

IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
CHARLESTON

COPY

BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT,  
a public corporation,

and

BERKELEY COUNTY PUBLIC SERVICE SEWER DISTRICT,  
a public corporation,

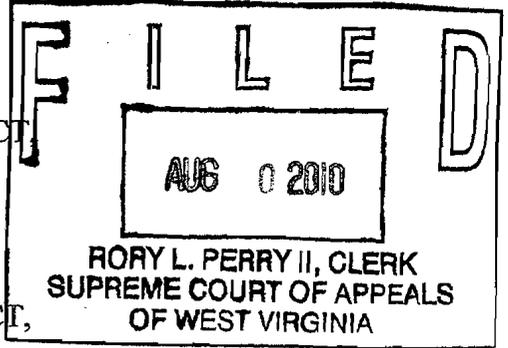
APPELLANTS,

vs.

Nos. 35651 and 35652  
Consolidated

LARRY V. FAIRCLOTH REALTY, INC.  
a corporation,

APPELLEE.



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**APPELLEE'S RESPONSE TO THE BRIEFS OF  
BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT  
AND BERKELEY COUNTY PUBLIC SERVICE SEWER DISTRICT**

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### Statutes:

#### Code of Georgia

§§ 36-71-1 *et seq.*

#### West Virginia Code:

§§ 7-20-1 *et seq.*

§ 14-2-2

§§ 16-13A-1 *et seq.*

§§ 22-28-1 *et seq.*

§ 29-12A-3

§ 55-13-1 *et seq.*

§ 55-17-3

### Rules of Court

#### Rules of Appellate Procedure.

Rule 22, Intervention

#### Rules of Civil Procedure:

Rule 19, Joinder of persons need for just adjudication.

Rule 20, Permissive joinder of parties.

Rule 24, Intervention.

Rule 57, Declaratory judgments. .

#### Trial Court Rules

Rule 22.03

Rule 22.04

### Cases:

*Apollo Civic Theater v State Tax Com'r*, 223 W.Va. 79, 672 SE2d 215 (2008).

*Arnold v W Va Lotteries Com'n*, 206 W.Va. 583, 526 SE2d 814 (1999).

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*Berkeley County Pub. Serv. Sewer v PSC*, 204 W.Va. 279, 512 SE2d 201 (1998).

*Burch v NedPower Mount Storm, L.L.C.*, 220 W.Va. 443, 647 SE2d 879 (2007)

*Cabot v Public Service Commission*, 332 F Supp 370 (S.D. W.Va. 1971).

*Central West Virginia Refuse v PSC*, 190 W.Va. 416, 438 SE2d 596 (1993).

*Chevron U.S.A. v Natural Res. Def. Council*, 467 US 837 (1984).

*City of Benwood v Public Service Commission*, 75 W.Va. 127, 83 SE 295 (1914).

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 T. Weston, Inc. v Mineral County, 219 W.Va. 564, 638 SE2d 167 (2006).

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56 Am Jur 2d *Municipal Corporations, etc.*, § 177 (2000).  
*Anal. of Congress*, 481-82, (1789).  
*Antieau on Local Government Law*, 2<sup>nd</sup> Ed. 2009, § 82.01  
 CSR § 150-1-5, Public Service Commission Rule 5,  
*The Charleston Gazette*  
*State Journal*

**INTRODUCTION**

**1. Glossary of abbreviations.**

- “CIF” - Capacity improvement fee”
- “Circuit Court” - Circuit Court of Berkeley County.
- “Commission” - The County Commission of Berkeley County.
- “Community Infrastructure Act” - West Virginia Code §§ 22-28-1 *et seq.*
- “Court” - Supreme Court of Appeals of West Virginia
- “Districts” - Water District and Sewer District collectively.
- “Faircloth” - Larry V. Faircloth Reality, Inc., Plaintiff below and Appellee.
- “Impact fee” - the fee defined and authorized under the Local Powers Act.
- “Local Powers Act” - West Virginia Code §§ 7-20-1 *et seq.*
- “Sewer District” - Berkeley County Public Service Sewer District, Appellant.
- “Water District” - Berkeley County Public Service Water District, Appellant.

“Order” - Order of the Berkeley County Circuit Court of January 29, 2010.

“PSC” - West Virginia Public Service Commission, Intervenor.

“PSD” - Public Service District(s).

“Transcript” - Transcript of the evidentiary hearing held on November 14, 2009, conducted by the Honorable Elliot Maynard.

**2. The Complaint in this action seeks a declaratory judgment.**

The Complaint in the underlying action was filed by the Plaintiff Larry V. Faircloth Realty, Inc., a corporation, in the Circuit Court of Berkeley County, West Virginia, on October 6, 2009. The Complaint joined two Defendants, the Berkeley County Public Service Water District and the Berkeley County Public Service Sewer District, both public corporations.

The action was instituted under the provisions of West Virginia Code §§ 55-13-1 *et seq.*, the West Virginia Uniform Declaratory Judgments Act, and Rule 57, West Virginia Rules of Civil Procedure.

The declaratory relief requested in the prayer was:

1) To declare that the Water District and the Sewer District have no statutory authority to assess capacity improvement fees on Larry V. Faircloth Realty, Inc., as a residential housing developer in Berkeley County; and

2) To declare that the Water District and the Sewer District cannot utilize the regulatory processes of the West Virginia Public Service Commission to impose a capacity improvement fee.

The Plaintiff made application for a preliminary injunction, and an evidentiary hearing was conducted on November 14, 2009, before the judge of the Circuit Court of Berkeley County. At the conclusion of the hearing, the Circuit Court granted a preliminary injunction restraining the imposition of CIF's.

A final Order granting Faircloth's prayer was issued January 29, 2010.

**3. The Complaint requested prospective relief only.**

The Complaint in ¶ 21 requests that the Circuit Court declare that the Districts' absence of authority to impose CIF's “be prospective from the date of filing of this action.”

