintenance fund); *id.* § 6-21-490 (disposition of surplus in depreciation fund); *id.* § 6-21-500 (disposition of surplus in contingent fund).

<sup>8</sup> Evidently, this practice was memorialized in 1993 through a resolution of the Columbia City Council, which provides that transfers from the water and sewer fund to the General Fund are permitted but should not be made where to do so would impair the City's ability to operate and maintain the system or service the related debt or result in a rate-increase for customers, among other things.

periodic determination of the measurable, actual costs attributable to the water and sewer system. For over fifteen years, the City's budget has included a blanket transfer into the General Fund in the amount of \$4.5 million, which appears to be a pre-determined amount that is essentially treated as "surplus" revenue and transferred into the General Fund for disposition at the City's discretion.

Although section 6-21-440 allows for the discretionary disposition of surplus revenues in certain circumstances, we find there is a genuine issue of material fact as to whether the City has 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. Although there is some evidence to suggest that the City has made expenditures for maintenance and capital improvements to its utility infrastructure, there is also evidence that these maintenance efforts have been inadequately funded and insufficient to keep the utility system in good repair and working order as required by section 6-21-440.

The record reveals that in 2013, the United States, through the Environmental Protection Agency (EPA), and the State of South Carolina, through the Department of Health and Environmental Control (DHEC), sued the City in federal court for various violations of the federal Clean Water Act resulting from numerous sanitary sewer overflows and other water quality impairments. This suit was ultimately settled by consent decree, in which the City agreed to implement a sound management program and 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.<sup>9</sup>

Accordingly, summary judgment was premature, and we reverse and remand 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.

#### IV.

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<sup>9</sup> The City also agreed to pay civil penalties in the amount of \$476,400 and expend an additional \$1,000,000 in a supplemental environmental project to improve water quality and reduce flooding in specific parts of the City's service area.

Finally, we reject the City's contention that interpreting section 6-1-330 to apply and limit the City's expenditure of service and user fees would effectively preclude any water and sewer revenues from ever being spent on anything other than the utility's direct costs. We do not construe the statutes in such a narrow and restrictive manner. Rather, the relevant statutory scheme expressly contemplates the unrestrained disposition of surplus funds under the appropriate circumstances. *See* S.C. Code Ann. § 6-21-440 (allowing "surplus revenues" to 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" once certain preconditions are satisfied). However, absent the legislatively sanctioned process and progression that permit the expenditure of user fees as "surplus revenues," the law requires some nexus between the City's provision of water and sewer services and the underlying purpose of each expenditure or transfer of water and sewer funds. Simply put, the statutes do not allow these revenues to be treated as a slush fund.<sup>10</sup>

**REVERSED AND REMANDED.**

**TOAL, C.J., PLEICONES, BEATTY, and HEARN, JJ., concur.**

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<sup>10</sup> We affirm pursuant to Rule 220(b)(1), SCACR, the trial court's denial of class action certification and its finding that Appellants Joseph Azar and Michael Letts lacked standing. Frank J. Cumberland, Jr., shall be the sole plaintiff on remand.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2011-CP-40-6705

Plaintiffs,

vs.

City of Columbia,

Defendant.

**ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

This matter came before the Court for a hearing on Plaintiffs' Motion for Class Certification. Specifically, the motion before the Court seeks to certify a class of water customers of the City of Columbia, past and present as of three years prior to the filing of the Complaint. Having reviewed the pleadings, the motion, and the memoranda submitted by Plaintiffs and Defendant, I find and conclude that class certification is not necessary or appropriate in this case.

The primary issue presented in the case is whether the City of Columbia's water and sewer charges are subject to limitations found in Section 6-1-330 of the South Carolina Code, which provides that service fees collected by local governments must be used for costs related to the service or program for which it was paid. Plaintiffs allege that the City of Columbia violated this statute by using some of its water and sewer revenues for purposes that they contend are unrelated to water and sewer service, such as funding economic development activities. Plaintiffs also allege that the City's annual transfer of up to \$4.5 million dollars from its water and sewer enterprise fund to its

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JEANETTE M. MERRID  
C.P. G.S.S.  
RICHLAND COUNTY  
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general fund violates Section 6-1-330 of the South Carolina Code. Plaintiffs seek a permanent injunction requiring Defendant in the future "to place all fees collected for operations of and/or capital improvement of the water and sewer system in a segregated account and to only be used for such purposes," and to replace all monies Defendant expended in the past for other purposes.

Plaintiffs are seeking to have a class certified in connection with their claim for injunctive relief. South Carolina appellate courts have not had an opportunity to address a situation involving a proposed class action seeking an injunction against a municipality. However, other courts have held in such cases that, regardless of whether the elements of Rule 23(a) are satisfied, a class should only be certified if there is a need for the complexities and extra costs associated with class suits. *See Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (6th Cir. 1976); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974). These courts concluded that class certification was unnecessary because any declaratory or injunctive relief given in the individual action of the named plaintiffs would inure to the benefit of other similarly situated individuals.

The principle set forth in cases like *Craft v. Memphis Light, Gas and Water Division* and *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach* is directly applicable in this case. Plaintiffs seek injunctive relief directing the City of Columbia to comply with Section 6-1-330 of the South Carolina Code. The named Plaintiffs can fully and adequately present this claim, and the Court can assume that the City will comply with an injunction if the Court ultimately deems it appropriate to enter

such relief. Thus, there is no need for the complexities and extra costs associated with class actions, and no useful purpose will be served by class treatment.

Not only is class certification unnecessary in this case, but Plaintiffs have not established all five of the requirements of Rule 23(a), SCRCF, which are necessary for class certification. The South Carolina Supreme Court has held that proponents of class certification bear the burden of proving five prerequisites under South Carolina law. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRCF. The prerequisites are: 1) the class must be so numerous that joinder of all members is impracticable; 2) there must be questions of law or fact common to the class; 3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; 4) the representative parties must fairly and adequately protect the interests of the class; and 5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy must exceed one hundred dollars for each member of the class. Rule 23(a), SCRCF. In deciding whether class certification is proper, the court must apply a rigorous analysis to determine whether each prerequisite is satisfied. Failure to satisfy even one prerequisite is fatal to class certification. *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003).

Plaintiffs seek to certify a class of "all Columbia water customers, past and present as of three years prior to the filing of the Complaint." However, Plaintiffs cannot establish the third and fifth requirements for class certification. The third element is that the claims of the representative parties are typical of the claims of the class. No evidence has been presented that any other potential class members wish to assert a claim.

Plaintiffs are complaining about the manner in which the City is spending water and sewer revenues. Plaintiffs have not shown that other citizens have presented similar complaints.

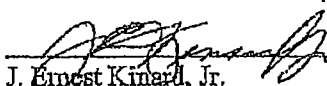
Plaintiffs also fail to meet the fifth requirement for class certification because the relief sought is not primarily injunctive or declaratory with respect to the class as a whole, and the amount in controversy does not exceed one hundred dollars for each class member. Plaintiffs apparently concede that the amount in controversy does not exceed one hundred dollars for each class member. In their Motion, they state that "Plaintiffs request injunctive relief such that the amount in controversy is not in issue." However, a review of Plaintiffs' Second Amended Complaint indicates that the relief primarily sought is not injunctive or declaratory, as required by Rule 23(a)(5), SCRCPP.

In their First Cause of Action, the relief primarily sought by Plaintiffs is injunctive relief. However, Plaintiffs allege three additional causes of action which do not seek injunctive or declaratory relief. In the Second Cause of Action, Plaintiffs assert a claim for breach of contract and seek "a refund of all fees collected." In the Third Cause of Action, Plaintiffs assert a claim for "Unconstitutional Collection." The relief sought in that cause of action is the creation of a common fund of all fees collected by the City for water improvements for the past three years. Finally, in the Fourth Cause of Action, Plaintiffs assert a claim for "Unconstitutional Tax." That cause of action asks for "judgment for the class and a common fund and for actual damages and the costs of the action." Thus, only one of the four causes of action alleged by Plaintiffs seeks an injunction as its primary relief. As such, Plaintiffs fail to satisfy the requirement set forth in Rule 23(c)(5) of the South Carolina Rules of Civil Procedure.

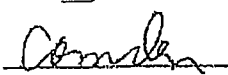
Based on the foregoing, class certification is both unnecessary and inappropriate in this case. If it is ultimately determined that the relief sought by Plaintiffs in this case should be granted, the Court may presume the good faith of government officials to respect such a ruling without the necessity of making this a class action. Moreover, a review of the record in this case indicates that Plaintiffs cannot establish all five elements required for class certification. Accordingly,

Plaintiffs' Motion for Class Certification is DENIED.

AND IT IS SO ORDERED.

  
J. Ernest Kinard, Jr.  
Presiding Judge  
Fifth Judicial Circuit

June 22, 2012

 South Carolina

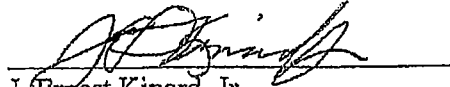


of action for injunctive relief against the City of Columbia, the relief entered in this action will inure to the benefit of other similarly situated individuals.

Based on the foregoing, class certification is both unnecessary and inappropriate in this case. If it is ultimately determined that the relief sought by Plaintiffs in this case should be granted, the Court may presume the good faith of government officials to respect such a ruling without the necessity of making this a class action. Accordingly,

Plaintiffs' Motion for Reconsideration is DENIED.

AND IT IS SO ORDERED.

  
J. Ernest Kinard, Jr.  
Presiding Judge  
Fifth Judicial Circuit

September 19, 2012

Camden, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
C/A NO. 2011-CP-40-6705

Joseph S. Azar, Frank J. Cumberland, Jr.,  
Michael A. Letts, Jennifer B. Gardner and  
Michael R. Ugino, Individually and as  
Class Representatives,

Plaintiffs,

vs.

City of Columbia,

Defendant.

ORDER DENYING DEFENDANT'S  
MOTION TO STRIKE

RICHLAND COUNTY  
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JANETIE W. McBRIDE  
C.C.P. & G.S.

This matter is before the Court based on Defendant City of Columbia's Motion to Strike certain allegations in the Plaintiffs' Complaint. The Plaintiffs previously amended their Complaint upon remand from the Supreme Court. The Defendant seeks to remove all allegations regarding a class action and to dismiss Plaintiffs Azar and Letts. The Court has been advised by Plaintiffs' counsel that they have agreed to delete the dismissed Plaintiffs (Azar and Letts) and to delete all allegations regarding a class action. The only allegation in contention is Defendant's motion to strike the establishment of a common fund.

A. JUDGE KINARD'S ORDER IS THE LAW OF THE CASE

Plaintiffs point out that a common fund is not only necessary, but applicable in this case. Judge Kinard envisioned such a common fund in his Order Denying Plaintiffs' Motion for Class Certification and the Order on Reconsideration.<sup>1</sup> In those Orders, Judge Kinard wrote:

These courts concluded that class certification was unnecessary because any declaratory or injunctive relief given in the individual action of the named plaintiffs would inure to the benefit of other similarly situated individuals.  
(Order of Judge Kinard filed June 26, 2012).

<sup>1</sup> Judge Kinard's Order is the law of the case as his Order was affirmed on appeal by the South Carolina Supreme Court.

SCANNED

Judge Kinard also wrote in his Order Denying Plaintiff's Motion for Reconsideration:

That is, if the Plaintiffs prevail on their cause of action for injunctive relief against the City of Columbia, the relief entered in this action will inure to the benefit of other similarly situated individuals.

(Order Denying Reconsideration filed September 19, 2012).

Accordingly, if Plaintiffs are successful in this case, all similarly situated individuals will benefit and all monies paid by water and sewer customers for water and sewer fees would have to be returned by the City of Columbia to the Water and Sewer Enterprise Fund. In effect, Plaintiffs' success in this action requires the City of Columbia to refund all payments made by any water and sewer customer to the Water and Sewer Enterprise Fund. *See also, Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948) holding that "A taxpayer singly or in a class suit may maintain a suit in equity to restrain unlawful municipal action which leads, directly or indirectly, to taxation and a taxpayer, as specially damaged by the increase of the burden of taxation on his property, has a special interest, distinct from the general public, in the subject matter of such a suit which entitles him to relief."

This Court finds that by definition Judge Kinard's Order creates a common fund should the Plaintiffs be successful in this case.

B. A MOTION TO STRIKE MAY NOT BE USED IN PLACE OF SUMMARY JUDGMENT.

There are also other reasons for denying Defendant's Motion to Strike. A motion to strike is governed by South Carolina Rule of Civil Procedure 12(h) of the South Carolina Rules of Civil Procedure. A motion to strike is not to be used as a motion for summary judgment. According to SCRCF 12(h): "The court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Because a motion to strike is part of SCRCF 12, this Court must evaluate the motion to strike in the light most favorable to the Plaintiffs

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if there are facts and inferences which would entitle the Plaintiffs to relief on any theory then a SCRCP 12 motion is improper. *See Freemantle v. Preston*, 398 S.C. 186, 728 S.E. 2d 40 (S.C. 2012). (If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal for failure to state a claim is improper). It also appears from Defendant's argument that they intend to strike a potential remedy affirmed by the Supreme Court (Judge Kinard's Order) and not any redundant, immaterial, impertinent or scandalous material in the complaint.

C. A MOTION TO STRIKE CANNOT BE USED TO DISMISS A NOVEL ISSUE.

A third reason for not granting Defendant's Motion to Strike is the novel issue rule. SCRCP 12 and the case law provides that when an issue is novel or requires resolution of facts or the application of the law, a motion to dismiss should not be granted. In this case, the remedy requested is novel since the Plaintiffs do not seek a refund of money to them -- but instead seek that funds paid by them be refunded to the Water and Sewer Enterprise Fund. *See Bessinger v. BiLo, Inc.*, 366 S.C. 426, 622 S.E.2d 564 (2005).

D. A COMMON FUND REMEDY IS ALLOWED IN SOUTH CAROLINA.

Finally, Defendant argues that the Motion to Strike should be granted because this is no longer a class action. South Carolina's courts have historically used the common fund remedy for similarly situated individuals in non-class actions since at least 1880 when the doctrine was first adopted. In fact, the seminal case *Petition of Crum Ex Relation Johnson, et al. v. Williams, et al.*, 14 S.E.2d 21 (1941) holds that a common fund is available for recovery of property created or preserved by an attorney representing a party who at his own expense has maintained a suit for the recovery, preservation, protection or increase of a common fund or common property or has created or brought into court a fund which others are entitled to share. In this particular case,



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Page 3 of 4

Plaintiffs seek to have all monies repaid to the Water and Sewer Enterprise Fund which were improperly spent by the City of Columbia.

In sum, the Court declines to grant Defendant's Motion to Strike the common fund remedy at this stage in the litigation since the Court realizes that according to Judge Kinard's Order any relief granted this Plaintiff will inure to all City of Columbia water and sewer customers and require the City of Columbia to return all funds that were allegedly taken from the Water and Sewer Enterprise Fund and used for non-water and sewer purposes.<sup>2</sup> See *Shillito*, "For all practical purposes this fund was created, protected and preserved for the benefit of the taxpayers of the City of Spartanburg through the medium of the judicial machinery set in motion by the respondent." 51 S.E.2d at 104

Accordingly,

IT IS ORDERED that Defendant's Motion to Strike the common fund remedy is denied.

IT IS FURTHER ORDERED that the parties have agreed that the other portions of the Complaint which deal with the class action should be stricken including those parties which the Supreme Court held have no claim—Joseph Azar and Michael Letts.

AND IT IS SO ORDERED.

August 30, 2016  
Columbia, South Carolina

  
\_\_\_\_\_  
G. Thomas Cooper, Jr.  
Presiding Judge

<sup>2</sup> The Court is mindful of the fact this matter will most likely be appealed to the Supreme Court a second time and thus wants to give each party a full and fair opportunity to develop the record.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4006705

Joseph S. Azar

City Of Columbia

Frank J. Cumberland

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(c), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code 2126 Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 2 day of Sept, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Gene McCain Connell Jr.

Charles D. Lee III

M. McMullen Taylor

Peter M Balthazor

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Jeanette W. McBride*

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Frank J. Cumberland, Jr., et al.

Plaintiff(s),

v.

City of Columbia,

Defendant(s).

IN THE COURT OF COMMON PLEAS

C/A NO.: 2011-CP-40-6705

**ORDER GRANTING DEFENDANT'S  
MOTION TO ALTER OR AMEND,  
AND GRANTING DEFENDANT'S  
MOTION TO STRIKE**

2016 OCT 17 PM 3:16  
JEANETTE W. GERRARD  
C.C.P. & C.S.

RICHLAND COUNTY  
FILED

This matter initially came before the Court for a hearing on August 4, 2016, Defendant's Motion to Strike. At the conclusion of the hearing, this Court requested proposed orders from the parties. This Court entered an Order on August 31, 2016, denying Defendant's Motion to Strike. Thereafter, Defendant timely filed and served a Rule 59(e), SCRCPP, motion to alter or amend the August 31, 2016, Order.

In Azar v. City of Columbia, the Supreme Court affirmed the trial court's dismissal of Plaintiffs Azar and Letts for lack of standing, and expressly directed that Plaintiff Cumberland "shall be the sole plaintiff on remand." Azar, 414 S.C. 307, 317 n. 10, 778 S.E.2d 315, 320 (2015). The Supreme Court also affirmed the trial court's denial of class certification pursuant to Rule 220(b)(1). The Plaintiff subsequently moved to file a Third Amended Complaint, which was granted by this Court. The Third Amended Complaint, however, continued to name Mr. Azar and Mr. Letts as Plaintiffs, and continued to assert a purported class action, in clear contravention of the Supreme Court's order. Consequently, Defendant moved to strike all references to Mr. Azar and Mr. Letts, and all references to a class, a class action or class certification. In addition, Defendant argued that, without a class certification, the remedy of a common fund

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requested within the pleadings should also be stricken as immaterial; or in the alternative, that reference to a common fund should be stricken as immaterial because the Plaintiffs' own description of what they call a common fund does not meet the common law definition of a common fund.

This Court entered an order denying Defendant's Motion to Strike. The order accepted the Plaintiffs' voluntary agreement to delete all references to Mr. Azar and Mr. Letts, as well as allegations regarding a class action. In deciding the issue of whether the common fund remedy should be stricken, this Court agreed with the Plaintiffs that the Plaintiffs' requested common fund could not be stricken because Judge Kinard's order denying class certification is the law of this case, and the law of the case is that Judge Kinard created a common fund. Further, denial of Defendant's Motion to Strike was appropriate because Defendant's arguments moved beyond the limited test applicable to a motion to strike and in any event, a remedy of a common fund is available even without a certified class of plaintiffs.

Defendant moved to alter or amend this Court's Order denying its Motion to Strike. Upon careful review of Defendant's Motion, for the reasons stated herein, this Court now grants Defendant's Motion to Alter or Amend. This Court hereby withdraws its previous Order Denying Defendant's Motion to Strike entered on August 31, 2016, and substitutes this Order granting Defendant's Motion to Strike.

#### LAW/ANALYSIS

This Court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12(f), SCRCP. "A motion to strike, challenging a theory of recovery in the complaint, is comparable to a motion to

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dismiss under Rule 12(b)(6), SCRPC.” Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009). The matter of striking from a pleading is largely within the discretion of the court and the grant of a motion to strike will not be reversed except for an abuse of discretion or an error of law. Id.

**1. Motion to Strike References to Messrs. Azar and Letts, and to Class Representation.**

The Plaintiffs’ continued reference to Messrs. Letts and Azar as Plaintiffs in this case, and reference to class representation, is immaterial in light of the Supreme Court’s order clearly dismissing Messrs. Letts and Azar, and denying class certification. A decision by an appellate court is binding as the law of the case. Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969). An appellate court’s determination of an issue is the law of the case on remand to the trial court. Prince v. Beaufort Memorial Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011).

Plaintiffs Azar and Letts shall be stricken from the caption of this action, and Paragraphs 1 and 3 shall be stricken from the Third Amended Complaint. Further, the Clerk of Court is directed to remove Plaintiffs Azar and Letts from the public index system concerning this matter. This Court also strikes from the caption the following statement: “*Class Action Pursuant to SCRPC 23*,” and the caption’s description of the Plaintiffs as class representatives. This Court further strikes from the Third Amended Complaint the following paragraphs in full: 8, 10, and 38. Lastly, this Court strikes from the pleadings any allegations in the following paragraphs concerning class action status or relief, as shown below:

46. The Plaintiffs, ~~individually and on behalf of the class~~, are informed . . .

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49. That the Plaintiffs are informed and believe under the statutes and case law of the State of South Carolina that Plaintiffs, ~~both individually and as class representatives,~~ had an agreement . . .

50. The Plaintiffs, ~~individually and on behalf of the class,~~ are further informed . .

52. That Plaintiffs asks [sic] for a judgment ~~individually and as a class~~ against the Defendant . . .

55. That the Plaintiffs, ~~individually as a class representatives,~~ requests [sic] that this Court . . .

59. That Plaintiffs, ~~individually and as class representatives,~~ are informed . . .

60. That Plaintiffs ~~individually and on behalf of a class~~ request a common fund . .

62. The Plaintiffs ~~individually and as class representative of a class of individuals~~ who paid fee . . .

65. That as an unfair . . . returned to the Plaintiff ~~individually and as class representative for the class of affected taxpayers.~~

69. That Plaintiffs ~~individually and on behalf of the class~~ requests the Court issue its order . . .

70. That Plaintiffs requests judgment ~~for the class and for a common fund . . . .~~

The Court also strikes the following allegations from the Prayer of the Third Amended Complaint:

A. ~~That this Court certify a class under SCRCP 23.~~

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B. On the First Cause of Action ~~individually and as a class~~ for preliminary and permanent injunction . . . .

C. On the Second Cause of Action ~~individually and on behalf of a class~~ for refund of all fees . . . .

D. On the Third Cause of Action ~~individually and on behalf of a class~~ for refund of all fees . . . .

E. On the Fourth Cause of Action ~~individually and on behalf of a class~~ for refund of all fees . . . .

G. [The Court orders that this entire paragraph be stricken.]

## 2. Motion to Strike Reference to a Common Fund

The more difficult issue is the Defendant's argument that all references within Plaintiffs' Third Amended Complaint to a common fund must be stricken. The Plaintiffs' primary rebuttal is that Judge Kinard's order denying class certification envisioned a common fund and in fact required the creation of a common fund in the event the Plaintiffs succeed on the merits of this case. Plaintiffs assert that their reading of Judge Kinard's order constitutes the law of the case, thereby preventing the Defendant from arguing at any point now or in the future whether a common fund is a proper or appropriate remedy should Plaintiffs prevail at trial. Keeping in mind the general rule that denial of a motion to strike "is not conclusive upon the trial of the case on the merits," Tate v. Oxner, 236 S.C. 313, 317, 114 S.E.2d 225, 225 (1960), it is incumbent upon this Court, as a matter of fairness, to carefully evaluate the law of the case doctrine as applied to Judge Kinard's order(s) and the Supreme Court's order before foreclosing an opportunity for the Defendant to argue in the future that the Plaintiffs have failed to

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meet the elements of a common fund, or even foreclosing this Court's discretion in deciding whether a common fund is fair and appropriate in the event Plaintiffs succeed on the merits. After careful consideration, this Court, for the following reasons, strikes Plaintiffs' reference to a common fund remedy as immaterial.

First, Plaintiffs impermissibly pick a particular ground for denial of class certification found within Judge Kinard's orders as the law of the case, while ignoring other grounds raised, and assume, without any basis, that the Supreme Court affirmed that particular ground.

Although Plaintiffs posit only one basis for Judge Kinard's denial of class certification, Judge Kinard's initial order (filed June 26, 2012) denied class certification for two reasons. First, Judge Kinard relied upon Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684 (6th Cir. 1976) and United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974), to conclude that there was no need for the complexities and extra costs associated with class actions. Secondly, Judge Kinard found that Plaintiffs could not establish all five elements required for class certification. Plaintiffs moved for reconsideration, which Judge Kinard denied.

Plaintiffs appealed Judge Kinard's ruling to the Supreme Court. In their appeal, Plaintiffs asserted that Judge Kinard erred in applying Craft and Delray Beach and that Judge Kinard erred in holding that Plaintiffs had not met the third and fifth elements of Rule 23(a), SCRCF. On appeal, Defendant (as Respondent) raised additional sustaining grounds addressing Plaintiffs' failure to meet the fourth requirement of Rule 23, SCRCF. See Jones v. Lott, 387 S.C. 339, 346-347, 692 S.E.2d 900, 904 (2010) ("A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower

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court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.”) citing to Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal.”).

Pursuant to Rule 220(b)(1), SCACR, and without discussion, the Supreme Court affirmed Judge Kinard’s denial of class certification. Azar v. City of Columbia, 414 S.C. 307, 317 n. 10, 778 S.E.2d 315, 320 (2015).<sup>1</sup> The Supreme Court did not provide any discussion concerning the denial of class action certification, and there is no indication as to the ground upon which the Supreme Court based its affirmance. Under the two issue rule, it is unnecessary for an appellate court to address all grounds appealed where one ground provides a basis for affirmance. Anderson v. South Carolina Dep’t of Hwys. & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996) (stating that when “the defendant has appealed both issues, the appellate court would affirm on the basis of ... the ‘two issue’ rule, if either of the two issues supported affirmance.”) (emphasis added). The Supreme Court’s general affirmance could have rested upon either of the two grounds raised by Plaintiffs, or the additional sustaining ground raised by Defendant. Plaintiffs cannot pick and choose which basis for denial is the law of the case. The only decision constituting the law of this case is the Supreme Court’s unexplained decision to affirm the denial of class certification.<sup>2</sup> Judge Kinard’s reasoning, whatever it may have

<sup>1</sup> Plaintiffs did not petition the Supreme Court for rehearing on this issue.

<sup>2</sup> A decision by an appellate court is binding as law of the case. Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969). An appellate court’s determination of an issue is the law of the case

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been, does not constitute the law of the case. The end result of Judge Kinard's orders, affirmed in result by the Supreme Court, constitutes the law of the case.

Secondly, the common fund remedy was not even in front of Judge Kinard. Judge Kinard's orders addressed the sole issue of whether to certify a class pursuant to Rule 23, SCRPC. Plaintiffs made clear that they were seeking class certification "only with respect to the claim for injunctive relief . . . ." Order Denying Plaintiffs' Motion for Reconsideration, p. 1. Judge Kinard did not mention the term "common fund" in his discussion concerning injunctive relief. Plaintiffs' cause of action for injunctive relief did not mention a common fund. Plaintiffs' pleadings seek to enjoin the City from: 1) "continuing to collect these fees and not placing them in a special account to be used only for operation of and capital improvements of the water and sewer systems;" and 2) "spending any of the fees generated for operations of and capital improvement of water and sewer systems for any other purpose . . . ." Plaintiffs further sought to require through injunctive relief an order directing the City to "return" or "replace" all monies it had previously spent for purposes allegedly unrelated to the water and sewer utility back to the Enterprise Fund. The "special" or "restricted" account Plaintiffs referred to in their pleadings is not a common fund, but rather, a reference to S.C. Code Ann. § 6-1-330 requiring local governments to place service fee revenues in a segregated, separate account from other local government revenues. See Second Amended Complaint, ¶ 32. Judge Kinard's orders cannot be read as envisioning or creating a common fund when the Plaintiffs' Second Amended Complaint did not seek a common fund via their cause of

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on remand to the trial court. Prince v. Beaufort Memorial Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011).

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action for injunctive relief. This Court declines to read into Judge Kinard's orders any determination or decision regarding Plaintiff's entitlement to any form of remedy.

Thirdly, even if Plaintiffs' chosen ground for denial of class certification could reasonably be viewed as the law of the case, Judge Kinard's statement that injunctive relief "would inure to the relief of other similarly situated individuals" does not go so far as to create a common fund. Plaintiffs' arguments to the contrary impermissibly isolate a sentence of the orders to construe the orders out of context. See Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC, 404 S.C. 385, 392, 745 S.E.2d 105, 108 (2013) (stating that, in construing a judicial order, the intent of the order is determined by considering the entire order, not isolated parts). Relying upon the rationale found in Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 686 (6th Cir. 1976) and United Farmworkers of Florida Housing Project, Inc. v. Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974), Judge Kinard simply concluded that the injunctive and declaratory relief sought by an individual plaintiff would, if granted, apply to all effected ratepayers of the City. Neither of the cases cited by Judge Kinard concerned an injunction to create a common fund. Judge Kinard did not cite to any case law addressing the common fund remedy and he did not find that Plaintiffs' action was a "suit for the creation, recovery, preservation, or increase of a common fund or common property." Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). Therefore, this Court now finds that Judge Kinard's statement that injunctive relief given to the named plaintiffs, if granted, would inure to the benefit of other similarly situated individuals, does not "envision" a common fund remedy, nor does it create a common fund.

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Lastly, Plaintiffs' requested injunctive relief bears no resemblance to the common fund doctrine. The availability of a common fund remedy is recognized by South Carolina courts in a limited number of contexts. A common fund is available in a class action seeking damages or refunds. See Condon v. State, 354 S.C. 634, 583 S.E.2d 430 (2003) (stating, in a class action, that an amount to be refunded directly to taxpayers was a common fund); Shillito v. City of Spartanburg, 214 S.C. 11, 24, 51 S.E.2d 95, 100 (1948) ("This suit was not instituted by the respondent taxpayer in his individual capacity nor for his private gain, but was brought as a class action on behalf of all the taxpayers of the city of Spartanburg to recover the money collected."). This case is not a class action.

In other cases, a common fund is available where a sum of money is ready to be distributed to litigants and others who may have a legal right to such property. See Petition of Crum, 196 S.C. 528, 14 S.E.2d 21 (1941) (allowing a common fund only where others are entitled to share in a recovery, and property is to be distributed to litigants and others who have a legal right to such property). A common fund necessarily requires an identifiable pool of monies to be returned to ascertainable individuals that have a lawful claim to a share of those monies. Caughman v. Caughman, 247 S.C. 104, 146 S.E.2d 93 (1965) (finding the plaintiff did not create, preserve, or protect a common fund that provided a return of property or funds to any ascertainable takers); Benjamin v. South Carolina Nat'l Bank, 269 S.C. 250, 253, 237 S.E.2d 72, 74 (1977) (holding that a common fund remedy is not available if the monies claimed by plaintiff have been paid out and are no longer held by the trustee).

Here, Plaintiffs' requested relief is not to refund to City utility customers monies that the City allegedly misspent. Instead, Plaintiffs seek an order requiring the City to

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raise whatever amount of money they believe was misspent in past years and deposit that amount into its Water and Sewer Enterprise Fund, to be used for improving the City's water and sewer infrastructure. This injunctive relief does not contemplate a refund of money that was paid by Plaintiffs in the past which remains in the possession of the City. Those monies have already been spent in a manner that Plaintiffs claim is unlawful. Plaintiffs are not requesting that any funds be returned to them or to others. In sum, Plaintiffs' requested injunctive relief does not bear resemblance to a common fund. Thus, the Plaintiffs' reference to a common fund is immaterial.

The allegations concerning the request for a common fund are stricken. The specific paragraphs of the Third Amended Complaint to be stricken in their entirety are as follows: Paragraphs 60, 69, and 70, and Paragraph I of the Prayer. In addition, Paragraph B of the Prayer is stricken as follows: "~~On the First Cause of Action . . . for improvement of the water and sewer system and for an Order of this court holding such fees in a common fund pending the outcome of this litigation. Plaintiffs only seek such an Order as to excess fees collected and not fees used for operating the water/sewer system.~~"

AND IT IS SO ORDERED.<sup>3</sup>

  
G. Thomas Cooper, Jr.  
Circuit Court Judge

October 4<sup>th</sup>, 2016

<sup>3</sup> Defendant also argues that this Court, in addition to denying the Motion to Strike, went one step further and improperly granted the common fund remedy. Defendant also asserts that this Court improperly found that a motion to strike cannot be used to dismiss a novel issue. This Court agrees, but finds it unnecessary to address these issues in light of the Court's ruling that Defendant's Motion to Strike should be granted.

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## FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4006705

Joseph S. Azar

City Of Columbia

Frank J. Cumberland

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

## DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

## ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

## INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment In Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code 2126 Date \_\_\_\_\_

## For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Oct, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Gene McCain Connell Jr.

Charles D. Lee III

M. McMullen Taylor

Peter M Balthazor

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

*Jeanette W. McBride*

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

Joseph Azar, Frank J. Cumberland, Jr., and Michael A.  
Letts, Individually and as Class Representatives,  
Appellants,

v.

City of Columbia, Respondent.

Appellate Case No. 2014-000032

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Appeal from Richland County  
J. Ernest Kinard, Jr., Circuit Court Judge  
G. Thomas Cooper, Jr., Circuit Court Judge

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Opinion No. 27573  
Heard April 7, 2015 – Filed September 9, 2015

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**REVERSED AND REMANDED**

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Charles D. Lee, III, of McLaren & Lee, of Columbia, and  
Gene M. Connell, Jr., of Kelaher Connell & Connor, PC,  
of Surfside Beach, for Appellants.

M. McMullen Taylor, of Mullen Taylor LLC, of  
Columbia, for Respondent.

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**JUSTICE KITTREDGE:** The City of Columbia generates approximately \$110 million in revenue from user fees each year by providing water and sewer services. For more than a decade, the City has been allocating substantial amounts of this revenue to its General Fund and for economic development purposes. Appellants

filed this action contending the City's practices violate sections 6-1-330 and 6-21-440 of the South Carolina Code. The trial court granted the City summary judgment. Because there are genuine issues of material fact as to whether the City's expenditures of water and sewer revenues were lawful, we reverse and remand. Specifically, we remand to the trial court for further proceedings to determine whether the funds transferred into the City's General Fund were properly considered "surplus revenues" under section 6-21-440 of the Revenue Bond Act<sup>1</sup> and could therefore be spent for unrelated purposes and whether the City's direct economic-development expenditures bore a sufficient nexus to its provision of water and sewer services such that they would be considered "related" expenditures under the terms of section 6-1-330(B) of the South Carolina Code.

## I.

The City owns and operates the state's largest water and sewer utility. The City provides water and sewer services to residents and non-residents by way of a service contract. Pursuant to the contract, the customer pays a minimum base rate plus any additional water or sewer use as measured by a meter. The rates the City charges for water and sewer services are set by ordinance. The revenue generated by the City in water and sewer fees is deposited into the Water and Sewer Enterprise Fund (Enterprise Fund).<sup>2</sup> Each year, the City transfers \$4.5 million from the Enterprise Fund to its General Fund.

Joseph Azar, Frank Cumberland, Jr., and Michael Letts (collectively, Appellants) brought this action to challenge the City's practice of using water and sewer revenues for unrelated purposes. Specifically, Appellants sought an injunction to prevent the City from transferring revenues from the Enterprise Fund for these uses, and a refund of all such transfers from the past three years.

The parties filed cross-motions for summary judgment. Following a hearing, the trial court issued an order granting summary judgment for the City. Appellants appealed, which this Court certified pursuant to Rule 204(b), SCACR.

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<sup>1</sup> S.C. Code Ann. §§ 6-21-5 to -570 (2004 & Supp. 2014).

<sup>2</sup> The City allocates monies from its water and sewer enterprise fund to pay for all or part of the costs of City economic-development functions, including its economic development department, economic development special projects, the office of business opportunities, and four development corporations.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Frank J. Cumberland, Jr., Jennifer B.  
Gardner and Michael R. Uginio

Plaintiffs,

vs.

City of Columbia,

Defendant.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Case No. 2011-CP-40-6705

**ORDER DENYING PLAINTIFFS'  
MOTION TO RECONSIDER**

This matter comes before the Court by way of Plaintiffs' Motion to Alter and/or Amend the Judgment pursuant to Rule 59(e), SCRCP filed October 27, 2016. Specifically, Plaintiffs ask this Court to reconsider its Order Granting Defendant's Motion to Alter or Amend and Granting Defendant's Motion to Strike that was filed October 17, 2016.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiffs' Motion under Rule 59(e), SCRCP, to reconsider this Court's October 17, 2016, Order. Furthermore, pursuant to Rule 59(f), SCRCP, the Court is of the opinion that oral argument is not necessary.

**IT IS SO ORDERED.**

C. Cooper, South Carolina  
November 2, 2016

G. Thomas Cooper, Jr.  
G. Thomas Cooper, Jr., Judge  
Fifth Judicial Circuit

SCANNED

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4006705

Joseph S. Azar

City Of Columbia

Frank J. Cumberland

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Dismissal); ☐ Rule 43(k), SCRCP (Settled); ☐ Other \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_

Judge Code 2126

Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 4 day of Nov, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Gene McCain Connell Jr.

Charles D. Lee III

M. McMullen Taylor

Peter M Balthazor

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
C/A NO. 2011-CP-40-6705

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

Plaintiff, )

vs. )

City of Columbia, )

Defendant. )

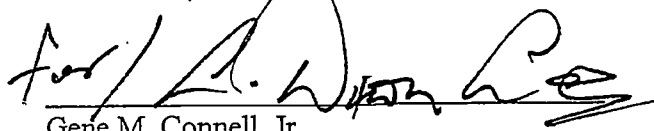
SECOND AMENDED SUMMONS

RICHLAND COUNTY  
FILED  
2012 JAN 17 AM 11:14  
JEANETTE W. McBRIDE  
C.C.P. & G.S.

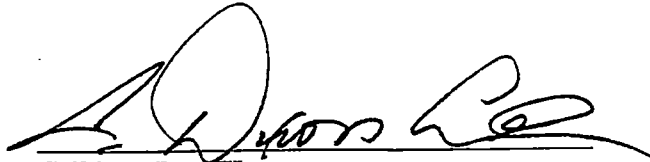
TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Amended Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Amended Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Amended Complaint and judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

KELAHHER, CONNELL & CONNOR, P.C.



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 (phone)  
(843) 238-5050 (facsimile)  
gconnell@classactlaw.net



C. Dixon Lee, III  
McLaren & Lee  
1508 Laurel Street (29201)  
Post office Box 11809  
Columbia, SC 29211  
(803) 799-3074 (phone)

**Attorneys for Plaintiffs**

January 17, 2012  
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
C/A NO. 2011-CP-40-6705

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

Plaintiffs,

vs.

City of Columbia,

Defendant.

*Class Action Pursuant  
to SCRCP 23*

**SECOND  
AMENDED COMPLAINT**

**NON-JURY TRIAL**

JEANETTE W. McBRIDE  
C.C.P. & G.S.

2012 JAN 17 AM 11:14

RICHLAND COUNTY  
FILED

The Plaintiffs, complaining of the Defendant, would respectfully allege unto this Court as follows:

**FOR A FIRST CAUSE OF ACTION**

1. The Plaintiff Joseph S. Azar is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
2. The Plaintiff Frank J. Cumberland, Jr. is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
3. The Plaintiff Michael A. Letts is a citizen and resident of the County of Richland, State of South Carolina, who lives outside the corporate limits of the City of Columbia.
4. The Defendant, City of Columbia, is a body politic and is a governmental entity organized and existing pursuant to the laws of the State of South Carolina.
5. The Defendant provides water and sewer service to the Plaintiffs and thousands of others in the City of Columbia and surrounding areas.

