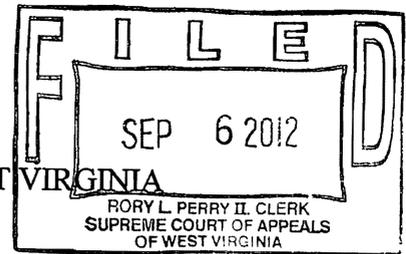


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON



Larry V. Faircloth Realty, Inc.,
a corporation, and
Larry V. Faircloth,
Appellants,

No. 12-1023

vs.

Public Service Commission of
West Virginia; In Re General Investigation
into Capacity Improvement Fees Charged by
Berkeley County Public Service Sewer
District and Berkeley County Public Service
District, d/b/a Berkeley County Public
Service Water District, Case No. 09-0961-
PSWD-GI,
Appellee.

APPELLANTS' BRIEF FOR APPEAL

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Kessel v Monongalia County General Hosp., 220 W.Va. 602, 648 S.E.2d 366 (2007).

Larry V. Faircloth Realty, Inc. v Berkeley Cty Pub. Serv. Dist., #35631, Memo. W. Va. 2011

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State v Reel, 152 W.Va. 646, 165 S.E.2d 813 (1969).

State v Wayne Cty. Public Service District, 195 W. Va. 135, 464 S.E. 2d. 777 (1995).

Waters v Montgomery County, 650 A.2d. 712 (Md 1994).

STATUTES:

West Virginia Code § 7-20-1 et seq.

West Virginia Code § 7-20-6(a)(4)

West Virginia Code § 7-20-7

West Virginia Code § 16-13A-3

West Virginia Code § 22-28-1 et seq.

West Virginia Code § 22-28-4 (a) & (b)

West Virginia Code § 22-28-8

ASSIGNMENT OF ERRORS

The Public Service Commission of West Virginia, (“PSC”) made the following errors in its May 9, 2012 Order.

1. The PSC concluded as a matter of law that a Capacity Improvement Fee (“CIF”) is not a tax but a charge, (See ¶ 3, Conclusions of Law).

2. The PSC concluded as a matter of law that it has jurisdiction to establish a CIF, (See ¶ 13, Conclusions of Law).

4. The PSC erred by failing to recognize that:

a. The Local Powers Act, West Virginia Code § 7-20-1 *et seq* authorizes the imposition of impact fees only if the county in which the public service district is established has implemented a comprehensive zoning ordinance (keeping in mind that Berkeley County does not have such a comprehensive zoning ordinance); and

b. The Community Infrastructure Investment Project Act, West Virginia Code § 22-28-1 *et seq.*, makes a CIF assessment unnecessary when a builder, elects to construct its own improvements for donation free-of-charge to the public service districts, as Faircloth did here.

5. In the event that this Court determines that the PSC has the jurisdiction to approve a CIF (and to discontinue a CIF), notwithstanding the lack of specific statutory authority to do so, the PSC clearly erred, as a matter of law, in arbitrarily and capriciously identifying the date of May 7, 2012, as the date that the Water and Sewer Districts ceased to meet the criteria necessary to support a CIF.

STATEMENT OF THE CASE

Essentially, the Appellants challenge the jurisdictional authority of the West Virginia Public Service Commission (PSC) to authorize county public service districts to assess and collect Capacity Improvement Fees (CIF's). In this case, the Berkeley County Public Service Water District and the Berkeley County Public Service Sewer District have received permission or authority from the PSC to assess CIF's for each new home built in Berkeley County in the combined amount of \$6,770.00 per home. The Appellants contend that a CIF is nothing more than an excise tax or an impact fee on construction of new homes, and thereby prohibited under the enabling statute for the PSC.

Appellees contend that the CIF's are necessary to meet the new demands upon the Districts that are created by the new growth in Berkeley County. Further, they contend that they continue to need the CIF's because of their bond indebtedness, notwithstanding the fact that the PSC did not authorize the CIF's for that purpose.

The un rebuttable evidence in the case is that the projected population growth in Berkeley County has come to screeching halt, and that the growth anticipated by the Districts when they made application (initially in 2004) to the PSC simply did not come to fruition. Neither the Districts nor the PSC made any effort to review, rescind or modify the CIF's until approximately three (3) years AFTER the Appellants filed two Complaints (later merged into one and dismissed by the PSC) with the PSC, requesting such review and relief.