## STANDARD OF REVIEW

Because the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo*; however, any determination of fact made by the circuit court in reaching its ultimate resolution is reviewed pursuant to a clearly erroneous standard. *Cox v Amick*, 195 W.Va. 608, 466 SE2d 459 (1995).

## THE ISSUE IN THIS APPEAL *IN NUCE*

The Circuit Court, in its Order concluded that: (1) the Defendant public service districts did not have authority and exceed their powers when they impose or assess CIF's on developers; and (2) the PSC exceeds its authority by authorizing public service districts to impose or assess CIF's.

Certain counties in West Virginia have experienced rapid growth in residential and commercial land development. This growth has placed a strain on public service districts to finance the expansion of capacity for both water and sewer service. Initially, the customers of the utility have to bear the cost of this expansion through higher rates for water and sewer service.

In 1990, the Legislature concluded that the burden of new public utility capacity expansion in these high-growth counties should be borne by the developers rather than, solely, by the existing customers. Therefore, it enacted the Local Powers Act. This Act provides that a county commission (not the PSC or any other entity) could impose an "impact fee" on new residential and commercial land development projects. The revenues from the impact fees would then be used to subsidize or defray capacity expansion expenses by the county commission's public service districts. (Most states have enacted similar statutes.)

The Local Powers Act, however, identifies certain requirements before a county commission can impose an impact fee. One of these requirements, that the county adopt a zoning ordinance, is foundational to the dispute. Berkeley County (a county to which the Local Powers Act is otherwise applicable) has never adopted a zoning ordinance. Therefore, its county commission is precluded from imposing impact fees under the Act.

The present dispute arises because, in 2005, either through oversight or deliberate design, the Districts circumvented the constraints of the Local Powers Act by convincing the Public Service

Commission to allow them to impose an “impact fee” under another name, a capacity improvement fee.

The narrow basis of this dispute is that, with the current depressed economic conditions and the housing “bust” of 2009, small developers like Faircloth find that they cannot pay both the PSC imposed capacity improvement fee and construct water and sewer facilities at their own expense without corresponding credit from the District(s) (to which many, including Faircloth, donate the improvements). In a word, the problem is “double billing.”

### **POINTS OF LAW RAISED BY THE DISTRICT TO SUPPORT THEIR ASSERTIONS OF ERROR**

The Districts assert the following errors by the Circuit Court:

1. That there was an abuse of discretion in exercising jurisdiction of the action;
2. That the PSC has no authority to authorize Districts to impose or collect CIF’s;
3. That the Districts are not subject to the Local Powers Act.
4. That the Districts are agencies of the Commission; and
5. That CIF’s are not related to the Community Infrastructure Act.

## **ARGUMENT**

### **1. The issue of jurisdiction of the Circuit Court.**

The Districts assert that the Circuit Court abused its discretion by not withholding its exercise of jurisdiction pending the outcome of a General Investigation by the PSC. It is the Districts’ contention that Faircloth is a party to the General Investigation and that the Circuit Court thereby should have deferred its exercise of jurisdiction until the completion of the General Investigation.

What the Districts really mean to say in their lengthy discourse, is that Faircloth was required but failed to exhaust his administrative remedy.

#### **(a) Exhaustion of administrative remedy.**

The Circuit Court concluded in its Order (at page 3) that: “there are no administrative remedies to be exhausted.” The Circuit Court based its conclusions on the following findings: a) that Faircloth had filed two complaints with the PSC regarding the reasonableness of the CIF’s; b) that Faircloth’s complaints were dismissed by the PSC; c) that the PSC, *sua sponte*

and *ex parte*, instituted a General Investigation into the reasonableness of the CIF's; and d) the Circuit Court concluded in its Order (page 3) that any decision from the PSC's investigation would be a determination of the fact of reasonableness and not a legal determination.

It is settled law that "the Public Service Commission of West Virginia has no jurisdiction to determine judicial questions," *St. Paul Fire & Marine Ins. v Town of Monongah, W.Va.*, 209 F Supp 514 (ND W.Va. 1962), citing earlier West Virginia cases. This is further consistent with the practice of the PSC in this case, whereby the Chairman of the PSC, at the hearing (in August 2009) refused to reconsider the PSC's jurisdictional authority to authorize CIF's in the first place.

The Districts make much ado about the fact that the PSC, in its *ex parte* Order, made Faircloth a "party" to the General Investigation.<sup>1</sup> The making of Faircloth, involuntarily, a party to a "General Investigation" does not make Faircloth a party litigant.<sup>2</sup> It merely makes Faircloth a party whose input may be solicited for the investigation.

PSC Rule 5, (§150-1-5, CSR) lists six different types of parties to proceedings, "applicants, petitioners, complainants, defendants, respondents, and intervenors." Reading PSC Rule 5.4, it appears that Faircloth most likely fits the definition of a party respondent. Rule 5.4. states:

Respondent means any party subject to the jurisdiction of the Commission to whom the Commission issues notice instituting a proceeding or investigation or inquiry of the Commission; and any party in interest or person ordered before any pending proceeding of the Commission.

As a respondent party to a General Investigation, Faircloth need not do anything and has no obligation to do anything—as opposed to a civil action or an adversary proceeding where one must answer, provide discovery, appear at trial, etc.

There is a distinction between standing to be a party and standing to bring an action in court for judicial review of an administrative decision. Thus, a party may be a party at an agency

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<sup>1</sup> See the extract of the PSC's Order of June 11, 2009, reproduced on page 17 of Water District's brief.

<sup>2</sup> Water District makes the loose assertion on page 20 of its brief, that "(2) a prior complaint has been made at the PSC which was converted into a General Investigation." This statement is wrong because Faircloths' complaints were dismissed. and the record in the complaint case was to be made part of the General Investigation. Water District makes the insinuation that the General Investigation is just an expanded continuation of Faircloth's complaints. Because the dismissal would be *res judicata as to Faircloth*, the complaints could only be used as reference or guidance material in the General Investigation. There was no *conversion* here.

proceeding but may not have standing to challenge an adverse agency ruling. It is inconceivable that Faircloth, as an involuntary party to the General Investigation, could have standing to challenge the agency ruling when and if the agency rules. He could have appealed an adverse ruling when he was a complainant—not now, however, when he is only a collateral party.