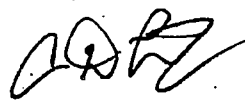


6. Plaintiffs bring this action pursuant to South Carolina Rule of Civil Procedure 23 which provides in pertinent part that a class action may be brought when there are questions of law and fact common to the class; the class is so numerous; the claims of the representative parties are typical of the claims of the class; the class representatives will fairly and adequately protect the interests of the class; and the amount in controversy exceeds One Hundred Dollars (\$100) for each member of the class.
7. Plaintiffs are and continue to be water and sewer customers with the Defendant City of Columbia.
8. That the Plaintiffs bring this as a class action on behalf of all past and current water and sewer customers of the City of Columbia.
9. The Defendant City of Columbia did institute water and sewer fees on all customers of its water and sewer system which were specifically designated, intended and required by South Carolina law to be used to pay costs related to the specific service or program for which those fees were paid, the water and sewer system.
10. That the fees paid by the Plaintiffs were for water and sewer charges or fees and not taxes.
11. That the fees which the Plaintiffs paid were specifically designated for expenses of and improvements to the water and sewer systems including the water and sewer treatment plants and the various delivery portions of the water and sewer service throughout the City and other areas where the City provides water and sewer service.
12. That for more than a decade, and notwithstanding the provisions of S.C. Code Ann. § 6-1-300, *et. seq.* (Supp. 2010) restricting the use of revenue derived from a service or



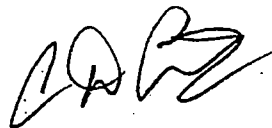
user fee imposed to finance the provision of public services to pay the costs related to the service or program for which the fee was paid, the City of Columbia has diverted and spent monies it collected as water and sewer fees for uses and purposes other than the City of Columbia water and sewer system.

13. That in the past 12 years the City has transferred in excess of \$80 million dollars out of its water and sewer fund for purposes and uses other than its water and sewer system.
14. That at the same time the City of Columbia was diverting and spending monies it collected as water and sewer fees for uses and purposes other than expenses of the City of Columbia water and sewer system, the City of Columbia was deferring, postponing, delaying and/or neglecting to perform appropriate and necessary upkeep, maintenance, repairs and improvements to the water and sewer system necessary to keep those systems in good condition and proper working order.
15. That as a direct and proximate result of the City of Columbia deferring, postponing, delaying and/or neglecting to perform appropriate and necessary upkeep, maintenance, repairs and improvements to the water and sewer system, the water and sewer system decayed, became run-down and dilapidated, and aged beyond its useful life to a point where water and sewer leaks, overflows and other problems were not only common but also exceeded levels of discharges allowed by Environmental Protection Agency ("EPA") and/or the South Carolina Department of Health and Environmental Control ("SC DHEC") rules and regulations.
16. That, on information and belief, in an effort to deceive the general public including its water and sewer customers, the EPA and/or SC DHEC, the City of Columbia falsified



record keeping of sewage overflows so as to make it appear that the untreated sewage overflows, spills or discharges by the City of Columbia were less severe than the sewage overflows which actually occurred.

17. That sewage overflows from the City of Columbia water and sewer system have exceeded allowable levels per EPA and SC DHEC rules and regulations and have resulted in unwarranted pollution of the lands and waters of the areas served by City of Columbia water and sewer system as well as those waterways downstream from where such sewage overflows occurred and, on occasion, have resulted in Plaintiff's and others being denied peaceful use and enjoyment of public and private properties due to the health hazards resulting from those sewage overflows.
18. That Plaintiffs are informed and believe that the water and sewer systems have not been properly operated or maintained resulting in otherwise unnecessary sewage overflows and water leaks, present unnecessary and unreasonable health hazards to Plaintiffs and other members of the public and are or were on the verge of being taken over by the Environmental Protection Agency and/or the South Carolina Department of Environmental Control. Notwithstanding, the Defendant City of Columbia continues to use the fees collected by it for other purposes and transfer those fees in the general revenue fund.
19. That the numerous leaks and overflows of untreated sewerage by the City of Columbia water and sewer system have resulted, from time to time, in the foul, unpleasant and offensive stench of raw sewage wafting through various parts of the City of Columbia and has been objectionable and offensive to Plaintiffs and other persons of normal sensibilities within those areas.



20. That, belatedly, the City of Columbia recognized the folly of its actions in spending water and sewers fees for purposes other than the water and sewer system and, at the same time neglecting, postponing and deferring proper upkeep, maintenance, repairs and improvements to its water and sewer system and hired Black & Veatch, an engineering, consulting and construction company, to conduct a study of and issue a report on the City's water and sewer system, which report concluded that the City needed to spend hundreds of millions of dollars, possibly as much as \$500,000,000.00, above normal operational expenses and implement rate increases of 5% per year for each year for a period of five (5) years to bring its water and sewer system into good and proper working order.
21. That in 2011 the City of Columbia increased water and sewer fees by 5% and passed an municipal ordinance authorizing the issuance of \$135,000,000.00 in new water and sewer bonds, in addition to the approximately \$180,000,000.00 proceeds collected from the sale of water and sewer bonds between January 1, 2009 and June 30, 2011.
22. That on or about November 2, 2011 the City of Columbia offered for sale, in two separate series, a total of \$135,000,000.00 in Waterworks and Sewer System Revenue Bonds, [\$100,000,000.00 of City of Columbia Waterworks and Sewer System Revenue Bonds, Series 2011A rated Aa1 by Moody's Investors Service and \$35,000,000.00 of City of Columbia Waterworks and Sewer System Revenue Bonds, Series 2011B also rated Aa1 by Moody's Investors Service] to help pay for upkeep, maintenance, repairs, improvements and expansion of its water and sewer system.

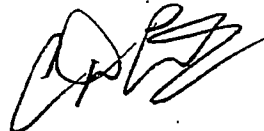


23. That the City of Columbia has pledged future water and sewer fees revenue to pay for the foregoing \$135,000,000.00 in Waterworks and Sewer System Revenue Bonds which it issued and sold.
24. That the monies which have and will be raised from the sale of aforesaid Waterworks and Sewer System Revenue Bonds and the rate increases necessary to pay for those bonds have been, are being and/or will be used by the City of Columbia to pay for upkeep, maintenance, repairs, improvements and expansions of its water and sewer system, which, but for the City of Columbia having diverted and spent monies previously collected as water and sewer fees from Plaintiffs for other purposes would have been paid for, in whole or in part, by the water and sewer fee money the City of Columbia previously collected from Plaintiffs and misspent for other non-water and sewer purposes, resulting in Plaintiffs having to pay twice for the same expenses.
25. As a direct and proximately result of the City of Columbia having issue bonds and to borrow money to replace the money it spent derived from water and sewer fees on purposes other than the water and sewer system, Plaintiffs will be forced to pay additional water and sewer fees to pay the attorney fees, other expenses and bond interest necessary to raise money to replace the earlier misspent monies.
26. The aforesaid conduct of City of Columbia has brought the City under the scrutiny of the EPA and/or SC DHEC, which is or has conducted an investigation of the City's water and sewer systems and operations and has or is, on information and belief, negotiated or is negotiating an agreement to make extensive repairs and improvements to its water and sewer system which will likely include payment of a substantial fine by the City of Columbia, the costs and expense of the same which

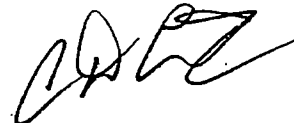


will inevitably have to be paid by Plaintiffs and which would otherwise have not occurred had the City of Columbia not misused the money it previously collected as water and sewer fees and, correspondingly, neglected and deferred proper upkeep, maintenance, repairs and improvements to its water and sewer system.

27. That Plaintiffs and thousands of others paid the water and sewer fees imposed by Defendant City of Columbia through its officers, agents and/or employees for the expenses of and improvement of the water and sewer systems.
28. That S.C. Code Ann. § 6-1-300, *et. seq.* allows a local governing body by ordinance approval by a positive majority to change and collect a service or user fee.
29. That the City of Columbia enacted such an ordinance.
30. That the service or user fees by the City of Columbia collected for water/sewer service must be used under South Carolina law solely to pay costs related to the service or program for which the fee was paid.
31. That the revenue generated from such service of users fees is to be used only for the program for which the fee was paid.
32. That the Defendant City of Columbia, in violation of its agreement to collect the fees from Plaintiffs and thousands of others for operation and/or improvement of the water system, did not segregate such fees for operations or improvement of the water system, but placed those monies in the general fund which were used for other purposes than operations and improvement of the water and sewer systems.
33. That those other purposes include moving approximately \$4.5 million dollars or more on an annual basis to other departments of the City.



34. That Defendant City of Columbia violated South Carolina law by taking the fees and using them as general revenue funds of the City of Columbia.
35. That the water and sewer fees are 5% or more of the Defendant's total budget.
36. That Plaintiffs, individually and on behalf of a class of other similarly situated, customers request an Order of this Court requiring the City of Columbia to return all the money it took from the water/sewer fund for other purposes to the water and sewer fund.
37. That Plaintiffs, as a citizen and resident of the City of Columbia and/or customers of the City of Columbia water and sewer sustems, are informed and believes that such fees have been used in violation of law and have been placed in the general fund and not spent on the City of Columbia's water and sewer facilities.
38. That Plaintiffs request this Court issue its Order enjoining the City of Columbia from continuing to collect these fees and not placing them in a special account to be used only for operation of and capital improvements of the water and sewer systems.
39. That Plaintiffs are informed and believes that they are entitled to an Order of the Court enjoining the City of Columbia from spending any of the fees generated for operations of and capital improvement of water and sewer systems for any other purpose and that the Court issue its Order enjoining such activities by the City of Columbia.
40. That such funds should be placed in a restricted account during the pendency of this action. Further, the City of Columbia must return all monies it spent for other purposes from the water and sewer fund.

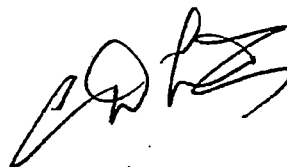


41. Further, Plaintiffs are informed and believes that an injunction is necessary and reasonable and that irreparable harm will occur if the Defendant continues to allow the fees to be used for other purposes other than for improvement of the water system.
42. That Plaintiffs request a judgment on the First Cause of Action for Injunction both temporary and permanent requiring the City of Columbia to place all fees collected for operations of and/or capital improvement of the water and sewers systems in a segregated account and to only be used for such purposes. Further, Plaintiffs request a mandatory injunction requiring Defendant to replace all monies in the water and sewer fund which was specifically used for that specific purpose.

**FOR A SECOND CAUSE OF ACTION**

(Breach of Contract)

43. The Plaintiffs reallege and reiterate each and every allegation as fully as if repeated verbatim herein.
44. The Plaintiffs, individually and on behalf of the class, are informed and believes they were required to pay fees to the City of Columbia with the representation/agreement through its ordinance and state law that the City of Columbia would only use such fees for the water and sewer systems.
45. That for years the Defendant City of Columbia and its officers, agents and/or employees have raided the funds which were to be used solely for the water and sewer systems.
46. That these funds have been repeatedly used for other purposes other than the water and sewer systems.

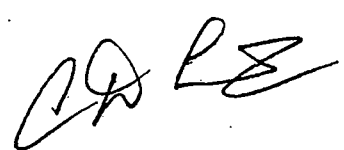
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47. That the Plaintiffs are informed and believe under the statutes and case law of the State of South Carolina that Plaintiffs, both individually and as class representatives, had an agreement and/or contract implied in law and in fact whereby Defendant City of Columbia agreed to collect such water and sewer fees for the purpose of the water and sewer system only and to keep those in a separate account for that purpose.
48. The Plaintiffs, individually and on behalf of the class, are further informed and believes that the Defendant City of Columbia did not live up to its agreement and has failed to maintain and improve the water an sewer systems with the fees collected from Plaintiffs and thousands of others.
49. That Plaintiffs request a court order for a refund of all water and sewer fees collected by the Defendant from Plaintiffs and all those individuals similarly situated for the last three years and bases this on breach of contract by the City of Columbia in failing to follow the statutes and case law regarding the collection of such fees and the segregating of such fees into a separate account.
50. That Plaintiffs asks for a judgment individually and as a class against the Defendant for breach of contract and for a refund of all fees collected since such fees constitute an illegal tax by the Defendant and that such fees have been used for general revenue for the City of Columbia and not for the specific purpose intended.
51. That such funds should be returned to the water and sewer fund.

**FOR A THIRD CAUSE OF ACTION**

(Unconstitutional Collection)

52. The Plaintiffs reallege and reiterates each and every allegation as fully as if repeated verbatim herein.

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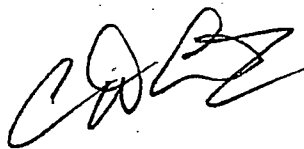
53. That the Plaintiffs, individually and as class representatives, requests that this Court find that the use of specific funds dedicated for the water and sewer service in the City of Columbia be declared unconstitutional when such funds are collected and used as general revenue in violation of case law and the statutes of the State of South Carolina.
54. That use of these fees for other purposes violates S.C. Code Ann. § 6-1-330 and the four part test of the case of C.R. Campbell Construction Co. v. Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997).
55. That in fact Defendant City of Columbia through its agents and/or employees has collected an illegal tax under the guise of charging it as a fee when such fees were not held for the specific purpose provided for when they were collected.
56. That as a result, the aforementioned collection of fees is violative of the South Carolina Constitution because it was implemented improperly by Defendant and that such was not held in a segregated account.
57. That Plaintiffs, individually and as class representatives, are informed and believes that the collection of a fee for water improvements for the City of Columbia and the use of such fees for other municipal purposes is violative of due process, equal protection and the South Carolina statutes in that the fees were collected for a specific purpose and not used for that specific purpose.
58. That Plaintiffs individually and on behalf of a class request a common fund of all fees collected by Defendant for water improvements for the past three years be formed and that such fees should be returned to the water and sewer fund by the City.

**FOR A FOURTH CAUSE OF ACTION**



(Unconstitutional Tax)

59. The Plaintiffs reallege and reiterate each and every allegation as fully as if repeated verbatim herein.
60. The Plaintiffs individually and as class representative of a class of individuals who paid the fee which was required by the City of Columbia and such fee must be specifically earmarked for water and sewer operations, construction and/or improvements.
61. That the aforementioned fees have for years been used by Defendant for general revenue and such fees have not been used for the purpose specifically intended, i.e., for operation, construction and/or improvement of the water and sewer service of the City of Columbia.
62. That as a result, such fees collected by the Defendant City of Columbia constitute an illegal and/or unconstitutional tax or taking under the South Carolina Constitution.
63. That as an unfair and/or illegal tax these fees should be returned to the Plaintiff individually and as class representative for the class of affected taxpayers.
64. That the basis of this cause of action is that Defendant collected an unconstitutional tax against the Plaintiff and as such implemented a tax under the guise of fee to use those monies for other general revenue expenses of the City of Columbia.
65. That such use of "service fees" for other municipal purposes is prohibited under established South Carolina Supreme Court precedent.
66. That as further basis of the refund of the unconstitutional tax is that all fees collected must be specifically used and/or kept for their required purpose and cannot used as general revenue funds of the Defendant.

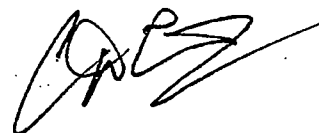
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67. That Plaintiffs individually and on behalf of the class requests the Court issue its order creating a common fund of monies collected for the past three years from those individuals who have paid such fees that have been used for other purposes and that these funds be returned to the City of Columbia water and sewer fund to be used only for the specific purpose for which the fee was collected.

68. That Plaintiffs requests judgment for the class and for a common fund and for actual damages and the costs of the action.

**WHEREFORE**, Plaintiffs prays for judgment as follows:

- A. That this Court certify a class under SCRCP 23.
- B. On the First Cause of Action individually and as a class for preliminary and permanent injunction against the Defendant collecting such fees unless such fees are specifically segregated and earmarked for improvement of the water and sewer system and for an Order of this court holding such fees in a common fund pending the outcome of this litigation. Plaintiffs only seek such an Order as to excess fees collected and not fees used for operating the water/sewer system.
- C. On the Second Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.
- D. On the Third Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.



E. On the Fourth Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

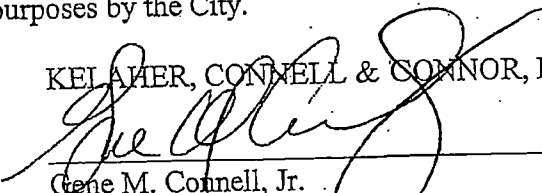
F. For an Order of this Court temporarily and permanently enjoining the Defendant from using the aforementioned money which is collected as fees from any other purpose other than improvement of the water and sewer system.

G. For an Order of this Court certifying a class of individuals, businesses, corporations and the like who paid more than \$100 in fees to the City of Columbia which fees were to be earmarked for use of the water and sewer service system and which fees were instead spent on general revenue projects of the City of Columbia, such funds to be returned to the water and sewer fund.

H. For an Order of the Court requiring Defendant to pay attorneys' fees and costs for violating established South Carolina law.

I. For an Order requiring Defendant to form a common fund to repay the water and sewer fund with all funds used for other purposes by the City.

KELAHIER, CONNELL & CONNOR, P.C.

  
Gene M. Connell, Jr.

The Courtyard, Suite 209

1500 U. S. Highway 17 North

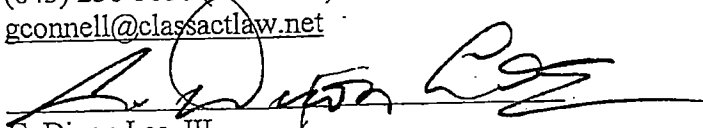
Post Office Drawer 14547

Surfside Beach, South Carolina 29587-4547

(843) 238-5648 (phone)

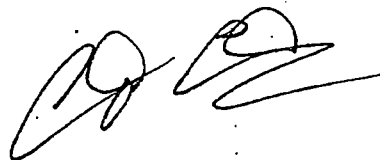
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C. Dixon Lee, III

McLaren & Lee  
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Post office Box 11809  
Columbia, SC 29211  
(803) 799-3074 (phone)  
**Attorneys for Plaintiffs**

December \_\_, 2011  
Surfside Beach, South Carolina

A handwritten signature in black ink, consisting of a stylized 'M' followed by a series of loops and a long horizontal stroke.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
C/A NO. 2011-CP-40-6705

Frank J. Cumberland, Jr., Jennifer B.  
Gardner and Michael R. Ugino,  
  
Plaintiffs,  
  
vs.  
  
City of Columbia,  
  
Defendant.

PLAINTIFFS' MOTION TO ALTER  
AND/OR AMEND THE JUDGMENT

RICHLAND COUNTY  
FILED  
2016 OCT 27 PM 3:11  
CLARENTE W. MCBRIDE  
C.C.P. & G.S.

YOU WILL PLEASE TAKE NOTICE that the undersigned moves under SCRCR 259 for the Court to reconsider its ruling granting Defendant's Motion to Alter or Amend and Granting Defendant's Motion to Strike filed October 17, 2016. The basis of this Motion is that the Court previously denied Defendant's Motion to Strike in an Order filed August 31, 2016. The Court has now reversed its previous Order and has granted Defendant's Motion to Strike. (See Order of October 17, 2016). Plaintiffs move that the Court reconsider this Order in that it affects the substantive legal issues in the case. Plaintiffs ask that the Order Granting Defendant's Motion to Alter or Amend and Granting Defendant's Motion to Strike filed October 17, 2016 be reconsidered and reversed based on the following grounds:

1. The Court's new Order Granting Defendant's Motion to Strike filed October 17, 2016 overrules the Order of Judge Kinard who in his previous Order stated that injunctive relief would "inure to the relief of others similarly situated individuals." Plaintiffs assert that the current Order is impermissible as a matter of law in that one circuit judge may not overrule another.



2. This Court's current Order of October 17, 2016 is in effect a motion for summary judgment. Under well-settled case law, a motion to strike cannot be used in place of a motion for summary judgment. See *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (S.C. 2012).

3. By granting the motion to strike as to the common fund issue, this Court has not taken into consideration SCRCP 12(h) which provides that only a pleading regarding an insufficient defense or redundant, immaterial or impertinent matters may be stricken. In this case, the Court's Order goes further and decides legal issue far beyond the purview of a motion to strike. Those rulings are as follows:

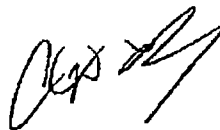
a. Judge Kinard's Order is not the law of the case. (See Order of this Court dated October 17, 2016 at page 8).

b. This Court's ruling that the common fund remedy was not decided by Judge Kinard. (See Order of this Court dated October 17, 2016 at page 8).

c. This Court's ruling that it "declines to read into Judge Kinard's Order any determination or decision regarding Plaintiffs' entitlement to any formal remedy." In practical effect this Court's Order denies the Plaintiffs and all others similarly situated the remedy they seek which is a mandatory injunction for all water and sewer customers to require the City to return funds to the Water and Sewer Enterprise Fund.

d. This Court's Order finding that Judge Kinard's statement that injunctive relief "would inure to the relief of other similarly situated individuals does not go so far as to create a common fund." The error being in this section of the Order that this is a motion to strike and that any remedy to the Plaintiffs should be decided at trial and not in a preliminary motion to strike.

e. This Court's Order that Judge Kinard's statement that injunctive relief be given to the named Plaintiffs, if granted, would inure to the benefit of other similarly situated



individuals does not envision a common fund remedy nor does it create a common fund. The error being that this is a matter for trial and not for a motion to strike.

f. This Court's Order holding that injunctive relief bears no resemblance to the common fund doctrine. The error being that should Plaintiffs prevail, Defendants would have to determine how much should be returned to the City's Water and Sewer Enterprise Fund from all individuals who were affected. The common fund in this case being the amount to be returned to the Water and Sewer Enterprise Fund by the City. This would obviously require a calculation of all monies impermissibly collected should the Plaintiff prevail.

g. A common fund would be required should the Plaintiffs prevail since the City of Columbia would have to calculate based on Judge Kinard's Order all monies to be returned to the Water and Sewer Enterprise Fund for the benefit of all water and sewer customers.

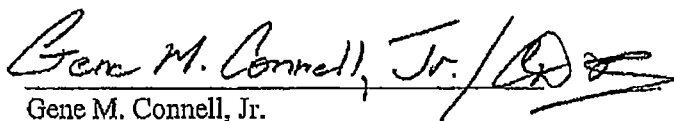
h. This Court's Order on a motion to strike holds for the first time that a common fund is not available when injunction is the cause of action. Plaintiffs assert this is a novel issue and novel issues should never be decided on motion for summary judgment let alone on motion to strike. See *Bessinger v. BiLo Inc.*, 366 S.C. 426, 622 S.E.2d 564 (2005) (when an issue is novel or requires resolution of facts or the application of law it should never be decided on a motion to dismiss.)

It is for these reasons, the Plaintiffs request the Court reconsider its Order and have a hearing on the record to decide these issues.

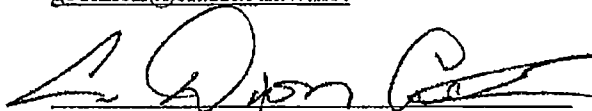
Respectfully submitted,

A handwritten signature in black ink, appearing to be 'CP' followed by a stylized flourish.

KELAHHER, CONNELL & CONNOR, P.C.



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(803) 799-3074 (phone)

October 27, 2016

**Attorneys for Plaintiff**

**RULE 11 CERTIFICATION**

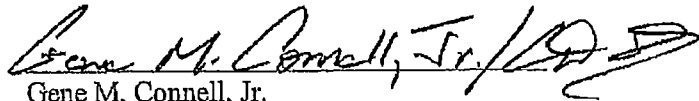
The attorney(s) below hereby certifies that either:

- \_\_\_ A. He/She has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion; or
- X B. Such consultation would serve no useful purpose, or could not be timely held; or
- \_\_\_ C. Due to the nature of the motion, there is no duty to consult opposing counsel in that this is a motion:

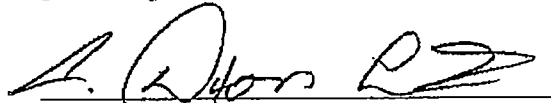
- \_\_\_ a. To Dismiss
- \_\_\_ b. For Summary Judgment
- \_\_\_ c. For New Trial
- \_\_\_ d. For Judgment NOV

RICHLAND COUNTY  
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2016 OCT 27 PM 3:11  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

KELAHER, CONNELL & CONNOR, P.



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(803) 799-3074 (phone)

October 27, 2016

Attorneys for Plaintiffs

**Frank J. Cumberland, Jr., et. al. v. City of Columbia**  
**Docket No: 2011-CP-40-6705**

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

**PROOF OF SERVICE**

The undersigned hereby certifies that on the 27th day of **OCTOBER**,  
2016 she did serve one (1) copy of the foregoing **PLAINTIFF'S MOTION TO ALTER**  
**AND/OR AMEND JUDGMENT** upon Plaintiff's/Defendant's attorney, \*\*\*\*, Esquire, by  
United States Mail, with sufficient postage affixed thereto, addressed as follows:

M. McMullen Taylor, Esquire  
Post Office Box 8567  
Columbia, SC 29202

Peter M. Balthazor, Esquire  
Riley Pope & Laney, LLC  
Post Office Box 11412  
Columbia, SC 29211

RICHLAND COUNTY  
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2016 OCT 27 PM 3:11  
JENNIFER W. McBRIDE  
C.C.P. & G.S.



Michelle Mallison Smoak

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

FRANK J. CUMBERLAND, JR. ET. AL. )

Plaintiff, )

vs. )

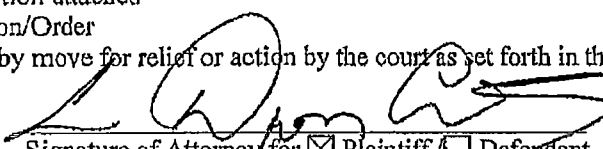
CITY OF COLUMBIA )

Defendant. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-40-6705

**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

|                                                                                                                                                                                                       |  |                                                                                                                                                                                            |  |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <b>Plaintiff's Attorney:</b><br>C. Dixon Lee, III, Bar No. 3165<br>Address:<br>POB 11809, Cola, SC 29211-1809<br>Phone: 803-799-3074 Fax 803-252-3548<br>E-mail: dlee@mcclarenandlee.com Other: _____ |  | <b>Defendant's Attorney:</b><br>M. McMullen Taylor, Bar No. _____<br>Address:<br>POB 8567, Cola, SC 29202<br>Phone: 803-254-1344 Fax _____<br>E-mail: mmt@MullenTaylorLLC.com Other: _____ |  |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete SECTIONS I and III)                                                                           |  | <b>FILED</b><br>2016 OCT 27 PM 3:11<br>JEANETTE MCBRIDE<br>C.C. JUDGE                                                                                                                      |  |
| <input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (complete SECTIONS II and III)                                                                                                      |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (complete SECTIONS II and III)                                                                                                           |  |                                                                                                                                                                                            |  |
| <b>SECTION I: Hearing Information</b>                                                                                                                                                                 |  |                                                                                                                                                                                            |  |
| Nature of Motion: Motion to Alter and/or Amend the Judgment                                                                                                                                           |  |                                                                                                                                                                                            |  |
| Estimated Time Needed: 30 Minutes                                                                                                                                                                     |  | Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO                                                                                               |  |
| <b>SECTION II: Motion/Order Type</b>                                                                                                                                                                  |  |                                                                                                                                                                                            |  |
| <input checked="" type="checkbox"/> Written motion attached                                                                                                                                           |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> Form Motion/Order                                                                                                                                                            |  |                                                                                                                                                                                            |  |
| I hereby move for relief or action by the court as set forth in the attached proposed order.                                                                                                          |  |                                                                                                                                                                                            |  |
|                                                                                                                    |  | 10-27-2016                                                                                                                                                                                 |  |
| Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant                                                                                          |  | Date submitted                                                                                                                                                                             |  |
| <b>SECTION III: Motion Fee</b>                                                                                                                                                                        |  |                                                                                                                                                                                            |  |
| <input checked="" type="checkbox"/> <b>PAID - AMOUNT: \$</b> _____                                                                                                                                    |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> <b>EXEMPT:</b> (check reason)                                                                                                                                                |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support                                                                                                                               |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> Domestic Abuse or Abuse and Neglect                                                                                                                                          |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party                                                                                                      |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief                                                                                                |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> Motion for Stay in Bankruptcy                                                                                                                                                |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)                                                                                        |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> Proposed order submitted at request of the court; or,<br>reduced to writing from motion made in open court per judge's instructions                                          |  |                                                                                                                                                                                            |  |
| Name of Court Reporter: _____                                                                                                                                                                         |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> Other: _____                                                                                                                                                                 |  |                                                                                                                                                                                            |  |
| <b>JUDGE'S SECTION</b>                                                                                                                                                                                |  | <b>JUDGE CODE</b> _____                                                                                                                                                                    |  |
| <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.                                                                                                                     |  | Date: _____                                                                                                                                                                                |  |
| <input type="checkbox"/> Other: _____                                                                                                                                                                 |  |                                                                                                                                                                                            |  |
| <b>CLERK'S VERIFICATION</b>                                                                                                                                                                           |  |                                                                                                                                                                                            |  |
| Collected by: _____ Date Filed: _____                                                                                                                                                                 |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> <b>MOTION FEE COLLECTED: \$</b> _____                                                                                                                                        |  |                                                                                                                                                                                            |  |
| <input type="checkbox"/> <b>CONTESTED - AMOUNT DUE: \$</b> _____                                                                                                                                      |  |                                                                                                                                                                                            |  |

SCCA 233 (11/2003)

**OTHER COUNSEL OF RECORD:**

| <u>PLAINTIFFS</u>                                                                                                                                                                                                                             | <u>DEFENDANT</u>                                                                                                                                                                                               |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Gene M. Connell Jr, Esquire<br><i>Kelaher, Connell &amp; Connor, P.C.</i><br>PO Box 14547<br>Surfside Beach, South Carolina 29587<br>Telephone: 843-238-5648<br>Email: <a href="mailto:gconnell@classactlaw.net">gconnell@classactlaw.net</a> | Peter M. Balthazor, Esquire<br><i>Riley Pope &amp; Laney, LLC</i><br>Post Office Box 11412<br>Columbia, SC 29211<br>Telephone: 803-799-9993<br>Email: <a href="mailto:peteb@rplfirm.com">peteb@rplfirm.com</a> |

RICHLAND COUNTY  
FILED  
28 OCT 27 PM 3:11  
JEANETTE W. MCBRIDE  
C.C.P. & G.S.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Frank J. Cumberland, Jr., Jennifer B.  
Gardner and Michael R. Ugino,

Plaintiffs,

v.

City of Columbia,

Defendant.

(Our File No.: 5253.00415)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2011-CP-40-06705

**DEFENDANT'S RULE 59(E) MOTION  
TO ALTER OR AMEND**

Please take notice that Defendant will move, by and through its undersigned counsel, ten days hereafter, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 59(e), SCRPC, for the court to alter or amend its order denying Defendant's motion to strike. The grounds for this motion are as follows:

1. The court misconstrued and misapplied the law of the case doctrine because the doctrine should not apply to Judge Kinard's orders after the supreme court issued a ruling on the class certification issue.
2. Even if Judge Kinard's reasoning constitutes the law of the case, the Court misconstrued and misinterpreted Judge Kinard's orders to read that the orders envisioned and created a common fund.
3. The Court improperly decided that a motion to strike could not be used at this stage of the litigation in place of summary judgment.
4. The Court improperly found that because the remedy sought by Plaintiffs is novel that it could not grant Defendant's motion.
5. The Court misconstrued and misapplied the law concerning the common fund remedy to find that the remedy is allowed and applicable in this action.
6. The Court should alter or amend its order to set forth the specific paragraphs or portions of the Third Amended Complaint that should be stricken regarding the class action allegations.

**I. THE COURT MISCONSTRUED AND MISAPPLIED THE LAW OF THE CASE DOCTRINE IN FINDING THAT JUDGE KINARD'S ORDER ENVISIONED AND CREATED A COMMON FUND.**

In the order denying Defendant's motion to strike, the Court found that Judge Kinard's orders denying class certification were the law of the case, and that the orders created a common fund should Plaintiffs be successful in this case. This Court misapplied the law of the case doctrine.

Judge Kinard's initial order (filed June 26, 2012) denied class certification for two reasons. First, Judge Kinard applied Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684 (6th Cir. 1976) and United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974), to find that there was no need for the complexities and extra costs associated with class actions. Secondly, Judge Kinard found that Plaintiffs could not establish all five elements required for class certification. Plaintiffs moved for reconsideration, which Judge Kinard denied. Although Judge Kinard's order denying reconsideration repeated only one of the two grounds for denial, the order's silence on the Plaintiffs' failure to meet all elements of Rule 23 does not negate this second basis for denial.

Plaintiffs appealed Judge Kinard's ruling to the supreme court. In their appeal, Plaintiffs asserted that Judge Kinard erred in applying Craft and Delray Beach and that Judge Kinard erred in holding that Plaintiffs had not met the third and fifth elements of Rule 23(a), SCRPC. On appeal, Defendant (as Respondent) raised additional sustaining grounds addressing Plaintiffs' failure to meet the fourth requirement of Rule 23, SCRPC. See Jones v. Lott, 387 S.C. 339, 346-347, 692 S.E.2d 900, 904 (2010) ("A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. The appellate court may review

respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.") citing to Rule 220(c) ("The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal.").

Pursuant to Rule 220(b)(1), SCACR, and without discussion, the supreme court affirmed Judge Kinard's denial of class certification. Azar v. City of Columbia, 414 S.C. 307, 317 n. 10, 778 S.E.2d 315, 320 (2015). Plaintiffs did not petition the supreme court for rehearing on this issue. The supreme court did not provide any discussion concerning the denial of class action certification, and there is no indication whether the supreme court adopted or rejected Judge Kinard's reasoning for denying class certification. The supreme court's affirmance of this Court's denial of class certification does not specify which ground for denial it relied upon. Under the two issue rule, it is unnecessary for an appellate court to address all grounds appealed where one ground provides a basis for affirmance. Anderson v. South Carolina Dep't of Hwys. & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996) (stating that when "the defendant has appealed both issues, the appellate court would affirm on the basis of ... the 'two issue rule, if either of the two issues supported affirmance.") (emphasis added). The supreme court's general affirmance could have rested upon any one of the two grounds raised by Plaintiffs, or the ground raised by Defendant. Plaintiffs cannot pick and choose which basis for denial is the law of the case. Because the supreme court did not identify its basis for affirmance, it is error for this Court to randomly pick one ground as the law of the case.

The only decision constituting the law of this case is the supreme court's unexplained decision to affirm the denial of class certification.<sup>1</sup> The end result of Judge Kinard's orders constitutes the law of the case, not whatever reasoning Judge Kinard relied upon to reach his conclusion. Thus, this Court's prior ruling on class certification does not help Plaintiffs' argument that a common fund is applicable or has been created in this case.

**II. EVEN IF JUDGE KINARD'S UNDERLYING REASONING CONSTITUTES THE LAW OF THE CASE, THIS COURT MISCONSTRUED AND MISINTERPRETED JUDGE KINARD'S ORDERS IN FINDING THAT JUDGE KINARD'S ORDERS ENVISIONED MUCH LESS CREATED A COMMON FUND.**

"As a general rule, judgments are to be construed like other written instruments."

Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC, 404 S.C. 385, 392, 745 S.E.2d 105, 108 (2013). In construing a judicial order of the court, the intent of the order is determined by considering the entire order, not isolated parts. Id. The orders at issue here were limited to the issue of whether to certify a class pursuant to Rule 23, SCRPC.

The common fund remedy was not in front of Judge Kinard, was not envisioned by Judge Kinard, and was not created by Judge Kinard. Class action status or certification, the issue addressed by Judge Kinard, is not a remedy. It was incorrect for the Court to read into Judge Kinard's orders that he was addressing or deciding Plaintiffs' entitlement to any form of remedy.

The only reference by Judge Kinard to a common fund came in his discussion of the Rule 23 elements for class certification and his recitation of a cause of action for "unconstitutional collection." Plaintiffs made clear that they were seeking class certification "only with respect to the claim for injunctive relief . . ." Order Denying Plaintiffs' Motion for Reconsideration, p. 1.

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<sup>1</sup> A decision by an appellate court is binding as law of the case. Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969). An appellate court's determination of an issue is the law of the case on remand to the trial court. Prince v. Beaufort Memorial Hosp., 709 S.E.2d 122 (Ct. App. 2011).

Judge Kinard did not mention the term "common fund" in his discussion concerning injunctive relief. What is more, the Plaintiffs' cause of action for injunctive relief did not mention a common fund. The Second Amended Complaint sought to enjoin the City from: 1) "continuing to collect these fees and not placing them in a special account to be used only for operation of and capital improvements of the water and sewer systems;" and 2) "spending any of the fees generated for operations of and capital improvement of water and sewer systems for any other purpose ...." Plaintiffs further sought to require through injunctive relief an order directing the City to "return" or "replace" all monies it had previously spent for purposes allegedly unrelated to the water and sewer utility back to the Enterprise Fund. The "special" or "restricted" account Plaintiffs referred to in their Second Amended Complaint was not a common fund, but rather, a reference to S.C. Code Ann. 6-1-330 requiring local governments to place service fee revenues in a segregated, separate account from other local government revenues. See Second Amended Complaint, ¶ 32. Judge Kinard's statement cannot be read as granting a remedy of a common fund when the Plaintiffs' Second Amended Complaint did not seek a common fund via their cause of action for injunctive relief.

Further, the case law cited within Judge Kinard's order reasoned that a certified class was not necessary because an order determining the constitutionality of the defendant's actions would apply to all effected individuals. Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 686 (6th Cir. 1976) ("As to a Rule 23(b)(2) class asserting claims to injunctive and declaratory relief, the district court properly recognized that such relief to the extent 'granted [would] . . . accrue to the benefit of others similarly situated', and, consequently, as the Eighth Circuit has recognized, 'no useful purpose would be served by permitting this case to proceed as a class action' because 'the determination of the constitutional question can be made by the Court and the rules and

regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action.”); United Farmworkers of Florida Housing Project, Inc. v. Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974) (“Even with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the individual appellants and the nonprofit corporation but all other persons subject to the practice under attack.”). Based on this reasoning, Judge Kinard’s order concluded that Plaintiffs’ injunctive relief of “directing the City of Columbia to comply with Section 6-1-330 of the South Carolina Code” would apply to rate payers similarly situated as the Plaintiffs without the need to certify a class. Order, p. 2 (June 26, 2012). Neither of the cases cited by Judge Kinard concerned an injunction to create a common fund. Judge Kinard did not cite to any case law addressing the common fund remedy and he did not find that Plaintiffs’ action was a “suit for the creation, recovery, preservation, or increase of a common fund or common property.” Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). Judge Kinard’s statement that injunctive relief given to the named plaintiffs, if granted, would inure to the benefit of other similarly situated individuals does not equate to the creation of a common fund, and should not be read to do so.

### **III. THIS COURT IMPROPERLY GRANTED THE COMMON FUND REMEDY AT THIS STAGE OF THE LITIGATION.**

The court has “decline[d] to grant Defendant’s Motion to Strike the common fund remedy at this stage in the litigation” but the court erred by going one step further and granting the relief requested in the pleadings by Plaintiffs. The court should alter or amend its order to deny Defendant’s motion to strike reference to a common fund at this stage in the litigation without prejudice to Defendant’s right to object to the establishment of a common fund at some later stage in the litigation. Plaintiffs did not request the court to make a determination at this

time that they are entitled to a common fund. The court declined to grant Defendant's motion because it found that a motion to strike should not be used as a motion for summary judgment. This rationale appeared for the first time in Plaintiffs' proposed order, giving the Defendant little opportunity to address it. However, the court appears to have granted partial summary judgment to Plaintiffs regarding the common fund remedy where no motion for such relief was pending before the court. This was error, and the court should alter or amend its order to either grant Defendant's motion, or to state simply that Defendant's motion is denied because the matter is not redundant, immaterial, impertinent or scandalous. The court has improperly gone a step further by deciding Plaintiffs are entitled to the common fund remedy. See Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990) (stating that in ruling on a motion to strike the court decides only "whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded."). Instead of simply ruling that Plaintiffs should be allowed to plead the common fund remedy, the court has found the common fund remedy is allowed and is applicable in this case.

