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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

IN RE:	§	Case No. 11-05736-TBB-9
	§	
JEFFERSON COUNTY, ALABAMA	§	
Debtor	§	Chapter 9
	§	
	§	
	§	

SUPPLEMENT TO RESPONSE TO OBJECTION OF JEFFERSON COUNTY ALABAMA REQUEST FOR ALLOWANCE OF ADMINISTRATIVE CLAIM [DOCKET NO. 2286

TO THE HONORABLE JUDGE BENNETT OF SAID COURT:

COMES NOW, Andrew Bennett, et al., sewer-rate payers, (collectively, "Applicant" or the "Ratepayers") to submit this Supplement to Response to Jefferson County, Alabama (the "County") objection to the Allowance of Administrative Claims (the "Request"), and in support thereof respectfully show as follows:

The question of whether the County, Sewer Warrant Holders and Bond Insurers came together in settlement of their disputes leading to a Plan of Adjustment approved in the confirmation Order in order to avoid, delay or frustrate the legitimate efforts of

Applicant to enforce their equitable claims to have the Sewer Swap Warrants declared void *ab initio* is a question of fact determined by circumstantial evidence. A settlement to avoid the legitimate claims of a Creditor group would clearly be in bad faith, and no debtor or cooperating creditor is going to admit bad faith. See, In re Albany Partners, Ltd., 749 F.2d 670 (11th Cir. Ga. 1984). Many of the circumstantial factors identified in cases such as In re Phoenix Piccadilly, Ltd., 849 F.2d 1393 (11th Cir. Fla. 1988) as evidencing a bad faith filing are present in this case as they relate to Applicant's claims for administrative fees for contributing to the settlement agreement:

a. **Settling parties wanted to frustrate Applicant's claim that except for the General Obligation Bonds (series 2001-B), the County had none of its own property subject to foreclosure or a security interest involved in the bankruptcy requiring a stay.**

A. The 1997 Sewer Warrant Indenture provided that

> "***the County does hereby grant, bargain, sell and convey, assign, transfer and pledge to and with the Trustee the following described **properties**, interests and rights of the County, whether the same are now owned by it or may be hereafter acquired:
> **The System Revenues (other than revenues derived from the Sewer Tax and any other tax revenues that constitute System Revenues) that remain after the payment of Operating Expenses**, subject, however, to the right of the County to receive and use any or all of such revenues that are deemed "surplus revenues" under Section 11.6 hereof after all prior and current obligations of the County hereunder have been satisfied to the extent required to be satisfied from the System Revenues***

The County had taken the proceeds of the initial issuance of fixed rate warrants and completed Consent Decree and other capital projects. All of the resulting assets or property purchased with sewer warrant proceeds were owned by the County free and clear of any Sewer Warrant Holder liens. The revenues generated by these assets had already been granted over to the Indenture Trustee as stated above. The sewer warrants then were not secured by any property owned by the County. None of the County's property was pledged to the Indenture Trustee. The County specifically stated it had no obligation to pay for any of the principal and interest on the Sewer Warrants from any of its own property.

Although the County had lost control of the disbursement of operating expenses with the appointment of the Receiver in State court, the County clearly had no debt secured by any of its property because the "net revenues" under section 2.1 of the 1997 Indenture and any property rights the county had in net revenues were owned by the Indenture Trustee. Moreover because the sewer warrants were not debt because they were only payable from funds "on hand" and collected, and the remedy was mandamus or the appointment of a receiver by a court to collect sewer fees, the warrants were not, by definition, an obligation of the County had to pay—the County's only obligation with the Sewer warrants was to fix rates as high as necessary to repay the principal and interest on the warrants—not repay from any of its own property.

B. The School Warrants were secured by a special sales tax that could only be used for school purposes, and the School warrants were not in any payment default when the bankruptcy was filed. No County property was pledged to the School warrants.

C. The Bessemer lease was subject to annual appropriation, so no county Property was pledged to the Bessemer lease.

D. Even though the county had lost its occupational tax it had cut its budget commensurately and had no long term debt backed by the occupational tax payable from any of its own property.

E. In fact, even the 2001 GO Bonds had a dedicated constitutionally approved source of repayment, which gave the County the ability to repay that debt when due. There is evidence that the County had already negotiated a forbearance of this swap termination and default in this "synthetic fixed rate' deal. Given J.P. Morgan's waiver of the termination value in the sewer swaps for corrupt activity which caused the County to disregard the 50% limit on swap deals in the 1997 Sewer Indenture, this was not a debt which could not have been resolved without a bankruptcy.