The status of a “party” in a PSC proceeding is very loose. In Maryland, for example, “anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter being considered by that agency, thereby, becomes a party to the proceedings.” *Sugarloaf v Dept. of Environment*, 686 A2d 605 (Md 1996); *Clipper v Sprenger*, 924 A2d 1160, 1171 (Md 2007). The circumstance in Maryland reflects the general law that the threshold for being a party in an administrative proceeding is, indeed, low. The Court in *Sugarloaf* explains that the reason for such a low threshold is to “encourage citizen participation.” (See *Sugarloaf* at 613).

Clearly, the Court was correct in finding that there were no administrative remedies for Faircloth to exhaust because his status as a party to the General Investigation was so inconsequential to the issue before the Circuit Court that it was a *non sequitur*.

**(b) The primary jurisdiction issue.**

The Circuit Court, in its Order, concludes that it has concurrent jurisdiction with the PSC regarding issues of fact but primary jurisdiction when this Court is requested to decide issues of law, citing in support, this Court’s decision in *Mounts v Chafin*, 186 W.Va. 156, 411 SE2d 481 (1991).

The Circuit Court also makes two significant factual findings (at page 4) in its Order. First, “the issues of law presented by the plaintiff are within the conventional experience of this court,” (emphasis added) and second, “this court does not require the special expertise of an administrative agency to assist it in deciding the legal issues presented.” (Emphasis added).

These findings of the Circuit Court conform to the factors set out by this Court to determine whether to apply the primary jurisdiction doctrine. See *BellAtlantic-West Virginia v Ranson*, 201 W.Va. 402, 497 SE2d 755 (1997). The matters presented to the Circuit Court by Faircloth only involve the interpretation of statutes—nothing more. There can be no possibility of inconsistent rulings because the PSC in its General Investigation is not interpreting a statute. Again, this was made very clear by the Chairman of the PSC during the August 2009 administrative hearing.

Districts cite the case of *State Ex Rel. Chesapeake and Potomac Telephone Co. of West Virginia v Ashworth*, 190 W.Va. 947, 438 SE2d 890 (1993) in support of their assertions. The case is inapplicable because it pertains to a circumstance where a complaint was filed with the PSC, and an appeal is, therefore, foreclosed until the administrative remedies are exhausted. In this action, no complaint with the PSC is pending and no appeal is sought.

**(c) The *Apollo Civic Theater* decision.**

This Court has recently held that: “The judiciary is the final authority on issues of statutory construction, and we are obliged to reject administrative constructions that are contrary to the clear language of a statute.” *Apollo Civic Theater v State Tax Com’r*, 223 W.Va. 79, 672 SE2d 215 (2008). Accordingly, it is of no moment that any administrative matter (even a so-called General Investigation) could possibly impact upon the jurisdictional authority of the PSC to approve the Districts’ applications for CIF’s. The only pending administrative matter before the PSC, to the knowledge of the Appellee, seeks to answer three questions: 1) the need for CIF’s; 2) the proper amount of the CIF’s; and 3) the proper use of the CIF’s. No finding on any one of these three questions will answer whether or not the PSC has jurisdictional authority to grant or deny the Districts’ applications for CIF’s in the first place.

**(d) The Districts’ supplicatory interlude.**

At the conclusion of its argument on the issue of Circuit Court jurisdiction, the Water District asserts (on page 21 of their brief) the series of supplications that:

- 1) There has been no oral argument on its motion to dismiss;
- 2) There has been no evidentiary hearing on the matters in the Complaint;
- 3) The Defendants were unaware that the Circuit Court intended to rule; and
- 4) An absence of communication between the Circuit Court and the Districts somehow indicated, or lulled the Districts, into believing that the Circuit Court was deferring to the PSC.

These assertions are little more than what Justice Robert Flanders of the Supreme Court of Rhode Island calls, the “kitchen-sink school of legal advocacy.”<sup>3</sup>

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<sup>3</sup> “Defendants apparently decided to throw up against our appellate wall as many possible arguments as it could

Point one. The Districts did not request an oral argument on their motions to dismiss. Trial Court Rule 22.03 provides that it is discretionary with the court to require or permit hearings on motions. (The Rule even permits telephonic hearings.)

It is pertinent to note that at the evidentiary hearing conducted on November 14, 2009, the Circuit Court explained that it had read the motion to dismiss and the briefs so far filed (“I’ve read the briefs,” Transcript page 50). Further, the Transcript of that November 14<sup>th</sup> hearing verifies significant oral argument by counsel for both Districts. See Transcript. See pages 50-68.

The Court asked questions of all counsel as to pertinent facts. Significantly, there was no disagreement as to any stated or proffered fact in response to such interrogation by the Court.

Moreover, the Court recognized that Faircloth had not been afforded an opportunity to respond to the motions(s) to dismiss and that the Sewer District had not yet supported its motion by way of a legal memorandum. The Court set a timeframe within which the parties were permitted to provide written legal support for their arguments.

Point two. An evidentiary hearing was conducted by the Circuit Court on November 14, 2009. The substance of this hearing was whether to grant or deny a preliminary injunction. Only one witness provided testimony at the hearing—Larry V. Faircloth. The transcript of the hearing shows that Larry Faircloth presented testimony, and was cross-examined thereon, concerning the whole scheme of CIF’s imposition by the Districts. See Transcript, pages 6-49.

Point three. The Districts claim that they were unaware that the Circuit Court intended to rule on Faircloth’s motion for summary judgment. This is nonsense! What did the Districts think the Circuit Court was to do with their motion(s)? (Trial Court Rule 22.04 requires that “motions shall be decided expeditiously,” and that any motion requiring immediate disposition should be called to the attention of the court.)

Point four. The Districts assert that the “lack of communication” from the Circuit Court implied to them that the Circuit Court was “deferring” to the PSC. This also is nonsense.