The Court also goes on to state in a footnote that it wants to give each party a full and fair opportunity to develop the record. However, by apparently granting the remedy sought by Plaintiff, the Court has denied Defendant the opportunity to develop the record on this issue. Thus, the Court should alter or amend its order to find only that Plaintiffs are entitled to plead a common fund remedy at this time, but that a common fund has not been created.

#### **IV. THE COURT IMPROPERLY FOUND THAT A MOTION TO STRIKE CANNOT BE USED TO DISMISS A NOVEL ISSUE.**

The Court declined to grant Defendant's motion on the ground that the remedy being sought by Plaintiffs was a novel issue. However, the Court then incorrectly allowed Plaintiffs'

requested remedy even though the issue is novel and should not be decided at this stage of the litigation. The Court states that if an issue is novel or requires resolution of facts or the application of law, a motion to dismiss (or strike) should not be granted. By the same token, if an issue is too novel to grant Defendant's motion, it should also be too novel to allow the remedy at this stage of the litigation before all of the facts have been discovered and presented to the Court.

**V. THE COURT MISCONSTRUED AND MISAPPLIED THE LAW CONCERNING  
THE COMMON FUND REMEDY TO FIND THAT THE REMEDY IS ALLOWED AND  
APPLICABLE IN THIS ACTION.**

The Court's order states that the remedy sought by Plaintiffs is not a refund of money to them, but instead a refund to the Enterprise Fund of funds that were paid by Plaintiffs. This statement demonstrates exactly why the creation of a common fund is redundant and immaterial to the relief requested by Plaintiffs.

If this is the remedy requested by Plaintiffs, it does not meet the definition of a common fund, and the Court incorrectly applied the law concerning common funds. The Court has overlooked that establishing a common fund to somehow recover monies already spent by Defendant and return that money to the Water and Sewer Enterprise Fund does not comport with the reasoning and justification for establishing a common fund. A common fund is only applicable in class action suits, or in very limited categories of cases that are not applicable here.

Petition of Crum, 196 S.C. 528, 14 S.E.2d 21 (1941), should not be relied on here for the establishment of a common fund. In Crum, an action was commenced to determine to whom property should pass under a will. The heirs of a deceased devisee answered, and the court determined that the heirs of the devisee could take under the will. The attorney for the successful heirs then "move[d] the Court for an order allowing him a fee out of the funds distributable

among the children of [all of the deceased devisees], which group included all those who would reap a benefit from the contest he had waged.” *Id.* at 23, 196 S.E.2d at \_\_\_\_\_. There, a common fund existed because there was a sum of money ready to be **distributed** to litigants and others who had a legal right to such personal property. The claimholders were “standing by, anxious, ready and willing to claim its benefits.” *Id.* at 23-4, 196 S.E.2d at \_\_\_\_\_. In the present case, there is nothing to be distributed. Crum stands only for the proposition that a common fund is proper where there are others who are entitled to share in some recovery. Here, there is no one standing by to share in any recovery.

In all of their causes of action, Plaintiffs are seeking a return to the Enterprise Fund of monies that allegedly were used for purposes unrelated to the provision of water and sewer services. The establishment of a common fund is unnecessary, redundant, and immaterial in light of Plaintiff’s demand that funds be returned directly to the Enterprise Fund. Plaintiffs are not seeking the return of money to rate payers, and Plaintiffs have no basis to seek the return of money to rate payers. One of the hallmarks of a common fund is not present here – there is nothing being distributed to rate payers.

**VI. IN THE EVENT THAT THE COURT DOES NOT GRANT THE MOTION TO STRIKE AS TO THE COMMON FUND, THE COURT SHOULD REQUIRE PLAINTIFFS TO FILE AN AMENDED COMPLAINT THAT DELETES ANY REFERENCES TO THE DISMISSED PLAINTIFFS AND TO THE CLASS ACTION ALLEGATIONS**

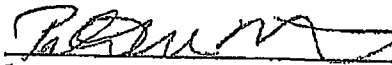
This Court’s Order states that Plaintiff’s counsel has “agreed to delete the dismissed Plaintiffs (Azar and Letts) and to delete all allegations regarding a class action. The Order further states “that the parties have agreed that the . . . portions of the Complaint which deal with the class action should be stricken”, including any reference to the parties which have no claim – Joseph Azar and Michael Letts.

Defendant requests that the Court alter or amend its Order to state that Plaintiffs Azar and Letts shall be stricken from the caption of this action, and that Paragraphs 1 and 3 be stricken from the Third Amended Complaint.

In addition, Defendant requests the Court to alter or amend its Order to require Plaintiff to file an amended pleading deleting those specific portions and paragraphs as set forth in Defendant's proposed order to the Court. Defendant believes this is necessary to alleviate any confusion over the portions and paragraphs that should be stricken, in light of Plaintiffs' apparent agreement to strike only Paragraphs 8, 38, 46, 50, 52, and 59. (Plaintiffs' Response to Defendant's Motion to Strike, p. 1).

#### CONCLUSION

Defendant respectfully requests that the Court alter or amend its Order Denying Defendant's Motion to Strike as set forth herein.



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ATTORNEYS FOR DEFENDANT

Columbia, South Carolina  
September 12, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Joseph S. Azar, Frank J. Cumberland, Jr.,  
Michael A. Letts, Jennifer B. Gardner and  
Michael R. Ugino, Individually and as  
Class Representatives,

Plaintiff,

v.

City of Columbia,

Defendant.

(Our File No.: 5253.00415)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2011-CP-40-06705

**CERTIFICATE OF SERVICE**

This is to certify that I, Monique W. Trifos, an employee with the law firm of Riley Pope & Laney, LLC, have this day caused to be served upon the person named below the attached **NOTICE OF MOTION AND DEFENDANT'S RULE 59(E) MOTION TO ALTER OR AMEND** in the above-captioned matter via United States mail, first-class postage prepaid, to the following:

C. Dixon Lee, III, Esquire  
McLaren & Lee  
1508 Laurel Street  
Columbia, SC 29211

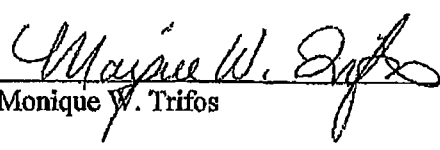
Gene M. Connell, Jr., Esquire  
Kelaher Connell & Connor, PC  
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Teresa A. Knox, Esquire  
Columbia City Attorney  
PO Box 667  
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Ms. M. McMullen Taylor, Esquire  
Mullen Taylor, LLC  
1230 Richland Street  
Columbia, SC 29201

The Honorable G. Thomas Cooper, Jr.  
P O Box 192  
Columbia, SC 29202-0192

Columbia, South Carolina  
September 12, 2016

  
Monique W. Trifos

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Joseph S. Azar, Frank J. Cumberland, Jr., Michael  
A. Letts, Jennifer B. Gardner and Michael R.  
Ugino, Individually and as Class Representatives,  
Plaintiff,

vs.

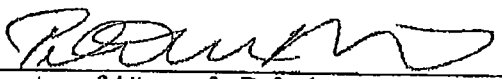
City of Columbia,

Defendant(s).

IN THE COURT OF COMMON PLEAS

C/A NO.: 2011-CP-40-06705

**MOTION INFORMATION FORM  
AND COVERSHEET**

|                                                                                                                                                                                                                                                                                                                                                                                                                                       |  |                                                                                                                                                                                                    |  |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <b>Plaintiff's Attorney:</b><br>C. Dixon Lee, III, Esquire<br>McLaren & Lee<br>1508 Laurel Street<br>Columbia, SC 29211<br><br>Gene M. Connell, Jr., Esquire<br>Kalahar Connell & Connor, PC<br>PO Drawer 14547<br>Surfside Beach, SC 29587                                                                                                                                                                                           |  | <b>Defendant's Attorney:</b><br>Peter M. Balthazor, SC Bar #68244<br>Riley Pope & Laney, LLC<br>Post Office Box 11412<br>Columbia, South Carolina 29211<br>Tel: (803) 799-9993/Fax: (803) 239-1414 |  |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete Sections I & III)<br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (Complete Sections II and III)<br><input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (Complete Sections II and III)                                                                                                          |  |                                                                                                                                                                                                    |  |
| <b>SECTION I: Hearing Information</b>                                                                                                                                                                                                                                                                                                                                                                                                 |  |                                                                                                                                                                                                    |  |
| Nature of Motion: <u>Notice of Motion and Defendant's Rule 59(E) Motion to Alter or Amend</u>                                                                                                                                                                                                                                                                                                                                         |  |                                                                                                                                                                                                    |  |
| Estimated Time Needed: <u>30 minutes</u>                                                                                                                                                                                                                                                                                                                                                                                              |  | Court Reporter Needed: <u>Yes</u>                                                                                                                                                                  |  |
| <b>SECTION II: Motion Type</b>                                                                                                                                                                                                                                                                                                                                                                                                        |  |                                                                                                                                                                                                    |  |
| <input checked="" type="checkbox"/> Written Motion Attached<br><input type="checkbox"/> Form Motion:<br><br>I hereby move for relief or action by the court as set forth in the attached proposed order.                                                                                                                                                                                                                              |  |                                                                                                                                                                                                    |  |
| <br>_____<br>Signature of Attorney for Defendant                                                                                                                                                                                                                                                                                                  |  | <u>September 12, 2016</u><br>Date Submitted                                                                                                                                                        |  |
| <b>SECTION III: Motion Fee</b>                                                                                                                                                                                                                                                                                                                                                                                                        |  |                                                                                                                                                                                                    |  |
| <input checked="" type="checkbox"/> <b>PAID - AMOUNT: \$25.00</b><br><br><input type="checkbox"/> <b>EXEMPT:</b> (check reason)<br><div style="margin-left: 150px;"><input type="checkbox"/> State Agency v. Indigent Party<br/><input type="checkbox"/> Motion for Stay in Bankruptcy<br/><input type="checkbox"/> Motion for Publication<br/><input type="checkbox"/> Motion for Execution<br/><input type="checkbox"/> Other</div> |  |                                                                                                                                                                                                    |  |
| <b>JUDGE'S SECTION</b>                                                                                                                                                                                                                                                                                                                                                                                                                |  |                                                                                                                                                                                                    |  |
| <input type="checkbox"/> Motion fee to be paid upon filing of the attached Order.<br><input type="checkbox"/> Other:                                                                                                                                                                                                                                                                                                                  |  | <div style="border: 1px solid black; padding: 5px;">JUDGE<br/>CODE: _____ Date: _____</div>                                                                                                        |  |
| <b>CLERK'S VERIFICATION</b>                                                                                                                                                                                                                                                                                                                                                                                                           |  |                                                                                                                                                                                                    |  |
| Collected by: _____<br>(Print Name)                                                                                                                                                                                                                                                                                                                                                                                                   |  | DATE FILED: _____                                                                                                                                                                                  |  |
| <input type="checkbox"/> <b>MOTION FEE COLLECTED:</b> _____<br><input type="checkbox"/> <b>CONTESTED - AMOUNT DUE:</b> _____                                                                                                                                                                                                                                                                                                          |  |                                                                                                                                                                                                    |  |

SCCA/233 (11-2003)

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
C/A NO. 2011-CP-40-6705

Joseph S. Azar, Frank J. Cumberland, Jr., )  
Michael A. Letts, Jennifer B. Gardner and )  
Michael R. Ugino, Individually and as )  
Class Representatives, )

Plaintiffs, )

vs. )

City of Columbia, )

Defendant. )

**PLAINTIFFS' RESPONSE  
TO DEFENDANT'S  
MOTION TO STRIKE**

This matter is before the Court based on Defendant City of Columbia's Motion to Strike. As the Court is aware, this matter was heard by the South Carolina Supreme Court and sent back for further consideration. Plaintiffs had previously appealed an Order Denying Class Certification and now the Defendant has moved to strike certain allegations from the Plaintiff's Complaint. The Plaintiffs consent to the following action by the Court:

The Third Amended Complaint states that the case is being brought as a class action. Since the South Carolina Supreme Court's Opinion in *Azar v. City of Columbia* affirmed the denial of class certification, Plaintiffs consent to striking of that allegation from the Complaint. Plaintiffs further consent to those allegations regarding a class action including Paragraphs 8, 38, 46, 50, 52, 59.

The Plaintiffs do take issue with the Defendant attempting to strike Plaintiffs' relief for a common fund. A class action is not required to have common fund relief and in fact in this case, Judge Kinard envisioned a common fund in his Order Denying Plaintiffs' Motion for Class Certification and his Order on reconsideration. (Attached as Exhibits A and B).

In the Order Denying Class Certification, Judge Kinard wrote:

These courts concluded that class certification was unnecessary because any declaratory or injunctive relief given in the individual action of the named plaintiffs would inure to the benefit of other similarly situated individuals. (Order of Judge Kinard filed June 26, 2012).<sup>1</sup>

Judge Kinard further wrote in his Order Denying Plaintiff's Motion for Reconsideration:

That is, if the Plaintiffs prevail on their cause of action for injunctive relief against the City of Columbia, the relief entered in this action will inure to the benefit of other similarly situated individuals. (Order Denying Reconsideration filed September 19, 2012).<sup>2</sup>

This lawsuit seeks injunctive relief to require the City of Columbia to return those monies used by the City of Columbia to the Water and Sewer Fund so that those funds could only be used by the Water and Sewer Fund. In effect, Judge Kinard's Order envisioned if the Plaintiffs won their case that all individuals affected would have monies which were collected returned to the Water and Sewer Fund for use for Water and Sewer Fund purposes only. This is and would be a common fund and Plaintiffs' action would benefit all other similarly situated water and sewer customers. A common fund has been consistently allowed throughout South Carolina by the South Carolina Supreme Court in non-class actions since the early 1930s. In the first case on record, *Petition of Crum Ex Relation Johnson, et al. v. Williams, et al*, 14 S.E.2d 21 (1941),<sup>3</sup> the Supreme Court of this state allowed an attorney's fee for recovery of property created or preserved by an attorney representing a party who, at his own expense, has maintained a suit for the recovery, preservation, protection or increase of a common fund or common property or has created or brought into court a fund which others are entitled to share.<sup>4</sup> 14 S.E.2d 23. This rule has been recently reaffirmed by the South Carolina Court of Appeals in *Matter of Estate of Kay*,

<sup>1</sup> In effect, the Court recognized this as a "defacto class action."

<sup>2</sup> The Supreme Court affirmed this Order.

<sup>3</sup> The doctrine was adopted in South Carolina in *Nimmons v. Stewart*, 13 S.C. 445 (S.C. 1880).

<sup>4</sup> This action benefits all customers of the City by making sure the money generated is only used for a specific purpose.

W.L. No. 3342250 ( \_\_ S.E.2d \_\_ 2016). In that case, the Court of Appeals again reaffirmed a decision to award counsel fees based on a common fund. The Court cited *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 as authority for its decision. ("Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved.") The Supreme Court further noted in *Layman*: "The rationale for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of expenses."

Plaintiffs request this Court review *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948). In *Shillito* the Supreme Court of South Carolina approved a taxpayer action and held a taxpayer singly or in a class action may maintain a suit in equity to restrain unlawful municipal action which leads, directly or indirectly, to taxation and a taxpayer, as specially damaged by the increase of the burden of taxation on his property, has a special interest, distinct from the general public, in the subject matter of such a suit which entitles him to relief. 51 S.E.2d at 99.

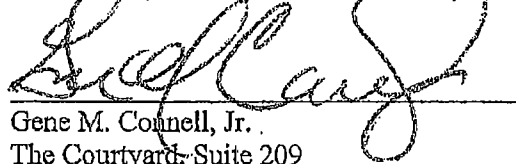
Further, *Shillito* held that where a taxpayer and citizen on behalf of themselves and other taxpayers successfully prosecutes an action regarding tax benefits the court may allow a reasonable fee to taxpayer's attorney payable out of the funds derived from the unlawful levy. The Court noted: "Citizens should be encouraged to bring suits like this, and when they have succeeded in covering into the county treasury money for the benefit of the people of the county that would otherwise be lost, it is no more than right and just that they should have these fees. 51 S.E.2d at 101.

Here, all water and sewer customers will benefit from the action of the Plaintiffs in that any monies returned to the Water and Sewer Fund will assist those customers in making their

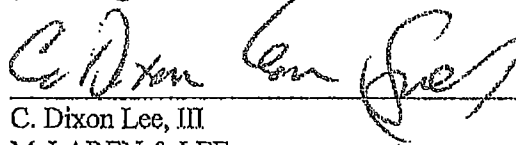
water and sewer service better, more efficient and safer for all citizens of the city. See *Shillito*, "For all practical purposes this fund was created, protected and preserved for the benefit of the taxpayers of the City of Spartanburg through the medium of the judicial machinery set in motion by the respondent." 51 S.E.2d at 104.

Finally, the issue of a common fund need not be addressed at this point in the litigation as the court still has to hear the evidence and decide how to apply the Supreme Court's decision in *Azar*. Accordingly, Plaintiffs request that the Court not strike the claim for a common fund at this point since such is premature and the common fund theory would clearly apply whether or not this is a class action.

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Attorneys for Plaintiffs

August 4, 2016

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

) IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2011-CP-40-6705

Plaintiffs,

vs.

City of Columbia,

Defendant.

**ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

This matter came before the Court for a hearing on Plaintiffs' Motion for Class Certification. Specifically, the motion before the Court seeks to certify a class of water customers of the City of Columbia, past and present as of three years prior to the filing of the Complaint. Having reviewed the pleadings, the motion, and the memoranda submitted by Plaintiffs and Defendant, I find and conclude that class certification is not necessary or appropriate in this case.

The primary issue presented in the case is whether the City of Columbia's water and sewer charges are subject to limitations found in Section 6-1-330 of the South Carolina Code, which provides that service fees collected by local governments must be used for costs related to the service or program for which it was paid. Plaintiffs allege that the City of Columbia violated this statute by using some of its water and sewer revenues for purposes that they contend are unrelated to water and sewer service, such as funding economic development activities. Plaintiffs also allege that the City's annual transfer of up to \$4.5 million dollars from its water and sewer enterprise fund to its

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RICHLAND COUNTY  
JEANETTE W. MORRIS  
C.J.P. & G.S.

general fund violates Section 6-1-330 of the South Carolina Code. Plaintiffs seek a permanent injunction requiring Defendant in the future "to place all fees collected for operations of and/or capital improvement of the water and sewer system in a segregated account and to only be used for such purposes," and to replace all monies Defendant expended in the past for other purposes.

Plaintiffs are seeking to have a class certified in connection with their claim for injunctive relief. South Carolina appellate courts have not had an opportunity to address a situation involving a proposed class action seeking an injunction against a municipality. However, other courts have held in such cases that, regardless of whether the elements of Rule 23(a) are satisfied, a class should only be certified if there is a need for the complexities and extra costs associated with class suits. See *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (6th Cir. 1976); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974). These courts concluded that class certification was unnecessary because any declaratory or injunctive relief given in the individual action of the named plaintiffs would inure to the benefit of other similarly situated individuals.

The principle set forth in cases like *Craft v. Memphis Light, Gas and Water Division* and *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach* is directly applicable in this case. Plaintiffs seek injunctive relief directing the City of Columbia to comply with Section 6-1-330 of the South Carolina Code. The named Plaintiffs can fully and adequately present this claim, and the Court can assume that the City will comply with an injunction if the Court ultimately deems it appropriate to enter

such relief. Thus, there is no need for the complexities and extra costs associated with class actions, and no useful purpose will be served by class treatment.

Not only is class certification unnecessary in this case, but Plaintiffs have not established all five of the requirements of Rule 23(a), SCRPC, which are necessary for class certification. The South Carolina Supreme Court has held that proponents of class certification bear the burden of proving five prerequisites under South Carolina law. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRPC. The prerequisites are: 1) the class must be so numerous that joinder of all members is impracticable; 2) there must be questions of law or fact common to the class; 3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; 4) the representative parties must fairly and adequately protect the interests of the class; and 5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy must exceed one hundred dollars for each member of the class. Rule 23(a), SCRPC. In deciding whether class certification is proper, the court must apply a rigorous analysis to determine whether each prerequisite is satisfied. Failure to satisfy even one prerequisite is fatal to class certification. *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003).

Plaintiffs seek to certify a class of "all Columbia water customers, past and present as of three years prior to the filing of the Complaint." However, Plaintiffs cannot establish the third and fifth requirements for class certification. The third element is that the claims of the representative parties are typical of the claims of the class. No evidence has been presented that any other potential class members wish to assert a claim.

Plaintiffs are complaining about the manner in which the City is spending water and sewer revenues. Plaintiffs have not shown that other citizens have presented similar complaints.

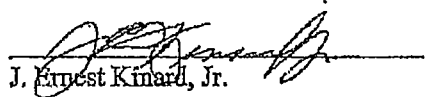
Plaintiffs also fail to meet the fifth requirement for class certification because the relief sought is not primarily injunctive or declaratory with respect to the class as a whole, and the amount in controversy does not exceed one hundred dollars for each class member. Plaintiffs apparently concede that the amount in controversy does not exceed one hundred dollars for each class member. In their Motion, they state that "Plaintiffs request injunctive relief such that the amount in controversy is not in issue." However, a review of Plaintiffs' Second Amended Complaint indicates that the relief primarily sought is not injunctive or declaratory, as required by Rule 23(a)(5), SCRPC.

In their First Cause of Action, the relief primarily sought by Plaintiffs is injunctive relief. However, Plaintiffs allege three additional causes of action which do not seek injunctive or declaratory relief. In the Second Cause of Action, Plaintiffs assert a claim for breach of contract and seek "a refund of all fees collected." In the Third Cause of Action, Plaintiffs assert a claim for "Unconstitutional Collection." The relief sought in that cause of action is the creation of a common fund of all fees collected by the City for water improvements for the past three years. Finally, in the Fourth Cause of Action, Plaintiffs assert a claim for "Unconstitutional Tax." That cause of action asks for "judgment for the class and a common fund and for actual damages and the costs of the action." Thus, only one of the four causes of action alleged by Plaintiffs seeks an injunction as its primary relief. As such, Plaintiffs fail to satisfy the requirement set forth in Rule 23(c)(5) of the South Carolina Rules of Civil Procedure.

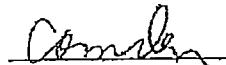
Based on the foregoing, class certification is both unnecessary and inappropriate in this case. If it is ultimately determined that the relief sought by Plaintiffs in this case should be granted, the Court may presume the good faith of government officials to respect such a ruling without the necessity of making this a class action. Moreover, a review of the record in this case indicates that Plaintiffs cannot establish all five elements required for class certification. Accordingly,

Plaintiffs' Motion for Class Certification is DENIED.

AND IT IS SO ORDERED.

  
J. Ernest Kinard, Jr.  
Presiding Judge  
Fifth Judicial Circuit

June 22, 2012

 South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2011-CP-40-6705

Plaintiffs,

vs.

City of Columbia,

Defendant.

JEANETTE M. MORRIS  
C.C.P. & G.S.  
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# ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

This matter came before the Court for a hearing on Plaintiffs' Motion for Reconsideration of the Order Denying Class Certification. At the hearing on the Motion, Plaintiffs' counsel indicated that the Plaintiffs are seeking class certification only with respect to the claim for injunctive relief alleged in the Second Amended Complaint. However, having reviewed the motion, the relevant pleadings, and the briefs submitted by the parties, the Court finds that class certification is not appropriate in this case.

As stated in the Order Denying Class Certification, a class should only be certified if there is a need for the complexities and extra costs associated with class suits. *See, Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (6th Cir. 1976); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974). The courts in the cited cases concluded that class certification was unnecessary because any injunctive relief entered in the individual action of the named plaintiffs would inure to the benefit of other similarly situated individuals. The same situation appears to exist in this case. That is, if the Plaintiffs prevail in their cause

of action for injunctive relief against the City of Columbia, the relief entered in this action will inure to the benefit of other similarly situated individuals.

Based on the foregoing, class certification is both unnecessary and inappropriate in this case. If it is ultimately determined that the relief sought by Plaintiffs in this case should be granted, the Court may presume the good faith of government officials to respect such a ruling without the necessity of making this a class action. Accordingly,

Plaintiffs' Motion for Reconsideration is DENIED.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
J. Ernest Kinard, Jr.  
Presiding Judge  
Fifth Judicial Circuit

September 19, 2012

Camden, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Joseph S. Azar, Frank J. Cumberland, Jr.,  
Michael A. Letts, Jennifer B. Gardner and  
Michael R. Ugino, Individually and as  
Class Representatives,

Plaintiff,

v.

City of Columbia,

Defendant.

(Our File No.: 5253.00415)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2011-CP-40-06705

**NOTICE OF MOTION AND  
DEFENDANT CITY OF COLUMBIA'S  
MOTION TO STRIKE**

YOU WILL PLEASE TAKE NOTICE that Defendant City of Columbia, by and through its undersigned counsel, will move, ten (10) days after service hereof, or as soon thereafter as counsel may be heard, pursuant to Rule 12(f), SCRCP, for an Order striking the following matters from Plaintiffs' Third Amended Complaint:

1. Plaintiffs' Third Amended Complaint, in the caption and in the body of the pleading, names multiple plaintiffs, some of whom have been dismissed from this action. This Court previously dismissed all claims brought by Plaintiffs Joseph S. Azar and Michael A. Letts based on a lack of standing. The dismissal of these Plaintiffs was affirmed by the Supreme Court, Azar v. City of Columbia, 414 S.C. 307, 317 n.10, 778 S.E.2d 315, 320 n.10 (2015). The Supreme Court indicated that the sole plaintiff on remand would be Frank J. Cumberland, Jr. Id. Plaintiffs Azar and Letts have not been removed from the Third Amended Complaint. Defendant moves for an Order striking any references to Plaintiffs Azar and Letts to alleviate any confusion over the identities of Plaintiffs and the claims being brought by any Plaintiffs.

2. The caption of Plaintiffs' Third Amended Complaint states that the action is being brought as a class action pursuant to Rule 23, SCRCP. The body of the Complaint sets forth

allegations supporting the claim for class certification. See, e.g. ¶ 8 of the Third Amended Complaint. Throughout the Complaint, Plaintiffs seek various relief individually and on behalf of a class of other similarly situated water and sewer customers. See, e.g. ¶¶ 38, 46, 50, 52, 55, 59, 60, 62, 69, and 70 of the Third Amended Complaint. The circuit court denied class certification in this matter. The denial of class certification was affirmed by the Supreme Court. Azar, 414 S.C. at 317 n.10, 778 S.E.2d at 320 n.10. The factual allegations of the Third Amended Complaint are identical to the factual allegations stated in earlier iterations of the Complaint. Therefore, Defendant is entitled to an Order striking all allegations in the Complaint concerning class action certification and striking all allegations for claims brought or relief sought concerning any class of individuals.<sup>1</sup>

3. In the Third Amended Complaint, Plaintiffs seek relief in the form of a common fund. Apparently the common fund would be created “from all fees collected by Defendant for water improvements for the past three years . . . .” Third Am. Compl., ¶ 60. Plaintiffs also seek a “common fund of monies collected for the past three years from those individuals who have paid such fees that have been used for other purposes . . . .” Id., ¶ 69. Plaintiffs ask that the monies placed in the common fund be returned, or repaid, to the water and sewer fund. Id., ¶¶ 60, 69. At the same time, Plaintiffs generally seek a return to the water and sewer fund of all monies spent for “other purposes”, id. at ¶ 42, and that water and sewer funds used as general revenue funds be returned to the water and sewer fund. Id., ¶¶ C, D, and E of the prayer for judgment.

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<sup>1</sup> At the time Plaintiffs filed their Motion to Amend, Defendant’s counsel attempted to address some of the issues raised in this motion. Plaintiffs’ counsel indicated in a letter dated January 27, 2016, that they are not asserting additional claims for either Azar or Letts. Plaintiffs’ counsel also indicated that Plaintiffs are not seeking renewed class status, and that Plaintiffs do not intend to do so. Defendant’s counsel appreciates this concession. However, Defendant feels constrained to bring this motion to clarify the allegations of the Complaint, particularly in light of the claim for a common fund. Defendant’s counsel certifies that it believes further consultation would serve no useful purpose.

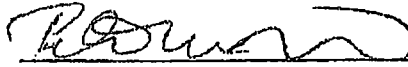
There is no basis in law or fact for the establishment of a common fund in this matter. Plaintiffs are generally seeking a return to the water and sewer fund of monies that allegedly were used for purposes unrelated to the provision of water and sewer services. The establishment of a common fund is unnecessary, redundant, and immaterial in light of Plaintiffs' request that funds be returned to the water and sewer fund. Plaintiffs are not seeking the return of any monies to themselves, or to other similarly situated individuals. In these circumstances, assuming the Plaintiffs prevail on any cause of action, the creation of a common fund would be a fiction, an unnecessary stop along the path back to the water and sewer fund. The creation and management of a common fund would add complexities and extra costs to this case which are unnecessary given this matter is not being brought on behalf of a class.

For the reasons stated herein, Defendant asserts that it is entitled to an Order striking from the Third Amended Complaint all requests for relief in the form of the creation of a common fund.

This motion shall be based upon the statute and case law of the State of South Carolina, upon the pleadings in this matter, and any other arguments and material properly received by the Court at any hearing on this matter.

***SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE***

Respectfully Submitted,



Peter M. Balthazor  
RILEY POPE & LANEY, LLC  
Post Office Box 11412  
Columbia, South Carolina 29211  
Telephone: (803) 799-9993  
Email: [peteb@rplfirm.com](mailto:peteb@rplfirm.com)

M. McMullen Taylor  
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1230 Richland Street  
Columbia, South Carolina 29201  
Telephone: (803) 254-1344  
Email: [mmt@MullenTaylorLLC.com](mailto:mmt@MullenTaylorLLC.com)

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina  
June 3, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Joseph S. Azar, Frank J. Cumberland, Jr.,  
Michael A. Letts, Jennifer B. Gardner and  
Michael R. Ugino, Individually and as  
Class Representatives,

Plaintiff,

v.

City of Columbia,

Defendant.

(Our File No.: 5253.00415)

IN THE COURT OF COMMON PLEAS

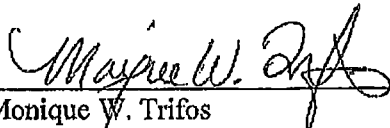
C/A NO.: 2011-CP-40-06705

**CERTIFICATE OF SERVICE**

This is to certify that I, Monique W. Trifos, an employee with the law firm of Riley Pope & Laney, LLC, have this day caused to be served upon the person named below the attached **NOTICE OF MOTION AND DEFENDANT CITY OF COLUMBIA'S MOTION TO STRIKE** in the above-captioned matter via United States mail, first-class postage prepaid, to the following:

C. Dixon Lee, III, Esquire  
McLaren & Lee  
1508 Laurel Street  
Columbia, SC 29211

Gene M. Connell, Jr., Esquire  
Kelaher Connell & Connor, PC  
PO Drawer 14547  
Surfside Beach, SC 29587

  
\_\_\_\_\_  
Monique W. Trifos

Columbia, South Carolina  
June 3, 2016

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Joseph S. Azar, Frank J. Cumberland, Jr., Michael  
A. Letts, Jennifer B. Gardner and Michael R.  
Ugino, Individually and as Class Representatives,  
Plaintiff,

vs.

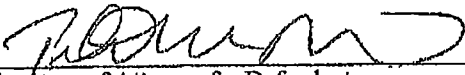
City of Columbia,

Defendant(s).

IN THE COURT OF COMMON PLEAS

C/A NO.: 2011-CP-40-06705

MOTION INFORMATION FORM  
AND COVERSHEET

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |  |                                                                                                                                                                                                    |  |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <b>Plaintiff's Attorney:</b><br>C. Dixon Lee, III, Esquire<br>McLaren & Lee<br>1508 Laurel Street<br>Columbia, SC 29211<br><br>Gene M. Connell, Jr., Esquire<br>Kelahe Connell & Connor, PC<br>PO Drawer 14547<br>Surfside Beach, SC 29587                                                                                                                                                                                                                                                          |  | <b>Defendant's Attorney:</b><br>Peter M. Balthazor, SC Bar #68244<br>Riley Pope & Laney, LLC<br>Post Office Box 11412<br>Columbia, South Carolina 29211<br>Tel: (803) 799-9993/Fax: (803) 239-1414 |  |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete Sections I & III)<br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (Complete Sections II and III)<br><input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (Complete Sections II and III)                                                                                                                                                                        |  |                                                                                                                                                                                                    |  |
| <b>SECTION I: Hearing Information</b><br>Nature of Motion: <u>Notice of Motion and Defendant City of Columbia's Motion to Strike</u><br>Estimated Time Needed: <u>30 minutes</u> Court Reporter Needed: <u>Yes</u>                                                                                                                                                                                                                                                                                  |  |                                                                                                                                                                                                    |  |
| <b>SECTION II: Motion Type</b><br><input checked="" type="checkbox"/> Written Motion Attached<br><input type="checkbox"/> Form Motion:<br>I hereby move for relief or action by the court as set forth in the attached proposed order.<br><div style="text-align: center;"><br/>_____<br/>Signature of Attorney for Defendant</div> <div style="text-align: right;"><u>June 3, 2016</u><br/>Date Submitted</div> |  |                                                                                                                                                                                                    |  |
| <b>SECTION III: Motion Fee</b><br><input checked="" type="checkbox"/> <b>PAID – AMOUNT: \$25.00</b><br><input type="checkbox"/> <b>EXEMPT;</b> (check reason)<br><div style="margin-left: 150px;"><input type="checkbox"/> State Agency v. Indigent Party<br/><input type="checkbox"/> Motion for Stay in Bankruptcy<br/><input type="checkbox"/> Motion for Publication<br/><input type="checkbox"/> Motion for Execution<br/><input type="checkbox"/> Other</div>                                 |  |                                                                                                                                                                                                    |  |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion fee to be paid upon filing of the attached Order.<br><input type="checkbox"/> Other:                                                                                                                                                                                                                                                                                                                                                      |  | <b>JUDGE</b><br>CODE: _____ Date: _____                                                                                                                                                            |  |
| <b>CLERK'S VERIFICATION</b><br>Collected by: _____<br>(Print Name)<br><input type="checkbox"/> <b>MOTION FEE COLLECTED:</b> _____<br><input type="checkbox"/> <b>CONTESTED – AMOUNT DUE:</b> _____<br>DATE FILED: _____                                                                                                                                                                                                                                                                             |  |                                                                                                                                                                                                    |  |

SCCA/233 (11-2003)

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
C/A NO. 2011-CP-40-6705

Joseph S. Azar, Frank J. Cumberland, Jr.,  
Michael A. Letts, Jennifer B. Gardner and  
Michael R. Ugino, Individually and as  
Class Representatives,

Plaintiffs,

vs.

City of Columbia,

Defendant.

THIRD  
AMENDED SUMMONS

FILED  
2016 MAY -6 PM 12:50  
CLERK OF COURT  
SOUTH CAROLINA

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Amended Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Amended Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Amended Complaint and judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.

The Courtyard, Suite 209

1500 U. S. Highway 17 North

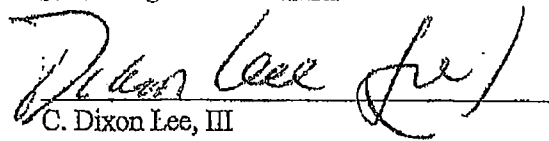
Post Office Drawer 14547

Surfside Beach, South Carolina 29587-4547

(843) 238-5648 (phone)

(843) 238-5050 (facsimile)

[gconnell@classactlaw.net](mailto:gconnell@classactlaw.net)



C. Dixon Lee, III

McLAREN & LEE

1508 Laurel Street (29201)

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Columbia, SC 29211

(803) 799-3074 (phone)

(803) 252-3548

[dlee@mclarenandlee.com](mailto:dlee@mclarenandlee.com)

Attorneys for Plaintiffs

January 9, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Joseph S. Azar, Frank J. Cumberland, Jr., Michael  
A. Letts, Jennifer B. Gardner and Michael R.  
Ugino, Individually and as Class Representatives,

Plaintiff(s)

vs.

City of Columbia,

Defendant(s)

Submitted By: Gene M. Connell, Jr.

Address: Kelaher, Connell & Connor, P.C.  
Post Office Drawer 14547  
Surfside Beach, South Carolina 29587-4547

IN THE COURT OF COMMON PLEAS

THIRD AMENDED  
CIVIL ACTION COVERSHEET

2011-CP-40-6705

SC Bar #: 1358  
Telephone #: 843-238-5648  
Fax #: 843-238-5050  
Other:

E-mail: gconnell@classactlaw.net

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.  
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Contracts</b><br><input type="checkbox"/> Constructions (100)<br><input type="checkbox"/> Debt Collection (110)<br><input type="checkbox"/> General (130)<br><input type="checkbox"/> Breach of Contract (140)<br><input type="checkbox"/> Fraud/Bad Faith (150)<br><input type="checkbox"/> Failure to Deliver/<br>Warranty (160)<br><input type="checkbox"/> Employment Disorin (170)<br><input type="checkbox"/> Employment (180)<br><input type="checkbox"/> Other (199)<br><b>Inmate Petitions</b><br><input type="checkbox"/> PCR (500)<br><input type="checkbox"/> Mandamus (520)<br><input type="checkbox"/> Habeas Corpus (530)<br><input type="checkbox"/> Other (599) | <b>Torts - Professional Malpractice</b><br><input type="checkbox"/> Dental Malpractice (200)<br><input type="checkbox"/> Legal Malpractice (210)<br><input type="checkbox"/> Medical Malpractice (220)<br>Previous Notice of Intent Case #<br>20 -NI-<br><input type="checkbox"/> Notice/ File Med Mal (230)<br><input type="checkbox"/> Other (299)                                                 | <b>Torts - Personal Injury</b><br><input type="checkbox"/> Conversion (310)<br><input type="checkbox"/> Motor Vehicle Accident (320)<br><input type="checkbox"/> Premises Liability (330)<br><input type="checkbox"/> Products Liability (340)<br><input type="checkbox"/> Personal Injury (350)<br><input type="checkbox"/> Wrongful Death (360)<br><input type="checkbox"/> Assault/Battery (370)<br><input type="checkbox"/> Slander/Libel (380)<br><input type="checkbox"/> Other (399)                                                                                                                                                           | <b>Real Property</b><br><input type="checkbox"/> Claim & Delivery (400)<br><input type="checkbox"/> Condemnation (410)<br><input type="checkbox"/> Foreclosure (420)<br><input type="checkbox"/> Mechanic's Lien (430)<br><input type="checkbox"/> Partition (440)<br><input type="checkbox"/> Possession (450)<br><input type="checkbox"/> Building Code Violation (460)<br><input type="checkbox"/> Other (499)                                                                                                                                                  |
| <b>Special/Complex /Other</b><br><input type="checkbox"/> Environmental (600)<br><input type="checkbox"/> Automobile Arb. (610)<br><input type="checkbox"/> Medical (620)<br><input checked="" type="checkbox"/> Other (699)<br><input type="checkbox"/> Sexual Predator (510)                                                                                                                                                                                                                                                                                                                                                                                                      | <b>Administrative Law/Relief</b><br><input type="checkbox"/> Reinstate Drv. License (800)<br><input type="checkbox"/> Judicial Review (810)<br><input type="checkbox"/> Relief (820)<br><input type="checkbox"/> Permanent Injunction (830)<br><input type="checkbox"/> Forfeiture-Petition (840)<br><input type="checkbox"/> Forfeiture-Consent Order (850)<br><input type="checkbox"/> Other (899) | <b>Judgments/Settlements</b><br><input type="checkbox"/> Death Settlement (700)<br><input type="checkbox"/> Foreign Judgment (710)<br><input type="checkbox"/> Magistrate's Judgment (720)<br><input type="checkbox"/> Minor Settlement (730)<br><input type="checkbox"/> Transcript Judgment (740)<br><input type="checkbox"/> Lis Pendens (750)<br><input type="checkbox"/> Transfer of Structured<br>Settlement Payment Rights<br>Application (760)<br><input type="checkbox"/> Confession of Judgment (770)<br><input type="checkbox"/> Petition for Workers<br>Compensation Settlement<br>Approval (780)<br><input type="checkbox"/> Other (799) | <b>Appeals</b><br><input type="checkbox"/> Arbitration (900)<br><input type="checkbox"/> Magistrate-Civil (910)<br><input type="checkbox"/> Magistrate-Criminal (920)<br><input type="checkbox"/> Municipal (930)<br><input type="checkbox"/> Probate Court (940)<br><input type="checkbox"/> SCDOT (950)<br><input type="checkbox"/> Worker's Comp (960)<br><input type="checkbox"/> Zoning Board (970)<br><input type="checkbox"/> Public Service Comm. (990)<br><input type="checkbox"/> Employment Security Comm (991)<br><input type="checkbox"/> Other (999) |

Submitting Party Signature

Date: January 8, 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note:** You must comply with the Supreme Court Rules regarding ADR.  
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
C/A NO. 2011-CP-40-6705

Joseph S. Azar, Frank J. Cumberland, Jr.,  
Michael A. Letts, Jennifer B. Gardner and  
Michael R. Ugino, Individually and as  
Class Representatives,

Plaintiffs,

vs.