The Appellants filed their Complaints with the PSC on February 27, 2009. These Complaints were summarily dismissed by the PSC and the Appellants were involuntarily added as parties to the PSC's "general investigation" into the CIF's. The Appellants engaged in the

tasks assigned to them and the PSC lumbered along with its investigation throughout the entire 2009 calendar year in, what the Appellants perceived to be, indifference to their initial and repeated requests for “immediate action.”

Although their Complaints (and thereby their requests for relief) were dismissed by the PSC, the Appellants continued to assert that the PSC had no jurisdiction to allow the Districts to collect the CIF’s. Alternatively, they argued and presented evidence that the PSC had a duty, yet failed, to revisit or reevaluate the need for CIF’s every three years according to the PSC’s own case law. Further, the Appellants argued that the projected population growth (used as the basis for CIF’s in the first place) no longer existed, did not continue as expected, and that the Districts had failed to satisfy both the first and second criteria set forth in *Willow Spring Public Service Corporation*, Case No. 06-1180-S-CN-PW-PC-- a PSC case that all parties (including the PSC) recognize as the controlling law in the case.

Frustrated by the bureaucratic and unaccountable delay in the PSC tribunal, after having their Complaints dismissed and the action identified as “Final. Removing from open docket” on the PSC website, the Appellants understandably believed that they had the right to challenge the jurisdiction of the PSC to authorize CIF’s for the public service districts in Berkeley County in circuit court. Moreover, the Chairman of the PSC had, during the two day testimony on August 8 and 9, 2009, advised the Appellants that he could or would not rule on the jurisdictional authority of the PSC to authorize CIF’s. On October 6, 2009, the Appellants filed a declaratory action in the Berkeley County Circuit Court. With all sitting judges in Berkeley County recusing themselves from hearing the case, this Honorable Court appointed retired Judge Elliott Maynard to hear the case.

By Order entered February 18, 2009, Judge Maynard clearly ruled that the PSC was without jurisdictional authority to permit the Districts to levy and collect CIF's. The Districts appealed and the PSC intervened. After accepting the case and hearing arguments of counsel, this Court agreed with the Districts that the circuit court was without the necessary jurisdiction to hear the matter and directed the Appellants to conclude the PSC proceedings first. Significantly, the Order was entered on February 24, 2011.

The Appellants waited for the PSC to rule (as it indicated to this Court it was ready to do when its counsel argued the matter during oral presentation) for more than four months. With no ruling in sight, the Appellants moved the PSC for an expedited ruling on July 8, 2011. The PSC issued a scheduling Order on July 19, 2011, directing the parties to submit additional evidence on population growth. Because the parties could not agree on the figures to be used in assessing population growth, the PSC ordered that the parties appear for a second set of hearings on December 8 and 9, 2011, to which the Appellants objected and applied to this Court for a Writ of Mandamus requiring the PSC to rule upon the evidence of record.

When this Court denied their Writ, the Appellants appeared and participated at the two day hearing that the PSC said it needed to explore the evidence on population growth. Thereafter, the parties submitted second initial and reply briefs to the PSC according to its scheduling Order. Ultimately, the PSC entered a final, appealable Order on **May 9, 2012**, a mere three years and three months after the Appellants first requested immediate relief from the CIF's. The PSC essentially ruled that: 1) it had the power and jurisdiction to establish CIF's according to its ability to "charge" a tariff; and 2) that the Districts no longer met the necessary criteria to collect a CIF. The PSC dodged the population growth issue since the parties could not

agree on the data to be used. It gave no direction for further consideration of population data when any other public service district ask the PSC for authority to assess a CIF in the future. Instead, the PSC merely found that neither of the Districts would exhaust their “reserves” within seven (7) years, thereby failing to meet the second test required in *Willow Spring, Supra*. The Order discontinued the collection of CIF’s effective as and for the date of the Order, May 9, 2012, without making any finding of fact as to when the Districts failed to meet the second criteria. Significantly, the Districts continued to collect CIF’s pending the PSC’s consideration of their petitions for reconsideration.