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squeeze into the fifty pages of briefing allowed by this Court, hoping that one or more of them might stick,” *Kurczy v St. Joseph’s Veterans Ass’n, Inc.* 820 A2d 929, 934 (RI 2003).

If there was a lack of communication, it was the oversight of the Districts, not the Circuit Court.<sup>4</sup> The Districts: 1) never filed a reply to Faircloth's Reply to Motion To Dismiss; (2) prepared a proposed order that would have rendered a decision in their favor. As the old railroad saying goes, "someone was asleep at the switch." Now, the Districts seek this Court's indulgence of their failure to timely protect their own interest below.

## **2. The Authority of the PSC to Impose or Assess CIF's issue.**

### **1. The Local Powers Act and the Community Infrastructure Investment Projects Act "trump" the jurisdiction of the Public Service Commission to authorize the imposition and collection of capacity improvement/impact fees.**

The Local Powers Act, West Virginia Code §§ 7-20-1 *et seq.* and the Community Infrastructure Investment Projects Act, West Virginia Code §§ 22-28-1 *et seq.*, trump the jurisdiction of the West Virginia Public Service Commission to authorize public service districts to impose or assess fees to expand or improve water and sewer service capacity.

#### **(a) The Local Powers Act.**

Through the Local Powers Act, enacted in 1990, the Legislature granted authority to county commissions, not the West Virginia Public Service Commission, to collect fees from developers to fund costs of capital improvements for, among other things, public utilities "established by county government" to provide water and wastewater treatment, distribution and disposal facilities.

The Legislature designated and defined these fees as "impact fees." See Code § 7-20-3(g). In its January 29, 2010 Order, at page 4, the Circuit Court makes a finding of fact that a capacity improvement fee, as defined and used by the Districts in this case, is substantially the same concept and fee as an "impact fee." This finding is consistent with the sworn testimony of Curtis Keller (the Sewer District's General Manager) before the PSC in Charleston last August where he agreed that a CIF was an impact fee. (PSC hearing transcript; 8-27-09; page 21).

The Legislature made findings, set out in Code §7-20-2, that the increased demand for development was (at the time) causing a strain on user charges at existing levels and impairing

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<sup>4</sup> The Circuit Court earlier in the litigation indicated that it was available by telephone, internet and facsimile—all instantaneous forms of communication.

the ability or residents and users to bear the cost of increased demand for county facilities and services.

The Legislature went on to find (at Code § 7-20-2(3)) that equitable considerations require that future residents and users of existing county facilities contribute toward the investment already made in those facilities and services.

The Legislature prescribed certain requirements and criteria before such fees could be collected. These requirements are set down at Code § 7-20-6. The County Commission of Berkeley County has been and is presently unable to meet the requirement of (a)(4) of section 6—passage of a zoning ordinance. The unlawful circumvention of this requirement by the Districts through the channel of the Public Service Commission is the root basis of this dispute.

In summary, the Legislature, by enacting the Local Powers Act, provided a medium by which the public service districts which are established by the county commissions (See West Virginia Code § 16-13A-2), may fund the costs to provide and maintain increased capacity to serve new customers of its water and sewer services.

**(b) The Community Infrastructure Investment Projects Act.**

Five years later in 2005, the Legislature enacted the Community Infrastructure Investment Projects Act. See West Virginia Code §§ 22-28-1 *et seq.*

In Section 22-28-1(c) and (d) the Legislature recognized that the costs of publicly owned sewer and water facilities are normally born by the state, its subdivisions and citizens and that the rates for public water and sewer services charged to customers have risen primarily due to the cost of utility construction and related debt service.

Further, in Section 22-28-1(e) (f) and (g), the Legislature found that there are private business entities willing to pay the cost associated with constructing needed public water and sewer services and to dedicate the facility to the local public utility after construction, without cost. Faircloth has been doing this all along and still paying the capacity improvement fees. See Tr. page 8.

The Community Infrastructure Investment Projects Act ties in with the Local Powers Act. The Local Powers Act acknowledges that new developers who pay impact fees (but who have also contributed to the cost of those capital improvements) may have a credit or offset. See Code

§ 7-20-7(5) and (7). Faircloth has never received such a credit or offset.

It is obvious why the PSC abhors the Community Infrastructure Investment Projects Act. Section 8 of the Act (§ 22-28-8) provides that: (1) all of the project facilities constructed are totally exempt from PSC jurisdiction; (2) the PSC cannot regulate or intervene in the approval or construction of any project; and (3) the acquisition of the project by a PSD shall not require the issuance of a certificate of convenience and necessity. This Act cuts a wide swath through the PSC's functions and jurisdiction. This Act effectively trims the PSC's sails. No wonder they oppose it.

In summary, the Local Powers Act, as early as 1990, combined with the Community Infrastructure Investment Projects Act in 2005, provides the exclusive authority to county commissions to impose impact fees (or CIF's) and to further account for the situation where a developer may construct its own water and sewer capacity improvements and dedicate (or donate) them to the public utility, in lieu of paying the impact fee or CIF.

### **3. The Limited power of the Public Service Commission.**

#### **(a) General principles.**

The power conferred upon the Public Service Commission is legislative in character. The duty of the Commission is the execution of the legislative mandate, respecting the matters committed to its jurisdiction. It does not possess unlimited or unrestricted power. In the devolution of certain duties upon it, the Legislature has not abdicated, surrendered, nor wholly delegated its powers regarding those subjects, *Randall Gas Co. v Star Glass Co.*, 78 W.Va. 252, 88 SE 840 (1916).<sup>5</sup>

Unless there has been such delegation by clear and express terms, the power is reserved in the state, which can exercise it at such times and to such an extent as may be found advisable. *City of Benwood v Public Service Commission*, 75 W.Va. 127, 83 SE 295, 297 (1914).