City of Columbia,

Defendant.

*Class Action Pursuant  
to SCRCP 23*

**THIRD  
AMENDED COMPLAINT  
NON-JURY TRIAL**

FILED  
2015 MAY -6 PM 12:50  
C.C. # 2011-CP-40-6705

The Plaintiffs, complaining of the Defendant, would respectfully allege unto this Court as follows:

**FOR A FIRST CAUSE OF ACTION**

1. The Plaintiff Joseph S. Azar is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
2. The Plaintiff Frank J. Cumberland, Jr. is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
3. The Plaintiff Michael A. Letts is a citizen and resident of the County of Richland, State of South Carolina, who lives outside the corporate limits of the City of Columbia.
4. The Plaintiff Jennifer B. Gardner is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina.
5. The Plaintiff Michael R. Ugino is a citizen and resident of the City of Columbia, County of Richland, State of South Carolina

6. The Defendant, City of Columbia, is a body politic and is a governmental entity organized and existing pursuant to the laws of the State of South Carolina.
7. The Defendant provides water and sewer service to the Plaintiffs and thousands of others in the City of Columbia and surrounding areas.
8. Plaintiffs bring this action pursuant to South Carolina Rule of Civil Procedure 23 which provides in pertinent part that a class action may be brought when there are questions of law and fact common to the class; the class is so numerous; the claims of the representative parties are typical of the claims of the class; the class representatives will fairly and adequately protect the interests of the class; and the amount in controversy exceeds One Hundred Dollars (\$100) for each member of the class.
9. Plaintiffs are and continue to be water and sewer customers with the Defendant City of Columbia.
10. That the Plaintiffs bring this as a class action on behalf of all past and current water and sewer customers of the City of Columbia.
11. The Defendant City of Columbia did institute water and sewer fees on all customers of its water and sewer system which were specifically designated, intended and required by South Carolina law to be used to pay costs related to the specific service or program for which those fees were paid, the water and sewer system.
12. That the fees paid by the Plaintiffs were for water and sewer charges or fees and not taxes.
13. That the fees which the Plaintiffs paid were specifically designated for expenses of and improvements to the water and sewer systems including the water and sewer

treatment plants and the various delivery portions of the water and sewer service throughout the City and other areas where the City provides water and sewer service.

14. That for more than a decade, and notwithstanding the provisions of S.C. Code Ann. § 6-1-300, *et. seq.* (Supp. 2010) restricting the use of revenue derived from a service or user fee imposed to finance the provision of public services to pay the costs related to the service or program for which the fee was paid, the City of Columbia has diverted and spent monies it collected as water and sewer fees for uses and purposes other than the City of Columbia water and sewer system.
15. That in the past 12 years the City has transferred in excess of \$80 million dollars out of its water and sewer fund for purposes and uses other than its water and sewer system.
16. That at the same time the City of Columbia was diverting and spending monies it collected as water and sewer fees for uses and purposes other than expenses of the City of Columbia water and sewer system, the City of Columbia was deferring, postponing, delaying and/or neglecting to perform appropriate and necessary upkeep, maintenance, repairs and improvements to the water and sewer system necessary to keep those systems in good condition and proper working order.
17. That as a direct and proximate result of the City of Columbia deferring, postponing, delaying and/or neglecting to perform appropriate and necessary upkeep, maintenance, repairs and improvements to the water and sewer system, the water and sewer system decayed, became run-down and dilapidated, and aged beyond its useful life to a point where water and sewer leaks, overflows and other problems were not only common but also exceeded levels of discharges allowed by Environmental

Protection Agency ("EPA") and/or the South Carolina Department of Health and Environmental Control ("SC DHEC") rules and regulations.

18. That, on information and belief, in an effort to deceive the general public including its water and sewer customers, the EPA and/or SC DHEC, the City of Columbia falsified record keeping of sewage overflows so as to make it appear that the untreated sewage overflows, spills or discharges by the City of Columbia were less severe than the sewage overflows which actually occurred.
19. That sewage overflows from the City of Columbia water and sewer system have exceeded allowable levels per EPA and SC DHEC rules and regulations and have resulted in unwarranted pollution of the lands and waters of the areas served by City of Columbia water and sewer system as well as those waterways downstream from where such sewage overflows occurred and, on occasion, have resulted in Plaintiffs and others being denied peaceful use and enjoyment of public and private properties due to the health hazards resulting from those sewage overflows.
20. That Plaintiffs are informed and believe that the water and sewer systems have not been properly operated or maintained resulting in otherwise unnecessary sewage overflows and water leaks, present unnecessary and unreasonable health hazards to Plaintiffs and other members of the public and are or were on the verge of being taken over by the Environmental Protection Agency and/or the South Carolina Department of Environmental Control. Notwithstanding, the Defendant City of Columbia continues to use the fees collected by it for other purposes and transfer those fees in the general revenue fund.

21. That the numerous leaks and overflows of untreated sewerage by the City of Columbia water and sewer system have resulted, from time to time, in the foul, unpleasant and offensive stench of raw sewage wafting through various parts of the City of Columbia and has been objectionable and offensive to Plaintiffs and other persons of normal sensibilities within those areas.
22. That, belatedly, the City of Columbia recognized the folly of its actions in spending water and sewers fees for purposes other than the water and sewer system and, at the same time neglecting, postponing and deferring proper upkeep, maintenance, repairs and improvements to its water and sewer system and hired Black & Veatch, an engineering, consulting and construction company, to conduct a study of and issue a report on the City's water and sewer system, which report concluded that the City needed to spend hundreds of millions of dollars, possibly as much as \$500,000,000.00, above normal operational expenses and implement rate increases of 5% per year for each year for a period of five (5) years to bring its water and sewer system into good and proper working order.
23. That in 2011 the City of Columbia increased water and sewer fees by 5% and passed an municipal ordinance authorizing the issuance of \$135,000,000.00 in new water and sewer bonds, in addition to the approximately \$180,000,000.00 proceeds collected from the sale of water and sewer bonds between January 1, 2009 and June 30, 2011.
24. That on or about November 2, 2011 the City of Columbia offered for sale, in two separate series, a total of \$135,000,000.00 in Waterworks and Sewer System Revenue Bonds, [\$100,000,000.00 of City of Columbia Waterworks and Sewer System

Revenue Bonds, Series 2011A rated Aa1 by Moody's Investors Service and \$35,000,000.00 of City of Columbia Waterworks and Sewer System Revenue Bonds, Series 2011B also rated Aa1 by Moody's Investors Service] to help pay for upkeep, maintenance, repairs, improvements and expansion of its water and sewer system.

25. That the City of Columbia has pledged future water and sewer fees revenue to pay for the foregoing \$135,000,000.00 in Waterworks and Sewer System Revenue Bonds which it issued and sold.

26. That the monies which have and will be raised from the sale of aforesaid Waterworks and Sewer System Revenue Bonds and the rate increases necessary to pay for those bonds have been, are being and/or will be used by the City of Columbia to pay for upkeep, maintenance, repairs, improvements and expansions of its water and sewer system, which, but for the City of Columbia having diverted and spent monies previously collected as water and sewer fees from Plaintiffs for other purposes would have been paid for, in whole or in part, by the water and sewer fee money the City of Columbia previously collected from Plaintiffs and misspent for other non-water and sewer purposes, resulting in Plaintiffs having to pay twice for the same expenses.

27. As a direct and proximately result of the City of Columbia having issue bonds and to borrow money to replace the money it spent derived from water and sewer fees on purposes other than the water and sewer system, Plaintiffs will be forced to pay additional water and sewer fees to pay the attorney fees, other expenses and bond interest necessary to raise money to replace the earlier misspent monies.

28. The aforesaid conduct of City of Columbia has brought the City under the scrutiny of the EPA and/or SC DHEC, which is or has conducted an investigation of the City's

water and sewer systems and operations and has or is, on information and belief, negotiated or is negotiating an agreement to make extensive repairs and improvements to its water and sewer system which will likely include payment of a substantial fine by the City of Columbia, the costs and expense of the same which will inevitably have to be paid by Plaintiffs and which would otherwise have not occurred had the City of Columbia not misused the money it previously collected as water and sewer fees and, correspondingly, neglected and deferred proper upkeep, maintenance, repairs and improvements to its water and sewer system.

29. That Plaintiffs and thousands of others paid the water and sewer fees imposed by Defendant City of Columbia through its officers, agents and/or employees for the expenses of and improvement of the water and sewer systems.
30. That S.C. Code Ann. § 6-1-300, *et. seq.* allows a local governing body by ordinance approval by a positive majority to change and collect a service or user fee.
31. That the City of Columbia enacted such an ordinance.
32. That the service or user fees by the City of Columbia collected for water/sewer service must be used under South Carolina law solely to pay costs related to the service or program for which the fee was paid.
33. That the revenue generated from such service of users fees is to be used only for the program for which the fee was paid.
34. That the Defendant City of Columbia, in violation of its agreement to collect the fees from Plaintiffs and thousands of others for operation and/or improvement of the water system, did not segregate such fees for operations or improvement of the water

system, but placed those monies in the general fund which were used for other purposes than operations and improvement of the water and sewer systems.

35. That those other purposes include moving approximately \$4.5 million dollars or more on an annual basis to other departments of the City.

36. That Defendant City of Columbia violated South Carolina law by taking the fees and using them as general revenue funds of the City of Columbia.

37. That the water and sewer fees are 5% or more of the Defendant's total budget.

38. That Plaintiffs, individually and on behalf of a class of other similarly situated, customers request an Order of this Court requiring the City of Columbia to return all the money it took from the water/sewer fund for other purposes to the water and sewer fund.

39. That Plaintiffs, as a citizen and resident of the City of Columbia and/or customers of the City of Columbia water and sewer systems, are informed and believes that such fees have been used in violation of law and have been placed in the general fund and not spent on the City of Columbia's water and sewer facilities.

40. That Plaintiffs request this Court issue its Order enjoining the City of Columbia from continuing to collect these fees and not placing them in a special account to be used only for operation of and capital improvements of the water and sewer systems.

41. That Plaintiffs are informed and believes that they are entitled to an Order of the Court enjoining the City of Columbia from spending any of the fees generated for operations of and capital improvement of water and sewer systems for any other purpose and that the Court issue its Order enjoining such activities by the City of Columbia.

42. That such funds should be placed in a restricted account during the pendency of this action. Further, the City of Columbia must return all monies it spent for other purposes from the water and sewer fund.
43. Further, Plaintiffs are informed and believes that an injunction is necessary and reasonable and that irreparable harm will occur if the Defendant continues to allow the fees to be used for other purposes other than for improvement of the water system.
44. That Plaintiffs request a judgment on the First Cause of Action for Injunction both temporary and permanent requiring the City of Columbia to place all fees collected for operations of and/or capital improvement of the water and sewers systems in a segregated account and to only be used for such purposes. Further, Plaintiffs request a mandatory injunction requiring Defendant to replace all monies in the water and sewer fund which was specifically used for that specific purpose.

**FOR A SECOND CAUSE OF ACTION**

(Breach of Contract)

45. The Plaintiffs reallege and reiterate each and every allegation as fully as if repeated verbatim herein.
46. The Plaintiffs, individually and on behalf of the class, are informed and believes they were required to pay fees to the City of Columbia with the representation/agreement through its ordinance and state law that the City of Columbia would only use such fees for the water and sewer systems.
47. That for years the Defendant City of Columbia and its officers, agents and/or employees have raided the funds which were to be used solely for the water and sewer systems.

48. That these funds have been repeatedly used for other purposes other than the water and sewer systems.
49. That the Plaintiffs are informed and believe under the statutes and case law of the State of South Carolina that Plaintiffs, both individually and as class representatives, had an agreement and/or contract implied in law and in fact whereby Defendant City of Columbia agreed to collect such water and sewer fees for the purpose of the water and sewer system only and to keep those in a separate account for that purpose.
50. The Plaintiffs, individually and on behalf of the class, are further informed and believes that the Defendant City of Columbia did not live up to its agreement and has failed to maintain and improve the water an sewer systems with the fees collected from Plaintiffs and thousands of others.
51. That Plaintiffs request a court order for a refund of all water and sewer fees collected by the Defendant from Plaintiffs and all those individuals similarly situated for the last three years and bases this on breach of contract by the City of Columbia in failing to follow the statutes and case law regarding the collection of such fees and the segregating of such fees into a separate account.
52. That Plaintiffs asks for a judgment individually and as a class against the Defendant for breach of contract and for a refund of all fees collected since such fees constitute an illegal tax by the Defendant and that such fees have been used for general revenue for the City of Columbia and not for the specific purpose intended.
53. That such funds should be returned to the water and sewer fund.

**FOR A THIRD CAUSE OF ACTION**

(Unconstitutional Collection)

54. The Plaintiffs reallege and reiterates each and every allegation as fully as if repeated verbatim herein.
55. That the Plaintiffs, individually and as class representatives, requests that this Court find that the use of specific funds dedicated for the water and sewer service in the City of Columbia be declared unconstitutional when such funds are collected and used as general revenue in violation of case law and the statutes of the State of South Carolina.
56. That use of these fees for other purposes violates S.C. Code Ann. § 6-1-330 and the four part test of the case of C.R. Campbell Construction Co. v. Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997).
57. That in fact Defendant City of Columbia through its agents and/or employees has collected an illegal tax under the guise of charging it as a fee when such fees were not held for the specific purpose provided for when they were collected.
58. That as a result, the aforementioned collection of fees is violative of the South Carolina Constitution because it was implemented improperly by Defendant and that such was not held in a segregated account.
59. That Plaintiffs, individually and as class representatives, are informed and believes that the collection of a fee for water improvements for the City of Columbia and the use of such fees for other municipal purposes is violative of due process, equal protection and the South Carolina statutes in that the fees were collected for a specific purpose and not used for that specific purpose.

60. That Plaintiffs individually and on behalf of a class request a common fund of all fees collected by Defendant for water improvements for the past three years be formed and that such fees should be returned to the water and sewer fund by the City.

**FOR A FOURTH CAUSE OF ACTION**

(Unconstitutional Tax)

61. The Plaintiffs reallege and reiterate each and every allegation as fully as if repeated verbatim herein.
62. The Plaintiffs individually and as class representative of a class of individuals who paid the fee which was required by the City of Columbia and such fee must be specifically earmarked for water and sewer operations, construction and/or improvements.
63. That the aforementioned fees have for years been used by Defendant for general revenue and such fees have not been used for the purpose specifically intended, i.e., for operation, construction and/or improvement of the water and sewer service of the City of Columbia.
64. That as a result, such fees collected by the Defendant City of Columbia constitute an illegal and/or unconstitutional tax or taking under the South Carolina Constitution.
65. That as an unfair and/or illegal tax these fees should be returned to the Plaintiff individually and as class representative for the class of affected taxpayers.
66. That the basis of this cause of action is that Defendant collected an unconstitutional tax against the Plaintiff and as such implemented a tax under the guise of fee to use those monies for other general revenue expenses of the City of Columbia.

67. That such use of "service fees" for other municipal purposes is prohibited under established South Carolina Supreme Court precedent.

68. That as further basis of the refund of the unconstitutional tax is that all fees collected must be specifically used and/or kept for their required purpose and cannot used as general revenue funds of the Defendant.

69. That Plaintiffs individually and on behalf of the class requests the Court issue its order creating a common fund of monies collected for the past three years from those individuals who have paid such fees that have been used for other purposes and that these funds be returned to the City of Columbia water and sewer fund to be used only for the specific purpose for which the fee was collected.

70. That Plaintiffs requests judgment for the class and for a common fund and for actual damages and the costs of the action.

WHEREFORE, Plaintiffs prays for judgment as follows:

A. That this Court certify a class under SCRCP 23.

B. On the First Cause of Action individually and as a class for preliminary and permanent injunction against the Defendant collecting such fees unless such fees are specifically segregated and earmarked for improvement of the water and sewer system and for an Order of this court holding such fees in a common fund pending the outcome of this litigation. Plaintiffs only seek such an Order as to excess fees collected and not fees used for operating the water/sewer system.

C. On the Second Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended

purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

D. On the Third Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

E. On the Fourth Cause of Action individually and on behalf of a class for refund of all fees collected over the past three years when such fees were not used for their intended purpose and were used as general revenue funds of the City of Columbia, such funds to be returned to the water and sewer fund.

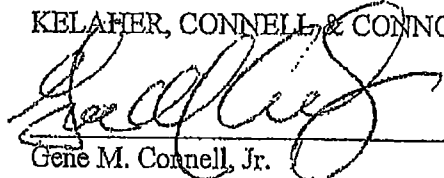
F. For an Order of this Court temporarily and permanently enjoining the Defendant from using the aforementioned money which is collected as fees from any other purpose other than improvement of the water and sewer system.

G. For an Order of this Court certifying a class of individuals, businesses, corporations and the like who paid more than \$100 in fees to the City of Columbia which fees were to be earmarked for use of the water and sewer service system and which fees were instead spent on general revenue projects of the City of Columbia, such funds to be returned to the water and sewer fund.

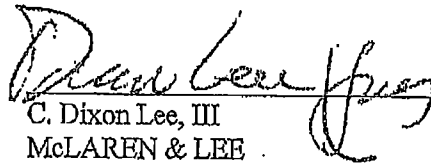
H. For an Order of the Court requiring Defendant to pay attorneys' fees and costs for violating established South Carolina law.

I. For an Order requiring Defendant to form a common fund to repay the water and sewer fund with all funds used for other purposes by the City.

KELAHER, CONNELL & CONNOR, P.C.



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**Attorneys for Plaintiffs**

January 8, 2015

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
C/A NO. 2011-CP-40-6705

Joseph S. Azar, Frank J. Cumberland, Jr.,  
Michael A. Letts, Jennifer B. Gardner and  
Michael R. Uglino, Individually and as  
Class Representatives,

Plaintiff,

vs.

City of Columbia,

Defendant.

AFFIDAVIT OF SERVICE  
BY MAIL

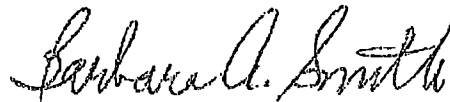
PERSONALLY appeared before me, Barbara A. Smith, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

M. McMullen Taylor, Esq.  
Mullen Taylor, LLC  
P. O. Box 8567  
Columbia, SC 29202

Peter M. Balthazor, Esq.  
Riley Pope & Laney, LLC  
P. O. Box 11412  
Columbia, SC 29211

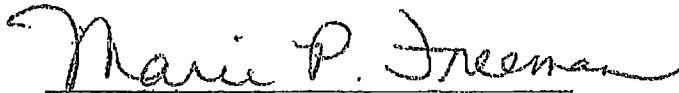
DOCUMENT: Third Amended Civil Action Coversheet  
Third Amended Summons  
Third Amended Complaint.

DATE OF MAILING: June 2, 2016



Barbara A. Smith

SWORN AND SUBSCRIBED before me,  
this 2<sup>nd</sup> day of June, 2016.



Notary Public for South Carolina

My Commission Expires: 6/11/24

State of South Carolina ) In The Court of Common Pleas  
County of Richland ) Fifth Judicial Circuit  
2011-CP-40-6705

Frank J. Cumberland, Jr., )  
Jennifer B. Gardner, & )  
Michael A. Letts, )

Plaintiffs, )

vs. )

City of Columbia, )

Defendant. )

Transcript of Record

August 4, 2016  
Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr., Judge

A P P E A R A N C E S:

Gene McCain Connell, Jr., Esquire  
C. Dixon Lee, III, Esquire  
Attorneys for the Plaintiff

Peter M. Balthazor, Esquire  
M. McMullen Taylor, Esquire  
Attorneys for the Defendant

Elizabeth B. Harris, CVR-M-CM  
Circuit Court Reporter

I N D E X

| <u>Witness/Description</u> | <u>Page No.</u> |
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| Certificate Page. . . . .  | 19              |

E X H I B I T S

| <u>No.</u> | <u>Description</u> | <u>Ev.</u> |
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No exhibits introduced.

1 THE COURT: Joseph Azar, et cetera, et cetera, et  
2 cetera. Go ahead, Mr. Balthazor.

3 MR. BALTHAZOR: Thank you, Your Honor. May it please  
4 the court? Pete Balthazor here on behalf of the City of  
5 Columbia. This is our motion to strike certain portions of  
6 the plaintiffs' third amended complaint.

7 THE COURT: When was that filed?

8 MR. BALTHAZOR: Your Honor, I think the motion to  
9 strike was filed on June 3rd of -- June 3rd of this year.  
10 I think, I think that's the date that I've got in my  
11 memorandum set forth in here. Yeah, I think it was hand  
12 delivered to the court on June 3rd. Do you have a copy in  
13 your file?

14 THE COURT: Well, I've got a huge file.

15 MR. BALTHAZOR: I'm sure you do.

16 THE COURT: Just tell me about it.

17 MR. BALTHAZOR: Certainly, Your Honor, and I, I trust  
18 I don't need to go into a whole lot of background with you.  
19 You're obviously intimately familiar with this case. After  
20 it was remanded from the Supreme Court ---

21 THE COURT: Right.

22 MR. BALTHAZOR: --- plaintiffs moved to amend the  
23 complaint. There was already a second amended complaint.  
24 They moved to amend the complaint, filed a third amended  
25 and ---

1 THE COURT: Is this dealing with the parties?

2 MR. BALTHAZOR: Yes, Your Honor. The only, the only  
3 difference between the second amended complaint and the  
4 third amended complaint was the addition of, of two  
5 parties, two parties plaintiff, and they were ---

6 THE COURT: And did they drop -- who did they drop?

7 MR. BALTHAZOR: Well, and that's the basis of my  
8 motion to strike. There was -- before you, I'm not sure if  
9 it was Judge Kinard that decided this or if you decided  
10 this, but at some point plaintiff Azar and Letts were  
11 dismissed from the case, and the Supreme Court affirmed  
12 that dismissal and Judge Kinard denied class certification  
13 in the case, and the Supreme Court in a footnote affirmed  
14 that denial of the class certification. Supreme Court did  
15 it without any further discussions, so we really don't even  
16 know what the, what the reasoning is for the Supreme  
17 Court's affirmance. So, it leaves everything, I guess,  
18 intact in, in Judge Kinard's orders denying class  
19 certification. So, when the third amended complaint was  
20 filed, other than adding in the two new plaintiffs ---

21 THE COURT: They are, they are ---

22 MR. BALTHAZOR: The two ---

23 THE COURT: --- Gardner and Ugino?

24 MR. BALTHAZOR: Yes, Your Honor, Gardner and Ugino.  
25 Other than adding in those two new plaintiffs, everything

1 in the third amended complaint is identical to the second  
2 amended complaint, right down to all of the plaintiffs  
3 being named in the caption and in the body of the third  
4 amended complaint, and all of the ---

5 THE COURT: So, the ---

6 MR. BALTHAZOR: --- of the references to class action  
7 also referenced in the third amended complaint, and I have  
8 had a discussion with Mr. Connell about that. He indicates  
9 that -- and they're not trying to, they're not trying to  
10 rebrand any class certification, but just for purposes of  
11 getting that cleared up, that's part of my motion to  
12 strike. The more significant portion of my motion to  
13 strike ---

14 THE COURT: Well, I --- let me just -- Mr. Connell, you  
15 agree with that?

16 MR. CONNELL: Yes, sir. We -- the only reason why we  
17 left the name Azar in there is because it started out the  
18 Azar case. It returns, it's still going to be the Azar  
19 case. We're not seeking to reinstate him as a plaintiff.  
20 We're not asking for class certification, but we really  
21 have one issue with the motion to strike. So, he's  
22 correct. We've talked about everything but ---

23 THE COURT: You need to, you need to correct that or?

24 MR. CONNELL: I don't think you do, Your Honor. We  
25 admit that Azar is not -- he can't proceed with him, but I

1 think it's still the Azar case.

2 THE COURT: He's got no standing.

3 MR. CONNELL: I understand.

4 THE COURT: Right.

5 Okay, go ahead, Mr. Balthazor.

6 MR. BALTHAZOR: Thank you, Your Honor, and like I  
7 said, I think the most -- that clears up that part of it.  
8 I think the most, you know, the most important, most  
9 significant part of the motion to strike is, is to strike  
10 any allegations as part of a remedy in the third amended  
11 complaint to the establishment of what's called a common  
12 fund in the third amended complaint. Again, that's carried  
13 over from the ---

14 THE COURT: That was in the first one.

15 MR. BALTHAZOR: Yeah. It was in, it was in all of  
16 them, Your Honor, and it was, it was carried over, and the  
17 reason we're bringing this motion mainly now is because now  
18 that the class action has been -- now that the class action  
19 denial has been affirmed, it would have been my thought  
20 that the common fund allegation, the request for the common  
21 fund would have been taken out of the, out of the complaint  
22 as well. I don't think Mr. Connell is going to be in  
23 agreement with, with me on, on that part. So, that's,  
24 that's what, that's what we're asking for today is to have  
25 those common fund allegations dismissed, and the main

1 reason is, is, is just that ---

2 THE COURT: But they, they have filed their third  
3 amended complaint?

4 MR. BALTHAZOR: Right.

5 THE COURT: Okay.

6 MR. BALTHAZOR: Yes, the third amended complaint has  
7 been filed. We filed a motion to strike, and we also  
8 answered the, the third amended complaint.

9 THE COURT: Okay.

10 MR. BALTHAZOR: Reserving, reserving any rights under,  
11 under the motion to strike.

12 THE COURT: Okay.

13 MR. BALTHAZOR: As I said, once that class action was  
14 dismissed, it's our contention that that would have done  
15 away with any common fund remedy at that point. It's -- we  
16 believe that a common fund is tied to a class action  
17 remedy. If there's no class action, then there can't be a  
18 common fund.

19 But on a more basic level -- and I'll get into that in  
20 a second -- but on a more basic level, we believe that a  
21 common fund is tied to some legal equitable, equitable  
22 right to some property. There's got to be some property  
23 that goes into a common fund that can be distributed out to  
24 some defined class of persons. So, that, that property has  
25 to be ascertainable either to a class or some defined

1 group.

2 Here there is no property. There's even no claimants  
3 that are tied to any legal right to get any refund or have  
4 any rights to any property. There's no dispute here that  
5 all of the monies paid in by either the plaintiffs or by  
6 any other ratepayers with the city, that that was invalid  
7 to pay that money into the city. There's -- I mean,  
8 everybody's paying their water, water and sewer bills. So,  
9 that, that's not disputed, the fact that it was paid.  
10 Nobody's asking to have that money refunded to them.

11 THE COURT: But don't they ask him or didn't they ask  
12 for the city to reimburse the money that they diverted for  
13 economic development purposes?

14 MR. BALTHAZOR: I don't know that reimbursement is the  
15 correct term, and I don't think that's the term that ---

16 THE COURT: Well, I haven't read it in a while.

17 MR. BALTHAZOR: Certainly.

18 THE COURT: But that's what I understood ---

19 MR. BALTHAZOR: Certainly, Your Honor.

20 THE COURT: --- they were seeking.

21 MR. BALTHAZOR: Well, and I think, I think that goes  
22 to, goes to the fact that a common fund is not necessary.  
23 What they are seeking is a return of some funds from --  
24 that may have gone to the general fund or may have been  
25 used for something else other than water and sewer.

---

1 They're asking for those funds to be returned to the, to  
2 the water and sewer fund, otherwise known as the, as the  
3 enterprise fund. So, there's absolutely no necessity for a  
4 common fund.

5 The sum of the cases I've cited in my, in my  
6 memorandum -- and my understanding of those cases of common  
7 fund again is something that claimants have some legal or  
8 equitable, equitable right to those funds. Here nobody has  
9 any right to get those funds back, and nobody's asking to  
10 get those funds back. They're just asking to be  
11 transferred or moved or reimbursed, or whatever the term  
12 may be, from one account to another within the city. So,  
13 like I say, on that basic level I don't think that the  
14 plaintiffs or any other claims out there have any right to  
15 these funds in the first place. So, there's no reason to  
16 even set up a common fund.

17 And I think there's, there's a case out of, out of  
18 Spartanburg, and I think the plaintiffs have cited this  
19 case. It's -- I'm going to butcher the first name, but  
20 it's *Shillito vs. City of Spartanburg*. It's from 1948, and  
21 that was a class action. Here we don't have a class  
22 action, and this is not a class action now. But in that  
23 case, it was a, it was a challenge to some taxes that the  
24 City of Spartanburg instituted, and there the court said  
25 that those funds that, that the taxpayers had paid into the

1 city were distributable as the plaintiffs' or claimants'  
2 property.

3 Here there's no dispute about the initial payment into  
4 the, into the city of these funds or, or these charges.  
5 So, there's nobody that has any property that's trying --  
6 nobody's trying to get back any, any property, and the  
7 plaintiffs even acknowledge that. They're not asking for a  
8 refund. They're not even asking for a refund of their own,  
9 of their monies because I don't think they've got -- they  
10 don't have any argument to get that money back. So, that's  
11 -- on a sort of basic level, there's certainly no need for  
12 a common fund.

13 But as I mentioned earlier, in almost all cases,  
14 common funds are tied to class actions. Again, now that  
15 the class action has been done away with here, the common  
16 fund would be done away with as well. And like I  
17 mentioned, since they're already seeking a -- whatever we  
18 call it, a return, a refund, whatever it may be, there's no  
19 reason for a common fund.

20 Now, let me say there's no -- based on my research, I  
21 really can't find a definition of a common fund in South  
22 Carolina. It looks like it's just sort of assumed that,  
23 you know, a common fund is something that is money or  
24 property that is ascertainable and is, is tied to a group  
25 of persons or to a class. The restatement which I cite in

1 my memorandum says it's something which: It is something  
2 such as funds or property which claimants share because of  
3 commonality. So, again something that -- something akin to  
4 a class action, and some of the cases I've cited in my  
5 memorandum are all class action cases where a common fund  
6 has been, has been sort of discussed.

7 It's never really discussed the creation of the common  
8 fund. It just sort of -- these cases assume that there is  
9 a common fund because there's ascertainable property and  
10 there are defined class members. That's true in the *Lehman*  
11 case which I've, which I cited. It's truly in the *Condon*  
12 *vs. State* case which I've cited. There it was a refund  
13 directly to taxpayers; it wasn't just moving money from one  
14 place to another. It was a refund directly to taxpayers  
15 case.

16 I cited the *Bowie* case, which is a U.S. Supreme Court  
17 case. There, there the Supreme Court talked about a common  
18 fund and said it was something that was an ascertainable  
19 claim to a judgment. So, ascertainable and there was,  
20 there was a judgment of some, of some of the funds.

21 THE COURT: All right, let me hear from Mr. Connell.

22 MR. CONNELL: Thank you, Your Honor. Your Honor, I  
23 assume that since we're talking about the remedy, they  
24 don't argue with us about the liability issue at this point  
25 because they've jumped from the liability ---

1 THE COURT: Don't assume two things.

2 MR. CONNELL: All right.

3 MR. BALTHAZOR: I wouldn't assume that.

4 MR. CONNELL: Well, well, I'd have to argue that in  
5 this case then that, Your Honor, this is equivalent to a  
6 12(b)(6) motion, and of course those are disfavored. We  
7 haven't gotten through the liability part of the case, and  
8 they already want to talk to you about what the remedy may  
9 be at the end.

10 Your Honor, I'd point out a couple of things in our  
11 brief that you should look at. Judge Kinard's order  
12 denying class certification in his reconsideration are both  
13 things that we've given -- I've given to you, and those are  
14 two very interesting orders. And in those orders, Judge  
15 Kinard says that, that: These benefits will inure to other  
16 similarly situated individuals. And then he goes on to say  
17 class action is not necessary in this case because if  
18 plaintiffs in this case win, then everybody's going to get  
19 the same remedy.

20 And, Your Honor, our remedy in this case is to take  
21 the money that they took out on the water-sewer fund which  
22 was collected for water and sewer fund purposes only, and  
23 put that amount back in, and even to this day we still  
24 don't know how much that is. We're -- in fact, about  
25 fifteen minutes ago we got some partial discovery

1 responses. So, our point about that, Your Honor, is is  
2 that there is an ascertainable amount of money that may go  
3 to what these people pay in the future. They may get a  
4 rate credit. There may be differences in, in what they're  
5 owed. We're not asking for money for them, but we're  
6 asking that the money be placed back into the fund and used  
7 for the purposes selected under the statute.

8 And if Your Honor looks at the cases I've cited --  
9 they've cited some cases from the district court looks  
10 like. All the cases I've cited from South Carolina, there  
11 are five. *Shillito vs. Spartanburg*, a taxpayer action back  
12 in the 1940s before there were class actions where a  
13 taxpayer brought an action and the court said either  
14 singularly or as a class action -- there was no class  
15 action rule in South Carolina then -- if you benefit other  
16 people, then that's entitled to be in a common fund, and  
17 that was the *Shillito* case. The petition of *Krum* and then  
18 another case we cite from 2015 all involved one person  
19 coming to a situation where they form a benefit for others.  
20 I mean, it can't be, it can't be argued in this case that  
21 if the plaintiffs prevail in their position, then everybody  
22 who was a ratepayer who was in this period of time is going  
23 to have some benefit because that money that they paid for  
24 purposes only for a water and sewer is going to be put back  
25 into the water and sewer account. So, I mean, that's an

1 ascertainable set of property.

2 And, Your Honor, we would argue also that, that -- and  
3 I put this in our little brief, but this issue really is at  
4 the heart of what Your Honor would decide after the issue  
5 of liability. It's not an issue that, that we think should  
6 be decided as -- this is kind of a, this is kind of what I  
7 call preliminary motion for summary judgment. What they're  
8 asking you to do is strike out a remedy or a proposed  
9 remedy before you decide the issue of liability. And so,  
10 Your Honor, we would ask that you look at those cases and,  
11 and, and understand that the key point in this case at this  
12 point that we still don't what know the answer is is how  
13 much money did you take out of the water and sewer fund,  
14 and what did you do with it, and what did you use it for,  
15 and we've been waiting for a long time for that  
16 information, and now we think that Your Honor needs to know  
17 that because that's the money ---

18 THE COURT: You're saying the common fund would never  
19 be created?

20 MR. CONNELL: I'm saying that the money -- if Your  
21 Honor rules in our favor, the money that they took out is  
22 going to be the fund that's going to be put back into the  
23 water and sewer account. That's the common fund, and it  
24 doesn't have to be in a class action. A taxpayer action  
25 can do that. The *Shillito* case talks about that. There

1 are other cases, the Sloan cases that talk about a taxpayer  
2 action, and that's kind of where we are in this case.

3 I will also point out to Your Honor that, that Judge  
4 Kinard was very clear that even -- he felt like there was  
5 no need for a class action because what we were doing was  
6 going to inure to the benefit of everybody else, and thus  
7 -- and defendants have agreed. The defendant has agreed  
8 that whatever happens -- that was their argument during  
9 the, during the motion for class certification. They said,  
10 well, you know, if y'all -- if one person wins, then  
11 everybody wins and Judge Kinard said okay. I'll buy that  
12 argument. If one person wins, everybody wins. You don't  
13 need a class cert -- class action.

14 The Supreme Court -- we appealed that issue. The  
15 Supreme Court on a Rule 23 did not decide that. So, Judge  
16 Kinard's order is the law of the case, and the law of the  
17 case in this matter is that whatever we do is going to  
18 inure to someone else. So, in effect, we have kind of a *de*  
19 *facto* class action where whatever our position is is going  
20 to benefit the 100,000 Columbia ratepayers who are -- who  
21 have been paying this money.

22 THE COURT: All right.

23 MR. CONNELL: Thank you, Your Honor.

24 MR. BALTHAZOR: Your Honor, I'm not aware of all of  
25 the cases cited by plaintiffs. I've not had a chance to

1 review their, their memorandum. I am familiar with the  
2 *Shillito* out of Spartanburg and that *Krum* case. I think  
3 what's, what's different and what -- one of the reasons why  
4 a common fund is just not necessary here, in those cases  
5 that Mr. Connell mentioned, a common fund was being created  
6 because there was a class and because there was a defined  
7 group of people. And because there was a refund being  
8 given to those people, the funds had to come from  
9 somewhere, be set up in a common fund, and then go to  
10 someone.

11 Here there's absolutely no reason for a common fund  
12 either. I mean, a common fund is just, is just a fiction  
13 here. I mean, the funds, the funds, wherever they,  
14 wherever they may be, if it's ever ordered -- we believe it  
15 could only be prospectively -- but if it's ever ordered  
16 that, that funds need to go from someplace else back into  
17 the enterprise fund, there's no reason for them to stop in  
18 a, in a common fund. That's just -- that would just be a  
19 fiction in this case. I mean, the funds, there's, there's  
20 -- the only reason for a common fund in those other cases  
21 was to distribute elsewhere. Here, there's not -- they're  
22 not distributed elsewhere. They're staying within the  
23 city.

24 As far as Judge Kinard's order, I would like to bring  
25 up, and I think this is another reason why, this is another

1 reason why the common fund should not be established here,  
2 is a common fund and its establishment is in many ways  
3 analogous to a class action. I think that's why you see it  
4 as a, as a remedy in class actions. As I talked about  
5 earlier, common fund, there's some ascertainable common  
6 interest.

7 THE COURT: All right.

8 MR. BALTHAZOR: And in, in a class action there's got  
9 to be some interest and claims have to be typical of the,  
10 of the claimants. And here Judge Kinard said in his order  
11 that: There is no evidence of others -- of others asserting  
12 any claim or that others have presented other claims. So,  
13 he's, he's -- in a, in a sense, I mean, that, that was his  
14 basis for denying class certification, but that's the same  
15 thing for, for a common fund. There's no other -- there's  
16 no evidence of anyone else asserting a claim. No need for  
17 a, no need for a common fund.

18 THE COURT: All right, I think I understand.

19 How about proposed orders ten days?

20 MR. BALTHAZOR: Well, can I get two weeks? I've got a  
21 big ---

22 THE COURT: Sure.

23 MR. BALTHAZOR: --- federal court brief due.

24 THE COURT: Sure. Tell me when two weeks is. Today's  
25 the 4th. Friday the 19th? That's two weeks and one day.

1 MR. BALTHAZOR: That would work for me, Your Honor.

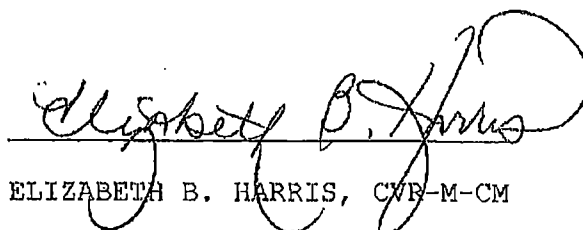
2 THE COURT: Just get them to us by the 19th.