The Districts filed petitions for reconsideration and the PSC denied those petitions by its Order dated **August 7, 2012**, thereby establishing the date to appeal according to Rule 14 of the West Virginia Appellate Rules of Procedure.

The Appellants appeal this PSC final Order on the following grounds and set forth this brief outline of the issues to be addressed in this brief.

1. The Local Powers Act.

In 1990, the Legislature of West Virginia enacted the Local Powers Act, West Virginia Code §§ 7-20-1 *et seq*. This Act authorizes counties and their agencies the authority to assess an “impact fee” on land development projects to fund capital improvements and public services. Section 7-20-3(a) makes the Act applicable to both water and sewer treatment and distribution facilities. Significantly, Berkeley County has failed to enact a local zoning ordinance, and thereby does not meet the criteria set forth in the Local Powers Act to permit collection of “impact fees” in Berkeley County.

2. Community Infrastructure Investment Project Act.

In 2005, the Legislature of West Virginia enacted the Community Infrastructure Investment Project Act, West Virginia Code §§ 22-28-1 *et seq.*. This Act modified the burdens of impact fees imposed by the Local Powers Act permitting builders to build capacity improvements to water and sewer systems at their timing and expense and then give the improvements to the public service districts without cost. The Appellants did this, and the uncontroverted evidence below was that it cost the Appellants about \$600,000.00.

2. Public Service Commission authorization to assess Capacity Improvement Fees.

In 2004 and 2005, the Public Service Commission (“PSC”) authorized Berkeley County Public Service Sewer District and the Berkeley County Public Service District (Water District) to implement, assess and collect Capacity Improvement Fees (CIFS) on new home builders in Berkeley County.

Impact fees on land development projects under the Local Powers Act in Berkeley County were and continue to be prohibited because Berkeley County failed (twice) to enact a comprehensive zoning ordinance. Appellants suggest that rather than comply with the Community Infrastructure Act, the public service districts did an end-run or dodge around both the Local Powers Act and the Community Infrastructure Investment Project Act by utilizing the PSC to authorize CIF’s.

3. Faircloth’s Complaint to Public Service Commission.

On February 27, 2009, Faircloth filed two formal Complaints with the Public Service Commission regarding the impropriety of the CIF’s. These Complaints were dismissed by the PSC on June 11, 2009.

On June 11, 2009, the PSC initiated a general investigation of the imposition of CIFS and

then made Faircloth, involuntarily, a new party, to a “newly docketed general investigation” according to the PSC website, with a new Case Number.

4. Faircloth Realty’s Complaint For Declaratory Judgment Order.

On October 16, 2009, Larry V. Faircloth Realty, Inc. initiated a Complaint For a Declaratory Judgment in the Circuit Court of Berkeley County, West Virginia to declare: a) that the Berkeley County Service Districts had no statutory authority to assess CIF’s; and (b) that the Public Service Commission may not be utilized as a vehicle to impose CIF’s otherwise perceived as excise taxes or impact fees.

After an evidentiary hearing and extensive briefing, the Judge of the circuit court of Berkeley County, Elliott Maynard, retired justice of the Supreme Court of Appeals, sitting by special appointment, in the instance of recusal of all judges in the 23rd Judicial Circuit to hear the case, found and concluded in an Order entered February 18, 2010, that:

- 1) The public service districts had no authority to impose capacity improvement fees on developers in Berkeley County; and
- 2) Second, the Public Service Commission exceeded its authority by authorizing the public service districts to impose and assess capacity improvement fees. (See Appendix 567).

The public service districts timely appealed the February 18, 2010 Order to this Court. On February 24, 2011, this Court issued a Memorandum Decision (35651 and 35652) concluding that Faircloths had failed to exhaust their administrative remedies and that the Circuit Court of Berkeley County, therefore, did not have jurisdiction. (See *Faircloth Realty, Inc. v. Berkeley County Public Service Water District, et. al.*, Nos 35651 and 35652).

5. Conclusion of the General Investigation.

The conclusion of the general investigation initiated June 11, 2009, terminating the imposition of CIF' by the Districts is set forth in the PSC's May 9, 2012 Order (See Appendix at 492).