There is no delegation in clear or express terms that the PSC is authorized to go beyond its rate-making powers to authorize the public service districts that it regulates to impose a capacity

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<sup>5</sup> The Court in *State Ex Rel Knight v Public Service Commission*, 161 W.Va. 447, 245 SE2d 144, 148, explains that an old decision is not necessarily obsolete in modern times and that the holding in *Randall Gas* "seems to state accurately the overwhelming weight of modern-day authority as well."

improvement fee on developers (who, in turn, actually produce customers for the districts). This Court has previously said that the PSC has no inherent jurisdiction, power or authority, see *Burch, Supra*.

It is a conclusion that the Legislature has reserved its delegation of powers on this subject until 1990 when it granted county commissions the authority, under the Local Powers Act, to assess and collect impact fees to fund water and sewer capacity improvements, provided that the county commission met certain terms and conditions. Throughout this appeal, it is fundamental that the Berkeley County Commission has not met each and every one of the legislatively imposed criteria to permit impact fees or CIF's the Legislature has, specifically, required the voters to be involved in the process. It has not given undivided authority to even the county commission. Among other requirements, there must be a county-wide zoning ordinance before a county commission may impose impact fees or CIF's.

At the time of the filing of this brief, the voters of Berkeley County have twice defeated a county-wide zoning ordinance. There are no known or public plans to re-submit the zoning issue to the Berkeley County voters. Although the Districts desire to avoid voter or citizen accountability as to CIF's, the Legislative manage is absolutely clear and unambiguous. Hence, no zoning equals no CIF.

There is a presumption in law that the Legislature has knowledge of all its prior enactments. See *Stamper v Kanawha Bd. of Educ.*, 191 W.Va. 297, 445 SE2d 238 (1994). Therefore, an inescapable conclusion must follow that the Legislature perceived that there was neither existing delegated authority to the Public Service Commission, nor any other state or county agency, to impose or assess fees to fund capital improvements for county water and sewer. This conclusion is confirmed by the enumerated findings by the Legislature spelled out in Section 7-20-2 of the Local Powers Act.

"It is always presumed that the legislature will not enact a meaningless or useless statute," *T. Weston, Inc. v Mineral County*, 219 W.Va. 564, 638 SE2d 167, 171 (2006). If the Legislature had any perception that the funding for capital improvements by levying a fee on developers could be effected through the PSC or some existing entity, then why would the Legislature need to enact the Local Powers Act?

True, the Local Powers Act authorizes the assessment of impact fees for other purposes, but it specifically (in § 7-20-3(b)(7)) designates “public utility systems and services provided by public utility systems personnel; water.”<sup>6</sup>

**(b) The Legislature has spoken—that is the end of the matter.**

In 1984, the Supreme Court of the United States, in the case of *Chevron U.S.A. v Natural Res. Def. Council*, 467 US 837, 842, held that when a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. For the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

In 1998, the Supreme Court of Appeals of West Virginia adopted the holding in *Chevron*, and applied it to an act of the West Virginia Legislature. In *Berkeley County Pub. Serv. Sewer v PSC*, 204 W.Va. 279, 512 SE2d 201, 206, the Court held that:

The court must first ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. No difference is due the agency’s interpretation at this stage.

Nearly five years before the PSC authorized the imposition of capacity improvement fees, the Legislature comprehensively spoke on that funding issue for, among others, public service districts, by enacting the Local Powers Act. Notwithstanding its enactment, the PSC ignored the Local Powers Act and approved the arbitrary assessment of CIF’s by the Districts.<sup>7</sup> In effect, the PSC vetoed the Local Powers Act.

This Court has recently explained that, where a statute provides for a thing to be done in a particular manner or by a prescribed person or tribunal, it is implied that it shall not be done otherwise by a different person or tribunal. *T. Weston, Inc. v Mineral County*, 219 W.Va. 564,

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<sup>6</sup> Faircloth makes the presumption that when the word “public utility” appears in a statute, it means a utility subject to regulation by the PSC.

<sup>7</sup> The PSC, in its brief, appears to shift the blame for the error by claiming that the Districts applied for the right to charge the fees, and by implication it was their error. The innuendo suggests that the PSC was only doing its job by processing the application.

638 SE2d 167 (2006).

The Local Powers Acts provides that impact fees are to be imposed and collected by county commissions. There is no legislative or judicial provision for public service districts to assess and collect such fees

under authority granted to them by the PSC.

**(c) The PSC's veto of the Local Powers Act.**

The novel use of the word "veto" as applied to the PSC comes from an opinion of the late Judge John Field in the case of *Cabot Corporation v Public Service Commission*, 332 F Supp 370 (S.D. W Va 1971).

In that case, *Cabot* entered into an agreement to transfer certain natural gas facilities. *Cabot* was subject to regulation under the federal Natural Gas Act. The PSC issued an order requiring *Cabot* to apply to the PSC for authority to effect the transfer. *Cabot* filed suit asking the court to enjoin the PSC from enforcing its order.

The Court held that the Natural Gas Act preempted state regulation and for *Cabot* to apply to the PSC for authority would, in effect, recognize that the PSC possessed an impermissible veto power over regulatory authority of the Federal Power Commission. In this action, the PSC, in authorizing the Districts to assess and collect capacity improvement fees, in effect vetoed the Local Powers Act.

Initially, it appears that the Districts' applications and the PSC's approval were a spurious tactic to circumvent the constraints of § 7-20-6(a)(4). However, the PSC did approve the assessment and collection of the fees by the Jefferson County Public Service District. At the time, Jefferson County fully met all the requirements of § 7-20-6 and could have proceeded to collect impact fees through the County Commission without PSC application and approval. It appears that the Jefferson County PSD was ill-advised in doing something that did not have to do.

This Court has said many times that when a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute. See *State Ex Rel. Board of Trustees v City of Bluefield*, 153 W.Va. 210, 168 SE2d 525 (1969); *Central West Virginia Refuse v PSC*,

190 W.Va. 416, 438 SE2d 596 (1993).

#### **4. That the Districts are Subject to the Local Powers Act issue.**

##### **(a) The impact fee issue (aka a capacity improvement fee).**

The Circuit Court in its Order makes the factual finding that a capacity improvement fee as defined and used by the Districts is substantially the same concept and fee as an impact fee defined under the Local Powers Act.