In short the County has reasons other than its inability to pay "debt" when due to file bankruptcy. Because the County took the position that warrants were not debt for constitutional debt limit purposes, it is bad faith, by definition, to then say warrants are debt for bankruptcy purposes. The arguments made by Applicant that warrants were not

constitutional without available funds the Krebs report said did not exist, were arguments the County and the warrant holders and the bond insurers all wanted to avoid.

b. The Debtor's financial problems involved essentially a dispute between the Debtor and the Receiver on the control of the operation of the Sewer system, which could have been be resolved by an appeal of the State Court Action and the lawsuit by Syncora and other bond insurers accusing the County and JPMorgan of a fraudulent conspiracy to hide the Paul Krebs consultants report that rates could never be raised high enough to pay back the sewer warrants.

Prior to Applicant's motion to intervene in the State Court action was denied, the County had two major lawsuits where it was a defendant—the Sewer Indenture Trustee's Receiver case and the Syncora lawsuit. Neither of these lawsuits had created debt for the County. Only if the County could take the opposite position it took when the four warrant deals (Sewer, School, GO, and Bessemer Lease) were issued i.e. they were not debts because funds were on hand to repay them, a case could be made out for bankruptcy. The Warrant Holders did not want to take the position the warrants were not debt because they would not get paid. So all parties were against the Applicant's claim that if the warrants were warrants to get around constitutional debt limits, they had to stay warrants for all other purposes—and just be paid from existing legally approved sources. This would mean no bankruptcy because the County would not be insolvent. If the bankruptcy could be continued the ratepayers could be left holding the bag obligated to rate increases sufficient to give everyone a deal. But if Applicant prevailed and the sewer warrants had to comply with State law, the sewer warrants would be a nullity and since they were real warrants, there would under State of

Alabama law be no holder in due course defense to non-payment for either the sewer warrant holders or the bond insurers. To be a "real" Warrant "money you see (on hand) is what you get." No warrant holder wanted that result and all parties rushed a settlement that was conditioned on release of Applicant's claims because of Applicant's position that the bankruptcy was untenable because the County had no debt.

c. The timing of the Debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the Ratepayer/creditors to enforce their rights.

By the time of the bankruptcy filing the Ratepayers had already laid out in their Motion to intervene in the State court Action filed after the Receiver announced a set of 25% per year rate increased over three years that would result in 100% total increase in rates. Although this motion was denied when the Attorney General came in on a *parens patriae* basis, the County and the sewer warrant holders were on notice that a consumer group was claiming that all of the variable rate sewer warrants were both illegal and unconstitutional. Even though the County interposed defenses that the Swap Warrants had been validated, and the ratepayers had no standing, neither of these defenses were plausible. Only the fourth supplemental amendment had been validated and that was a "new money" not a refunding issue done only after bribes had been paid. The Ratepayers clearly had a property interest and lack of due process because the sewer levy and collection was in the nature of a property tax because (1) the County was operating in a governmental capacity under express 1901 authority to establish a sewer system to benefit the public good not charging for use in a proprietary capacity, and (2)

the sewer fees were paid involuntarily by all those on the system being precluded from using septic tanks and keeping the disposal on their own properties like other county residents, and (3) because the language of the constitutional provision authorizing sewer fees used "levy and collect" and allowed collection as if it were an assessment lien, and (4) because the sewer charges did not represent benefit to each individual user but benefitted the county as a whole.

None of the cases on proprietary 'self-liquidating" water and sewer charges applied to Jefferson county which was required by express law to set up a sewer system rather than providing the service as would a private company in a proprietary manner. The analyses presented by ratepayers that the County was acting in a governmental capacity for the public benefit in establishing and maintaining the sewer system was critical to causing the settlement. This is because if the system was set up for the public good the sewer fees are for the public good and not just for the cost of the benefit or service provided each user and it follows that taxes have to be voter approved under due process whether or not Amendment 73 says what is says about voter approval.

The Ratepayer creditor intervention also raised the following issues:

1. For the first time the issues of whether the county electorate had to vote on sewer rate increases in a proposal presented under Amendment 73 was now in the case. By any rule of construction, Amendment 73 distinguishes "fixing rates" among users depending on pipe size and other factors in the proper administration of the system, from the "levy and collection" of sewer fees that requires a vote both

when the first bonds were issued and for any future operation, maintenance, expansion and extension of the system. The only case cited by the County in opposition to the voter approval requirement was Lunsford et al. v. Jefferson County (2007 ALA. Sup. Ct) 973 So. 2d 32 (attached as Exhibit A) where the issue was where a law allowing a lien for non payment of renters' sewer bills to not be placed on the landlords' property as required by Amendment 73. All the landlords argued there was that the Amendment 73 should not be enforced at all since the original bonds approved by the voters had been paid off. The landlords never argued that the language regarding approval of the sewer fees for the bonds was in the disjunctive, that it required voter approval both to issue the bonds and to collect fees for ongoing operation and maintenance and enlargement and extensions.