On May 21, 2012, both public service districts filed separate petitions for reconsideration of the PSC's May 9, 2012 Order. On August 7, 2012, the PSC denied the public service districts' petitions for reconsideration. (See Appendix at 552). **It is from this August 7, 2012 Final Order affirming the May 9, 2012 Order that Faircloth appeals from.**

6. Relief Requested.

Faircloths ask this Court to reverse the May 9, 2012 Order upon the following grounds and for the following reasons.

a) the PSC has no jurisdictional authority to authorize local public service districts to assess and collect CIF's; or alternatively

b) the PSC's Order is arbitrary and capricious in setting the date for discontinuing the CIF's on May 9, 2012, when the evidence upon which it discontinued the CIF's was available to the PSC and the parties well before the date that the Appellants filed their Complaints with the PSC on February 24, 2009.

In the event that the Court finds that the PSC has the jurisdictional authority to authorize the local public service districts to assess and collect CIF's, then the Appellants pray that the Court reverse the PSC Order insofar as it arbitrarily assigns May 9, 2012, as the date that the Districts failed to meet the *Willow Spring* criteria, and Order the PSC to identify the date of February 24, 2009, as the date on which the Districts failed to meet the criteria, thereby requiring

the Districts to refund all CIF's collected from February 24, 2009 to the present.

In the further event that this Court finds that the PSC has the jurisdictional authority to authorize the Districts to assess and collect CIF's, the Appellants pray that this Court require the PSC to identify the precise data upon which it will rely in determining population growth as it may relate to future requests of the Districts to re-establish CIF's. Moreover, the Appellants ask this Court to require the PSC, upon granting any subsequent authority to the Districts to levy and collect CIF's, to automatically re-evaluate population growth and capacity reserves every three years without requiring a citizen such as Faircloth to monitor the PSC at his own expense.

In the further event that this Court finds that the PSC has such jurisdictional authority, Appellants further pray that the PSC be required to automatically review all subsequently authorized CIF's at last once every three (3) years as suggested by the Willow Springs case. Finally, Appellants seek and pray for their costs, including reasonable attorney fees, in pursuing this action.

SUMMARY OF ARGUMENT

I. NO JURISDICTION

A. The Capacity Improvement Fee is a “tax” and not a “charge” as asserted by the Public Service Commission. The Commission has no authority to authorize public service districts to levy a tax.

B. The Public Service Commission has no jurisdiction to establish a Capacity Improvement Fee.

C. The Public Service Commission has circumvented the Local Powers Act.

D. The Public Service Commission has side-stepped and refused to recognize the provisions of the Community Infrastructure Investment Projects Act.

II. ARBITRARY AND CAPRICIOUS DATE SET BY PSC (ARGUMENT IN THE ALTERNATIVE)

A. The Public Service Commission arbitrarily and capriciously identified May 9, 2012, as the date that the Districts failed to meet the criteria supporting CIF’s without identifying any facts to support this finding or conclusion.

B. The Public Service Commission must identify the specific population data upon which it will rely in authorizing CIF’s for any future requests.

C. The Public Service Commission must independently and automatically review any subsequently authorized CIF’s within a three year period, thereby not requiring individual citizens to monitor the regulatory process of the PSC.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

(1) Oral argument necessary.

The complexity of this case necessitates oral argument since it involves the: (1) authority of the Public Service Commission to approve the levying of CIF's; (2) application of the Local Powers Act to the levying of CIF's by public service districts; and (3) application of the Community Infrastructure Investment Project Act limiting the levying of CIF's by public service districts. Further, there will be most likely intervenors who will assert various positions on the issue.

(2) The case is not appropriate for a memorandum decision in that it involves issues concerning the plenary authority of the Public Service Commission and the interrelationship of two Legislative enactments dealing with CIF's. A full discourse by the Court on these issues and its decision suggests an official reported decision necessary to set precedent.

ARGUMENT

A. A Capacity Improvement Fee is a tax and not a charge.

1. In Judge Maynard's February 18, 2011, Declaratory Judgment Order (See Appendix at 567), he considered and followed the decision of the Supreme Court of Vermont in *Kirchner v Giebink*, 150 Vt. 172, 552 A.2d. 372 (1988), by concluding that the CIF, as imposed here in Berkeley County, is a special kind of "tax" that is imposed only once on some of the properties in a governmental district because of the special benefit to those properties of a particular public improvement.¹

2. In *Home Builders Ass'n v West Des Moines*, 644 N.W. 2d. 339 (2002), the Supreme Court of Iowa held that impact fees were excise taxes: "fees were transaction-based and made a condition of obtaining subdivision plat approval or building permit."