The Districts say, “ no!” They reason that the revenues under the Local Powers Act impact fees would have to be intended to fund the costs of public facilities “owned, supported or established by county government,”(at page 30 of Water District’s brief.) Query? Are not the Districts *established* by county government?

In effect, they assert that the Districts are independent entities not owned, supported or established by county government.<sup>8</sup> They imply that the law allows two sets of impact fees: PSC CIF’s; and the impact fees under the Local Powers Act. Double taxation, by any standard is not only absurd, but is blatantly unconstitutional.

The Districts and the PSC assert that their formula for imposing the CIF’s are based on a “Georgia Tech” model. What ever that is, the State of Georgia does not use it. Georgia adopted a “Development Impact Fees Act”, similar to the West Virginia Local Powers Act. See Ga. Code Ann §§ 36-71-1 *et seq.* § 36-71-13 makes Georgia water and sewer authorities subject to that Act.

##### **(b) The statutory background.**

West Virginia Code § 7-1-3a authorizes county commissions to operate waterworks, water mains, sewer lines and sewage disposal plants.

It is axiomatic that local governments use supplementary public corporations to perform functions or provide services to their constituencies that are often referred to as authorities, districts, boards or commissions. These entities perform a specific governmental or proprietary

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<sup>8</sup> The Districts admit that they were established by the County Commission of Berkeley County. See Transcript page 60. Interestingly, counsel, in a dialogue with the Circuit Court, says that the Water District is not a “creature of the County Commission” and “we are an independent body.”(at page 59). Curiously, in answer to the Circuit Court question, “Who created you?”, counsel responded, “the County Commission and the Public Service Commission.” (at page 60).

function, or a limited number of such functions, and usually do not possess the taxing power. They are not customarily, directly responsible to the electorate, *Antieau On Local Government Law*, 2<sup>nd</sup> Ed. 2009, § 82.01; 56 Am Jur 2d *Municipal Corporations, Counties, and Other Political Subdivisions*, § 177 (2000).

The County Commission has devolved its statutory authority to operate water and sewer works in Berkeley County by establishing public service districts. West Virginia Code § 16-13A-2 empowers the Berkeley County Commission to create public service districts to provide water, sewer, stormwater and gas services.

The creation and operation of water and sewer systems under the channel of a public service district is a direct devolution of the Berkeley County Commission's authority under West Virginia Code § 7-1-3a.

**(c). The public corporation and political subdivision issue.**

The Local Powers Act provides that a county commission may collect fees from new development projects for capital improvements to public facilities "owned, supported or established by county government." See West Virginia Code § 7-20-3. These public facilities include water and sewer services. See West Virginia Code § 7-20-3(a)(1), (2) and (3).

The "agency" issue arises in this litigation because the Districts say that they are not agents of the County Commission and that the Local Powers Act, therefore, applies to someone else other than them. To whom the Local Powers Act applies, they do not suggest.

The Circuit Court in its Order, concludes that the Districts were subject to the Local Powers Act by virtue of their establishment by the County Commission and that the Districts are agencies of the Berkeley County Commission.

**(i) The public corporation issue.**

West Virginia Code § 16-13A-3 provides that a public service district "is a public corporation and political subdivision of the state."

The designation of the District as a public corporation in the statute was made to distinguish it from a private, profit-making corporation. There have been sticky issues in the past on who is a private corporation and who is a public corporation. See, for example, *Hogan v Clarksburg Hospital Co.*, 63 W.Va. 84, 59 SE 943, 944 (1907) and *State v Ohio Valley Hospital Ass.n*, 149

W.Va. 229, 140 SE2d 457, 460 (1965).

**(ii) The political subdivision issue.**

The Districts conclusively assert that, because public service districts are deemed to be a “political subdivision of the state”, they are somehow independent agencies separate and apart from the any other governmental body, in effect, sovereign entities. This is an erroneous assertion. Public Service Districts do not have sovereign power. They are an agency of some entity.<sup>9</sup>

In *Kucera v City of Wheeling*, 153 W.Va. 531, 170 SE2d 217, 220 (1969), this Court explains that:

The attributes which are generally regarded as distinctive of a political subdivision are that it exists for the purpose of discharging some function of local government, that it has a prescribed area, and that it possesses authority for subordinate self-government through officers selected by it.(Emphasis added.)

The Circuit Court, in its Order on page 5, concludes that the Districts “are agencies of the Berkeley County Commission and not separate political subdivisions.” The use of the word “separate” in context, suggests that the Circuit Court meant that the Districts, as they are deemed political subdivisions by statute, are not separate political sovereign entities. (A better choice of words in the Order might have been “not sovereign entities” rather than “not separate political subdivisions.”)

It appears that the term “political subdivision” was first officially defined in West Virginia Code § 29-12A-3(c), the Tort Claims and Insurance Reform Act (1986). That section identifies public service districts as political subdivisions in the context of providing liability insurance to

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<sup>9</sup> N.B. Apparently the Districts have abandoned the assertion forcefully made in earlier motions and filings, that they are “state agencies.” This tact probably stemmed from their failure to meet the standards set out in *Arnold Agency v W Va Lottery Com’n*, 206 W.Va. 583, 526 SE2d 814 (1999) and the earlier cases. Also, the Districts knew at the outset that they were not state agencies or they would have filed motions to dismiss on the basis of Code §55-17-3, thirty day notice before filing suit against a state agency and Code § 14-2-2, suits against state agencies to be brought in Kanawha County.

them. It confines the definition to public service districts established by a county commission and whose jurisdiction is coextensive with one or more counties. Clearly, there is no suggestion in this Act that public service districts are separate, autonomous, sovereign units of government.

**(d) The agency issue.**

The reason that the “agency” issue is a point of contention by the Districts is that, if the Districts are deemed agencies of the County Commission, they are necessarily subject to the operation of the Local Powers Act and must resort to that Act for financing capacity improvements

The Local Powers Act, Code 7-20-3(b)(7), defines county services as public utility systems and services provided by public utility systems personnel, water.