3 --- END OF TRANSCRIPT OF RECORD ---

## CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED  
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH  
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO  
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE  
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE  
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING  
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE  
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON  
THE 4TH DAY OF AUGUST, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,  
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



ELIZABETH B. HARRIS, CWR-M-CM

COLUMBIA, SOUTH CAROLINA

FEBRUARY 6TH, 2017

**STATE OF SOUTH CAROLINA**  
In the Court of Appeals

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**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

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

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

Appellants,

vs.

**CITY OF COLUMBIA,**

Respondent.

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**FINAL BRIEF OF APPELLANTS**

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**ATTORNEYS FOR APPELLANTS**

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### **STATEMENT OF ISSUES ON APPEAL**

- I. The Circuit Court committed error in its interpretation and application of Title 6, Chapter 1, Article 3 of the South Carolina Code of Laws, and in particular, S.C. Code § 6-1-330 (Supp. 2013) to the water and sewer fees collected by the City of Columbia from operation of its water and sewer systems.
- II. The Circuit Court committed error by denying Appellant's class action status to sue the City of Columbia over its use of the water and sewer fees collected by the City of Columbia from operation of its water and sewer systems.
- III. The Circuit Court committed error by denying standing to sue the City of Columbia over its use of the water and sewer fees collected by the City of Columbia from operation of its water and sewer systems to Appellants Letts and Azar.
- IV. South Carolina Courts favor class actions in declaratory judgments.

## STATEMENT OF THE CASE

For decades the City of Columbia has used monies it collected as water and sewer fees to pay for non-water and sewer services and expenses, including by transferring millions of dollars to its general fund and by allowing the City's four economic development corporations to spend millions of additional dollars directly from the account where the City's water and sewer fees are deposited. At the same time the City 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 sewer system.

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 City's water and sewer system, the monies previously misappropriated by the City in prior years.

The material facts in this are not disputed. Both parties made motions for summary judgment. The Circuit Court granted the City's Motion for Summary Judgment and denied Appellants' Motion for Summary Judgment. Appellants' have appealed.

The principal issue in this case is whether or not the City of Columbia may legally use water and sewer fees it collects for non-water and sewer purposes?" Appellants submit the answer to this question is a resounding no based on established case law and SC statutes.

## STATEMENT OF FACTS

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 newly added 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 2009/2010; and, \$110,749,377.00 in FY 2009/2010. (R. Vol. II, p. 930, ¶ 8); Affidavit of Jeffrey M. Palen).

All water and sewer fees collected by the City of Columbia are deposited into the City's "Water and Sewer Enterprise Fund" account, from which the expenses of the City's water and sewer system are paid. (R. Vol. I, p. 9, ll. 14-20; Order Granting Defendant's Motion for Summary Judgment; R. Vol. II, p. 930, ¶ 7; Affidavit of Jeffrey M. Palen). The City does not have the means to nor does it segregate water and sewer revenues collected from non-residents of the City from those collected from residents of the City. (R. Vol. II, p. 931, ¶ 12; Affidavit of Jeffrey M. Palen). No other monies other than revenues from water and sewer fees and directly related operations such as water connection fees, water meter installation fees, sewer taps fees, sewer plant expansion

fees, interest income and miscellaneous income fees are deposited into the City's "Water and Sewer Enterprise Fund" account. (R. Vol. II, p. 930, ¶ 7; Affidavit of Jeffrey M. Palen).

From the City's "Water and Sewer Enterprise Fund" the City also funds its four development corporations, the Colombia Development Corporation, the Eau Claire Development Corporation, the Columbia Housing Development Corporation and the TN Development Corporation. Collectively, the City expended \$1,147,242.42 in FY 2008/2009, \$1,154,479.00 in FY 2009/2010, and \$1,147,242.42 in FY 2010/2011 out of City's "Water and Sewer Enterprise Fund" for these four development corporations. On an annual basis going back to at least 2001 the City has transferred \$4,500,000.00 annually from the "Water and Sewer Enterprise Fund" where water and sewer fees deposited into the City's general fund where those monies are comingled with other City revenues subsequently spent for purposes not directly related to City's water and sewer system. Between 1999 and 2010 the City of Columbia transferred \$78.6 Million from its water and sewer fund for other uses. (R. Vol. II, p. 567; Deposition of Stephen Gantt).

At the same time the City has been transferring money collected as water and sewer fees from the "Water and Sewer Enterprise Fund" to the City's general fund account and allowing various departments of the City's office of economic development to spend money collected as water and sewer fees and deposited into the Water and Sewer Enterprise Fund account for purposes other than the City's water and sewer system, the City has badly neglected to maintain, its water and sewer system.

Appellants' commenced this action alleging that the City of Columbia's expenditure of monies collected as water and sewer fees for purposes other than "...to pay costs related to the provision of the service or program for which the fee was paid" violated S.C. Code Ann. § 6-1-300, et. seq. (Supp. 2013), and, in particular, the restriction on use of revenue derived from service or user fees imposed under S.C. Code Ann. § 6-1-330(B) (Supp. 2013).

Appellants' Motion for class action status was heard by the Circuit Court on June 5, 2012 and denied by Order entered June 26, 2012. Appellant's Motion for Reconsideration of the June 26, 2012 Order was heard on September 13, 2012 and denied by Order entered September 20, 2012.

The parties agreed that the relevant facts in this case were not disputed and the issue which the Court would be called upon to resolve was one of application of law rather than fact. Appellants and Respondent each made Motions for Summary Judgment. Those Motions were heard by the Circuit Court on August 8, 2013. By Order entered September 26, 2013 the Circuit Court granted the Respondent's Motion for Summary Judgment and, correspondingly denied Appellant's Motion for Summary Judgment. Appellant's Motion for Reconsideration of the September 26, 2013 Order was denied by Order entered November 27, 2013.

This appeal followed.

## ARGUMENTS

### **I. THE CIRCUIT COURT COMMITTED ERROR IN ITS INTERPRETATION AND APPLICATION OF TITLE 6, CHAPTER 1, ARTICLE 3 OF THE SOUTH CAROLINA CODE OF LAWS, AND IN PARTICULAR, S.C. CODE §6-1-330 (SUPP. 2013) AS APPLIED TO THE PERMISSIBLE USES OF WATER AND SEWER FEES COLLECTED BY THE CITY OF COLUMBIA FROM OPERATION OF ITS WATER AND SEWER SYSTEMS.**

On a fiscal year basis the City of Columbia collects in excess of \$100,000,000.00 in water and sewer fees.<sup>1</sup> Water and sewer fees collected by the City of Columbia represent approximately 48% to 49% of the City of Columbia's total annual budget. Each year, the City of Columbia transfers at least \$4.5 Million from monies collected as water and sewer fees to the general fund and has done so for many years. (See R. Vol. II, p. 567; Exhibits 1 and 2 – City of Columbia Budget Summaries for Fiscal Year 2010-2011 and Fiscal Year 2011-2012.) Further, the City of Columbia funds the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, various development corporations, the Economic Development Contingency Fund, the City Center Partnership and Community Promotions by using money collected as water and sewer fees for those purposes. (See R. Vol. II, p. 934, ¶ 29; Affidavit of Jeffrey Palen) which states:

The City funds four development corporations from its Fund – the Columbia Development Corporation, the Eau Claire Development Corporation, the Columbia Housing Development Corporation and the TN Development Corporation. Collectively, the City expended \$1,053,522.00 in FY 2008/2009, \$1,154,478.00 in FY 2009/2010, and \$1,147,242.42 in FY 2010/2011 for these four development corporations. (R. Vol. II, p. 934; ¶ 29).

Well-established South Carolina case and statutory law clearly provide that transfers and expenditure of water and sewer fees for purposes other than the water and sewer system are illegal and a violation of established South Carolina statutory and case law.

---

<sup>1</sup> Fiscal Year 2010-2011=\$103,708,234.00. Fiscal Year 2011-2012=\$110,400,499.00.

Plaintiffs' Complaint sought a declaratory judgment on behalf of all City water customers to require the City of Columbia to repay the utility fund those funds transferred to the General Fund of the City of for the last three years and to recover money expended by the City from water and sewer fees for purposes other than the water and sewer system. The City has numerous water and sewer customers who are not City residents. In fact, approximately 55% of all water and sewer customers live outside the City of Columbia and any water and sewer fees spent on city-only activities do not benefit them. Further, monies collected as water and sewer fees and deposited into the Water and Sewer Utility Fund are specifically designated for use for water and sewer services only and may not be used for any other purpose. See S.C. Code Ann. § 6-1-330(B) (Supp. 2013) which provides in relevant part:

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 essence of this case turns on whether or not the City of Columbia may use monies collected as water and sewer fees for purposes other than its water and sewer system. South Carolina case law and S.C. Code Ann. § 6-1-330(B) (Supp. 2013) clearly prohibits the City of Columbia from using these monies for other than for the operation, repair, upgrade, maintenance and/or expansion of the water and sewer system of the City. S.C. Code Ann. § 6-1-300(6) (Supp. 2013) defines a service or user fee as follows:

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.

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).

It is well settled in South Carolina that service charges or user fees collected by a city for water/sewer service must be used solely to pay costs directly related to the service or program for which the fee was paid. In this case, the City of Columbia, in violation of South Carolina law, collected fees for services from the water and sewer service and transferred those monies each year to the City's general fund for use in other departments and for other uses not allowed by law.

Further, while the City attempts to distinguish its government functions from its proprietary functions and represent itself as a an entrepreneur doing business outside of city limits and thus be entitled to "profit" and use those "profits" as it sees fit, and not be restricted by the provisions of S.C. Code Ann. § 6-1-330 and § 6-1-300(6) (Supp. 2013) that argument was debunked by decision in *Calcaterra v. City of Columbia*, 315 S.C. 196, 432 S.E.2d 498 (1993) where the S.C. Court of Appeals held:

"The furnishing of water to residents and non-residents is a governmental function, and the State makes no distinction between the proprietary and governmental functions of municipalities." citing *Looper v. City of Easley*, 172 S.C. 11, 172 S.E. 705 (1934). 432 S.E.2d at 499.

While the City is entitled to charge a higher rate for non-resident water and sewer customers<sup>2</sup>, that fact does not exempt them from application of clear and unambiguous South Carolina statutory and case law governing the permissible uses of water and sewer fees.

This lawsuit seeks to require the City to return those monies within the three year statute of limitations before this case was commenced that were paid to the General Fund (approximately \$4.5 Million per year) which were used to fund other City departments. 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.”

#### **I. PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

On October 5, 2012, Plaintiffs moved for summary judgment as has Defendant. Plaintiffs’ Motion for Summary Judgment has the following basis:

1. It is admitted that the City of Columbia takes money from the Utility Water and Sewer Enterprise Fund and places those funds in the General Fund and not for water and sewer service.

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<sup>2</sup> *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911) (non-resident alleged a charge of four times that charged residents was excessive and exorbitant).

2. It is admitted that the funds are transferred to the General Fund and such funds are used by other City departments and not for water and sewer purposes.

3. It is admitted the City of Columbia transferred at least \$4.5 million annually to the General Fund of the City to be used for other purposes than water and sewer related activities.

In support of the Motion for Summary Judgment, the Plaintiffs took the depositions of several City employees who verified that water and sewer funds were not used for water and sewer purposes solely.

**A. Deposition of Steven A. Gantt (Exhibit 5).**

The deposition of Steven Gantt, the City of Columbia Manager, established the following: the City collected water and sewer fees and transferred a portion of those fees to the City's general fund every year since at least 2001 (R. Vol. I, p. 460, ll. 9-13; that occurring was based on a City resolution (R. Vol. I, p. 461, ll. 11-13); the City of Columbia needed at least \$500 Million of work done on its water and sewer system (R. Vol. I, p. 472, ll. 16-23); a study performed by Black & Veatch criticized the practice of the City transferring monies from the Water and Sewer Enterprise Fund to the City's general fund (R. Vol. II, p. 579; ll. 21-22); Gantt agreed that \$4.5 Million had been transferred each of the last three years from the Water and Sewer Enterprise Fund to the City of Columbia and that this practice dated back to 1993 (R. Vol. I, p. 479, ll. 8-17; Vol. I, p. 480, ll. 23-25); the Water and Sewer Enterprise Fund helped pay for other services (R. Vol. I, p. 483, ll. 1-4); City Council transfers money as it sees fit (R. Vol. I, p. 484, ll. 4-17); lots of people who do not live in the City but are water and sewer customers (R. Vol. I, p. 485, ll. 1-15); that according to the consultant's report (Black & Veatch) \$3.6 million transferred from the

Water and Sewer Enterprise Fund to the general fund for development companies was not justified (R. Vol. I, p. 490, ll. 1-10); that an indirect transfer of \$3.2 Million from the Water and Sewer Enterprise Fund to the City of Columbia was too much according to the consultants (R. Vol. I, p. 491, ll. 1-4); a building at Washington Square was purchased with water and sewer funds and over half of the building is used for purposes other than for water and sewer (R. Vol. I, p. 492, l. 18); that the City of Columbia has 130,000 water customers and 70,000 sewer customers and that 45% of the customers are in the City and 55% are out of the City (R. Vol. II, p. 505, ll. 1-25); that the \$4.5 Million transfer from the utility enterprise fund to the general fund was for basic services such as police, fire, etc. (R. Vol. II, p. 559, ll. 10-15); that further monies were transferred from the Water and Sewer Enterprise Fund to the general fund for economic development (R. Vol. II, p. 599, ll. 19-23).

**B. Deposition of William H. Ellis (Exhibit 6).**

William Ellis, the Director of Finance for the City of Columbia (R. Vol. II, p. 687, ll. 19-21); that \$4.5 million was transferred to the general fund from the Water and Sewer Enterprise Fund and was not used for a specific purpose (R. Vol. II, p. 691, ll. 17-18); that there was no question that the ratepayers had \$4.5 million transferred from the Water and Sewer Enterprise Fund to the general fund (R. Vol. II, p. 722, ll. 20-25); and that some ratepayers did not live in the City (R. Vol. II, p. 723, ll. 9-12); and that the \$4.5 million was not used for water/sewer (R. Vol. II, pp. 739-740 - Deposition of William H. Ellis).

**C. Deposition of Missy Caughman (Exhibit 7).**

Missy Caughman, the Budget Director for the City of Columbia (R. Vol. II, p. 603, l. 25 - p. 604, l. 5); as budget director and manages she manages the City's operating capital project funds (R. Vol. II, p. 605, ll. 7-9); that \$4.5 million dollars comes from the Water and

Sewer Enterprise Fund and is money collected from people who pay the water and sewer fees (R. II, p. 605, ll. 16-25); once the money is transferred into the general fund it is not designated for a specific purpose of the general fund (R. Vol. II, p. 606, ll. 11-15); money which is transferred from the Water and Sewer Enterprise Fund to the City's general fund is not used for water and sewer purposes (R. Vol. II, p. 606, ll. 4-11); that the general fund includes police, fire, public works, parks and recreation, municipal court, city management, city administration, development services, legislative, public relations, information technology and human resources (R. Vol. II, p. 607, ll. 21-25).

The essence of the City's use of the Water and Sewer Enterprise Fund is found in the testimony of Missy Caughman is as follows:

Q. Do you know why it is or when it was decided that money needed to be taken from the utility enterprise fund and put in the general fund?

A. The practice goes back well before my time at the city. The earliest information I have on it is from resolution from 1993. However, the transfers were occurring before that which is why the resolution was developed.

Q. And I'm assuming that one of the reasons why the money is transferred from the utility enterprise fund to the general fund is because if do you [sic] that you won't have to increase taxes; is that right?

THE WITNESS: That is -- I mean, if it -- if the general fund were to lose that source of revenue it would have to seek another form of revenue to replace it or it would have to cut services. We would either have to raise the revenue or cut the expenses.

Q. How many mills would you have to increase taxes to --

A. I think the last count I heard was approximately ten mills.

Q. To --

A. To replace the 4.5 million. (R. Vol. II, p. 609, ll. 1-25).

Further, Caughman recommended in a written memorandum (See R. Vol. II, p. pp. 739-740) that a transfer from the water and sewer fund of \$4.5 million to \$5.2 million was recommended to move certain departments to the general fund and that those departments would need funding (R. Vol. II, p. 616, ll. 1-25).

Caughman also testified that the methodology in hiring Black & Veatch to do a study of the utility enterprise fund was correct and accurate.( R. II, p. 621, ll. 4-9); that closer to \$3 Million was being moved from the utility enterprise fund to the general fund (R. Vol. II, p. 625, ll. 20-21); and that the indirect cost transfer amount was reduced by \$978,000 to \$2.2 Million (R. Vol. II, p. 627, ll. 8-16); that there are currently line items in the enterprise operating fund that are not directly attributable to supply, treatment and distribution of water, collection, treatment and disposal of waste water and that those line items include economic development, public relations and public safety for security (R. Vol. II, p. 629, ll. 1-18); that if the \$4.5 million was not directly transferred from utility enterprise fund to the general fund there would have to be a rate increase (R. Vol. II, p. 631, ll. 4-11).

#### **ADDITIONAL EVIDENCE IN THE RECORD**

In 1993, the City of Columbia adopted a City Council resolution approved by the Mayor and the City Manager (R. Vol. II, pp. 569-571) which provided for transfers from the City water and sewer fund to the general fund of the City. The resolution provided a general policy statement that:

1. No transfer of net revenues from the water and sewer fund to the general fund shall be made if such transfer would impair the ability of the City to operate and maintain the system in a sound and businesslike manner.

The City Council resolution clearly indicated the City's clear intent to continue to use monies from the water and sewer fund for purposes other than water and sewer.

In 2007 the City of Columbia, through its City Manager, Charles Austin, hired Black & Veatch to provide a review of the City water and sewer utility fund. In that Exhibit dated April 2, 2007, the consultant, Thomas Peterson wrote:

Based on our cost casual analysis, of the utilities 2006 budget of \$94.8 million in Exhibit 2a and 2b, approximately \$7.5 million of directly funded costs should not be funded by the utility enterprise fund and more appropriately funded through the general fund budget. This includes \$3.6 million for non-departmental capital improvements and component uses (development corporations). 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 casual based justification for direct funding from utility was supported for purposes of this study.

Mr. Peterson went on to write in his April 7, 2007 report:

The estimated cost of services and associated benefit to the utility provided through the indirect transfer totals \$2.27 million as shown in Exhibit 1a and 1b. These costs are primarily associated with legal support, human resources, legislative offices and accounting. When compared to the budgeted indirect transfer level of \$3.2 million, our analysis supports a reduction in this transfer of \$930,000. It should be noted, based on the manner in which the utility budget is presented, this amount is included in the \$7.5 million noted above in Exhibit 2a and 2b.

The Black & Veatch report of April 2, 2007 was preceded by a draft report March 19, 2007 in which the conclusions of Thomas Peterson were echoed except at that time he wrote:

Approximately \$7.6 of directly funded costs should not be funded by the utility enterprise fund and are more appropriately funded through the general fund budget.

At the same time City of Columbia was plundering water and sewer fees to pay for non-water and sewer expenses, by transferring money to the City's general account and by allowing multiple City economic development departments to pay their expenses out of the City's Water and Sewer Enterprise Fund, the City did not keep its water and

sewer system in a state of good repair. That fact is evidence by two independent pieces of evidence. One, the City hired Black & Veatch, a consulting firm, to conduct and study and report on the condition of its water and sewer system. The Black & Veatch report, issued in 2007, was highly critical of the City's practice of using water and sewer monies for purposes other than its water and sewer system.

As previously stated, S.C. Code Ann. § 6-1-330(B) (Supp. 2013) which provides in relevant part:

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 cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Eagle Container Co, LLC v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (2011); *Garvin v. State*, 365 S.C. 16, 21, 615 S.E.2d 451, 453 (2005); *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct.App.2003); *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000).

The above statutory language is "plain and unambiguous".

In 2013 the United States of American (Environmental Protection Agency) and the State of South Carolina (Department of Health and Environmental Control) sued the City of Columbia over numerous Sanitary Sewer Overflows from the City of Columbia's sewer system. That case was ultimately settled by Consent Decree in which the City of

Columbia agreed to make extensive repairs and upgrades in its sewer system and pay civil penalty of \$476,400.00 to the Plaintiffs in that action and implement a large scale program to upgrade and improve its sewer system. (R. Vol. III, pp. 1077 – 1180 - Consent Decree).

While the City did enact its first Water Rate Ordinance in 1895, as noted by the Circuit Court, that Ordinance did not include sewer 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).

The Circuit Court's reliance upon S.C. Code Ann. § 6-21-5 et. seq. (Supp. 2013) to justify the City's spending water and sewer revenue for purposes other than its water and sewer system is badly misplaced. S.C. Code Ann. § 6-21-5 et. seq. (Supp. 2013) is the South Carolina "Bond Revenue Act". While it does allow a municipality to pledge revenues of its water system for water and sewer for construction, improvements and enlargement of its water and sewer system (see, S.C. Code § 6-21-440 (Supp. 2013)), it does not authorize expenditure of water and sewer revenues for purposes other than the water and sewer system unless certain specific preconditions are met, none of which existed in this case.

S.C. Code Ann. § 6-21-440 (Supp. 2013), relied upon by the Circuit Court in reaching its decision, requires segregation of revenues into multiple categories of funds. One, "Out of the revenues there shall be set aside a sum sufficient to pay the principal of and the interest upon the bonds as and when they become due and payable. If the revenues of any calendar, operating, or fiscal year shall be insufficient to pay the principal of and interest on the bonds maturing in any such calendar, operating, or fiscal

year, an additional amount sufficient to pay the principal of and interest on such bonds outstanding and unpaid shall be set aside out of the revenues of the next succeeding calendar, operating, or fiscal year and applied to the payment of the principal of and interest on such outstanding and unpaid bonds. This fund shall be designated the "bond and interest redemption fund".

Two, "Out of the revenues there also shall be set aside a sum sufficient to provide for the payment of all expenses of administration and operation and such expenses for maintenance as may be necessary to preserve the system, project or combined system in good repair and working order. This fund shall be designated the "operation and maintenance fund".

Three, "Out of the remaining revenues there shall be next set aside a sum sufficient to build up a reserve for depreciation of the existing system or combined system. This fund shall be designated the "depreciation fund".

Four, "Out of the remaining revenues there shall be next set aside a sum sufficient to build up a reserve for improvements, betterments, and extensions to the existing system, project, or combined system, other than those necessary to maintain it in good repair and working order as herein provided. This fund shall be designated the "contingent fund".

Fifth and finally, "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 Circuit Court relied upon the fifth category as allowing the City to spend water and sewer fees "...as it may determine from time to time to be for the best interest of the borrower (the City)". That argument fails for a number reason. First and foremost, 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 (Supp. 2013) as a

prerequisite to ever reaching the fifth category. The statute's language is clear and unambiguous, "Any surplus revenues", meaning any money remaining after funding of the preceding four categories, could be spent as authorized by category five. As the City has not funded any of the first four categories, it has no "surplus revenues", nor is there any evidence or finding that any such "surplus revenues" exist as defined by category five of the subject statute to be spent in the manner advocated by the City.

For the reasons set for above, Appellants' respectfully submit that the decision of the Circuit Court granting summary judgment to the Respondent City of Columbia should be reversed; that the Circuit Court's decision denying Plaintiffs' Motion for Summary should be reversed; and, that this case should be remanded to the Circuit Court for entry of summary judgment in favor of the Appellants and further proceedings to determine the amount of money the City of Columbia should be required to repay to its Water and Sewer Enterprise Fund and an award of attorneys' fees, costs and expenses to Plaintiffs.

## **II. THE COURT ERRED IN DENYING CLASS CERTIFICATION TO THE PLAINTIFFS.**

### **A. Background Facts as to Class Certification.**

This is a putative class action which involves a challenge by customers of the City of Columbia's water and sewer system to the fiscal practice of the City of Columbia of transferring monies collected by the City of Columbia as water and sewer fees to the City of Columbia's General Fund where those monies are spent for purposes other than the water and sewer system.

On a fiscal basis, the City of Columbia collects in excess of \$100 Million in water and sewer fees (see fiscal year 2010-2011 equals \$103,708,234.00) from over 100,000

customers. Water and sewer fees collected by the City of Columbia are approximately 48% to 49% of the City of Columbia's total annual budget. Each year the City of Columbia transfers \$4.5 Million from monies collected as water and sewer fees to the General Fund and has done so for many years. Further, the City funds the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, various Development Corporations and the Economic Development Contingency Fund from this account. The City also uses money from this account for Community Promotions and for the City Center Partnership. The Plaintiffs assert that such transfers are illegal and in violation of established South Carolina Supreme Court case law and statutory authority.

Plaintiffs in this lawsuit seek a declaratory and injunctive classwide judgment on behalf of all City water and sewer customers to require the City of Columbia to repay the utility fund those monies illegally transferred to the General Fund of the City for the last three years and to recover all money expended by the City from water and sewer fees for purposes other than the water and sewer service. Monies in the water and sewer utility fund are specifically designated for use for water and sewer services only and may not be used for other purposes. See S.C. Code Ann. § 6-1-330(b) (Supp. 2013) ("The revenue derived from a service or user fee imposed to finance the provisions of public services must be used to pay costs related to the provision of the service or program for which the fee was paid.")

The essence of this case and the central legal issue turns on whether or not the City of Columbia may use monies collected as water and sewer fees for other purposes. The Plaintiffs assert that South Carolina law prohibits the City of Columbia from using

those monies for other than the operation, repair, upgrade, maintenance and/or expansion of the water and sewer system of the City. S.C. Code § 6-1-330 and § 6-1-300(6) (2013) define a service or user fee as follows:

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.

A number of South Carolina Supreme Court cases have held that a sewer service charge is a fee and cannot be used for other purposes by the governmental entity. See *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*, 519 S.C.2d 561 (1991); *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). (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.”).

It is against this backdrop that Plaintiffs filed a motion to certify class on behalf of all water and sewer customers.

**B. The Court refused to hear the Motion to Certify Class.**

At a hearing before the Honorable Ernest J. Kinard on June 5, 2012 to hear the Motion to Certify, the Court noted:

I am not going to certify the class. I haven't even heard anything on that. (R. Vol. I, p. 287, ll. 19-22).

Plaintiffs' counsel then told the Court:

It's a declaratory class, Your Honor, just like the Sloan cases, and it ought to be certified just like any other declaratory class. I've given you a brief with all the cases. (R. Vol. I, pp. 288, ll. 4-7)

The Court then stated:

I know you've given me a brief and normally I read them, but I'm burned out. You gave me a brief by e-mail didn't you? (R. Vol. I, p. 288, ll. 8-10)

The following questions/answers occurred between counsel and the Court:

Counsel: Your Honor, would you be inclined to hear that on another day, then— (R. Vol. I, p. 288, ll. 15-16)

The Court: No. I am willing to hear it today, does it matter to you? (R. Vol. I, p. 288, ll. 17-18)

Counsel: Yes, sir, I think it does. (R. Vol. I, p. 288, l. 19)

The Court: Does it matter to y'all? (R. Vol. I, p. 288, l. 20)

Mr. Lee:<sup>3</sup> Matters to us that it not be granted. We don't think it's appropriate for class certification and it's not necessary as you've just indicated. (R. Vol. I, p. 288, ll. 21-23)

The Court: I don't think it's necessary, but I have not read anything. So the simplest thing on that, rather than you argue, is just prepare an order granting it. Send it to me. You prepare one denying it. Y'all get it to me by the weekend, I'll rule on it next week while I'm in Camden so you know where you stand on it. (R. Vol. I, p. 288, l. 24 – p. 289, l. 4)

Further, the Court noted:

If y'all want to come to Camden next week, we've got common pleas. We'll break down by Thursday, probably. If you feel like you need to, I'll give you some time next Thursday. But it's better if you just send your order in. I might be able to read what you say and make an informed decision on it. I can't make an informed decision today. (R. Vol. I, p. 289, ll. 18-25).

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<sup>3</sup> The Court reporter made an error in naming Mr. Lee as the speaker. It was actually Defendant's counsel, Mr. Lydon.

Thereafter, counsel for Appellant and Respondent both sent proposed orders to the Court. Appellants' counsel's order granted class certification. Respondent's counsel's order denied certification. Appellants received a copy of the order denying class certification despite the fact that Appellants tried to schedule a hearing in Camden the Thursday after the argument before the Court on June 5, 2012. Appellants' counsel argues that the process by which the court denied class certification denied Appellants the right to hearing (and due process) and to argue his position on the record before the trial court issued an order denying class certification.

It is axiomatic in our system of justice that parties be heard by the court. Appellants assert it is a violation of due process because the Court failed to hear Appellants and instead accepted briefs on the subject matter without oral argument. Appellants fully understand when the trial court is tired. However, Appellants had a right to have a hearing before the court and argue their reasons for granting class certification. Because Appellants were denied such right, the order denying class certification should be reversed for a new hearing.

**C. The trial court erred in citing *Craft v. Memphis Light, Gas and Water Div.*, 534 F.2d 684 (6<sup>th</sup> Cir 1976) as a reason for denying class certification.**

The trial court in denying Appellant's motion for class certification stated in its Order:

... regardless of whether the elements of Rule 23 are satisfied, a class should only be certified if there is a need for the complexities and extra costs associated with class suits. See *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (6<sup>th</sup> Cir 1976); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5<sup>th</sup> Cir. 1974). These courts concluded that class certification was unnecessary because any declaratory or injunctive relief given in the individual action of the

named plaintiff would inure to the benefit of others similarly situated. (R. Vol. I, p. 2, ll. 9-16).

Appellants believe that the above statement by the trial court is erroneous as a matter of law. South Carolina's class action rule is expansive and is vastly different from the Federal Rule of Civil Procedure 23. In *Littlefield v. S.C. Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1991) a group of former state employees challenged the manner in which state agencies were calculating pay for unused annual leave of retiring state employees. The Supreme Court reversed the denial of class certification that relied on several federal cases. The court went on to note that the South Carolina class action rule differs significantly from Federal Rule 23. The Court stated: "This state endorses a more expansive use of class action availability than its federal counterpart." 523 S.E.2d at 783. The Court further found that the trial court should only look at the prerequisites of Rule 23 for deciding whether to certify a class.

In another seminal case on SCRP 23, the Supreme Court reversed denial of class certification in *Kennedy v. S.C. Retirement System*, 549 S.E.2d 243 (2000). The Court stated: "The adoption of the new Rule 23 in 1985 signaled the end of our restrictive view of class certification. This court will not read into the class action rules requirements based on federal law." *Kennedy* at 549 S.E.2d at 244. *Kennedy* was reaffirmed in *Guaiza v. S.C. State Plastering LLC*, 703 S.E.2d 197 (2010). In that case the Supreme Court held that class actions are favored in this state and we have a more expansive view of class actions here than our federal counterparts. The Court again reversed the trial court for denial of class certification. Here, Appellant argues that the circuit court erroneously held that there was no need for the complexities and extra costs associated with class

actions. This is not part of South Carolina's class action rule and the trial court erred in using such a standard in denying this class action certification status.<sup>4</sup>

**D. The trial court erred in holding that the third element of SCRCP 23(a) had not been met.**

The trial court in its order also wrote that the Plaintiffs cannot "establish the third and fifth elements for class certification. The third element is that the claims of the representative parties are typical of the claims of the class. No evidence has been presented that any other potential class member wishes to assert a claim. (Order of Judge Kinard 6/22/2012). Plaintiffs are complaining about the manner in which the City is spending water and sewer revenues. Plaintiffs have not shown that other citizens have presented similar complaints." (R. Vol. I, p. 3, l. 21- p. 4, l. 3 Order of Judge Kinard dated June 22, 2012).

Appellants assert that the South Carolina's class action rule does not require Plaintiffs to show that other citizens have presented similar complaints. Rule 23(a)(3) requires that claims or defenses of representative parties must be typical of the claims or defenses of the class. There is no requirement that plaintiffs show other citizens presented similar claims. The class representative's claim must be typical of all class members. The tenants of commonality and typicality are most often dealt with as one in terms of class certification. Typicality requirements of Rule 23(a)(3) require a claim or defenses of the class be similar. To satisfy the typicality requirements the named class members must be similar enough to those of the class to ensure that the class's interests are vigorously prosecuted. *7a Charles Allen Wright and Arthur R. Miller, Federal Practice Procedure 2<sup>nd</sup> Ed.* 1986.

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<sup>4</sup> In *Littlefield*, the Supreme Court also found that the good faith of the governmental entity had nothing to do with the prerequisites of SCRCP 23(a) and should not be considered by the trial court.

Here, the record establishes as follows:

- The City provides water service to 114,000 customers (numerosity established under SCRCF 23(a)). (R. Vol. II, p. 577).
- The City provides wastewater services to 59,000 (numerosity under SCRCF 23(a)). (R. Vol. II, p. 577).
- Black & Veatch, a consultant firm, was hired by the City of Columbia to review its direct funding and indirect transfers to the City for services provided by these non-utility departments. The Black & Veatch Study found the current transfer of \$4.5 million to the general fund is relatively high compared to industry averages. (Black & Veatch 2007 Indirect Cost of Service Study) (R. Vol. II, pp. 577 - 592).
- It is recommended that the transfer be reduced to \$3 Million to be consistent with the estimated tax liability utilities would experience if they were a private entity. (Black & Veatch 2007 Indirect Cost of Service Study) (R. Vol. II, pp. 577- 592).
- The most defensible level of transfer would not exceed \$3 Million (evaluation of general fund transfer Black and Veatch Study (Black & Veatch 2007 Indirect Cost of Service Study) (R. R. Vol. II, pp. 577-580).
- Based on our analysis of the utilities 2006 budget of \$94.8 million approximately \$7.6 million of directly funded costs should not be funded by the utility enterprise fund and are more appropriately funded through the general budget (Black & Veatch 2007 Indirect Cost of Service Study) (R. Vol. II, p. 579, ¶ 3).

- Our analysis indicates no direct cost causation or benefit could be attributed to the utility for these services and therefore no justification for direct funding from the utility fund was supported for purposes of this study. 2007 indirect cost of service study by (Black & Veatch 2007 Indirect Cost of Service Study) (R. Vol. II, p. 579, ¶ 3).
- As an enterprise fund that receives its operating revenues from rate payers for water and wastewater services received, it is important that the operating budget be directly attributable to the supply, treatment and distribution of water and the collection, treatment and disposal of wastewater. (Black & Veatch 2007 Indirect Cost of Service Study) (R. Vol. II, p. 580, ¶ 1).

In sum, Plaintiff and over 114,000 water service customers and 59,000 sewer service customers have the identical claim. The monies the Plaintiff and others similarly situated are paying into the water and sewer utility fund are not being used for the water and sewer repair or maintenance, but are being used by the City of Columbia for other nonwater and sewer purposes. The fact that no other water and sewer customer had made a complaint is irrelevant to whether or not Plaintiff had claims that were typical of all other water and sewer customers. Accordingly, the trial court erred in finding that Plaintiff as class representative was not typical of all other water and sewer service customers of the City of Columbia in regard to the use of water and sewer fees collected.

**E. The court erred in holding the Plaintiff failed to meet the fifth element of the class certification rule.**

The trial court in its ruling held that the Plaintiff did not meet SCRCP 23(a)(5) which provides in pertinent part:

(5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy may exceed \$100 for each class member or for each member of the class.

The trial court erroneously found that SCRCP 23(a)(5) had not been met. However the record reveals that on numerous occasions Appellants' counsel had indicated to the court that they were only seeking class certification for injunctive and declaratory relief.

At the motion for reconsideration of the trial court's order denying class certification Appellant's counsel stated:<sup>5</sup>

We do not seek to get any money back for any individual. We only seek to get the City of Columbia to put that money back that they should not have used for that purpose back into the water and sewer or what is called the enterprise fund. (R. Vol. I, p. 304, l. 25 -- p. 305. l. 5).

Appellant again pointed out to the trial court that it reconsider its order under Rule 59 and issue an order for injunctive and declaratory class to the plaintiff. (R. Vol. I, p. 307, ll. 24-25)

Further, the trial court showed a basic misunderstanding of the class action rule when it stated as follows:

Well I don't understand other than attorney's fees why he can't get the relief he seeks without certifying the class. That is a problem I have. (R. Vol. I, p. 312, ll. 2-5).

Later in the same hearing, the court stated:

And they don't have any they you are not seeking monetary compensation although you have got those other two or three class causes of action. So I don't see any benefits. I mean, I don't see why you need to certify this class therein lies my problem I feel that if the judge rules with you and enjoins the City everybody

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<sup>5</sup> Counsel never got to argue the Motion for Certification before the lower court.

benefits from it without having to send out notices to all those people and so forth. (R. Vol. I p. 312, ll. 16-25).

Finally it should be noted that the court directed respondent's counsel to place the following in the order denying reconsideration:

And he concedes at the hearing that he is not seeking the unconstitutional use and the overcharges and what have you, the other three causes of action specifically say I feel he can get this relief post haste. (R. Vol. I, p. 317, ll. 5-10).

Appellant respectfully points out to this court that this was not placed in the order on reconsideration and that respondent's counsel placed in the order issues about causes of action which did not seek injunctive or declaratory relief and which were contra to the court's instructions to respondent's counsel at the hearing. Accordingly, respondent's preparation of the trial judge's order did not comply with the court's instruction when the order was prepared. In fact, the Court's opinion stated:

However, a review of plaintiff's second amended complaint indicates that the relief primarily sought is not injunctive or declaratory as required by Rule 23(a)(5) SCRPC. (R. Vol. I, p. 4, ll. 9-11 - Order of Kinard dated June 22, 2012).

**F. The record establishes that Appellant was entitled to class certification on injunctive and declaratory relief.**

The South Carolina Supreme Court has held that proponents of class actions bear the burden of proving five prerequisites under South Carolina law unless the class action seeks injunctive or declaratory relief. Those prerequisites are as follows: the class must be so numerous that joinder of all members is impractical; there must be questions of law or fact common to the class; claims and defenses of the representative party must be typical of the claims or defenses of the class; representative parties must fairly and adequately protect the interest of the class; and in cases in which the relief primarily

sought is not injunctive or declaratory with respect to the class as a whole the amount in controversy must exceed \$100 for each member of the class.

At the outset appellants only sought an injunctive and declaratory class and accordingly Rule 23(a)(5) (the amount in controversy) was not applicable to plaintiff's motion for class certification. Appellants now address each of the prerequisites of SCRCF which were met in this case.

**(1) The Plaintiffs meet the numerosity requirement of the class action rule.**

In order to prove that this matter should be certified as a class, the Plaintiffs must first meet the numerosity requirement. While South Carolina has not decided how many class members are needed to meet numerosity, this is not an issue in this case. First, Defendant's Brief admits that numerosity has been satisfied. Also, the documents presented by Plaintiffs' counsel and attached to Plaintiffs' brief clearly indicate that the City of Columbia has over 114,000 water customers and 59,000 wastewater customers. South Carolina courts have certified class actions with fewer than twenty members. See *Premium Investment Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (S.C. App. 1984). Here, the vast number of water and sewer customers proves numerosity and the fact that this action seeks only to return money to the water and sewer utility fund for all customers shows that numerosity has been easily proven.

**(2) This case involves a common question of fact and law.**

South Carolina's class action rule requires common questions of law and fact exist as to members of the class. The commonality requirement is liberally construed and given permissive application so that common questions have been found to exist in a

wide range of context. See *McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 54, 157-58 (Ct.App. 1986) which held:

It is important to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. **In fact, a single common issue will suffice....**

The *McGann* case has become a mainstay in South Carolina Class Action law and has been cited numerous times by the Supreme Court and Court of Appeals. Here, common issues abound since all 114,000 water customers and 59,000 sewer customers have the same interest in seeing that the service fees are being used to improve and/or maintain the water and sewer service. All class members have this common interest and want their service fees to be used only to repair and/or maintain the system. The central common legal issue in this case involves whether or not the City of Columbia may transfer funds from the water and sewer utility fund to the general fund for purposes other than water and sewer expansion, maintenance and repair. This common legal question pervades this case and applies equally to all class members as do the claims and defenses of the Defendants.