Impact fees, the Iowa Court defined, are a monetary payment assessed as a condition of the issuance of a building permit or plat approval, which is typically used to finance large-scale, off-site public facilities and services necessary to serve new development, *Id.*

CIF's imposed by the public service districts in Berkeley County are excise taxes. Public service districts are forbidden to levy and collect ad valorem taxes. (See West Virginia Code § 16-13A-3). However, CIF's are in a fashion, reverse ad valorem excise taxes. The districts determine how much money they need to finance capital improvements per lot, then adjust backward the amount they must add—ad valorem—to the price of a CIF.

Faircloth has been unable to find any West Virginia statute authorizing either the PSC or the

¹ While the February 24, 2011, Memorandum Decision of this Court reversed Justice Maynard's February 18, 2010, Order on grounds that the administrative remedies had not been exhausted, it did not disturb any findings of fact or conclusions of law in that Order.

public service districts to levy excises taxes.

3. The Maryland Court of Appeals, in *Waters v Montgomery County*, 650 A.2d. 712 (Md 1994), defines an excise tax as a tax imposed upon the performance of an act, the engaging of an occupation, or the enjoyment of a privilege. The Court held that a development impact tax operates as an excise tax rather than a property tax. It is not imposed simply because the taxpayer owns the land; rather it is imposed only when the owner of land makes a particular use of the land, i.e., develops it and builds a new home on it (*Id.*, at 717).

4. The imposition of a CIF is not regulatory in nature as the PSC asserts. The Supreme Court of Mississippi, in holding that impact fees are a tax and not a regulatory fee, held that to be regulatory in nature, there must be a specific benefit on the payer of the fee. *Mayor of Ocean Springs v Homebldrs. Assn*, 932 So. 2d 44 (Miss 2006).

Capacity improvement fees assessed by the Berkeley County public service districts do not provide a specific benefit to the parties paying the fees. The PSC Order from which this appeal is taken fails to make such a finding of fact and merely concludes that the PSC has jurisdiction to approve a charge. Moreover, the builder upon whom the CIF is levied derives no specific benefit and, in fact, suffers a loss by imposition of the CIF, especially if he builds the infrastructure and conveys it free of charge to the district (as Faircloths did here) and provides the districts with new customers who pay a monthly service fee to the districts. The potential homeowner receives no specific benefit over and above service of water and sewer which is equally provided to other users on the same system, for which the homeowner pays a monthly charge.

5. Hamilton Township, Ohio, adopted a schedule of fees to be charged to applicants for zoning certificates for new construction or redevelopment. They include four categories: a road-

impact fee, a fire-protection impact fee, a police-protection impact fee, and a park-impact fee.

The Supreme Court of Ohio, in a recent decision, held that the impact fees operated as taxes, and, accordingly, the Township was not authorized to impose them. See *Drees Co. v Hamilton Twp*, 2012 OH 2370, 970 N.E.2d 916 (Ohio, 2012).

The impact fee provided for in the Local Powers Act (see below) is a tax by the all of the above definitions, but it is authorized by the West Virginia Legislature only under certain very specific conditions, all of which must be met in order to allow an impact fee to be levied. At hearing in August 2009, the manager of the Sewer District admitted (under cross examination) that CIF's were "impact fees." Berkeley County has not met all of the conditions precedent to imposition of an impact fee.

B. The Public Service Commission has no jurisdiction to authorize a CIF.

6. The PSC attempts to justify its grant of authority to the Berkeley County public service districts as a "charge" rather than a tax.

7. The PSC asserts that the CIF is a charge that represents a cost to the utility and its existing customers caused by the addition of extreme levels of new load. (See May 9, 2012 Order, page 15.)

8. The PSC perverts the meaning of "charge" as provided by its enabling statute. "Charges" generally refer to charges that represent a contribution to the costs of, for example installing service connections. To finance the expansion of a public service district's physical plant capacity solely on the backs of new home builders, rather than on the existing and future customers, is a perversion and misuse of the word "charge."