2. Similar to the Syncora suit our intervention motion went to whether the sewer warrants had been procured by fraud but used the facts differently. Ratepayers' view of the same facts was that the bribery and fraud made the warrant contracts procured by bribery and fraud invalid. Ratepayers as a subset of this argument claimed that the SEC findings that the money used to pay bribes was passed along in higher sewer rates, meant that the warrants issued violated Article IV, sec. 94 since the money from the warrants was used for private benefit. (87 Ala. 227, Garland v. Board of Revenue)

3. Ratepayer intervention pointed out that this was not just an issue of warrants without money available to repay as discussed in the Syncora lawsuit but these were warrants used to purchase swaps which had acceleration provisions and which created a debt that was neither a bond or a warrant but a "synthetic fixed rate" debt which violated the debt limit.

RATEPAYERS INTERVENE IN THE BANKRUPTCY CAUSES THE SETTLEMENT

Once the Applicant intervened in the bankruptcy to invalidate the lien on net revenues all of the parties who had been fighting –the county, the Sewer Warrant Holders and the Bond Insurers fought the intervention claims. (See, AP-16)This is not because the claims did not have merit. This is because the warrants were not real debts and because the sewer fees are in actuality a tax under federal law.

Ratepayers proof of claim on bar date showing the County is operating in a governmental capacity meant that the sewer fees are a debt under Amendment 73 and not a charge for a self liquidating proprietary sewer system. The County is not providing sewer services voluntarily but as a part of state legislative imposed governmental duties and Ratepayers are not making payments voluntarily for the benefit to their parcels. The sewer is being operated for the common good and ratepayers are legally required to connect to the sewer and can't use septic tanks or porta potties. These claims made the sewer fees a tax under Federal law and the Ratepayers taxpayers who clearly have a right and standing for declaratory judgment. The Alabama

supreme court has ruled that the Jefferson county provides sewer services in its "governmental capacity." So these fees even without amendment 73 would require a vote. Sewers operated in a proprietary capacity by definition are voluntary with the caveat that one pays for the benefit added to the value of their property, which is fair. In this case the sewer fees have nothing to do with construction costs since they have been used to pay warrants where construction costs have been inflated from non bid and fraudulent construction contracts and from no bid and fraudulent financial services contracts.

Sewer fees paid to county in its governmental capacity are by definition taxes because not based on implied contract to pay for value of use—this governmental capacity is consistent with the requirement of voter approval since any debt backed by taxes is a debt. Because the county is under state law acting in a governmental capacity and the tax is collected as an assessment lien against property and the citizen has no right to put in a septic tanks—the charge is *in invitum* and therefore meets the test of a tax under Alabama law based on supreme court decisions.

> "But it is plain that both the vendor and the vendee are made liable for payment of the tax in invitum without regard to those provisions by which the seller may shift the incidence of the tax to the buyer and the tax may be summarily collected by distraint of the property of either the seller or the buyer. A pecuniary burden so laid upon the bankrupt seller for the support of government, and without his consent, thus has all the characteristics of a tax entitled to priority of payment in bankruptcy within the meaning of § 64 of the Bankruptcy Act. New Jersey v. Anderson, supra. Cf. United States v. Updike, 281 U.S. 489, 494. It is not any the less a tax laid on the seller because the statute places a like burden in the alternative on the purchaser or because it affords to the seller facilities of which he did not avail himself to pass [*288] the tax on to the buyer. While an action

in debt may be resorted to for the recovery of a tax, it is evident that in this case the bankrupt is liable to the state only because it owes a tax. Price v. United States, 269 U.S. 492, 500; Milwaukee County v. White Co., 296 U.S. 268, 271.