*Kennedy v. South Carolina Retirement System withdrawn on unrelated grounds and superseded by substitute opinion*, 345 S.C. 339, 549 S.E.2d 243, *rehearing denied*, 349 S.C. 339, 534 S.E.2d 322 (2001) is authority for a class action in this case. In the original *Kennedy* opinion, the Supreme Court stated:

We believe the current case especially appropriate for class treatment. The number of potential plaintiffs is very large, there is one main issue of law, that issue is identical for each plaintiff, all injuries result from the same misapplication of the statute by the Retirement System and individual calculation of damages would be simple.

This line of judicial reasoning was adopted from *Littlefield v. S.C. Forestry Commission*, 337 S.C. 348, 521 S.E.2d 781 (1999). In fact, *Littlefield* is on point because the Defendant argues exactly what the Court in *Littlefield* decided was not a defense to class actions. In this case, the City of Columbia states that the Court should assume the City “will comply with an injunction if the Court determines it appropriate to enter such relief, thus, no useful purpose will be served by class treatment.” (Defendant’s Brief at page 3). In *Littlefield*, the Circuit Court ruled that state agencies should be afforded an opportunity to comply voluntarily with any final judgment invalidating certain agency rules. (*Littlefield*, 521 S.E.2d at 782.) The Circuit Court relied on two federal cases for adopting this proposition. The Supreme Court noted that this was error because the drafters of South Carolina’s Rules of Civil Procedure intentionally omitted from South Carolina’s rule the additional requirements found in the federal rule. By admitting these additional requirements, the *Littlefield* Court found that South Carolina endorsed a more expansive view of class action availability than its federal counterpart. In sum, based on *Littlefield*, the City cannot argue that the class action rule (SCRCP 23) does not apply since it will voluntarily comply with any injunctive relief ordered by a court.

Appellants further point to the voluminous discovery which has been produced in this matter supports class certification on these common issues. In at least two documents presented to the Court by Plaintiffs’ counsel as exhibits to their motion to certify, it was pointed out by consultants of the City that transfers of monies by the City from the water and sewer utility fund to the General Fund was problematic. The “2007 Black & Veatch Indirect Cost of Service” study recommends that monies collected in the utility enterprise fund be used for the water and sewer system only which is exactly what

the issue is in this case. (R. Vol. II, p. 580, ¶ 1- Black & Veatch corporate study for City of Columbia dated March 19, 2007).

Accordingly, common legal and factual issues abound in this case and all water and sewer customers have a united interest in resolution of this matter as a certified class.

**(3) The claim of the class representative is typical of all claims of class members.**

The tenets of commonality and typicality most often are dealt with as one in terms of class certification. See *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 158 (1982) (The commonality and typicality requirements of Rule 23(a) tend to merge). The typicality requirements of Rule 23(a)(3), requires that the claims or defenses of the class be typical. To satisfy the typicality requirement, the named representatives' claims must be similar enough to those of the class to assure that the class's interests are vigorously prosecuted. 7A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, (2<sup>nd</sup> Ed. 1986).

Here, the claims and defenses of the representative Plaintiffs are typical of the claims and defenses of the class. Each Plaintiff asserts his or her claim based on payment of water and sewer fees and that these monies are paid into the City's water and sewer utility fund but are not used for water and sewer repair and/or maintenance. Instead the monies are being used by the City of Columbia for other unrelated purposes. Thus, all class members (water and sewer customers) have the same claim. This common set of facts applies uniformly to all class members just as it did in the *Littlefield* and *Kennedy* cases cited above.

Further, Defendant City of Columbia, through its discovery including the Black & Veatch Study committed its acts uniformly with regard to each of the class members and

admits that it takes monies from the water and sewer utility fund and uses those monies for other unrelated purposes. Accordingly, by virtue of the acts committed, if the act is illegal or inappropriate as to the named Plaintiff, it is also illegal as to all water and sewer customers of the City of Columbia. There is no individual advantage in proceeding separately. In fact, there is a distinct disadvantage when compared with the potential costs of bringing this action, because the expense and burden of this litigation is unjustifiable for individual actions. Further, judicial economy requires that the court not be required to try each case since to do so would be duplicitous. The class action device resolves those issues in a single action. Accordingly, because all water and sewer customers have the same interests as the class representatives, the typicality provision of the class action rule has been met.

**(4) The named Plaintiffs are adequate representatives.**

South Carolina Rule of Civil Procedure 23(a)(4) requires that the named plaintiff fairly and adequately protect the interests of the class. The protection involves two factors: (1) counsel must be qualified, experienced and generally able to conduct the proposed litigation; and (2) Plaintiffs' claims must be sufficiently interrelated and not antagonistic to the class claims. See *Waller v. Seabrook Island Property Assn.*, 300 S.C. 465, 388 S.E.2d 799 (1990).

Here there is no argument that Azar, Cumberland or Letts will not fairly and adequately protect the interest of the class. All are Columbia water and sewer customers and all have identical interests in making sure that the fees they paid go towards water and sewer utility repairs, maintenance and upgrades. Each class Representative has the identical claim to the claim of every water and sewer customer for the City of Columbia.

There are no conflicts between class members and the class representatives. Each class representative challenges the City of Columbia's legal authority to use monies from the water and sewer fund for other purposes such as transferring those monies to the general fund. Because each class representative's claim is exactly like all other water and sewer customers, the class representatives have satisfied the requirement that they are adequate representatives.

**G. The court erred in relying on the good faith of City officials.**

In its order on reconsideration the court again denied class certification and noted: "the court may presume the good faith of government officials to respect such a ruling without the necessity of making a class action." (R. Vol. I, p. 5, ll. 3-4). Appellant submits that this is not the law in South Carolina and that the good faith rule espoused by the court is not part of the South Carolina's class action rule. Further this exact issue was decided by the Supreme Court in *Littlefield v. S. C. Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1991) wherein the lower court used similar logic in denying a class action. The Supreme Court went on to note this was not appropriate and that class actions are to be expansively used in this state.

For these reasons Appellant requests that the class certification order for declaratory and injunction class relief be granted and that the order of the trial court be reversed

**III. THE CIRCUIT COURT ERRED IN HOLDING THAT PLAINTIFF'S HAD NO STANDING TO BRING THIS LAWSUIT.**

Appellant appeals the Order of the Honorable Thomas Cooper dated September 26, 2013 granting Defendant's motion for summary judgment. In that order Judge

Cooper found that Azar lacks standing to bring any of his causes of action because he does not pay water and sewer fees to the City, is under no contract of the City and has no personal or property interest at stake in this action. (Vol. I, p. 9, ll. 3-15; Order of Cooper 9/26/13)

As to Mr. Letts, Judge Cooper found that he lacked standing to bring a breach of contract claim when the contract at issue affords him no protective interest in how the City uses its water and sewer revenues. The Court went further and found a nonresident water and sewer customer has no rights against the City. (R. Vol. I, p. 9, l. 16 – p. 12, l. 2- Order of Cooper 9/26/13)

Appellants argue that Judge Cooper had no authority to issue such a ruling when this issue had previously been brought before Judge Kinard on June 5, 2012. At that hearing the City argued the three plaintiffs lacked constitutional standing to bring their claims. (R. Vol. I, , p. 279, ll. 3-5 - Trans. p. 13, Hearing of June 5, 2012 before Judge Kinard).

Further, the court issued an oral bench ruling on June 5, 2012 and stated: “I say they got standing...I say they all have standing to go ahead, named Plaintiffs. (R. Vol. I, p. 287, ll. 18-24 - Trans. June 5, 2012, p. 21, lines 18-24.)

Appellants point out to the Court that Judge Cooper in his order attempts to overrule Judge Kinard’s ruling on standing. Appellants believe that the settled rule in this state is that one circuit judge cannot overrule another and as a result Judge Cooper had no authority to overrule Judge Kinard’s decision that all the plaintiffs have standing to bring this suit. (Transcript of June 5, 2012 before Judge Kinard indicates that

Respondents vigorously argued no standing and the court disagreed.) (See R. Vol. I, p. 269, ll. 16 – p. 281, l. 9)

The rule is well settled that the prior order of a circuit judge may not be modified by a subsequent order of another circuit judge except in cases when the right to do so has been reserved to the succeeding judge. (See *Charleston County Dept. of Social Services, v. Father, Stepmother & Mother*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995)); (see also *Tisdale v. American Life Ins. Co.*, 216 S.C.10, 13, 56 S.E.2d 580, 581 (1941) (holding that it is “axiomatic that a circuit judge does not have the power to reverse the ruling of another circuit judge”)); (See also *Cooper Tire and River Co. v. Perry*, 261 S.C. 538, 201 S.E.2d 245 (1973) (in the absence of a proper exception, question of whether early orders by another judge reached correct conclusion could not be considered on appeal)).

In sum, Judge Cooper’s Order could not address the issue of standing as this had been addressed by Judge Kinard’s oral ruling from the bench. Respondent’s only alternative would have been to appeal that order at the conclusion of the case. Respondent has not appealed that order and thus it is the law of the case and Judge Cooper could not overrule Judge Kinard who issued his decision at the previous hearing on June 5, 2012.

At the hearing before Judge Kinard on June 5, 2012, respondent’s counsel argued the Plaintiffs lacked standing to sue the city. (R. Vol. I, p. 269, ll. 20-23); filed a motion in support (R. Vol. I, p. 270, ll. 10-22); filed an affidavit as to Azar’s status as a non-customer (Tr. p. 4, lines 11-13); that Azar is not a fee payer (R. Vol. I, p. 270, ll. 23-24); that Letts is a nonresident who pays fees (Vol. I, p. 270, ll. 24-25) and that there is a lack

of standing under constitutional tests, taxpayer standing and the public importance exception (R. Vol. I, p. 272, ll. 7-10).

The respondent's argument on standing was fully argued before Judge Kinard and is found in the Transcript, pages 3-15. At the conclusion of the argument Judge Kinard clearly and unequivocally held that the Plaintiffs have standing. (See R. Vol. I, p. 290, ll. 7-13): "I say they all have standing to go ahead, named Plaintiffs" (R. Vol. I, p.287, ll. 18-24). Accordingly, Judge Cooper was prohibited from passing on the same arguments and reading a different conclusion. Further, the respondent has not appealed Judge Kinard's Order of June 5, 2012 and thus are prohibited from arguing it now as it is the law of the case. Thus, Judge Cooper's Order page 8-15 on standing should be reversed as a matter of law.

#### **IV. SOUTH CAROLINA COURTS FAVOR CLASS ACTIONS IN DECLARATORY JUDGMENTS.**

Plaintiffs' counsel advised the circuit court that the class does not seek monetary damages. This is a class action for injunctive and declaratory relief that seeks an order of this Court that funds collected for water and sewer charges cannot be used by the City of Columbia for any other purposes. South Carolina Rule 23(a)(5) makes it clear that equitable or declaratory relief is permitted in state court class actions and that the One Hundred Dollar rule does not apply. SCRCPP 23(a)(5) provides as follows:

(5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds One Hundred Dollars to each member of the class.

Here, Plaintiffs' claims are injunctive and declaratory only. Plaintiffs do not seek a return of monies to any class member. The State Supreme Court has consistently

affirmed certification of a class action for declaratory judgment actions. See *South Carolina Public Service Authority v. C&S National Bank of South Carolina*, 300 S.C. 142, 386 S.E.2d 775 (1989). In that case, a class consisting of bondholders was certified in a declaratory judgment brought by a utility concerning its rights to change its fiscal year.

Appellants are aware of the many cases involving Edward D. Sloan, a Greenville County resident who has brought declaratory class actions concerning the spending of public monies. Each of those cases was a class action. See *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *Sloan v. Greenville Hospital Systems*, 388 S.C. 152, 694 S.E.2d 532 (2010); *Sloan v. Greenville County*, 380 S.C. 528, 670 S.E.2d 663 (Ct.App. 2009); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007); *Sloan v. Friends of the Hunley*, 369 S.C. 20, 630 S.E.2d 474 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E. 2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Greenville County*, 361 S.C. 568, 606 S.E.2d 464 (2004); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct.App. 2003); and *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2<sup>nd</sup> 299 (Ct.App. 2006).

Ten of the twelve *Sloan* cases involve challenges concerning the expenditure of public monies by government or quasi-governmental entity. In each of those, Sloan was granted class action status. Similar to the *Sloan* cases, Plaintiffs' lawsuit challenges the unlawful past, present and future unlawful expenditure of tens of millions of dollars collected by the City of Columbia as water and sewer fees for purposes other than its

water and sewer system. Plaintiffs and others similarly situated have been directly harmed by the City of Columbia's unlawful appropriation of these monies for purposes other than its water and sewer system. Accordingly, Appellants believe that class certification is appropriate in this case especially in light of the large number of people involved, the fact there is one main legal issue, that the issues are identical for all water and sewer customers and that all injuries result from misapplication of the same South Carolina statute

## CONCLUSION

In summary, for decades the City of Columbia has repeatedly used money it collected as water and sewer fees for purposes specifically prohibited by both South Carolina statutory law and by multiple decisions of the appellate courts in this State. That law is unequivocally clear that monies collected as user fees or service charges "...must be used to pay costs related to the provision of the service or program for which the fee was paid...." Monies collected as user fees or service charges cannot be used to fund other government services and to do so violates South Carolina law. All such monies paid by ratepayers must be used for "...the specific service or program for which the fee was paid" and, in this case, that service or program is the City of Columbia's water and sewer system, i.e., water and sewer operations, upkeep, maintenance, repair and expansion. This is particularly true when, at the same time the City is spending water and sewer revenues elsewhere, it is neglecting badly needed repairs and upgrades to its water and sewer system. The City of Columbia should not be permitted to flout the law and use ratepayers' monies, many of whom are not residents of the City, for in-City services. To do so effectively subjects those ratepayers outside the City of Columbia to taxation without representation in violation of the law.

Accordingly, Plaintiffs request this Court (1) reverse the decision of the Circuit Court in this case; (2) issue its order enjoining this practice by the City of Columbia; and, (3) require the City of Columbia to return to the City's "Water and Sewer Enterprise Fund" account all monies which were transferred from that account to the City's general fund by the City of Columbia and all monies used by the City's various development corporations who directly spent money out of the City's "Water and Sewer Enterprise Fund" for the

time period three (3) years prior to commencement of this lawsuit, the applicable statute of limitations, through date of return of those monies.

Plaintiffs further request that this Court then remand this case to the trial Court for further proceedings including awarding Plaintiffs class action status.

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**ATTORNEYS FOR APPELLANTS**

Columbia, South Carolina

Dated: October 30, 2014

**STATE OF SOUTH CAROLINA**  
In the Court of Appeals

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**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

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

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

Appellants,

vs.

**CITY OF COLUMBIA,**

Respondent.

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**FINAL REPLY BRIEF OF APPELLANTS**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. The Circuit Court committed error in its interpretation and application of Title 6, Chapter 1, Article 3 of the South Carolina Code of Laws, and in particular, S.C. Code § 6-1-330 (Supp. 2013) to the water and sewer fees collected by the City of Columbia from operation of its water and sewer systems.

## ARGUMENTS

**I. THE CIRCUIT COURT COMMITTED ERROR IN ITS INTERPRETATION AND APPLICATION OF TITLE 6, CHAPTER 1, ARTICLE 3 OF THE SOUTH CAROLINA CODE OF LAWS, AND IN PARTICULAR, S.C. CODE §6-1-330 (SUPP. 2013) AS APPLIED TO THE PERMISSIBLE USES OF WATER AND SEWER FEES COLLECTED BY THE CITY OF COLUMBIA FROM OPERATION OF ITS WATER AND SEWER SYSTEMS.**

**A. Respondent's position on the use of water and sewer fees collected by the City of Columbia results in an unconstitutional taxation without representation in violation of S.C. Constitution, Art. X, § 5 as to the "non-resident" water and sewer customers.**

It is undisputed that a majority of the City of Columbia's water and sewer customer are non-resident of the City of Columbia. These non-residents have no voice in the election of City Council members or of the Mayor of the City of Columbia.

S.C. Constitution, Article X, § 5 provides as follows:

**S.C. CONST Art. X, § 5**

§ 5. No tax without consent; taxes to be levied in pursuance of law.

No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.

The facts in this case are undisputed that for decades the City of Columbia has "transferred" millions of dollars from monies collected as water and sewer fees from water and sewer customer who are residents and non-residents into its general operation account and then expended those monies for purposes other than the City's water and sewer system.

Well established case law in this State distinguishes between the permissible use of monies collected as "taxes" and monies collected as "fees". In *J. K. Construction v.*

*Western Carolina Regional Sewer Authority*, 336 S.C. 162, 519 S.E.2d 561 (1999), the

South Carolina Supreme Court addressed that distinction stating:

### **1. IS THE FEE A CHARGE OR A TAX?**

JKC contends the trial court erred in ruling the new account fee is a sewer service charge. The fee provides a general benefit to everyone who lives in Authority's district because proceeds will be used to expand treatment capacity. Consequently, the court erred in refusing to hold that the fee is actually a tax which Authority must apply uniformly to all residents of the district, not just to new customers, JKC argues.

We disagree. We hold that the required payment is a charge, not a tax, and Authority has uniformly imposed the charge upon those who are required to pay it.

First, the required payment primarily benefits those who must pay it because they receive a special benefit or service as a result of improvements made with the proceeds. That special benefit is the proper treatment and disposal of sewage. *Brown v. County of Horry*, 308 S.C. 180, 184-85, 417 S.E.2d 565, 568 (1992) (holding that road maintenance fee imposed on all motor vehicles registered in county was a service charge, not a tax). It is true that the entire area may benefit from improved and expanded sewage service, but a charge does not become a tax merely because the general public obtains some benefit. *Brown v. County of Horry, supra*; *Robinson v. Richland County Council*, 293 S.C. 27, 33, 358 S.E.2d 392, 396 (1987) (holding that required payment imposed to fund installation and maintenance of sewer facility was assessment, and not tax, regardless of whether general public obtained health benefit from elimination of sewage problem).

Second, proceeds from the required payments are dedicated solely to capital improvement projects. The proceeds are not placed in a general fund to be spent on Authority's ongoing expenses and maintenance, which is a hallmark of a tax. *Hagley Homeowners Ass'n v. Hagley Water, Sewer, and Fire Auth.*, 326 S.C. 67, 75, 485 S.E.2d 92, 96 (1997) ("[g]enerally, taxes are imposed on all property for the maintenance of government"); *Brown v. County of Horry, supra* (revenue from fees destined for general fund indicates a tax).

Third, as the parties stipulated, the revenue generated by the required payment will not exceed the cost of capital improvements to the system. *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997) (applying factors from *Brown v. County of Horry, supra*, to uphold validity of municipal real estate transfer fee dedicated to

parks and recreation).

Fourth, Authority uniformly has imposed the required payment upon those who must pay it. The trial court ruled the required payment, because it was a charge imposed by a special purpose district, was not mandated by statute or the constitution to be uniform in the sense that every customer had to pay it. The court noted, however, that Authority uniformly had imposed the required payment on all new customers based on their anticipated water usage.

We agree with the trial court's reasoning. While no statute or constitutional provision explicitly requires charges by special purpose districts to be uniform, the Court has stated that charges or assessments imposed only upon certain individuals "must be fairly and justly apportioned among those charged with their payment. A method of apportionment, whether by statute or by regulation, that is manifestly arbitrary or discriminatory does not fulfill the constitutional requirements of due process and equal protection." *Hagley Homeowners Ass'n*, 326 S.C. at 76-77, 485 S.E.2d at 97 (quoting *Newton v. Hanlon*, 248 S.C. 251, 149 S.E.2d 606 (1966)).

Fifth, we may consider the fact that Authority intended to classify the payment as a charge. *Brown v. County of Horry*, 308 S.C. at 184, 417 S.E.2d at 568 (while governmental entity's intent may be considered, the question of whether a required payment is a charge or a tax depends on its real nature and not the label assigned to it by the governmental entity that approved it). Authority described it as a "new account fee" in the resolution adopting it, and has not used tax levies since 1975 in order to maintain continued eligibility for federal grants. (emphasis added) 519 S.E.2d at 564, 565.

Also see *Ford v. Georgetown County Water & Sewer District*, 341 S.C. 10, 532 S.E.2d 673 (2000).

Here, the City of Columbia has collected water and sewer fees from both residents of the City of Columbia and non-residents of the City of Columbia, initially deposited those monies into the City's "Water and Sewer Enterprise Fund" and then transferred millions of those dollars to the City's general fund. Additionally, the City allowed other departments of City, in addition to the water and sewer department, to spend monies out

of the Water and Sewer Enterprise Fund originally collected and deposited into that account as water and sewer fees.

By definition, the City's use of monies collected as water and sewer fees to pay general operating expense of the City unrelated to its water and sewer system makes any water and sewer fees treated in that manner a "tax" and not a "fee" or "service charge". To the extent such monies were collected from non-residents' of the City of Columbia, the actions of the City of Columbia result in "taxation without representation" in violation of S.C. Constitution, Article X, § 5.

Contrary to its argument otherwise, the City of Columbia is not allowed to collect water and sewer fees, particularly from non-residents of the City, as it has done and continues to do, and then expend those monies for purposes other than its water and sewer system.

**B. The Rules of Statutory Construction require that any potential conflict between the language in S.C. Code Ann. § 6-1-330(b) and S.C. Code Ann. § 6-21-440 (Supp. 2013) must be read to harmonize those statutes.**

Respondent attempts to nullify the language in S.C. Code Ann. § 6-1-330(B) (Supp. 2013) which provides in pertinent part:

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.

Appellant submits that there is no conflict in the language between S.C. Code Ann. § 6-1-330(b) and S.C. Code Ann. § 6-21-440 (Supp. 2013). However, if this Court determines that such a conflict exists then the Rules of Statutory Construction require that this Court read those statutes in a manner to harmonize them. *Hodges v. Rainey*, 341 S.C.

79, 533 S.E.2d 578 (2000); *Davis v. School District of Greenville County*, 374 S.C. 39, 647 S.E.2d 219 (2007).

Here, any claimed, supposed or perceived conflict between the language in S.C. Code Ann. § 6-1-330(b) and S.C. Code Ann. § 6-21-440 (Supp. 2013) is easily harmonized. S.C. Code Ann. § 6-1-330(B) (Supp. 2013) is the general rule which expressly and unambiguously mandates that revenue derived as a service or user fee be used to finance the costs of the service or program for which the fee was paid. S.C. Code Ann. § 6-21-440 (Supp. 2013) provides a limited exception to that rule when and only when specific four preconditions, discussed in more detail in the Brief of Appellant, are satisfied. The City of Columbia has not satisfied any one of those four preconditions much less all four of them and, thus, cannot shield itself under S.C. Code Ann. § 6-21-440 (Supp. 2013).

## CONCLUSION

If Respondent prevails in this appeal and the decision of the Circuit Court is affirmed the longstanding distinctions in this State between “service charges or user fees” and “taxes”, which appear in our statutory law and the prior decisions of the appellate courts of this State, will be fundamentally abolished. Counties, cities, town, public service districts and other governmental entities who charge service charges or user fees will be free to spend the revenues collected from those sources in virtually any manner they desire with no constraints. Carried to its logical conclusion, tax increases requiring the consent “...of the people or their representatives...” would no longer be necessary. Governmental entities could simply increase or create new service charges or user fees and then redirect the revenues derived to pay for whatever project or other uses that governmental entity desired, without limitation or restriction. Property and other tax burdens now paid by “residents” could easily be shifted to “non-residents” by increasing service charges or user fees charged to those non-residents and then using the revenues derived from those service charges or user fees to pay the expenses previously paid by tax revenues.

The decision of the Circuit Court in this case is not only in error but also, if affirmed, opens the proverbial door for undesirable consequences far beyond the scope of this case. The existing law in this State governing the use of monies collected as service charges or user fees is clear and unambiguous. The Circuit Court did not follow that law in its decision in this case and, thus, was in error.

Accordingly, Plaintiffs request this Court (1) reverse the decision of the Circuit Court in this case; (2) issue its order enjoining this practice by the City of Columbia; and, (3) require the City of Columbia to return to the City’s “Water and Sewer Enterprise Fund”

account all monies which were transferred from that account to the City's general fund by the City of Columbia and all monies used by the City's various development corporations who directly spent money out of the City's "Water and Sewer Enterprise Fund" for the time period three (3) years prior to commencement of this lawsuit, the applicable statute of limitations, through date of return of those monies.

Plaintiffs further request that this Court then remand this case to the Circuit Court for further proceedings including awarding Plaintiffs class action status.

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**ATTORNEYS FOR APPELLANTS**

Columbia, South Carolina

Dated: October 29, 2014

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS  
The Honorable G. Thomas Cooper  
The Honorable J. Ernest Kinard

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Case No. 2011-CP-40-6705

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

v.

CITY OF COLUMBIA, .....RESPONDENT.

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FINAL BRIEF  
OF  
RESPONDENT CITY OF COLUMBIA

---

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### STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE APPELLANTS INAPPROPRIATELY RELY ON THE TEST SET FORTH IN *C.R. CAMPBELL CONSTRUCTION CO. V. CITY OF CHARLESTON* TO CONSTRUCT S.C. CODE ANN. § 6-1-330?
- II. WHETHER APPELLANT ABANDONED APPELLATE REVIEW OF THE CIRCUIT COURT'S RULING THAT *C.R. CAMPBELL* DOES NOT APPLY TO THE FACTS PRESENTED; OR IN THE ALTERNATIVE, THAT *C.R. CAMPBELL* DOES NOT APPLY TO THE FACTS OF THIS CASE?
- III. WHETHER THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY'S WATER AND SEWER CHARGES, OR AT LEAST CHARGES PAID BY NON-RESIDENT CUSTOMERS, ARE NOT SUBJECT TO S.C. CODE ANN. § 6-1-330?
- IV. IN THE ALTERNATIVE, WHETHER THE CIRCUIT COURT CORRECTLY RULED THAT RESPONDENT'S USE OF WATER AND SEWER REVENUES FOR ECONOMIC DEVELOPMENT AND PUBLIC INFORMATION PURPOSES DOES NOT VIOLATE S.C. CODE ANN. § 6-1-330(B)?
- V. IN THE ALTERNATIVE, WHETHER THE CIRCUIT COURT CORRECTLY RULED THAT RESPONDENT'S TRANSFER OF \$4.5 MILLION DOLLARS PER YEAR IN PROFIT FROM ITS WATER AND SEWER ENTERPRISE FUND TO ITS GENERAL FUND DOES NOT VIOLATE S.C. CODE ANN. § 6-1-330(B)?
- VI. WHETHER THE CIRCUIT COURT VIOLATED APPELLANTS' DUE PROCESS RIGHTS WHEN, AT THE SUGGESTION OF THE COURT DURING A HEARING ON THE MATTER OF CLASS CERTIFICATION, THE PARTIES SUBMITTED PROPOSED ORDERS IN LIEU OF ORAL ARGUMENT?
- VII. WHETHER APPELLANTS FAILED TO MEET THE ADEQUACY REQUIREMENT OF RULE 23(A), SCRPC?
- VIII. WHETHER THE CIRCUIT COURT PROPERLY RULED ON THE CITY'S ARGUMENT THAT PLAINTIFFS AZAR AND LETTS LACK STANDING TO BRING THEIR CLAIMS AGAINST THE CITY, WHEN A PRIOR HEARING BEFORE ANOTHER CIRCUIT COURT JUDGE YIELDED NO WRITTEN AND ENTERED ORDER?

## STATEMENT OF THE CASE

Appellants' causes of action pertain to the City's alleged violation of municipal finance law. On October 10, 2011, Joseph S. Azar, individually and as a class representative, commenced this action against Respondent City of Columbia seeking a non-jury trial. (R. pp. 43-52). Two days later, an Amended Complaint was filed, adding Frank J. Cumberland as another Plaintiff, individually and as a class representative. (R. pp. 53-62). On November 14, 2011, the City filed its Answer to the Amended Complaint denying all claims, and filed a Motion to Dismiss Messrs. Azar and Cumberland from the Amended Complaint pursuant to Rule 12(b)(1) for lack of standing. (R. pp. 78-88); (R. pp. 89-95). On January 17, 2012, a Second Amended Complaint was filed adding Michael A. Letts as another Plaintiff, individually and as a class representative, and making additional allegations of fact in an effort to avoid dismissal for lack of standing. (R. pp. 63-77). The City filed its Answer to this Second Amended Complaint on February 21, 2012, denying all claims. (R. pp. 96-108).

The Plaintiffs challenged the City of Columbia's use of revenue derived from monthly charges for water and sewer service for purposes other than maintaining and improving the infrastructure of the City of Columbia's water and sewer utility ("Utility") on several grounds.

First, Plaintiffs sought, individually and on behalf of a class, an injunction requiring the City of Columbia to return all the money to its water and sewer enterprise fund that it took from the water and sewer enterprise fund for other purposes allegedly in violation of S.C. Code Ann. § 6-1-330, and to refrain from continuing to collect and use water and sewer fees for any purpose other than operation and capital improvements of the Utility.

(R. pp. 70, 75). Second, Plaintiffs alleged that the City's use of water and sewer revenues for purposes other than operation, maintenance and improvement of its Utility constituted a breach of contract, and sought, individually and on behalf of a class, a refund of all water and sewer fees collected by the City for the past three years, to be returned to the City's water and sewer enterprise fund. (R. pp. 72, 75). Third, Plaintiffs alleged, individually and on behalf of a class, that the City's use of water and sewer revenues for purposes other than operation, maintenance and improvement of its Utility amounted to "unconstitutional collection" in that such practice violated S.C. Code Ann. § 6-1-330 and *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), and requested a common fund of all fees collected by the City for the past three years, to be returned to the City's water and sewer enterprise fund. (R. pp. 73, 75). Lastly, Plaintiffs alleged, individually and on behalf of a class, that the City's transfer of \$4.5 million dollars from its water and sewer enterprise fund to its general fund constituted an unconstitutional tax, and requested an order creating a common fund of all water and sewer revenues used for other purposes, to be returned to the City's water and sewer enterprise fund. (R. pp. 74-76). Essentially, Plaintiffs demand that the City pay an amount totaling approximately \$22 million dollars into a common fund, from which the City would be ordered to spend for maintenance and improvement of its Utility along with any attorney's fees awarded.<sup>1</sup>

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<sup>1</sup> (See R. p. 337, line 11 – p. 338, line 9) (Appellants' counsel stating that they seek the return of \$4.5 million transferred to the general fund over the past three years, plus the City's expenditures from its water and sewer enterprise fund for its economic development activities).  $\$4,500,000 \times 3 = \$13,500,000.00$ . The City's total economic development expenditures over the three fiscal years at issue here amount to  $\$8,319,768.00$ .  $\$13,500,000.00 + \$8,319,768.00 = \$21,819,768.00$ . In their briefs and oral argument, Appellants mistakenly state that the City's economic development expenditures total approximately \$2.3 million per year. (See R. 338, lines 3-9); (R. p. 439, line 23 – p. 441, line 18). The correct amounts expended for economic development purposes, as attested by the City's current Finance Director, are as follows: \$2,922,446.99 in FY 2008/2009, \$2,844,127.67 in FY 2009/2010, and \$2,716,110.03 in FY 2010/2011 (R. pp. 933-934).

On March 27, 2012, Plaintiffs moved for class certification to include all of the City of Columbia's water customers during the three years prior to filing of the Complaint. (R. pp. 109-110). On May 17, 2012, the City filed an Amended Motion to Dismiss pursuant to Rule 12(b)(1) to include arguments that Plaintiff Letts lacked standing. (R. pp. 111-112). The parties filed memoranda in support or opposition to their respective motions.

Both motions were heard on June 5, 2012 before The Honorable J. Ernest Kinard. Judge Kinard heard oral argument on the City's 12(b)(1) Motion to Dismiss, and verbally denied this Motion. (R. pp. 269-287). The court did not request either party to prepare an order, and both parties expected that Judge Kinard would enter a short order of denial. However, no written order concerning Defendant's Motion to Dismiss was ever entered in spite of Defendant's attempt to elicit an order from the court.

Turning to the Plaintiff's Motion for Class Certification, Judge Kinard offered to hear the Parties' arguments, but recommended as a better approach that the Parties submit proposed orders on the issue for his consideration. (R. p. 288, line 24 – p. 289, line 24).<sup>2</sup> Both Parties submitted proposed orders addressing class certification. On June 26, 2012, Judge Kinard entered a written order denying Plaintiffs' Motion for Class Certification. On July 5, 2012, Plaintiffs filed a Motion to Reconsider the circuit court's denial of class certification. After hearing arguments on September 13, 2012, Judge Kinard denied Plaintiffs' Motion. (R. pp. 1-5).

After extensive discovery, the City moved for summary judgment on all causes of action on August 14, 2012. In this motion for summary judgment, the City raised again its argument that Plaintiffs Azar and Letts lacked standing to bring their asserted causes of

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<sup>2</sup> Note that the Court Reporter erred in identifying counsel. Where the transcript on the cited pages states that Mr. Lydon, counsel for the City, was speaking, Mr. Lee, counsel for Plaintiffs, was actually speaking.

action. On September 18, 2012, Plaintiffs filed a motion for summary judgment on the issues of whether the City's use of water and sewer revenues violated S.C. Code Ann. § 6-1-330 and *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997). About this same time, a Suggestion in Bankruptcy was filed on behalf of a plaintiff in this case on September 7, 2012, which erroneously stayed the case or otherwise caused the case to be deemed inactive. The case was revived after a status conference was held with the Chief Administrative Judge on May 8, 2013.

The Parties' motions for summary judgment were heard on August 5, 2013 before The Honorable G. Thomas Cooper. Following review of proposed orders, Judge Cooper scheduled *sua sponte* another hearing to ask further questions and allow additional argument. Following this second hearing on September 13, 2013, the court, on September 26, 2013, granted the City's Motion for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment. On October 14, 2013, Plaintiffs moved for reconsideration. Plaintiffs' motion was denied by an order received on December 6, 2013. Plaintiffs now appeal the circuit court's ruling on summary judgment, as well as the circuit court's denial of their motion for class action certification.

## STATEMENT OF THE FACTS

Pursuant to a specific grant of authority to municipalities under the South Carolina Constitution, the City of Columbia has owned and operated a water and/or sewer utility for over a century. *See* (R. p. 741); S.C. Const. art. VIII, § 16. The City's water and sewer utility's physical plant consists of approximately 1,053 miles of sewer lines, a sewer treatment plant, 67 sewer pump stations, two water treatment plants, and approximately 1,966 miles of water mains. (R. p. 1319); (R. p. 510, lines 5-6). As of June 28, 2012, the City provided water to 137,066 customers and provided sewer to 69,910 customers. (R. p. 449, lines 14-25). Most of the City's customers reside outside of the City's corporate limits. (R. p. 454).

By an ordinance enacted by the City Council in 1895, the City established "rates of water rents" for provision of water from its waterworks to those who made application for connection to the City's water utility (hereinafter referred to as "Water Rate Ordinance"). (R. p. 741, ¶ 4). Since 1895, the City's Water Rate Ordinance has remained in force and effect. (R. p. 741, ¶ 5). In 1970, the City enacted an ordinance establishing a sewer rate structure (hereinafter referred to as "Sewer Rate Ordinance"). (R. p. 742, ¶ 8). Since 1970, the City's Sewer Rate Ordinance has remained in force and effect. (R. p. 742, ¶ 9). The City has amended its Water Rate Ordinance and Sewer Rate Ordinance numerous times. (R. p. 742, ¶ 6 and ¶ 10). The City's amendments to its water and sewer rates operate to revise its existing rate structure established in 1895 and 1970, respectively. (R. p. 742, ¶ 11).

If a person or business wishes to receive water and sewer from the City, he or she submits an application for a water service contract to the City. (*See* R. pp. 1321, 1322,

1400). The City provides water and sewer to its customers according to the terms set forth by this contract. *Id.* The contract states that:

The undersigned hereby applies to the City of Columbia for a water/sewer supply, to be furnished through a meter, for which service the undersigned agrees to pay a monthly rate and minimum charge (whether the minimum volume of water is used or not) as may be established by the City of Columbia in accordance with its ordinances. It is understood and agreed that the applicant will comply with all rate schedules, rules, regulations and ordinances (Section 5-4012) of the City of Columbia in connection with this service; that the City reserves the right at any time without notice to interrupt water service for maintenance, repairs or extensions without any liability to the undersigned or owner of such premises for damages resulting therefrom; that the undersigned will not receive water from any part of the City water system without a valid permit from the City Engineer or without an in-service meter and that unpaid charges for water service shall be posted against the undersigned applicant's Security Deposit. *Id.*

The City's water and sewer customers pay a monthly service charge in return for receipt of water and sewer service. The City's water service rate consists of a monthly base charge for the first 300 cubic feet of water consumed that varies according to meter size and whether the customer resides within the City limits or outside City limits. (*See R.* pp. 1311-1312). Customers are then charged for additional water consumption as determined by customer category. (*Id.*). Similarly, the City has established a base sewer rate for customers residing within the City limits ("Resident") and without City limits ("Non-Resident"), with an additional charge for each 100 cubic feet of wastewater consumed. (*Id.*). Because most of the City's water and sewer customers are Non-Residents and Non-Resident water and sewer charges are higher than charges applicable to Residents, most of the City's water and sewer revenue is derived from Non-Resident customers, as shown in the table below:<sup>3</sup>

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<sup>3</sup> (*R.* pp. 930-931, ¶ 9 and ¶ 11).

| Fiscal Year | Non-Resident Charges | Resident Charges |
|-------------|----------------------|------------------|
| 2008/2009   | \$64,100,000.00      | \$32,000,000.00  |
| 2009/2010   | \$66,000,000.00      | \$33,100,000.00  |
| 2010/2011   | \$65,700,000.00      | \$33,500,000.00  |

In accordance with Generally Accepted Accounting Principles applicable to local governments, the City of Columbia manages its water and sewer utility in a propriety capacity. (R. p. 614, lines 2-10); (R. p. 697, line 16 – p. 698, line 21); (R. p. 1317). The City collects its water and sewer charges and deposits them into a segregated enterprise fund.<sup>4</sup> (R. p. 1317). An enterprise fund is used to account for business operations, whereas a governmental fund is used to account for government services. (R. p. 697, lines 16-21).

From this enterprise fund, the City expends monies for administration, operation, maintenance, and improvements of its Utility. (R. p. 931, ¶ 13 and ¶ 14). In fiscal year 2008/2009, the Utility's net revenue from all of its income sources, without deductions to account for depreciation, was approximately \$51 million dollars. (R. p. 1406). In fiscal year 2009/2010, the Utility's net revenue from all of its income sources, without deductions to account for depreciation, was approximately \$37 million dollars. (*Id.*) In fiscal year 2010/2011, the Utility's net revenue from all of its income sources, without deductions to

<sup>4</sup> The City charges rates for customer consumption of water and sewer services on a monthly basis, as well as other miscellaneous fees such as a one-time fee, usually paid by developers, to tap into the sewer system. (See R. p. 731, line 25 – p. 734, line 13). Appellants only challenged the City's use of revenues derived from monthly water and sewer service charges, not the City's other miscellaneous utility fees, and thus, all of the City's financial data produced in this case pertains to monthly Utility charges. (See R. pp. 63-64, and p. 67, ¶ 21) (referring to Plaintiffs as customers of the City's water and service with no mention of paying any other type of Utility fee, and identifying a City Ordinance amending monthly water and sewer rates as the fees that they challenge); (R. pp. 259, 265) (Appellants arguing that rate payers' monies cannot be used to fund anything other than the specific program for which it was paid (emphasis added)); (See R. p. 605, line 10 – p. 606, line 4); (R. p. 722, line 14 – p. 723, line 12; p. 731, line 25 – p. 734, line 13) (Appellants questioning deponents about monthly Utility charges). Lastly, the Summary Judgment Order clearly stated that the fees at issue were the City's monthly water and sewer charges and Plaintiffs did not, in their Motion to Reconsider, take any issue with the circuit court's characterization of the fees they were challenging; thus failing to preserve for appellate review any eleventh-hour attempt to challenge other fees. (R. p. 8); *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 554, 709 S.E.2d 99, 111 (Ct. App. 2011).

account for depreciation, was approximately \$31 million dollars. (*Id.*) From this net revenue, the City provides for debt service for revenue bonds secured by water and sewer charges issued for capital replacements or improvements to its system. (R. p. 931, ¶ 14); (R. p. 1406). The City also maintains reserve funds as required by its revenue bond ordinance, as well as surplus revenue, or profit. (R. p. 516, line 4 – p. 518, line 4); (R. pp. 1323-1366); (R. p. 615, lines 5-18); (R. p. 1406).