The town of Stowe, Vermont, tried to use a "connection charge" as a means of capital

improvement funding. The Court in *Kirchner v Giebink, Supra.*, held that “a one-time connection charge contained in the agreement is closer to special assessment than to rates or rents. While rents are continuous charges imposed on the basis of use, an assessment levy is in the nature of a tax and is incurred only once and is collected from a landowner who is specifically benefited by the sewer’s construction.” (*Supra.*).

9. As the Court stated in *State v Wayne Cty. Public Serv. Dist.*, 195 W. Va. 135, 464 S.E.2d 777 (1995), the PSC has a long standing policy that tap fees are not to be cost-based. The PSC reasoning is based on the fact that high tap fees discourage users. Correspondingly, a CIF should not be cost-based because they slow building of new homes, stall the growth of tax bases, restrict employment of blue collar labor, and slow the overall economy of the service area. A cost-based CIF is, in effect, an anti-growth measure. Incidentally, Berkeley County voters have twice, in the past decade, overwhelmingly defeated a county zoning ordinance – both times by a vote of 2-1! Berkeley County is not an anti-growth county, despite the political leanings of the Districts.

10. By using a CIF to slow development in Berkeley County, the public service districts, abetted by the PSC, are in effect engaging in back-door land planning and development, growth restriction, and de facto zoning. Using a “charge” authorized by the PSC to justify lower water and sewer rates to existing customers to pay for those lower water and sewer rates by extracting a tax on new homes, while politically expedient to existing water and sewer customers, ultimately will lead to public service district insolvency.

With the termination of the CIF’s by the May 9, 2012 Order, it is a question now of how the districts will pay their bond service.

11. Faircloths, on information, believe that the water district has bond default insurance,

whereas the sewer district does not. The sewer district must rely on its bond counsel's malpractice/errors and omissions insurance to compensate bondholders for its default.

C. Circumventing the Local Powers Act by the PSC.

11. The Local Powers Act, West Virginia Code §§ 7-20-1 *et seq.* authorizes the assessment, collection and payment of impact fees for the use of public service districts and others, see § 7-20-7, only upon meeting specific conditions.

12. The Local Powers Act was enacted in 1990, fourteen years before the PSC established its CIF authority to the Berkeley County public service districts. Interestingly, the Legislature had the foresight to anticipate the need for capacity impact funding for, among other county agencies, public service districts.²

Had the Berkeley County public service districts met the criteria to impose impact fees under the Local Powers Act, there would be no need for the PSC to implement a sneaky, back-door approach to capacity improvement funding.

13. The one and only obstacle to taking advantage of the Local Powers Act was and is Berkeley County's failure to comply with West Virginia Code § 7-20-6(a)(4) in adopting a comprehensive zoning ordinance. (Adjacent Jefferson County has already adopted a zoning ordinance and is taking advantage of the Local Powers Act.)

14. There have been two public referendums in recent years and both have failed to pass a zoning ordinance. Accordingly, "impact fees" are absolutely prohibited in Berkeley County, then

² A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with existing law, applicable to the subject matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if the terms are consistent therewith, Syllabus Point 4, *Kessel v Monongalia County General Hosp.*, 220 W.Va. 602, 648 S.E.2d 366 (2007). (Emphasis added.)

and now.

D. The Community Infrastructure Investment Project - elimination of CIF's.

15. The Community Infrastructure Investment Projects Act, enacted in 2005, West Virginia Code §§ 22-28-1 *et seq.*. Section 22-28-4(a)&(b) provides that public service districts may enter into agreements with private builders such as Faircloths to construct new project facilities and then, on completion, turn the project facility “without cost” over to the public service district. CIF's are therefore unnecessary and unenforceable when a builder (Faircloths in this case) utilizes the provisions of this Act.³

16. West Virginia Code § 22-28-8 specifically and further provides that all project facilities constructed under this chapter shall be divested from Public Service Commission jurisdiction and supervision.

17. The Circuit Court of Berkeley County, in its Order of February 18, 2010, (Appendix at 567) found, in unchallenged testimony, that Faircloths have built and conveyed - - free of charge -- to the public service districts thousands of dollars in both water and sewer infrastructure at no cost to the public service districts, all according to their respective specifications and independent inspections with a one year warranty.