[***LEdHR4] LEdHN(4)[4]In New York City v. Goldstein, supra, we reversed per curiam, citing Matter of Atlas Television Co., supra, a decision of the Court of Appeals for the Second Circuit that a claim of the City for payment of tax by the seller was not entitled to priority under § 64 of the Bankruptcy Act. The court below attributed our reversal to the circumstances that at that time, though not now, § 64 allowed priority to debts entitled to priority under state law, and to the decision of the state court in the Atlas case, that upon a general assignment for the benefit of creditors made under state law a claim against the seller for the sales tax was entitled to priority. But in placing this interpretation upon our decision in the Goldstein case the court below overlooked the fact that the Court of Appeals ruled in the Atlas case that an ordinary debt due the state is not entitled to priority by state law, and it sustained the priority in that case only on the ground that the demand was for a tax, the unqualified duty to pay which was placed by the statute on [**1031] the seller. This interpretation of the state statute was reaffirmed by that court in the Matter of Brown Printing Co., supra. For reasons already given, the duty imposed upon the seller by the taxing act thus construed is also a tax within the meaning of § 64 of the Bankruptcy Act.

New York v. Feiring, 313 U.S. 283 (U.S. 1941)

“But a tax for purposes of § 64 (a) (4) includes any "pecuniary burden laid upon individuals or property for the purpose of supporting the Government," by whatever name it may [*516] be called. New Jersey v. Anderson, 203 U.S. 483, 492. Although he may not be referred to in §§ 801 and 802 as the taxpayer, and although he may also be subject to the "excise tax" prescribed by § 804, the plain fact is that the employer is liable for the § 801 tax whether or not be has collected it from his employees. We therefore hold that the Title VIII claim of the United States against the estate of this bankrupt employer is entitled to the priority afforded by § 64 (a) (4).”

United States v. New York, 315 U.S. 510 (U.S. 1942)

As carefully explained in a Supreme court of Pennsylvania case a sewer fee either benefits the property of the Ratepayer in the amount of the fee or it is for the general benefit of the government.

> "Being imposed without any regard whatever to the extent or value of the use made of the sewer facilities, or whether any use is made, the charge provided for by the ordinance is, in legal effect, undoubtedly a tax, and the obligation to pay it could be created only by the City's exercise of its general taxing power. See New York University v. American Book Co., 197 N.Y. 294 (1910), 90 N.E. 819; In Re Union College, 129 N.Y. 308 (1891), 29 N.E. 460; Remsen v. Wheeler, 105 N.Y. 573 (1887), 12 N.E. 564; Village of Lemont v. Jenks, 197 Ill. 363 (1902), 64 N.E. 362; [***11] Culver v. Mayor and Aldermen of Jersey City, 45 N.J.L. 256 (1883); 3 Dillon Municipal Corporation (5th ed.), Sec. 1323, page 2223. Cf. [**36] Sanitary Sewer Dist. v. Smith, 342 Mo. 365 (1938), 115 S.W. (2d) 816; Grim v. Lewisville, 54 Ohio App. 270 (1935), 6 N.E. (2d) 998."
>
> Hamilton's Appeal, 340 Pa. 17 (Pa. 1940)

> "Whether an assessment imposed by a state is a tax entitled to priority under the Bankruptcy Code is a question of federal law. City of New York v. Feiring, 313 U.S. 283, 285, 85 L. Ed. 1333, 61 S. Ct. 1028 (1941); In re Pan Am. Paper Mills, Inc., 618 F.2d 159, 162 (1st Cir 1980). HN6Under the Bankruptcy Act the Supreme Court established a two part test, the Anderson-Feiring Test, to determine what was a tax for federal bankruptcy purposes. See Feiring, 313 U.S. 283, 85 L. Ed. 1333, 61 S. Ct. 1028; State of New Jersey v. Anderson, 203 U.S. 483, 51 L. Ed. 284, 27 S. Ct. 137 (1906). Under the first part of the Anderson-Feiring Test, the exaction must have the attributes of a tax. A tax is "a pecuniary burden laid upon individuals or their property . . . for the purpose of defraying the expenses of government or of undertakings [**10] authorized by it." Feiring, 313 U.S. at 288; see Anderson, 203 U.S. at 492. Further, an exaction that is a tax is fixed by statute and can be enforced against the will of a taxpayer. See Feiring, 313 U.S. at 287; Anderson, 203 U.S. at 492. In Feiring the Court fleshed out this definition by specifically pointing out that an exaction is no less a tax because the statute provides an alternative wherein the tax can be collected from either the purchaser or the seller of the property. See Feiring, 313 U.S. at 287-88.
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> Under the second part of the Anderson-Feiring Test, the exaction which has the

attributes of a tax, must not be a "debt" or a "penalty." [*844] United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 226, 135 L. Ed. 2d 506, 116 S. Ct. 2106 (1996). HN7A "debt" is an obligation "for the payment of money founded upon contract, express or implied." Anderson, 203 U.S. at 492. HN8A penalty, although defined by the Supreme Court in a different context, is "an exaction imposed by statute as punishment for an unlawful act." United States v. La Franca, 282 U.S. 568, 572, 51 S. Ct. 278, 75 L. Ed. 551 (1931). [**11] Finally, while looking at all of these characteristics of a tax the court should keep in mind the underlying policies of the Bankruptcy Code. See Feiring, 313 U.S. at 285; Workers' Comp. Trust Fund v. Saunders, 234 B.R. 555, 564 (D. Mass. 1999).