In addition, during the past three fiscal years,<sup>5</sup> the City allocated monies from its water and sewer enterprise fund to pay for all or part of the costs of City economic development functions: its economic development department, economic development special projects, office of business opportunities, and four development corporations,<sup>6</sup> (R. p. 534, line 7 – p. 541, line 24). The City also allocated water and sewer revenues to fund the expenses of printing material that informed the public of the City's compliance with safe drinking water standards and how to help reduce sewer overflows. (R. p. 535, line 5 – p. 536, line 7). These expenditures are shown as follows:

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<sup>5</sup> Because the statute of limitations in this case is three years, the relevant fiscal years are FY 2008/2009, 2009/2010 and 2010/2011.

<sup>6</sup> Appellants challenge an expenditure of \$70,000.00 for the City Center Partnership, also described as the Business Improvement District. Appellants' Brief, p. 11; (R. p. 1320); (R. p. 540, lines 10-14). This expenditure was paid from the Economic Development Special Project Fund. Further, Appellants challenge use of water and sewer revenues for "community promotions." Appellants' Brief, p. 11. However, during the three fiscal years at issue here, the City did not fund "community promotions" from water and sewer revenues. (R. p. 541, line 13 – p. 542, line 5). The City stopped funding community promotions from water and sewer revenues approximately seven years ago. (R. p. 567).

| Expenditures Challenged by Appellants <sup>7</sup> | FY 2008/2009          | FY 2009/2010          | FY 2010/2011          |
|----------------------------------------------------|-----------------------|-----------------------|-----------------------|
| Economic Development Department <sup>8</sup>       | \$814,543.70          | \$774,879.02          | \$772,267.33          |
| Economic Development Special Projects <sup>9</sup> | \$624,267.29          | \$590,857.11          | \$585,936.77          |
| Office of Business Opportunities <sup>10</sup>     | \$393,934.55          | \$297,179.54          | \$210,663.51          |
| Development Corporations <sup>11</sup>             | \$1,053,522.00        | \$1,154,478.00        | \$1,047,242.42        |
| Public Relations <sup>12</sup>                     | \$36,199.45           | \$26,734.00           | <sup>13</sup> 0       |
| <b>Total Per Fiscal Year</b>                       | <b>\$2,922,466.99</b> | <b>\$2,844,127.67</b> | <b>\$2,716,110.03</b> |

Pursuant to a policy adopted by Resolution in 1993, during the past three fiscal years, the City has transferred up to \$4.5 million dollars of the utility's profits annually to its general fund to defray the costs of ordinary municipal services. (R. p. 479, line 18 – p. 480, line 4); (R. p. 606, line 5 – p. 608, line 2); (R. pp. 653-655). If the City did not transfer the entire \$4.5 million dollars to its general fund on an annual basis, City residents' property tax bills would increase by nine to ten mills. (R. p. 482, lines 14-23); *see also* (R. p. 609, line 17 – p. 610, line 4). Transfer of some portion of water and sewer revenues from a city's water and sewer utility to its general fund is a fairly common practice in South Carolina. (R. p. 481, line 10 – p. 482, line 4).

All together, the expenditures and transfers challenged by Appellants comprise less than 10% of the Utility's annual revenues derived from water and sewer charges, as shown below:

<sup>7</sup> Appellants tend to refer to a chart showing the City's use of water and sewer revenues for the Office of Business Opportunities, Economic Development Department, Public Relations, Development Corporations, Economic Development Contingency, City Center Partnership, and Community Promotions, that was included in a State Newspaper article. (R. p. 567). The City's Budget Director testified that the numbers in this chart were budgeted amounts, not actual expenditures. (R. p. 638, line 2 – p. 640, line 2). The figures shown in the table above reflect actual expenditures as attested within the affidavit of Mr. Palen, the City's Finance Director at the time the affidavit was executed.

<sup>8</sup> (R. p. 933, ¶ 26).

<sup>9</sup> (R. p. 933, ¶ 27).

<sup>10</sup> (R. p. 934, ¶ 28).

<sup>11</sup> (R. p. 934, ¶ 29).

<sup>12</sup> (R. p. 933, ¶ 23).

<sup>13</sup> In FY 2008/2009, the City budgeted \$46,600 for public educational materials relating to the Utility; however, the money was not expended. (R. p. 933, ¶ 23).

| Year      | Contested Expenditures | Contested Transfer of Net Revenues | Total Contested (expenditures + transfer) | Utility Revenues From Ratepayers |
|-----------|------------------------|------------------------------------|-------------------------------------------|----------------------------------|
| 2008/2009 | \$2,922,446.99         | \$4,500,000.00                     | \$7,422,446.99                            | \$96,100,000.00                  |
| 2009/2010 | \$2,844,127.67         | \$4,500,000.00                     | \$7,344,127.67                            | \$99,100,000.00                  |
| 2010/2011 | \$2,716,110.03         | \$4,500,000.00                     | \$7,216,110.03                            | \$99,200,000.00                  |

During the time period at issue, water and sewer rates were increased in a manner consistent with a rate study prepared in 2006 by the engineering, consulting and construction company Black & Veatch ("Rate Study") recommending rate and fee revisions over a five-year period ending June 30, 2011. (R. pp. 1387-1388). The Rate Study based its analysis on the City's projected costs and other factors. (See R. pp. 1378-1385). It included a return on investment, or profit, built into the City's water and sewer rates. (R. pp. 1389-1390). The Rate Study also factored into the proposed rates the costs associated with the City's Five-Year Capital Improvement Plan, totaling approximately \$350 million dollars. (R. p. 1386).

The City has always invested in annual maintenance of its sewer system every year. (R. p. 512, lines 15-16). Every fiscal year, the City prepares a list of projects for water and sewer construction, repair and maintenance for funding consistent with its Five-Year Capital Improvement Plan. (R. p. 542, line 19 – p. 543, line 4). Prior to the year 2006, there was a time period in which the City invested more money and attention to its water system due to the important need to upgrade the City's aging water treatment plant along the Columbia Canal. (R. p. 512, lines 9-25). Since 2006, the City shifted its priorities to its sewer system.<sup>14</sup> (R. p. 512, line 20 – p. 513, line 4). The City completed all of the

<sup>14</sup> Beginning in 2007, the City experienced more frequent sewer overflows, largely due to infiltration of tree roots into sewer lines and accumulation of grease blocking sewer lines. (R. p. 471, lines 3-13); (R. p. 508, lines 3-21); (R. p. 551, line 16 – p. 553, line 20). The City has significantly reduced sewer overflows from its sewer system. (R. p. 556, lines 9-12). In 2013, largely due to the City's sewer overflows, the U.S. Environmental Protection Agency ("EPA"), the South Carolina Department of Health and Environmental Control ("DHEC") and the City entered into a Consent Decree, in which the City did not admit any liability

capital improvement projects contained in the Rate Study, which cost approximately \$350 million dollars, within five years. (R. p. 472, line 12 – p. 473, line 2); (R. p. 1386). Of this total of \$350 million dollars, \$212,704,769.00 was dedicated to sewer projects. (R. p. 1386). In 2011, the City embarked on its next Five-Year Capital Improvement Plan to spend \$100 million per fiscal year for sewer projects. (R. p. 472, line 12 – p. 473, line 4); (R. p. 1405).

### STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this Court applies the same standard that the trial judge was required to apply under Rule 56(c), SCRPC. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC; *Southeast Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 512, 693 S.E.2d 33, 35 (Ct. App. 2010). A grant of 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. Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). Speculation and “inferential leaps” are insufficient to defeat a motion for summary judgment. *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010).

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under the Clean Water Act. (R. p. 1081). The Decree stated that the City “has voluntarily undertaken various capital improvement projects intended to improve its ... [wastewater treatment plant] as well as reduce the occurrence of [sanitary sewer overflows], which, over the past five years, have resulted in significant expenditures of resources by Columbia.” (*Id.*) The Consent Decree did not impose upon the City any additional capital improvement projects; instead it incorporated the City’s implementation schedule for its previously adopted Five-Year Capital Improvement Plan and made that schedule enforceable under the Consent Decree. (R. p. 1092). The Consent Decree imposed new requirements to improve maintenance and operational protocol, staff training, and emergency response planning. (R. pp. 1093-1103).

Proponents of class certification have the burden of proving that the prerequisites of class certification under Rule 23(a), SCRCP, have been met. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 467-468, 388 S.E.2d 799, 801 (1990). The court must apply "a rigorous analysis" to assure that these prerequisites have been satisfied. *Id.* The failure of the proponents to satisfy any one of the prerequisites is fatal to class certification. *Id.* Additionally, a trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion. *Id.*

### ARGUMENTS

At issue in this appeal is whether the City's use of Utility revenue to fund its economic development functions and certain public information materials, and to use Utility profits to supplement its general fund, violates municipal finance law governing service fees.<sup>15</sup> Under article VIII, § 16 of the South Carolina Constitution and S.C. Code Ann. § 5-31-610 *et seq.*, the City of Columbia owns and operates a water and sewer utility ("Utility") with the authority to charge rates for service provided to its customers. Monthly Utility charges for water and sewer service are a lawful fee and 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); *Green v. City of Rock Hill*, 149 S.C. 234, 264, 147 S.E. 346, 357 (1929). Further, cities may charge utility rates that yield

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<sup>15</sup> 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. The City has invested hundreds of millions of dollars in maintaining and improving its Utility and completed all sewer construction projects identified within its five-year capital improvement plan applicable to the time period relevant here. (R. p. 472, line 12 -- p. 473, line 2). Appellants' attempt to cast the City's use of about \$7 million dollars per year from its annual water and sewer revenues of approximately \$100 million as the cause of its consent decree with the EPA represents a gross oversimplification of a complex array of issues relating to the current status of the City's wastewater system. The circuit court order properly rejected these assertions as irrelevant to the merits of this case.

a fair profit. *Sossamon v. Greater Gaffney Metro Utilities Area*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960); *Simons*, 181 S.C. 353, 357, 187 S.E. 545, 546 (1936); *Green*, 149 S.C. 234, 264, 147 S.E. 346, 356-57 (1929). What is more, cities may use that profit for any lawful purpose within the discretion of their governing bodies. See S.C. Const. art. VIII, § 17 ("Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.").

In spite of this well-established law, Appellants argued below that under *C.R. Campbell v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), the City's Utility charges are not a valid fee and thus, amount to an unconstitutional tax. Appellants failed to preserve their arguments under *C.R. Campbell* for appellate review, and in any event, the circuit court did not err in holding that *C.R. Campbell* was distinguishable on the facts, or at the very least, not applicable to Non-Resident Utility charges.

Appellants also argue that the City's expenditure of revenues derived from Utility charges for economic development and public information purposes violates the directive found within S.C. Code Ann. § 6-1-330(B) 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 statute has never before been construed by this Court. The circuit court correctly held that the Service Fee Statute does not apply to the City's water and sewer charges. In the alternative, the circuit court unerringly ruled that the City's use of Utility revenues for economic development and certain public information activities are related to the provision of water and sewer services and thus, do not violate S.C. Code Ann. § 6-1-330(B). Additionally, the City's

transfer of \$4.5 million in Utility profits annually from its Utility Enterprise Fund to its general fund does not violate S.C. Code Ann. § 6-1-330 when read in light of existing common law and in *pari materia* with related statutes.

By demanding that the City raise the equivalent of millions of dollars that were previously spent and dictating that this money should then be used specifically for improvements as opposed to other equally important uses, Appellants are in effect seeking to impose their own personal views on how the City's Utility ought to be managed, and in the process, significantly disrupt the City's financial condition. Appellants seek to impermissibly intrude upon City Council's legislative budgetary function as well as its discretion in how it chooses to operate its water and sewer system. *See 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 ...."). Appellants' attempt to usurp the City's discretion is unavailing.

**I. APPELLANTS IMPROPERLY APPLY CASES DECIDED UNDER *BROWN V. HORRY COUNTY* IN THEIR ARGUMENTS CONSTRUING S.C. CODE ANN. § 6-1-330.**

Appellants raise as an issue on appeal that the trial court erred as a matter of law in its interpretation of S.C. Code Ann. § 6-1-330 (also referred to as "Service Fee Statute"). In Appellants' argument concerning the Service Fee Statute, Appellants turn to *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992) as articulated by *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), *J.K. Constr., Inc. v. Western Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 519 S.E.2d 561 (1999), and *Ford v. Georgetown County Water & Sewer District*, 341 S.C. 10, 532 S.E.2d 873 (2000), to

support its interpretation of the Service Fee Statute. Appellants' Brief, pp. 12-13. These cases do not interpret the Service Fee Statute. Reliance on these cases to interpret the Service Fee Statute contravenes the cardinal rule of statutory construction that legislative intent is ascertained solely by the plain and unambiguous language of the statute. *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).

In *Brown*, as articulated in *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 236 481 S.E.2d 437, 438 (1997), the Court set forth a test to determine whether a particular type of fee was a valid service fee and not a tax. 325 S.C. 235, 236, 481 S.E.2d 437, 438 (1997) citing to *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992). The City argues *infra* that Appellants have abandoned appellate review of the circuit court's ruling pertaining to *C.R. Campbell*, and that, in any event, *C.R. Campbell* applies to a context not present here. But for the purposes of this argument, the important point is that the test articulated in *C.R. Campbell* rests upon a constitutional dimension because it serves to determine whether a fee is a valid uniform service charge or an unconstitutional tax. If the fee in question fails to meet the test, then it would be struck down as a tax levied without uniformity in violation of article X, section 6 of the South Carolina Constitution. If a fee is deemed invalid under *Brown*, then the Service Fee Statute would not even come into play because the fee is in actuality an unconstitutional tax.

In contrast, the Service Fee Statute is not intended to discern between a valid fee or an unconstitutional tax; it addresses valid service fees only. The Service Fee Statute injects procedural requirements upon adoption of a fee and it places a limitation upon fees imposed to finance a public service. Any violation of the Service Fee Statute is separate and distinct from a constitutional violation under *Brown* and *C.R. Campbell*. See e.g. *State v. Covert*,

368 S.C. 188, 195, 628 S.E.2d 482, 486 (Ct. App. 2006) ("In South Carolina, the statutory warrant requirement is separate and distinct from the prohibition in the federal and state constitutions against unreasonable searches and seizures."). Given these distinctions, Appellants mistakenly assume that *C.R. Campbell* may appropriately be used to interpret the Service Fee Statute.<sup>16</sup>

**II. TO THE EXTENT THAT APPELLANTS ARE ATTEMPTING TO ARGUE THAT THE CITY'S USE OF REVENUE DERIVED FROM WATER AND SEWER CHARGES FAILS TO COMPLY WITH *C.R. CAMPBELL*, SUCH ARGUMENT IS UNPRESERVED FOR APPELLATE REVIEW; SHOULD THIS COURT FIND OTHERWISE, THE CIRCUIT COURT CORRECTLY RULED THAT *C.R. CAMPBELL* DOES NOT APPLY TO THE FEES AT ISSUE HERE.**

Under Rule 208(b)(1)(B), SCACR, an appellant must, in the Initial Brief, set forth the issues to be considered by the appellate court. No point will be considered which is not set forth in the statement of issues on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). If a party fails to raise arguments with supporting authority in the Initial Brief, then such arguments are deemed abandoned on appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). Although rules of issue-preservation should not be applied in a rigid, "hyper-technical manner," it is a basic tenet of the law that an appellate court cannot rule on issues not presented to it. *Herron v.*

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<sup>16</sup> Furthermore, the test set forth in *C.R. Campbell* employs different language than the Service Fee Statute. In situations where the benefit that the payer of a fee receives in return for payment of the fee lies in the government's use of the proceeds of the fee to fund future improvements, *C.R. Campbell* held that such a fee is valid if the revenue generated from a service fee is used only for the specific improvement contemplated and the revenue generated by the fee does not exceed the cost of the improvement. 325 S.C. 235, 236, 481 S.E.2d 437, 438 (1997). In contrast, the Service Fee Statute's limitation on use of fee revenues applies to fees "imposed to finance the provision of public services," S.C. Code Ann. § 6-1-330(B). The revenue derived from these fees "must be used to pay costs related to the provision of the service or program for which the fee was paid." *Id.* The *C.R. Campbell* test is narrower and more restrictive than the Service Fee Statute. By turning to case law addressing whether a fee is a valid service fee or an unconstitutional tax to interpret the Service Fee Statute, Appellants ask this Court to impermissibly resort to forced construction that would limit or expand the Service Fee Statute's operation. *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).

*Century BMW*, 395 S.C. 461, 469-470, 719 S.E.2d 640, 644-645 (2011). Appellants have failed to identify as an issue on appeal, or argue within their Initial Brief, any error in the circuit court's ruling that *C.R. Campbell* does not apply to the facts of this case. An appellant is precluded from using its reply brief to argue any grounds for reversal because all issues must be raised and argued in the Initial Brief. *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct. App. 1997). Therefore, Appellants have abandoned appellate review of their claim under *C.R. Campbell*.

To the extent this Court finds otherwise, the circuit court did not err. Restating *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992), *C.R. Campbell Constr. Co. v. City of Charleston* held that a fee is a valid uniform service charge and not an unconstitutional tax if:

(1) the revenue generated is used to the benefit of the payers, even if the general public also benefits (2) the revenue generated is used only for the specific improvement contemplated (3) the revenue generated by the fee does not exceed the cost of the improvement and (4) the fee is uniformly imposed on all the payers....325 S.C. 235, 481 S.E.2d 437, 438 (1997).

It is well established in South Carolina that a monthly water or sewer charge is not a tax, but rather, a rent or charge for services rendered, collected merely as compensation by those who choose to receive and use the water. *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). Appellants Letts and Cumberland<sup>17</sup> have entered into a contract with the City to receive water and sewer supply delivered through the City's water

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<sup>17</sup> Appellant Azar is not a customer of the City's Utility. He has no account or service contract in his name with the City, does not receive a utility bill from the City, and does not pay any Utility charges to the City. Mr. Azar is a resident of the Hermitage Condominiums, whose association is a customer of the City. Mr. Azar reimburses the Hermitage Condominium Association for his pro rata share of the water and sewer bills paid by the Association. (See R. pp. 143, 167).

and sewer infrastructure. (R. p. 1321); (R. p. 1400). In return for this access to and use of City property and consumption of water supply, they pay a monthly base rate for up to 300 gallons of water used and an additional rate based upon actual consumption beyond 300 gallons per month. (See R. pp. 1311-1312). For sewer, they also pay a base rate and an additional rate based upon cubic feet of wastewater created. (*Id.*). In other words, Messrs. Letts and Cumberland have a *quid pro quo* arrangement with the City where they receive the benefit of water and sewer in exchange for monetary payment based upon actual consumption. Thus, the City's water and sewer rates constitute a lawful fee.<sup>18</sup> Because the question of whether a municipal utility charge for water and sewer service has already been answered, there is no need to apply *C.R. Campbell* to the City's water and sewer charges.

Further, *Brown*, as articulated by *C.R. Campbell*, is distinguishable from the facts of this case. Unlike the situation here, where Utility customers receive the benefit of water and sewer service in return for their payment of water and sewer actually consumed, in *Brown* and its progeny, the payers of the fee did not receive a direct exchange of money for a service provided, but instead benefitted from how the proceeds were to be spent for future improvements. *Brown*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992). Because the benefit received in *Brown* was the future use of proceeds from the fee imposed, the Court devised a test containing limits on use of this revenue in order to maintain the constitutional distinction between a fee and a tax. However, in situations "where the benefit to the payer derives not from the municipality's use of the revenue but is a benefit given directly and solely to the [payer] in exchange for the fee," *Brown* does not apply.

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<sup>18</sup> A fee is a charge in exchange for a particular service that benefits the person paying it in a manner not shared by the general public, whereas taxes are imposed on all property for the maintenance of government. *Robinson v. Richland County Council*, 293 S.C. 27, 33, 358 S.E.2d 392, 396 (1987); *Casey v. Richland County Council*, 282 S.C. 387, 390, 320 S.E.2d 443, 444 (1984).

*BellSouth Telecommunications v. City of Orangeburg*, 337 S.C. 35, 39-40, 522 S.E.2d 804, 806 (1999). The benefit Appellants receive in return for payment of the City's water and sewer charges is not in how the City expends the revenue derived from water and sewer fees. The benefit is in the immediate delivery of water and sewer service when Appellants turn on the faucet within their residences. In such a situation, the *Brown* test is inapplicable.

Any reliance on *Ford v. Georgetown County Water & Sewer District*, 341 S.C. 10, 532 S.E.2d 873 (2000) and *J.K. Construction, Inc. v. Western Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 519 S.E.2d 561 (1999) is misplaced. At issue in these cases was sewer impact fees imposed to pay for future sewer improvements. See *Ford*, 341 S.C. 10, 532 S.E.2d 873 (2000) (sewer impact fee imposed to pay for capital improvements to sewer system); *J.K. Construction*, 336 S.C. 162, 519 S.E.2d 561 (1999) (sewer impact fee imposed to pay for sewer improvements). Like the situation in *Brown*, the payers in *Ford* and *J.K. Construction* did not receive a direct benefit in exchange for the fee paid, but instead derived a benefit from how the proceeds of the sewer impact fee would be spent. Here, Appellants challenge an entirely different type of fee than that challenged in *Ford* and *J.K. Construction*. Appellants challenge the City's monthly water and sewer service charges paid by customers in return for the access to and use of drinking water and the disposal of wastewater. Thus, *C.R. Campbell* has no bearing on the issues presented in this appeal.

Even if this Court holds that *C.R. Campbell* applies to municipal water and sewer rates generally, *Brown* cannot apply to charges for water and sewer service to Non-Resident customers. *C.R. Campbell* addresses whether a uniform service charge, as authorized under S.C. Code Ann. § 5-7-30, is valid. *C.R. Campbell*, 325 S.C. 235, 237,

481 S.E.2d 437, 438 (1997). Pursuant to S.C. Code Ann. § 5-7-30, a municipality is empowered to establish “uniform service charges” within its corporate boundaries. S.C. Code Ann. § 5-7-30 does not govern charges outside of the City’s corporate limits. *See Lomax v. Greenville*, 225 S.C. 289, 297, 82 S.E.2d 191, 195 (1954) (“It is apparent that this grant of power for purposes of municipal legislation is ... broad and comprehensive ... limited alone ... by the territorial confines of the municipality authorized to exercise it ....”). A city’s relationship with its non-resident utility customers is governed solely by contract. S.C. Code Ann. § 5-7-60; S.C. Code Ann. § 5-31-1710; S.C. Code Ann. § 5-31-1910; *Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 687 (2001); *Childs v. City of Columbia*, 87 S.C. 566, 571, 70 S.E. 296, 298 (1911). Nothing in the water and sewer service contract between the City and its Non-Resident customers obligates the City to use revenues derived from Non-Resident customers in any particular manner, nor does it subject the City to the dictates of *C.R. Campbell*. *C.R. Campbell* simply has no bearing on charges for water and sewer service to Non-Resident customers. (R. p. 1400); *see* 1989 S.C. A.G. LEXIS 168, \* 7 (July 17, 1989) (opining that “uniform service fee” under S.C. Code Ann. § 5-7-30 not applicable to non-resident utility rates). The City’s revenues derived from Non-Resident 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. (R. p. 931, ¶ 11). This revenue generated by Non-Resident customers more than covers the expenditures Appellants complain of.

**III. THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY’S WATER AND SEWER CHARGES, OR AT LEAST NON-RESIDENT CHARGES, ARE NOT SUBJECT TO S.C. CODE ANN. § 6-1-330(B).**

Appellants assert that the City’s water and sewer charges violate S.C. Code Ann. § 6-1-330, which states:

(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.

(B) 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. If the revenue generated by a fee is five percent or more of the imposing entity's prior fiscal year's total budget, the proceeds of the fee must be kept in a separate and segregated fund from the general fund of the imposing governmental entity.

South Carolina Code Ann. § 6-1-300 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.'" The Service Fee Statute does not apply to the City's water and sewer service charges, or at the very least, does not apply to the City's revenues derived from Non-Resident customers.

**A. The City's monthly water and sewer service rate structure was enacted prior to the Service Fee Statute.**

The Service Fee Statute was enacted as part of Act 138 of the South Carolina General Assembly, 112<sup>th</sup> Session (1997-1998), with an effective date of July 1, 1997, except as otherwise provided. Subsection (A) of the Service Fee Statute 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 statute clearly has prospective effect only.<sup>19</sup>

The City’s Water and Sewer Rate Ordinances were enacted long before the effective dates of the Service Fee Statute. A historical review of the City’s water and sewer ordinances indicates that the City first enacted a water rate ordinance in 1895 and a sewer rate ordinance in 1970. (R. p. 741, ¶ 4, ¶ 8). Subsequent to the Service Fee Statute’s effective dates, the City re-codified its ordinances in 1998; however, the City’s Water and Sewer Rate Ordinances were continued in effect without interruption. ((R. p. 741, ¶ 5, p. 742, ¶ 9, and ¶ 11); (R. p. 1394, Section 1-3). Because the Service Fee Statute has prospective effect, not retroactive, the City’s long-standing Water and Sewer Rate Ordinances are not subject to the limitations found in S.C. Code Ann. § 6-1-330(B). *See, e.g., C.R. Campbell*, 325 S.C. 235, 481 S.E.2d 437, 438 n. 2 (1997) (stating that law enacted after City’s enactment of real estate transfer fee does not apply).

Appellants argue that amendments to the City’s water and sewer ordinances enacted after the effective date of S.C. Code Ann. § 6-1-330 to increase rates constitute a “new service or user fee” subject to the limitations found in S.C. Code Ann. § 6-1-330(B). In 1997, 1998, 2000, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2010, 2011, 2012 and 2013, the City amended its Water and/or Sewer Rate Ordinances to modify certain rates contained

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<sup>19</sup> 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.*, 393 S.C. 571, 579, 720 S.E.2d 462, 466 (2011).

therein. (R. p. 742, ¶ 6, ¶ 10); (R. pp. 1298-1300). S.C. Code Ann. § 6-1-330 does not apply to amendments.

The legislature's choice of words within the Service Fee Statute indicate that amendments to a service fee enacted prior to December 31, 1996 or July 1, 1997 were not intended to be subject to the limitations imposed on newly enacted service or user fees. Section 6-1-330(A) provides that fees "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). No mention is made of 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 polloy"). The General Assembly could have added the word "amend" or "amendment" to this section but chose not to do so.<sup>20</sup> The City's amendments to its long-standing Water and Sewer Rate Ordinances are not subject to the limitations found in S.C. Code Ann. § 6-1-330(B). To hold otherwise would upset the City's reliance on and expectation of stability and continuity in its management and operation of its Utility.

**B. Revenue derived from Non-Resident monthly Utility charges are not subject to S.C. Code Ann. § 6-1-330(B).**

Even if this Court holds that the Service Fee Statute applies to the City's subsequent amendments to its water and sewer ordinances, S.C. Code Ann. § 6-1-330(B) cannot apply to revenues derived from Non-Resident customers. As explained above, Non-Resident

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<sup>20</sup> 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).

water and sewer charges are governed solely by contract. Nothing in the City's contract with Non-Residents limits the City's discretion in how collected Utility charges are used.

A statutory limitation on how a municipality uses revenues derived from Non-Resident customers applies only if the statute expressly applies to fees paid by Non-Resident customers. *See 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."). The Service Fee Statute does not expressly apply to Non-Resident water and sewer customers.

Aside from complete silence in the Service Fee Statute concerning applicability to Non-Resident Utility charges, the language of Service Fee Statute provides further reason to conclude that Non-Resident Utility charges are outside the reach of the Service Fee Statute. Under S.C. Code Ann. § 6-1-330(B), 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 ...." The word "impose" is defined as to "establish as something to be obeyed or complied with; enforce." *Collins English Dictionary - Complete & Unabridged 10th Edition* (HarperCollins Publishers 2013) (available at <http://dictionary.reference.com/browse/impose>). The City cannot impose water and sewer service upon Non-Residents. If Non-Resident wishes to receive water and sewer from the City, he or she submits an application for a water service contract to the City. (*See R. p. 1400*). The contract is voluntary. Moreover, a water and sewer customer is paying for water actually consumed. As a result, the amount of the fee paid by a water and sewer customer can be controlled by the customer. The less water consumed, the less the monthly water charge, or conversely, the more water consumed, the more the monthly water charge. Because a

pre-determined water and sewer charge is not unilaterally imposed on Non-Resident customers, S.C. Code Ann. § 6-1-330(B) does not govern Non-Resident Utility charges.<sup>21</sup>

The Service Fee Statute cannot be used to limit how the City makes use of Utility revenues derived from Non-Resident customers. *See* 2012 S.C. AG LEXIS 79 (S.C. A.G. 2012) (opining that the Service Fee Statute applies to fees imposed within the city limits, but not for fees imposed outside the city limits). Consequently, the City may use its water and sewer revenues derived from Non-Resident water and sewer charges however it chooses, including those expenditures challenged by Appellants. Revenues derived from Non-Resident customers more than cover the expenditures that Appellants complain of.

**IV. TO THE EXTENT THIS COURT ADDRESSES WHETHER THE CITY'S CHALLENGED USES OF REVENUE DERIVED FROM MONTHLY WATER AND SEWER CHARGES VIOLATE THE SERVICE FEE STATUTE, THE CITY'S USE OF SUCH REVENUES IS LAWFUL.**

South Carolina Code Ann. § 6-1-330(B) states that “the revenue generated 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 services or program for which the fee was paid.” Appellants argue that S.C. Code Ann. § 6-1-330(B) “clearly prohibits” the City of Columbia from using water and sewer revenue for anything other than “the operation, repair, upgrade, maintenance and/or expansion of the water and sewer system of the City.”

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<sup>21</sup> No one is commanded or required to purchase water and sewer from the City. *See Ruggles v. Padgett*, 240 S.C. 494, 510, 126 S.E.2d 553, 561 (1962) (holding that a water charge is a rent or charge for services rendered, collected merely as compensation by those who choose to receive and use the water). Further, through a private contract with individual customers, the City sells a retail commodity. (R. p. 733, line 10 – p. 734, line 13); *see 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); *Green*, 149 S.C. 234, 264, 147 S.E. 346, 356-57 (1929). Water and sewer service is a voluntary contractual sale entered for the benefit of the parties. *See Peoples v. South Carolina Power Co.*, 166 S.C. 150, 156, 164 S.E. 605, 607 (1932) (“... parties contract for their own benefit, and not for that of others not parties to the contract ...”). Subsection (B) of the Service Fee Statute applies to public services, not the sale of a commodity under the terms of a contract, utilizing the City’s property, i.e., water and sewer infrastructure, to access such commodity. Under the facts of this case, subsection (B) of the Service Fee Statute arguably does not apply to monthly water and sewer charges paid by Non-Residents or Residents.

Appellants' Brief, p. 12. In particular, Appellants argue that: 1) the City's expenditures from its Utility enterprise fund for economic development functions and the printing of Utility-specific public educational material violates S.C. Code Ann. § 6-1-330(B);<sup>22</sup> and 2) the City's transfer of up to \$4.5 million dollars in Utility profits from its Utility enterprise fund to its general fund to defray costs of ordinary government operations violates S.C. Code Ann. § 6-1-330(B). The circuit court correctly ruled that these uses do not run afoul of S.C. Code Ann. § 6-1-330(B).

**A. The City's use of Utility revenues to fund a specific public information expense and to fund economic development activities is related to the provision of water and sewer service, and therefore, lawful under the Service Fee Statute.**

S.C. Code Ann. § 6-1-330(B) states in relevant part 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," (emphasis added). According to its plain and ordinary meaning, the word "related" is commonly defined as "connected by reason of an established or discoverable relation," with "relation" defined as an "aspect or quality (as resemblance) that connects two or more things or parts as being or belonging or working together or as being of the same kind."

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<sup>22</sup> Appellants' Brief, on p. 24, states that Appellants are challenging the City's expenditures for the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, various Development Corporations, and the Economic Development Contingency Fund (which is the same as what the City describes as the Economic Development Special Project Fund). Yet on page 19, Appellants seem to challenge approximately \$7.5 million dollars in expenditures as identified in a Black & Veatch Cost of Service Study as budgeted expenditures from the water and sewer enterprise fund to pay for costs that the City deemed appropriate, which Black and Veatch opined otherwise. (R. 588). The \$7.5 million dollars identified by Black & Veatch include expenditures for the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, various Development Corporations, and the Economic Development Contingency Fund; but it also includes expenditures that Appellants did not raise in their Motion to Reconsider. To the extent that Appellants are now challenging the categories of expenditures identified by Black & Veatch on R. p. 588, other than those for the Office of Business Opportunities, the Economic Development Department, the Public Relations Department, the Development Corporations, and the Economic Development Special Project Fund, they are unpreserved for appellate review. *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 554, 709 S.E.2d 99, 111 (Ct. App. 2011).

See Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/related?show=0&t=1369940142> and <http://www.merriam-webster.com/dictionary/relation>. The legislature could have chosen restrictive language such as “solely” or “exclusively;” instead, the word “related” gives a measure of discretion to the City in determining how it may use its Utility revenues. See *Thompson v. County of Horry*, 294 S.C. 81, 84, 362 S.E.2d 646, 648 (Ct. App. 1987) (explaining that legislature’s choice of less restrictive language shows legislative intent to confer a measure of discretion in how revenues can be spent). The circuit court did not err in ruling that the City’s expenditures to print public educational materials about clean water and sewer overflows, and to fund its economic development activities,<sup>23</sup> are indeed related to the provision of water and sewer service.

Appellants challenge the City’s charge to its Utility Enterprise Fund for expenses of printing material distributed during National Water Week to educate the public about the City’s water quality test results for its drinking water, and also printing fliers to educate the public on how to help reduce sewer overflows. (R. p. 534, line 25 – p. 536, line 7). Clearly, informing the public about the performance and functioning of the Utility is related to the provision of water and sewer service, and therefore, is lawful under S.C. Code Ann. § 6-1-330(B).

Appellants challenge the City’s charge to its Utility Enterprise Fund for its economic development activities. A water and sewer utility has been long recognized in this State as having an important role in economic development. *Green v. City of Rock*

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<sup>23</sup> Appellants challenge the general category of economic development-related expenditures, not particular expenditures within this category, with the exception of expenditures for the City Center Partnership (business improvement district). (See R. p. 378, line 7 – p. 54, line 7).

*Hill*, 149 S.C. 234, 264, 147 S.E. 346, 357 (1929); *Ancrum v. Camden Water*, 82 S.C. 284, 295, 64 S.E. 151, 155 (1909); *Babb v. Green*, 222 S.C. 534, 73 S.E.2d 699, 1952 LEXIS 54, 14 (1952). A water and sewer utility “lower[s] the rate of insurance, increase[es] the general sense of security, and therefore the general happiness, diminish[es] the risk of numbers of persons being thrown out of employment, and generally ... giv[es] steadiness and confidence to the life and the enterprises of a city.” *Green*, at 264-65, 357. A municipal water and sewer utility serves the needs of industry “upon which the prosperity of so many modern urban communities vitally depends.” *Id.* The City’s Utility is an engine of economic development that attracts businesses to the Midlands region. (R. p. 633, lines 5-7); (R. p. 634, lines 9-14); (R. p. 636, lines 10-13); (R. p. 489, lines 23-25). Adequate water supply is an important economic development tool. (R. p. 514, lines 17-19). The City’s economic development activities serve to capitalize on the important role its Utility plays in the local economy.

The undisputed evidence in this case shows that the City’s economic development office and economic development special project fund serves to promote economic development in the region. (R. p. 536, line 19 – p. 538, line 1); (R. p. 559, line 15 – p. 560, line 8). The goal of the City’s economic development office and its designated economic development special project fund<sup>24</sup> is to attract new businesses to the region and encourage expansion of existing business in order to grow the Utility’s customer base. (*Id.*) In the process, the Midlands region benefits by strengthening the economy. (See R. p. 634, lines

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<sup>24</sup> Appellants single out the City’s use of \$70,000.00 from its economic development special projects fund for the downtown business improvement district, more popularly known as the City Center Partnership, as violative of S.C. Code Ann. § 6-1-330(B). (R. p. 1320). The City Center Partnership is a business improvement district that works to enhance new development or redevelopment of Main Street. (R. p. 540, line 10 – p. 541, line 5). The City Center Partnership was instrumental in the development of the Meridian Building and Number One Main Street Building, both of which are significant water and sewer users. (R. p. 540, line 10 – p. 541, line 5).

4-14). The City's use of water and sewer revenues for its economic development office and economic development special projects are related to the provision of water and sewer service, and therefore, are lawful under S.C. Code Ann. § 6-1-330(B).

The undisputed evidence in this case shows that the City's Office of Business Opportunities builds the capacity of minority businesses being able to bid on and compete for utility construction projects. (R. 523, lines 7-22). Coaching small businesses how to bid on water and sewer projects increases the number of bids received, which improves bidding competitiveness, thereby lowering the City's water and sewer construction costs. (R. p. 523, line 7 – p. 524, line 9). The City's Office of Business Opportunities is related to the provision of water and sewer service, and therefore, the City's expenditures from its water and sewer revenues to fund this office are lawful under the Service Fee Statute..

The City funds four development corporations from its water and sewer revenues. "The Columbia Development Corporation assists the City in promoting and improving the growth and development of business concerns through the strengthening of the economic and residential base of the community." (R. p. 1318). The Columbia Development Corporation was instrumental in transforming the Vista, a declining warehouse district, into a vibrant entertainment district. (R. p. 538, lines 6-23). The Eau Claire Development Corporation redevelops neighborhoods and commercial corridors in North Columbia. (R. p. 1318); (R. p. 538, line 24 – p. 539, line 3). Both the Columbia Housing Development Corporation and the Development Corporation assist the City in the development of affordable housing and to promote growth in the residential base of the City. (R. p. 1318). These latter two corporations are important to economic development because "the appearance of neighborhoods and affordable housing is a major driver when people look

to relocate a business or to enlarge their business in the Columbia area.” (Gantt Dep. p. 85, lines 6-18). The City’s use of water and sewer revenues to fund its development corporations is related to the provision of water and sewer service, and therefore, is lawful under S.C. Code Ann. § 6-1-330(B).

Appellants argued below that construing the Service Fee Statute to allow use of Utility revenues to pay for the City’s economic development activities is an overly broad reading that would ultimately result in the City being able to fund virtually all of its operations, such as fire, police, parks, recreations, streets, museums, etc., out of water and sewer fee revenues because those expenditures enhance the attractiveness and prosperity of the City. Appellants’ argument misses the point that the City’s above-described activities are related to water and sewer service not because they generally make the City a better place to live, but because they benefit the Utility by strengthening and increasing its residential and commercial customer base, and in the case of the office of business opportunities, by lowering the costs of water and sewer construction through enhanced business competition. The City’s use of Utility revenues for economic development purposes has a clear and rational connection to its Utility. Appellants impermissibly ask this Court to strictly construe the word “related” to mean only expenditures for operation, maintenance and improvement of the Utility, in contravention of article VIII, section 17 of the South Carolina Constitution, which mandates that “all laws concerning local government shall be liberally construed in their favor.”