Next, the Local Powers Act, Code 7-20-3(c), defines direct county services as those public services provided by various county agencies or departments.

As stated above, the Circuit Court, in its Order concludes that the Districts are agencies of the County Commission.

**(i) The unshakable conclusion that the Districts are agencies of the Berkeley County Commission.**

- The Districts are created by the County Commission, Code § 16-13A-2(a)(1). It is from this discretionary initiative of the County Commission that they owe their existence.

- The Districts may be dissolved on motion of the County Commission, by Order duly adopted. Code § 16-13A-2(a)(1). It is from this discretionary initiative of the County Commission that their existence may be terminated.

- The Districts may not enter into any agreement, contract or covenant that infringes upon, impairs, abridges or usurps the duties, rights or powers of the County Commission. Code § 16-13A-2(g).

In the vernacular, this means that the Districts cannot get away with anything that the County Commission does not approve, implicitly or explicitly.

- The County Commission appoints the members of each public service board. Code § 16-13A-3.

The power to appoint is the power to control! As early as 1789, Rep. James Madison spoke

in the U.S. House of Representatives on the issue of the power to appoint: "I conceive that if any power whatsoever is in the nature of the executive, it is the power of appointing, overseeing and controlling those who execute the laws," 1 *Annals of Congress* 481-82 (1789).<sup>10</sup>

The County Commission, if it so chooses, may exercise micro control over the Districts merely by their choice of particular persons whom they appoint to the Boards.

- The County Commission, (not the Districts) may in its discretion, enlarge a District, reduce the area of a District, or consolidate the Districts. Code § 16-13A-2(g).

- The members of the board, the chair, secretary and treasurer are required to make available to the County Commission, at all times, all of its books and records pertaining to each District's operation, finances and affairs, for inspection and audit. Code § 16-13A-3.

This is what is called in contemporary government, "transparency." This provision of the Code gives the county commissioners the opportunity to exercise their oversight and to keep abreast of how District management is performing.

Presumably, since the Code specifies "records" in addition to "books," this means that legal opinions and advice of the Districts' legal counsel would at all times be available for review and evaluation by the County Commission's attorney.

It is this particular provision of the Code that may have prompted the Circuit Court, in its Order, to reach out and conclude that the Districts "are under the virtual, if not micro, control of the county commissions that establish them." (Page 5).

- The County Commission may remove members of the board through a petition to the Circuit Court for the following reasons: failure to attend meetings; failure to diligently pursue objectives of the district; and failure to perform any other duty prescribed by law. Code § 16-13A-3a. Removal of a board member based on failure to attend meetings sounds in micro management.

- The County Commission may adopt an order changing the official name of the District. Code § 16-13A-4(f).

- The Districts are required to send a copy of their adopted annual budget to the County

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<sup>10</sup> The *Annals*, formerly known as *The Debates and Proceedings in the Congress of the United States*, was succeeded by the *Register of Debates*, and subsequently by the *Congressional Globe* which evolved into the present *Congressional Record*.

Commission. Code § 16-13A-10. The logical presumption of this requirement is that the members of the County Commission will study the budget for managerial, integrity and control purposes and make recommendations to its appointed board members— not to just put it in the fire-proof vault.

- The Districts are required to cause their accounts to be audited once a year by an independent accountant and a copy must be forwarded to the County Commission within 30 days. Code 16-13A-11. The logical presumption of this requirement is that members of the County Commission will review the audit and, thereby, evaluate the effectiveness of management and the efficient application and security of funds. Presumably, the Commission will make recommendations to its appointed board members.

- The Districts must obtain approval of the County Commission if they want to sell, lease or rent their water or sewer systems. Code § 16-13A-18a.

- While not in the record, and subject to fact presentation at oral argument, a member of the County Commission is presently a sitting member of the Sewer board and that same member's nonagenarian father sits on the Water board.

Considering the eleven points above, the Districts' conclusion on page 34 of their brief that "the county commission , after creation of a public service district, and the approval of the creation of the district by the PSC, has virtually no control over the conduct of the district or its board members." is a totally erroneous conclusion.

**(ii) Because the Districts are agencies of the County Commission, the Districts are subject to the Local Powers Act and the Community Infrastructure Investment Projects Act.**

As stated above, the Community Infrastructure Investment Projects Act is tied in with the Local Powers Act through West Virginia Code §§ 7020-7(5) and (7). That section of the Code authorizes the Commission to give credit to developers who construct their own facilities and then donate them to the PSD's. The Community Infrastructure Investment Projects Act provides the formal procedure for a comprehensive scheme, wherein developers may build the capacity improvements (except for central plants) and donate them free-of-charge to the PSDs. The Act relieves the PSD of more debt burden, and construction undertaking.

True, it shrinks their fiefdom. As the late 23<sup>rd</sup> Circuit Judge Vance Sencindiver often said in court, “the mother’s milk of government is contracts.” Having the developers build the infrastructure eliminates, for the most part, the cost burden on the PSD’s to raise money,<sup>11</sup> and engage engineering firms, financial consultants, bond and legal counsel and the like. It will also reduce management costs to the extent applied to contracting activities. The mother’s milk is reduced!

Having the infrastructure financed by the PSD through impact fees constitutes “public improvements” that are subject to prevailing wage, local labor, preferences, and competitive bidding. See West Virginia Code § 7-20-22. With private enterprise doing the construction, these restrictions do not apply. Many developers have their own engineering staff, of their own equipment and their own workers. They can do the job cheaper. Further, they have the ability to phase the extension of capacity to the velocity of sales.

The Districts make much ado that there have been no infrastructure agreements in force. First, Faircloth firmly believes that neither the Districts nor their counsel ever heard of the Act prior to the filing of this action. Second, there are very few counties that the Act applies to—high growth counties—of which there are very few in West Virginia. That is why there are no agreements in place.

The Districts omit to say that they are open to engaging in an infrastructure agreement.