18. Larry Faircloth testified at an August 27, 2009, hearing before the PSC that his firm had given “\$600,000 worth of infrastructure to the Districts but had not received any compensation therefrom.”(See Page 7 of May 9, 2012 Order.)

³ This Court has held in numerous cases that statutes relating to the same subject should be read together although they were enacted at different times and the subsequent statute makes no reference to the prior statute, *State v Reel*, 152 W.Va. 646, 165 S.E.2d 813 (1969). Statutes which relate to a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent, see Syllabus Point 3, *State v Dunbar*, ___ W. Va. ___, 728 S.E.2d 539(2012) (Per Curiam).

19. The public service districts and the PSC have refused to recognize the provisions of the Community Infrastructure Investment Projects Act and permit its operation.

E. The CIF issue is not moot - CIF's are only in suspension.

20. While the PSC's Order of May 9, 2012 struck from the tariffs and discontinued the districts' authority to impose capacity improvement fees at the current time, the PSC still asserts that it has authority to reimpose CIFS as per the criteria set forth in that Order.

21. It is the position of the Appellants Faircloths that the PSC's authority to authorize public service districts to impose CIF's is null and void.

F. Declaratory Judgment Order of February 18, 2010.

20. Because the Order of the Circuit Court of Berkeley County in *Larry V. Faircloth Realty v Berkeley County Public Service Water District*, et al., Civil Action No. 09-C-826, entered February 18, 2010, this Court should consider the findings of fact and conclusions of law set forth in that Order.

21. That Court took evidence and considered voluminous briefs before making its decision. Faircloths suggest to the Court that significant weight should be given to those findings of fact and conclusions of law in deciding this case.

G. Other Defects In May 9, 2012, PSC Order.

22. The May 9, 2012, PSC Order fails to identify the data that the PSC will use with regard to documenting increases in population growth for any future consideration of CIF's. If this Court finds that the PSC has jurisdictional authority to authorize CIF's, then it must direct the PSC to use established and objective data as opposed to whatever the Districts think, at the time, is

appropriate to document their need for additional revenue under the guise of a CIF.

23. The May 9, 2012, PSC Order further fails to make any findings of fact as to when the Districts, exactly and precisely, failed to meet the second test concerning capacity reserves as identified in the *Willow Springs* case. Assuming that this Court finds that the PSC has the jurisdictional authority to authorize the Districts to impose CIF's, the date for the discontinuation of the CIF's should be amended to reflect the date of February 27, 2009, the date on which the Appellants first filed their original Complaints with the PSC. It is clear that the Districts did not merely "stop meeting the second criteria concerning capacity reserves" on the date that the PSC ultimately finalized the three year and three month journey that the Faircloths have made through the "Land of Oz". To allow the PSC to delay a final order in this case amounts to allowing the PSC to arbitrarily and capriciously punish Faircloths for daring to challenge their jurisdictional authority.

24. In the event that this Court determines that the PSC has jurisdictional authority to authorize CIF's, this Court should require, in its Order, that the PSC automatically and systematically review all CIF's (and the underlying criteria supporting them) at last once every three years as the PSC says it should do (See *Willow Springs, Supra.*). In this case, CIF's have been authorized in Berkeley County since 2004. Never once has the PSC (or the Districts) even suggested a review of such criteria until Faircloths filed their Complaints with the PSC on February 27, 2009 (five years later and two years after the PSC acknowledges that a review should have been undertaken). To require a citizen such as Faircloths to audit the administrative duties of the PSC is entirely unreasonable, inefficient and serves to perpetuate an unjust result.

CONCLUSION

The Public Service Commission does not have jurisdiction, neither explicit nor implicit, to authorize public service districts to impose capacity improvement fees. Accordingly, the Court should reverse the May 9, 2012, Order of the PSC with instructions that they require the Districts to immediately return any and all CIF's collected from the Appellants since 2004, when the PSC first authorized the assessment and collection of a CIF in Berkeley County.