In addition, Appellants rely heavily on a report by the engineering firm Black & Veatch prepared in 2007 that examined the City’s use of Utility revenues. (R. pp. 577-592). In this report, Black & Veatch analyzed two categories of Utility expenditures: 1) a

charge to the Utility for the estimated costs of support services provided by other City departments to the Utility, such as legal services, human resources and accounting (described as "indirect costs"); and 2) charges to the Utility for City functions that directly and measurably serve or benefit the Utility (described as "direct costs"). (R. p. 577). At issue here is the recommendation from Black & Veatch that direct costs totaling \$7.5 million dollars charged to the Utility should not be charged to the Utility because, in Black & Veatch's opinion, the services paid for by the Utility bore no "direct cost causation or benefit" to the Utility. Included within this \$7.5 million dollar figure is the cost of the City's economic development activities and the public education materials that Appellants have challenged.<sup>25</sup> According to Appellants, this recommendation conclusively establishes that the City's use of Utility revenue for the economic development activities and public education materials described above violates the Service Fee Statute; however, the Black & Veatch recommendation does nothing of the sort. 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 S.C. 524, 528, 402 S.E.2d 189, 191 (Ct. App. 1991) (holding that County Council is not bound to follow recommendations

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<sup>25</sup> Appellants' Brief quotes from this Black & Veatch Cost of Service Study (R. pp. 577-592) its recommendation to reduce the amount from \$3.2 million to \$2.27 million that the City charged to the Utility for administrative services provided to the Utility by other City departments, such as its legal, human resources, and accounting offices, which City chose to do. Appellants' Brief, p. 19; (R. p. 627, lines 2-16). During the summary judgment hearing before Judge Cooper, Appellants stated that they were not complaining of these expenditures. (R. p. 397, lines 16-17). A party is bound by the statements of its counsel. See *Smith v. Pearson*, 210 S.C. 524, 530, 43 S.E.2d 479, 482 (1947). To the extent Appellants are now attempting to challenge the City's use of \$2.27 million in Utility revenues to pay for administrative support of the Utility, it is unpreserved for appellate review because Appellants failed to raise this issue in their Motion to Reconsider. (R. pp. 131-133); *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 554, 709 S.E.2d 99, 111 (Ct. App. 2011).

from its boards and committees). Black & Veatch took a very narrow view of direct causation or benefit, so narrow that it saw the costs of collecting outstanding water and sewer bills by the City Finance Department, the cost to maintain fire hydrants,<sup>26</sup> and the cost of GIS mapping of the Utility's water and sewer lines, to lack "direct causation or benefit" to the Utility. (R. p. 579). Black & Veatch's recommendations are not determinative of the issue here.

**B. The City's use of a portion of its Utility profits to defray expenses of ordinary government operations does not violate the Service Fee Statute.**

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.*

Thus, the legislature is presumed to know that water and sewer charges for monthly service are unique in comparison to many other local government fees. Article VIII, § 16 of the South Carolina Constitution entitles municipalities to operate a water and sewer utility as a business enterprise like any other public utility.<sup>27</sup> *Sossamon v. Greater Gaffney*

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<sup>26</sup> The former City Manager testified that "It's the water utility's responsibility to make sure that we have operating fire hydrants on our water system throughout our service area. That's not a fire services. That's a utility service." (R. p. 497, line 22 – p. 498, line 4).

<sup>27</sup> Appellants claim that it was error for the circuit court to accept that the City fiscally manages its Utility in a proprietary manner because *Calcaterra v. City of Columbia*, 315 S.C. 196, 432 S.E.2d 498 (1993) holds that "the furnishing of water to residents and non-residents is a governmental function, and the State makes no distinction between proprietary and governmental functions of municipalities." While true that many aspects of municipal provision of water and sewer service are deemed a governmental function, "there can

*Metro Utilities Area*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960); *Simons*, 181 S.C. 353, 357, 187 S.E. 545, 546 (1936); *Green*, 149 S.C. 234, 264, 147 S.E. 346, 356-57 (1929). Like any other public utility, a municipality may charge a rate for water and sewer service that generates a profit. *Sossamon*, 236 S.C. 173, 182, 113 S.E.2d 534, 538 (1960); *Simons*, 181 S.C. 353, 358, 187 S.E. 545, 547 (1936); *Green*, 149 S.C. 234, 264, 147 S.E.2d 346, 357 (1929). "Profit" is defined as "excess of revenues over expenditures" or "gain," meaning that "profit" is monies remaining after the City's budgeted expenditures are met. *Black's Law Dictionary*, Pocket Edition, p. 505 (5<sup>th</sup> ed. 1979).

Any profit or surplus remaining after Utility expenses are paid or obligated may be used for other purposes. See "*Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E. 2d 684, 687, fn. 9 (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..."); *Cox v. Bates*, 237 S.C. 198, 215, 116 S.E.2d 828, 835 (1960) (holding that "where a surplus remains after payment of appropriations, it may be appropriated to other purposes."); *Welling v. Clinton Newberry Natural Gas Authority*, 221 S.C. 417, 427, 71 S.E.2d 7, 11 (1952) (noting that remaining revenues of a joint municipal utility after expenses and debt service paid was to be distributed to participating municipalities); *Parker v. Bates*, 216 S.C. 52, 60, 56 S.E.2d 723, 726 (1949) (stating that "where a surplus remains after the accomplishment of the purpose for which an appropriation is made, it may be diverted to other causes.")<sup>28</sup> The

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be no doubt that in the fiscal aspect thereof the operation and maintenance of such utility partake largely of the nature of a commercial or business enterprise." *Green*, 149 S.C. 234, 264, 147 S.E. 346, 356-357 (1929). In fact, the City manages its Utility Enterprise Fund in a proprietary manner consistent with Generally Accepted Accounting Principles set forth by the Governmental Accounting Standards Board. (R. p. 929).  
<sup>28</sup> See also 1968 S.C. A.G. LEXIS 158 (S.C. A.G. 1968); 1962 S.C. AG LEXIS 530 (S.C. A.G. 1962); AM JUR 2D *Municipal Corp., Counties, Other Political Subdivision* § 515 ("Net revenue derived from a municipally owned utility belongs to the municipality and may be used for any municipal purpose.");

City's power to use its Utility profits in any manner within its sound discretion is fairly implied under its authority to make a profit from its Utility. *See* S.C. Const. art. VIII, § 17 ("Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.").

As already noted, the key phrase at issue within Section 6-1-330(B) is its directive that "the revenue generated 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 services or program for which the fee was paid." Notably, the plain language of S.C. Code Ann. § 6-1-330(B) does not expressly prohibit the City from using surplus Utility revenue for some other legitimate purpose after its Utility costs are met.<sup>29</sup> In the absence of any language within S.C. Code Ann. § 6-1-330(B) prohibiting use of any surplus revenues or profit remaining after the costs and obligations of the Utility are paid, this subsection should be construed as not prohibiting the City to use \$4.5 million of its profit to offset property taxes. *See 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."); *see also 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

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MCQUILLIN, *Municipal Corporations*, § 35:59 ("A city is entitled to a reasonable profit and it may even use that profit for other valid municipal uses.").

<sup>29</sup> In contrast, other provisions within Act 138, which enacted the Service Fee Statute and other provisions relating to local government taxes and fees, used restrictive language. For example, under provisions 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 & § 6-1-730 (emphasis added).

“exclusively” in the “unincorporated areas” of the county in which the proceeds of the tax are collected.”).

Appellants concede that the City is entitled to a profit from its Utility,<sup>30</sup> but assert that the Service Fee Statute essentially abrogates the City’s right to use that profit for other purposes, thereby requiring that all revenues, including profits, be used to pay the direct costs of the Utility. 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 its profit be extinguished. The Service Fee Statute does not prohibit the City from realizing a profit from its Utility and applying that profit in a manner within its sound discretion as part of its budgeting process. To construe the Service Fee Statute as extinguishing the City’s right to make a profit from its Utility contravenes a municipality’s right to operate a utility under art. VIII, § 16 of the South Carolina Constitution. *Sossamon v. Greater Gaffney Metropolitan Utilities Area*, 236 S.C. 173, 184, 113 S.E.2d 534, 539 (1960).

In addition, to hold otherwise would impermissibly intrude upon the City’s legislative discretion to establish a budget for its Utility and within that budget, decide what improvements will be funded. A municipality is afforded broad discretion in how it chooses to operate its water and sewer utility. *See 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 ....”); *Sossamon*, 236 S.C. 173, 181, 113 S.E.2d 534, 538 (1960) (stating that cities have right to

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<sup>30</sup> (See R. p. 334, lines 17-20) (“The defendants argue in their brief that they can make a profit and do with it as they see fit. And we don’t argue that they can’t make a profit. We don’t have a problem with that.”).

determine how to use their surplus water). The City has the discretion to determine whether its utility is in good repair and working order and what expenditures it will make to keep its system in good repair and working order. *Green v. City of Rock Hill*, 149 S.C. 234, 262, 147 S.E.2d 346, 356 (1929); *Werts v. Feagles*, 83 S.C. 128, 135, 65 S.E. 226, 229 (1909).

Moreover, "it is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). All statutes covering the same subject must be given effect, if it can be done by any reasonable construction. *Hodges v. Ratney*, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000). The City's statutory authority to charge utility rates, along with the Revenue Bond Refinancing Act of 1937 and the Revenue Bond Act for Utilities found within Title 6 must be read together in *pari materia* with the Service Fee Statute in order to determine whether the City's transfer is unlawful.

Pursuant to S.C. Code Ann. § 5-31-670, "any 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." Under S.C. Code Ann. § 5-7-60 and § 5-31-1910, the City by contract may provide service to non-residents, and in doing so, is obligated "to sell its surplus water for the sole benefit of the city at the highest price obtainable." *Childs v. City of Columbia*, 87 S.C. 566, 571, 70 S.E. 296, 298 (1911). Under the Revenue Bond Acts, a municipality is authorized to issue revenue bonds for the acquisition, construction, improvement, enlargement, and

repair of its water and sewer utility. S.C. Code Ann. § 6-21-190; S.C. Code Ann. § 6-17-30.

Municipalities may pledge its water and sewer revenues to secure such bond issues, S.C. Code Ann. § 6-17-30; S.C. Code Ann. § 6-21-340. Water and sewer rates shall be sufficient to provide for the payment of the interest upon and the principal of all such bonds, a bond and interest redemption fund, 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; S.C. Code Ann. § 6-21-440; S.C. Code Ann. § 6-17-180(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]."<sup>31</sup> 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 be liberally construed." S.C. Code Ann. § 6-21-570.

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<sup>31</sup> Appellants argue that no evidence exists that the City has complied with the requirements of S.C. Code Ann. § 6-1-440 that must first be met before the City may use any surplus funds in a manner deemed by the City Council to be in the best interest of the City. Appellants' Brief, pp. 21-23. Contrary to Appellants' contention, the City's Bond Ordinance established the various funding obligations required under S.C. Code Ann. § 6-21-440, and this ordinance was entered into evidence. (R. pp. 1343-1349). The City's Resolution states that the Utility has "produced annual revenues in excess of the sum of the expenses of operating and maintaining of the System and debt service" and further states that the City has maintained "rates and charges ... sufficient to allow the City to meet the financial covenants of its Bond Ordinances." (R. pp. 569-571). The former City Manager testified as to funds set aside for debt service, operations and maintenance, and reserves, how the City's bondholders annually scrutinize the Utility's finances, and how the City retains surplus funds. (R. p. 515, line 24 - p. 518, line 4). The City's budget director testified that the Utility almost always generates surplus funds after expenditures are paid or obligated. (R. p. 615, lines 5-18). The Rate Study shows the City's funds for existing and future debt service and depreciation. (R. pp. 1386, 1389-1390). 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).

Pursuant to these statutes, the City has adopted a revenue bond ordinance ("Bond Ordinance") which authorized the issuance of water and sewer revenue bonds with the bond payments paid solely from net Utility revenues remaining after payment for operation and maintenance of the system was made.<sup>32</sup> (R. pp. 1343-1349). Pursuant to § 6.7 of the City's General Bond Ordinance, after fulfilling its obligation to pay for operation and maintenance of the system, to pay principal and interest on outstanding bonds, and to fund various reserve funds, the Council may apply the net water and sewer revenues as Council determines from time to time "to be in the best interest of the City." (R. p. 1348). The City Council adopted a resolution ("Resolution")<sup>33</sup> establishing a policy regarding use of Utility revenues left after these obligations were met. (R. pp. 569-571).

In reading these statutes together with the Service Fee Statute, it is clear that municipalities have a specific right to charge rates for water and sewer service that includes a profit. The City has outstanding revenue bonds and has, through its Bond Ordinance and Resolution, exercised its legislative authority to apply surplus water and sewer revenues "as Council determines from time to time to be in the best interest of the City." S.C. Code Ann. § 6-21-440; (R. p. 1348, § 6.7); (R. pp. 569-571). Thus, under the facts of this case,

<sup>32</sup> In subsequent years, including the time period relevant to this case, the City supplemented the 1993 ordinance to authorize additional bond issuances. See e.g. (R. pp. 1367-1377).

<sup>33</sup> The Resolution authorized transfer of monies from its water and sewer enterprise fund to its general fund so long as such transfer did not impair the City's ability to: 1) operate and maintain the utility in a "sound and businesslike manner," 2) satisfy the covenants of its Bond Ordinance, 3) maintain all financial and capital reserves at their required levels, and 4) maintain the capacity to fund capital improvements without unduly relying on bond issuances. (R. pp. 569-571). Additionally, the Resolution prohibited transfer of surplus revenues in amounts that would result in uncompetitive rate increases, or reduction in creditworthiness in the City's general obligation bonds. (*Id.*) Lastly, the Resolution limited any transfer to no more than 50% of net earnings of the utility or one-twelfth of the City's total general fund expenditures, whichever is less. (*Id.*) In 2013, the City repealed the Resolution and enacted in its place a new policy. The 2013 Resolution, enacted over a year after this litigation was commenced, is not at issue.

the City is authorized to use surplus water and sewer revenues in a manner it believes to be best for the City, and the Service Fee Statute does nothing to interfere with this discretion.

**V. THE CIRCUIT COURT DID NOT VIOLATE APPELLANTS' DUE PROCESS RIGHTS**

Appellants argue in their Brief, p. 27, that the circuit court, in offering to decide their motion for class certification by reviewing proposed orders rather than hearing oral argument, denied their due process right to oral argument during a hearing. A hearing was in fact scheduled on June 5, 2012 to hear both Appellants' Motion for Class Certification and the City's Motion to Dismiss. (R. p. 287, line 25 – p. 290). Prior to the hearing, both parties submitted memoranda supporting their respective positions on class certification. (R. pp. 196-208); (R. pp. 190-195). After hearing arguments on the City's Motion to Dismiss, the Circuit Court Judge offered to hear oral argument on Appellants' Motion for Class Certification but suggested instead that the parties simply submit proposed orders. (R. p. 288, line 8 – p. 289, line 24) (note that the Court Reporter misidentified counsel -- what is attributed as Mr. Lydon's statements, is actually those of Mr. Lee, counsel for Appellants). The Circuit Court Judge also offered to reschedule oral argument for another day. (R. p. 289, lines 18-24). Appellants' counsel seemingly agreed to submit proposed orders. (R. p. 288, line 24 – p. 289, line 17). On June 7, 2012, the City's counsel sent its proposed order to the circuit court and opposing counsel. (R. p. 1407). On June 8, 2012, Appellants' counsel submitted their proposed order, along with copies of their previously filed memoranda in support of class certification. (R. pp. 1414-1415). Although Appellants' cover letter to their proposed order mentioned the possibility of a subsequent hearing, they took no further action to follow-up with the court to make sure that a hearing was scheduled. Another hearing was not scheduled. On June 26, 2012, the circuit court's

order denying class certification was entered. In response to Appellants' motion to reconsider the court's denial of class certification, the class certification prerequisites and other issues was given a full hearing by the court. (R. pp. 293-319).

There is no due process violation here. *See Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) ("The fundamental requirements of due process ... include notice, an opportunity to be heard in a meaningful way, and judicial review. Further, due process is flexible and calls for such procedural protections as the particular situation demands."); *FCC v. WJR, Goodwill Station, Inc.*, 337 U.S. 265, 276 (1949) (holding that procedural due process does not require oral argument in all cases). The lack of another hearing was not prejudicial to the Appellants; at best, it was harmless error. An error not shown to be prejudicial does not constitute grounds for reversal. *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997); Rule 61, SCRCP; *see also* 56 AM JUR 2D *Motions, Rules, and Orders* § 32 ("Unless a hearing on a motion is specifically required by court rule, failure to conduct a hearing on that motion ordinarily will not constitute reversible error absent abuse of discretion; there is no abuse of discretion when the complaining party can point to no single, definable aspect of its position which could not have been adequately presented by a written submission.").

#### **VI. THE CIRCUIT COURT DID NOT ERR IN DENYING CLASS CERTIFICATION.**

Review of the circuit court's order denying class certification is only necessary if Appellants prevail on the substantive merits of this appeal. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003). Pursuant to Rule 23(a), SCRCP, the court may certify a class of plaintiffs only if the court finds: 1) the class must be "so numerous that joinder of all members is impracticable;" 2) there must be "questions of law or fact

common to the class;" 3) the claims or defenses of the representative parties must be "typical of the claims or defenses of the class;" 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and 5) "in cases in which the relief primarily sought is not injunctive or declaratory ... the amount in controversy exceeds one hundred dollars for each member of the class." "Proponents of class certification bear the burden of proving five prerequisites under South Carolina law." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 20, 577 S.E.2d 190, 200 (2003). "In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied." *Id.* at 21, 200. Failure to establish one prerequisite is fatal to class certification. *Id.*

Appellants take issue with every aspect of the circuit court's denial of class certification. Because failure to withstand rigorous analysis of just one of the five prerequisites for class certification will defeat class certification, the City argues that Appellants fail to meet the adequacy requirement. To meet the adequacy requirement of Rule 23(a)(4), SCRPC, "Appellants must demonstrate they have no interest antagonistic to or in conflict with the interests of the unnamed members of the class such that they are fairly and adequately able to protect the interests of the purported class." *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). A named plaintiff who has economic interests that are antagonistic or adverse to those of the class fails to meet this adequacy requirement. *Id.* Where a named Plaintiff seeks relief that conflicts with the interests of the class, class certification is precluded. *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 337 (4th Cir. 1998).

Mr. Letts, a named Plaintiff, is a Non-Resident customer of the Utility. Mr. Cumberland, a named Plaintiff, is a Resident customer of the Utility. Appellants moved to certify a class comprised of all water and sewer customers of the City, both Resident and Non-Resident, over the three years prior to the initiation of their suit. The relief sought by Appellants is to require the City to pay into a common fund an amount representing at a minimum, the total amount of Utility revenues transferred into the City's general fund for the past three years, which amounts to \$13.5 million dollars.<sup>34</sup> If the challenged economic development and public information expenses are included, at a maximum, Appellants seek to require the City to pay into a common fund up to approximately \$22 million dollars.<sup>35</sup> In order to comply with any such order granting this remedy, the City would likely be forced to significantly raise property taxes.<sup>36</sup> A common fund of \$22 million dollars would require the staggering burden of an additional tax levy of 44 mils upon City taxpayers. (*See* R. p. 482, lines 14-23) (stating that one mil equals about \$500,000.00).

In addition, Appellants seek to enjoin future transfers of \$4.5 million dollars per fiscal year from its water and sewer enterprise fund to the general fund, and from using approximately \$2.7 million dollars in Utility revenues for economic development functions. If the City was enjoined from future transfers of \$4.5 million from its enterprise fund to its general fund, the City would be required to increase the tax burden upon City residents by 9 mils in order to fill the funding gap left by the City's inability to supplement its general fund with Utility profits. (R. p. 482, lines 14-20). To fund the City's economic

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<sup>34</sup> (*See* R. p. 337, line 11 – p. 338, line 12).

<sup>35</sup> *See* footnote 1.

<sup>36</sup> (*See* R. p. 608, line 3-11). The City's Utility debt service and debt service reserve accounts maintained pursuant to its Bond Ordinance cannot be used for any other purpose, thus, cannot be used to create a common fund. (*See* R. pp. 1344-1348).

development activities from the general fund would add yet another 5.4 mils. (See R. p. 482, lines 14-23) (stating that one mil equals about \$500,000.00). A prospective injunction would therefore add 14.4 mils to the tax bills of Resident customers.

Undoubtedly, the economic interests of City Residents would be adversely affected by Appellants' requested relief. The interests of Mr. Letts, as a Non-Resident customer who does not pay City property taxes, conflicts with Resident class members, who would be forced to bear a significant tax burden in order to achieve the outcome that Mr. Letts seeks.<sup>37</sup>

Similarly, the interests of Appellant Cumberland, as a Resident Utility customer, are adverse to the interests of Non-Resident Utility Customers. Instead of raising property taxes to comply with any order creating a common fund, the City could significantly raise Non-Resident sewer rates while either minimally raising Resident rates or leaving Resident rates unchanged.<sup>38</sup> Should this Court enjoin the City from using Utility revenues derived from Resident customers, Non-Resident customers would shoulder the entire burden of paying for economic development expenditures through increased rates. Under these scenarios, Mr. Cumberland's economic interests are adverse to Non-Resident Utility customers who would bear the brunt of complying with the remedy Appellants seek. For these reasons, Appellants fail to meet the adequacy prerequisite of Rule 23(a), SCRC.P. *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 337 (4th Cir. 1998); *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990).

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<sup>37</sup> Although S.C. Code Ann. § 6-1-320(A)(1) limits local governments' ability to increase its operating millage, there is an exception for compliance with a court order. S.C. Code Ann. § 6-1-320(B)(3).

<sup>38</sup> Pursuant to 1971 S.C. Acts 474, § 1, the City is prohibited from raising rates for water service to Non-Resident customers more than double that of Residents' rates. It does not place this same limitation upon Non-Resident sewer rates.

**VII. THE CIRCUIT COURT DID NOT ERR IN DISMISSING ON SUMMARY JUDGMENT MR. LETTS AND MR. AZAR FOR LACK OF STANDING BECAUSE NO FINAL ORDER HAD BEEN ENTERED ARISING FROM A PREVIOUS HEARING ON THE CITY'S RULE 12(b)(1) MOTION TO DISMISS FOR LACK OF STANDING.**

On November 14, 2011, the City moved to dismiss Messrs. Azar and Cumberland for lack of standing pursuant to Rule 12(b)(1), SCRCP. (R. pp. 89-95). A Second Amended Complaint was filed on January 17, 2012 to add Mr. Letts as a plaintiff, individually and as a class representative. On May 17, 2012, the City's Rule 12(b)(1) Motion was amended and supplemented to include arguments that Mr. Letts lacked standing. (R. pp. 111-112). During a hearing held on June 5, 2012, Circuit Court Judge Kinard orally denied this motion. (R. p. 290, 7-13). After approximately one month expired without receipt of an order, the City followed up with the Circuit Court Judge requesting an order. (R. p. 1427). The City received no response, and a written order was never entered.<sup>39</sup>

In an effort to assure that a ruling on the issue of the Appellants' standing would be forthcoming, the City included lack of standing of Messrs. Azar and Letts<sup>40</sup> as part of its Motion for Summary Judgment. No written order had been entered as of the date of the summary judgment hearing held over a year after the City originally argued its Rule 12(b)(1) Motion before Judge Kinard. In ruling that Messrs. Azar and Letts lacked standing, Judge Cooper did not impermissibly overrule the decision of another circuit court judge, as Appellants argue. Judge Cooper was not bound by a prior verbal order by Judge

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<sup>39</sup> Even if Judge Kinard had entered a written order denying the City's Motion to Dismiss for lack of standing, the denial of a Motion to Dismiss "does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." *Woodard v. Westvaco Corp.*, 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995) (stating that "an order *denying* a motion to dismiss for lack of subject matter jurisdiction does not finally determine anything" and further explaining that such motion can be raised again at a later stage in the proceedings) (emphasis in original).

<sup>40</sup> The City withdrew its previous assertions that Mr. Cumberland lacked standing to bring his breach of contract claim.

Kinard because Judge Kinard never did reduce his ruling to writing and enter it for recordation by the Clerk of Court. *Hilton Head Resort Four Seasons Ctr. Horizontal Property Regime Council of Co-Owners v. Resort Inv. Corp.*, 311 S.C. 394, 397, 429 S.E.2d 459, 461-462 (Ct. App. 1993).

"No order is final until it is written and entered." *First Union Nat'l Bank v. Hitman*, 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991), *citing to* Rule 58(a), SCRPC. The written order is the trial judge's final order and as such constitutes the final judgment of the court. *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001). A judgment is not effective until an order is entered by the clerk of court. Rule 58(a), SCRPC. An oral order of the court is not final and binding until reduced to writing, signed by the judge, and delivered for recordation. *Brailsford v. Brailsford*, 380 S.C. 443, 452, 669 S.E.2d 342, 346 (Ct. App. 2008). Thus, Judge Kinard's oral ruling could not have become the law of the case.

Appellants raise the novel argument that a hearing transcript constitutes a written order, and that the City should have expeditiously obtained a copy of the transcript of the hearing before Judge Kinard where he denied the City's Motion to Dismiss, and moved for reconsideration of the circuit court's verbal ruling as reduced to writing in the transcript. Appellants' Brief, p. 41. Then, Appellants argue, the City should have appealed Judge Kinard's decision to this Court. Because the City did not do these things, Judge Kinard's verbal ruling that the Appellants have standing is the law of the case, Appellants assert. Therefore, Appellants contend that the City was prohibited from raising the standing issue in the subsequent summary judgment hearing before Judge Cooper, and from raising it here. *Id.* at p. 42. Appellants cite no law for this proposition, nor can they, for there is no

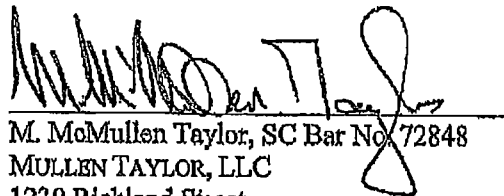
Rule of Civil Procedure or Appellate Practice, and no law that supports their argument.

This Court should reject Appellants' argument as lacking any foundation in the law.

### CONCLUSION

For the foregoing reasons, the City respectfully asks this Court to uphold the Order Granting Summary Judgment, and the Order Denying Class Certification.

Respectfully submitted,



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Oct. 27, 2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Frank J. Cumberland, Jr., Jennifer B.  
Gardner and Michael R. Ugino,

Plaintiffs,

v.

City of Columbia,

Defendant.

(Our File No.: 5253.00415)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2011-CP-40-6705

**DEFENDANT'S MEMORANDUM IN  
IN SUPPORT OF MOTION TO  
STRIKE**

RICHLAND COUNTY  
FILED  
2016 SEP 15 PM 12:28  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

**INTRODUCTION**

Defendant City of Columbia submits this memorandum in support of its motion to strike certain portions of Plaintiffs' Third Amended Complaint.

Plaintiffs moved to amend their Second Amended Complaint following the remand of this action from the supreme court. The supreme court had affirmed the dismissal of two of the original Plaintiffs – Azar and Letts – and the supreme court also affirmed the circuit court's denial of class certification.

The Plaintiffs sought to “add additional parties to make the record clear on review and to make sure that all parties are properly before the court . . . .” (Plaintiffs' Memorandum in Support of Plaintiff's Motion to Amend). Plaintiffs also stated that they did not seek to revisit the issue of class certification because the circuit court's order denying the class created a “defacto class action.” (*Id.*)

This Court granted the Plaintiffs' motion to amend, and Plaintiffs filed their Third Amended Complaint on May 6, 2016. Other than adding the two new Plaintiffs, the Third Amended Complaint is identical in all respects to the preceding Complaint. The

Third Amended Complaint does not delete the dismissed Plaintiffs (Azar and Letts), and the caption states that it is a class action pursuant to SCRCP 23, and is brought on behalf of the Plaintiffs individually and as class representatives. All of the allegations concerning class status remain. For example, Paragraph 10 states that the Plaintiffs bring this case as a class action on behalf of all past and current water and sewer customers. Many other paragraphs throughout the Third Amended Complaint also seek relief for the Plaintiffs individually and on behalf of a class.

The Third Amended Complaint also seeks to have a common fund established. For example, concerning the first cause of action, which seeks an injunction, the Plaintiffs ask for an order from the Court holding fees in a common fund to be returned to the water and sewer fund. (Prayer of 3<sup>rd</sup> Am. Compl., ¶ B).

The third cause of action, for unconstitutional collection, requests a common fund of all fees collected by Defendant for water improvements and that such fees be returned to the water and sewer fund. (3<sup>rd</sup> Am. Compl. ¶ 60). The fourth cause of action, for unconstitutional tax, apparently seeks the same common fund as the third cause of action; the creation of a common fund of fees collected that have been used for "other purposes" and that those funds be returned to the water and sewer fund. (3<sup>rd</sup> Am. Compl. ¶ 69). Finally, the Prayer of the Complaint generally seeks an Order "requiring Defendant to form a common fund to repay the water and sewer fund with all funds used for other purposes by the City." (Prayer of 3<sup>rd</sup> Am. Compl. ¶ I).

Defendant filed its Answer and this motion to strike on June 3, 2016. Defendant believes it is entitled to an order striking from the 3<sup>rd</sup> Amended Complaint all references or allegations concerning former Plaintiffs Azar and Letts, all allegations concerning

class action certification or status, and all allegations and requests for a common fund to be established.

### **STANDARD OF REVIEW**

A motion to strike pursuant to Rule 12(f), SCRCP, “seeks to have stricken from a pleading ‘any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.’” Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990), quoting Rule 12(f), SCRCP. “In ruling on such a motion, a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded.” Id.

“A motion to strike, challenging a theory of recovery in the complaint, is comparable to a motion to dismiss under Rule 12(b)(6), SCRCP.” Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009). The matter of striking from a pleading is largely within the discretion of the court and the grant of a motion to strike will not be reversed except for an abuse of discretion or an error of law. Id.

### **LAW/ANALYSIS**

In the Third Amended Complaint, Plaintiffs seek relief in the form of a common fund. Apparently the common fund would be created “from all fees collected by Defendant for water improvements for the past three years . . . .” Third Am. Compl., ¶ 60. Plaintiffs also seek a “common fund of monies collected for the past three years from those individuals who have paid such fees that have been used for other purposes . . . .” Id., ¶ 69. Plaintiffs ask that the monies placed in the common fund be returned, or repaid, to the water and sewer fund. Id., ¶¶ 60, 69. At the same time, Plaintiffs generally seek a return to the water and sewer fund of all monies spent for “other purposes”, id. at ¶ 42,

and that water and sewer funds used as general revenue funds be returned to the water and sewer fund. Id., ¶¶ C, D, and E of the prayer for judgment.

In the cause of action for breach of contract, which does not request a common fund, the Plaintiffs similarly seek a return of fees to the water and sewer fund. The relief sought by Plaintiffs in all causes of action is consistent in one regard – they seek a refund to the water and sewer fund of all fees collected which were used for purposes other than water and sewer operations or maintenance. However, inexplicably, Plaintiffs inconsistently request a common fund to facilitate the return of the monies.

In other words, in all causes of action, Plaintiffs are generally seeking a return to the water and sewer fund of monies that allegedly were used for purposes unrelated to the provision of water and sewer services. The establishment of a common fund is unnecessary, redundant, and immaterial in light of Plaintiffs' demand that funds be returned directly to the water and sewer fund. Plaintiffs are not seeking the return of any monies to themselves, or to other similarly situated individuals.<sup>1</sup> In these circumstances, assuming the Plaintiffs prevail on any cause of action, the creation of a common fund would be a fiction, an unnecessary stop along the path back to the water and sewer fund. The creation and management of a common fund would add complexities and extra costs to this case which are unnecessary given this matter is not being brought on behalf of a class. One of the reasons for denial of class certification was that creating a class would add unnecessary costs and complexities to the case. The creation of a common fund would add back in the same complexities that were done away with by the denial of class status.

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<sup>1</sup> At a hearing concerning class certification counsel stated: "We do not seek to get money back for any individual. We only seek to get the City of Columbia to put that money back that they should not have used for that purpose back into the water and sewer . . . fund." (R. Vol. I, p. 304).

The common fund doctrine is largely a vehicle for the recovery of attorney's fees, in class actions, "to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). According to the Restatement 3d, a common fund "consists of money or other property in which two or more persons (the 'beneficiaries') are entitled to share by reason of their common or parallel interests therein." Restatement (Third) of Restitution and Unjust Enrichment § 29 (2011).

A common fund is not proper outside of the context of class actions, except for certain categories that are not present here. The cases in South Carolina discussing a common fund almost always do so in the context of an award of attorney's fees where a plaintiff has secured a sum of money to be distributed to a class.

In Layman (I) v. State, the supreme court ordered a return of all contributions made by TERI participants. Following the court's decision in Layman I, the TERI plaintiffs requested attorney's fees under either: (1) the common fund doctrine; or (2) § 15-77-300. The Supreme Court denied the request under the common fund doctrine, and remanded to circuit court for a determination under the statute. Layman (II) v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). Layman II concerned the circuit court's method of determining a reasonable fee.

In evaluating the amount of attorneys' fees awarded, the supreme court examined different methods of calculation. Under the "American Rule," parties generally bear their own costs and fees. One exception to the American Rule is the award of fees pursuant to the common fund doctrine. The fees are taken directly from the common fund or recovery and are borne by the prevailing party through fee spreading. In other words,

each member of the class or defined group of claimants is paying his pro rata share of the fees. The discussion in Layman II was in light of the earlier decision finding a class was entitled to have funds returned to them. The common fund was present because a class had been certified, and there was an ascertainable amount of property that could be attributed to each member of the class. See also Condon v. State, 354 S.C. 634, 583 S.E.2d 430 (2003) (stating, in a class action, that an amount to be refunded directly to taxpayers was a common fund).

In the present case, the class action has been foreclosed, and with it the opportunity to establish a common fund. Here, the Plaintiffs are not requesting any funds be returned to them or others. The Plaintiffs simply paid monthly service charges in return for receipt of water and sewer service. There is no claim being raised that the monthly service charges were themselves invalid. Plaintiffs have no basis for seeking a refund to Plaintiffs of the monthly service charges, and Plaintiffs do not attempt to do so.

In Boeing Co. v. Van Gemert, 444 U.S. 472 (1980), the Supreme Court evaluated the use of a common fund doctrine to award attorney's fees in a class action. In its discussion, the Court indicated that a common fund was proper, and attorney's fees could be spread by a common fund, where each member of a certified class has an "undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." Id. at 479; see DeWitt v. Darlington County, 2013 WL 6408371 (D.S.C. 2013) (citing Van Gemert, and stating that the common fund doctrine allows attorney's fees to be based on a percentage of the total recovery to the plaintiff class).

Here, a class has not been certified, and there is no ascertainable claim from the members of any class. A common fund must convey some benefit in the form of a return of funds or property to a class.

Moreover, given that the characteristics of a common fund are closely analogous to some of the requirements to establish a class action, it follows that once class certification was denied in this matter, the recovery of a common fund was also foreclosed. As shown above, the characteristics of a common fund are that there is an undisputed and ascertainable claim to property in which two or more persons share common interests. One of the prerequisites of class certification is that the claims of the representative parties must be typical of the claims of the class. Rule 23(a)(3), SCRCP. It has been conclusively established that this prerequisite was not met in this case.

By denying class certification on this basis, the Plaintiffs recovery of a common fund has also been foreclosed. Plaintiffs were unable to establish that their claims were typical of the claims of the class. Likewise, and in turn, Plaintiffs are unable to establish that there would be undisputed and ascertainable claims to any of the water and sewer funds that were voluntarily paid by users.

Moreover, the property or funds at issue here would not be ascertainable to any particular Plaintiff, or to any other claimant. The portion of funds that is in dispute in this case is that transferred to the general fund, or that used to fund activities related to the provision of water and sewer service. These funds are placed in the Enterprise Fund, and are not traceable to any one Plaintiff or other claimant.

The fact that Plaintiffs are attempting to create a common fund through the use of an injunction further shows the unascertainable nature of this remedy. Plaintiffs want this

Court to order the creation of a common fund. In the cases discussing common funds, the property has been ascertainable, and the common fund springs from the ascertainable nature of the property. There has not been any action required by a court to create a common fund.

On a more basic level, there is no authority for the establishment of a common fund where a plaintiff or other claimant cannot establish some legal or equitable right to the property or funds. Here, the Plaintiffs paid the service charges voluntarily and without protest. There is no dispute that Defendant has the right to hold and keep these funds. A common fund should not be established where, as here, the Plaintiffs have no basis for any property right in the funds.

If there is not a certified class, our courts have allowed or found a common fund only in a small category of cases where there is a defined group of claimants, and some ascertainable property to be distributed to those claimants. For example, in Petition of Crum, 196 S.C. 528, 14 S.E.2d 21 (1941), an action was commenced to determine to whom property should pass under a will. The heirs of a deceased devisee answered, and the court determined that the heirs of the devisee could take under the will. The attorney for the successful heirs then “move[d] the Court for an order allowing him a fee out of the funds distributable among the children of [all of the deceased devisees], which group included all those who would reap a benefit from the contest he had waged.” Id. at 23, 196 S.E.2d at \_\_\_\_\_. Thus, a common fund was established. It does not appear that any special procedure was used, or that a specific request was made for the common fund. What does appear though, is that there was a sum of money ready to be distributed to litigants and others. The claimholders were “standing by, anxious, ready and willing to

claim its benefits.” Id. at 23-4, 196 S.E.2d at \_\_\_\_\_. The benefits here were in the form of their rights to share in the distribution of property from an estate.

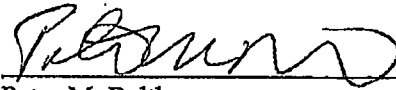
This rule appears evident Crown Cent. Petroleum Corp. v. Elmwood Properties, 244 S.C. 588, 138 S.E.2d 38 (1964). In Crown, the supreme court stated that a common fund had been created, preserved, and protected by the plaintiff’s actions in recovering real property for the benefit of itself and others. The rule that there must be some property interest or ascertainable funds that could be returned to a class or group members is also shown in Caughman v. Caughman, 247 S.C. 104, 146 S.E.2d 93 (1965). There, a life tenant sought the sale of real property in order to provide an income during her lifetime. After the property was sold, the life tenant sought attorney’s fees pursuant to the common fund doctrine. This request was denied because the plaintiff did not create, preserve, or protect a common fund that provided a return of property or funds to any of the ascertainable remaindermen.

The allegations concerning the establishment of a common fund should be stricken. The allegations are unnecessary and immaterial to the relief being sought by the Plaintiffs. There is not a common fund to be shared by any beneficiaries.

#### CONCLUSION

Defendant requests, for the reasons stated herein, that its motion to strike be granted.

[SIGNATURE APPEARS ON NEXT PAGE]



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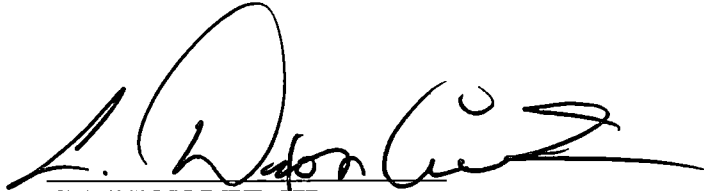
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Columbia, South Carolina  
August 4, 2016

# **CERTIFICATION OF COUNSEL**

The undersigned attorney for Appellants hereby certifies that the foregoing Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

A handwritten signature in black ink, appearing to read 'C. Dixon Lee, III', written over a horizontal line.

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Dated: August 8, 2017