The PSD’s, through the cooperation of the PSC, have effectively vetoed the Community Infrastructure Act by charging the CIF and requiring the developers to donate capacity improvements.

## SUMMARY

### **The sky is not falling on the Districts.**

The Districts bray that if the Circuit Court’s Order is affirmed, water rates will have to be raised 22%. The sewer rates will have to be raised 18%. So what is catastrophic about raising rates to that level? Others have had to raise their rates.

Hurricane moved to raise water rates by 12%, *The Charleston Gazette*, April 7, 2010, page C 1,

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<sup>11</sup> Faircloth opines that piling debt upon debt upon debt is not a good policy for government.

West Virginia American Water applies to raise water rates 15%, *The Charleston Gazette*, August 3, 2010, page 6A.

Perhaps what the PSD's fear is the political impact that raising water and sewer rates will have on the integrity and public confidence in the management of the Districts. It might provoke customers to start asking questions. It might jolt the County Commission out of its slumber.

For example, just recently, the Wellsburg City Council proposed a 35% sewer rate hike in order to keep the system solvent. Immediately, five members of the City Council resigned. See the *State Journal*, August 13, 2010, page 5.

**Limited application of the decision.**

What the Districts fail to tell the Court is that the Circuit Court's Order only applies to Berkeley County or another high growth county that doesn't meet the requirements of Code § 7-20-6. The only high-growth county east of Monongalia County in West Virginia is Jefferson County. That county already has long met all of the requirements of the Local Powers Act—it is thereby unaffected<sup>12</sup> Monongalia County is also unaffected since it too long ago met all the requirements of the Local Powers Act.

**What the PSC should be doing to protect the customers of the Districts.**

While the Districts put up quite a front in arguing that they need the CIF's in order to better serve their customers in Berkeley County, they blatantly omit much of the Appellee's legitimate questions about their fiduciary responsibility and accountability to those same customers. Although the PSC cannot, legitimately or lawfully, authorize the Districts to impose CIF's to enhance their budgets, the PSC is obligated to protect the customers of those same districts from the financial folly of the Districts in failing to act in a financially responsible manner.

First, it is essential for this Court to recognize that new customers bring new and additional fees to the Districts for the services that are being provided to them. This means more money for each of the Districts. Given that developers such as Faircloth have already built and conveyed (free of charge) the infrastructure to the Districts, the only additional "cost" to the Districts is in maintaining that infrastructure and providing for additional processing. It is, further, incumbent

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<sup>12</sup> Jefferson County PSD charges CIFs. Even though the County Commission could levy impact fees as early as 1990, the PSD was improvidently advised into going the PSC route. They apparently wanted to get from Charleston what they could have gotten from Charles Town.

upon this Court to recognize that much of the financial debt and obligation incurred by the Districts has to do with infrastructure and treatment plants located in north Berkeley County as opposed to the treatment facilities that are providing services to Faircloth's subdivision at Elizabeth Station in south Berkeley County. Could it be that the Districts are attempting to offset their mismanagement of the north Berkeley County facilities by double taxing Faircloth and others similarly situated?

Second, the PSC should be asking and "investigating" the answer to this question. Moreover, the PSC should be demanding that the Districts provide factual support for their contention that they need in excess of \$7,000.00 for each new home whether or not it is ever sold to a new customer. The list of pertinent questions continues and the PSC fails to ask any of the questions that might make it easier for the Districts to provide services to new customers in Berkeley County without double taxing them for their interest in living in Berkeley County.

Third, the PSC should be asking the Districts exactly what they intend to do with the new revenue to be generated from monthly fees they intent to collect from the new homeowners or customers of the Districts. In asking such questions, the PSC should remind each of the Districts that it is not their function to operate for profit. Tangential to this inquiry is a long list of overdue answers to questions about the fiscal irresponsibility of each of the Districts. To name a few, the Districts ought to be required to answer: 1) why the recent salary increases of their attorneys and managers approximate what circuit judges or supreme court justices in the State of West Virginia are currently earning; 2) how the Sewer District can justify paying high salaries to its general manager and its general manager's wife (who operates in a supervisory capacity as well); 3) why the manager of the Sewer District drives a State-owned vehicle to and from his residence, located in the State of Maryland, each day (although this may explain why the Districts are confused into believing that they are agencies of the State as opposed to agencies of the County Commission); 4) how the Sewer District can justify that each of its conference room chairs were purchased for a sum of \$1,500.00; 5) how the Sewer District can justify the exorbitant and outrageous costs of its Christmas parties; and 6) how the Water District can explain that its General Manager, Paul Fisher, was able to purchase three residential properties (from one of the Water District's largest developers/customers in north Berkeley County, amounting to a little less than \$600,000.00 in

total value) in or around the same time that public water was provided to that person's subdivisions in north Berkeley County. These are only a few of the questions that are certainly worthy of "investigation" at the PSC level.

Where the Districts may be guilty of mismanagement of their current revenues, it is unacceptable that they be permitted to levy unlawful CIF's against new customers in order to attempt to balance their already corrupt budgets.

### CONCLUSION

Wherefore, the Appellee, Faircloth prays that this Court: (1) AFFIRM the January 29, 2010 Order of the Circuit Court; and (2) on affirmance, remand this case back to the Circuit Court of Berkeley County to determine costs, expenses and attorney fees subject to award under West Virginia Code § 55-13-1 *et seq.*

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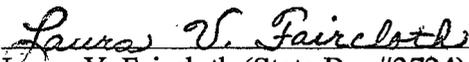
**CERTIFICATE OF SERVICE**

I, Laura V. Faircloth, attorney for the Appellee, hereby certify that I have served an original and nine true copies of Appellee's Response To The Briefs of Berkeley County Public Service Water District and Berkeley County Public Service Sewer District to the West Virginia Supreme Court of Appeals via United States Postal Service, postage pre-paid, at Capitol Complex, Building 1, Room E-317, Charleston, WV 25305, and to counsel of record via regular mail, at their respective addresses as listed, this 27th day of August, 2010.

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