In the event, however, that this Court should find that the West Virginia Public Service Commission has the jurisdiction to authorize the Districts to assess and collect CIF's, absent clear and specific statutory language enabling it to do so, then this Court should instruct the Public Service Commission to immediately implement the following procedures to prevent irreparable harm and delay in the future: 1) identify an objective body of data that the PSC will use in all cases to determine any and all increases or decreases in population growth to determine whether or not the first criteria in the *Willow Springs* case is met to support creation and/or continuation of a CIF; 2) establish an independent and self-generating means by which the PSC will automatically review CIF's and the supporting criteria for CIF's every three years without requiring a citizen such as the Appellants here to initiate litigation with the PSC to determine whether or not the PSC is discharging its lawful duty to supervise the Districts; and 3) amend the date of May 9, 2012, to February 27, 2009, as the date on which the Districts failed to meet the second criteria established in the *Willow Springs* case concerning capacity reserves. In amending the date to February 27, 2009, this Court should require the PSC to direct that the Districts return any and all CIF's collected from Faircloths since February 27, 2009.

Because Faircloths have been required to initiate this action which the Public Service

Commission lawfully had a duty to initiate, on its own (according to *Willow Springs*), this three year and three month litigation process has, for all intent and purpose, been a suit to compel the PSC to exercise a non-discretionary duty. Please recall that this Court required Faircloths to “exhaust their administrative remedies” before PSC, even as parties to a general investigation, before asking this Court for relief. Moreover, it has included Faircloths’ efforts to file a declaratory judgment action in the Circuit Court of Berkeley County. These acts have been at considerable cost and expense to Faircloths. Since the May 9, 2012, PSC Order rescinds the CIF’s without disturbing the jurisdictional authority of the PSC, Faircloths have ultimately achieved the financial relief requested in rescission of the CIF’s. Accordingly, it is only fair, just and proper that Faircloths be awarded their reasonable attorney fees and costs associated with their efforts to compel the PSC to review and rescind the CIF’s – a matter which the PSC absolutely ignored for a period of two years prior to the time that Faircloths first initiated action with the PSC.

PRAYER FOR RELIEF

Appellants, Larry V. Faircloth and Larry V. Faircloth Realty, Inc., pray that this Court grant the following relief in reversing the May 9, 2012, Order:

1. That this Court find and conclude that the Capacity Improvement Fee, at issue, is a tax and not a charge as construed by the Public Service Commission;

2. That this Court find and conclude that the Public Service Commission has no jurisdiction to authorize the Berkeley County public service districts to impose and collect Capacity Improvement Fees;

3. That this Court find and conclude that the only existing authority for the Berkeley County public service districts to impose and collect Capacity Improvement Fees is under the authority and conditions set forth in the Local Powers Act;

4. That this Court find and conclude that the Community Infrastructure Investment Project Act nullifies the imposition and collection of Capacity Improvement Fees where a developer or builder, in agreement with a public service district, chooses to construct its own capital improvements and to transfer the ownership, upon completion, to the public service districts without cost; and

5. That the Court reinstate the terms of the February 18, 2010 Order of the Circuit Court of Berkeley County to the extent that the Court ordered that the Plaintiff in that action be awarded reasonable costs and attorney fees.

Alternatively, in the event that this Court finds that the Public Service Commission has the jurisdictional authority to authorize the districts to collect CIF's, then in such event, the Appellants pray for the following relief to reverse and remand with instructions:

- 1) That this Court find and conclude that the effective date of May 9, 2012, for the rescission of CIF's is arbitrary, capricious and not supported by the record below;
- 2) That this Court find and conclude that the appropriate effective date for rescission of the CIF's be February 27, 2009;
- 3) That this Court find and conclude that the Public Service Commission establish clear and objective data upon which it will rely in determining and evaluated increases and decreases in population growth in future CIF applications as required by the *Willow Springs* case;
- 4) That this Court find and conclude that the Public Service Commission must, in all cases involving CIF's, independently and upon its own initiative, review CIF's and the underlying criteria supporting them at least once every three years; and
- 5). That this Court find and conclude that the Appellants be awarded their reasonable attorney fees and costs in bringing this action.

Respectfully Submitted.

Larry V. Faircloth , et al.
By Counsel


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CERTIFICATE OF SERVICE

I, Laura V. Faircloth, attorney for the Respondent, hereby certify that I have served a true copy of Appellants' Brief For Appeal 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 5th day of September, 2012.

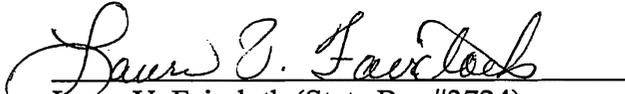
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