Mass. Div. of Empl. & Training v. Boston Reg'l Med. Ctr., Inc. (In re Boston Reg'l Med. Ctr., Inc.), 265 B.R. 838 (B.A.P. 1st Cir. 2001)

There is no evidence that the Sewer Fees enhance the value of the property to which it is charged. In the prior criminal cases relating to the sewer system, it was found that the no bid contracts caused an increase to the ratepayers which was a negative additional cost not a benefit. The refinancing of 2002C, 2003B and C increased the principal due with no additional benefit.

"It is well established that whether a particular obligation imposed is a tax within the meaning of this section is a federal question. City of New York v. Feiring, 313 U.S. 283, 285, 61 S. Ct. 1029, 85 L. Ed. 1333 (1941); County Sanitation Dist. No. 2 of Los Angeles v. Lorber Indus. of Cal., Inc. (In re Lorber Indus. of Cal., Inc.), 675 F.2d 1062, 1066 (9th Cir. 1982). In order to determine the character of the obligation, the Ninth Circuit in the Lorber case, stated that [**27] the tax must have all of the following attributes: (1) an involuntary pecuniary burden, regardless of name, laid upon individuals or property; (2) imposed by, or under authority of the legislature; (3) for public purpose, including the purposes of defraying expenses of government or undertaking authorized by its; and (4) under the police or taxing power of the state. The label given to a particular obligation is not relevant, and the Court must consider whether or not, pursuant to the principles established by Lorber, the assessment is

a tax.

HN4While the interpretation of the term "tax," by Florida Courts is not governing, it is illustrative and helpful to consider. HN5Florida Courts have long recognized the distinction between taxes and special assessments. It is the special and peculiar benefit conferred on the property that distinguishes a special assessment from a tax. City of Boca Raton v. State, 595 So.2d 25, 29 (Fla. 1992). As one early case stated:A "tax" is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to [**28] perform. A "special assessment" is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax, but it is inherently different and governed by entirely different [*543] principles. It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment.

…

It seems settled law in this country that an ad valorem tax and special assessment, through cognate in immaterial respects, are inherently different in their controlling aspects ….Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 907-908 (Fla. 1930).

Olde Fla. Invs., Ltd. v. Port of the Islands Cmty. Improvement Dist. (In re Fla. Invs., Ltd.), 293 B.R. 531 (Bankr. M.D. Fla. 2003)

Pre-petition, the County had assigned all of its net revenues to the Indenture Trustee so it retained no interest in that property. The net Revenues by contract was not property of the County and was therefore could not become a part of the bankruptcy estate. The County never answered the adversary complaint as to whether it agreed we had a core proceeding or not. Sewer fees are paid to the

county in its governmental capacity which is why there is an election requirement to impose them.

Between taxes--or 'general taxes,' as they are sometimes called . . . --and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement, supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes . . . . Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. . . . On the other hand, special assessments or special taxes proceed upon the theory that, when a local improvement enhances the value of neighboring property, that property should pay for the improvement. **There is no requirement to show under Amendment 73 a special benefit to any particular parcel. The Sewer project is a tax because it benefits the entire County not just those who pay sewer fees.**

See, Wright Runstad Props. Ltd. Pshp. v. United States, 40 Fed. Cl. 820 (Fed. Cl. 1998)In re Pan American Paper Mills, Inc., 618 F.2d 159 (1st Cir. 1980).

> "The court reasoned that the premiums were a tax under the Feiring definition: HN18"Pecuniary obligations laid upon individuals or their property, regardless of their consent, for the purpose of de fraying the expenses of government or of undertakings authorized by it." Pan American, 618 F.2d at 162. While addressing a different [*625] issue, the Sixth Circuit, in State of Ohio v. Mansfield Tire and Rubber Co. (In re Mansfield Tire and Rubber Co.), 660 F.2d 1108 (6th Cir. 1981), cited Pan American with approval, stating in dicta: "Claims for unpaid premiums against bankrupt employers are entitled to priority under section 64(a)(4) of the Bankruptcy Act of 1898." Id. at 1110 (citing Pan American, 618 F.2d 159).
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> In re Suburban Motor Freight, 134 B.R. 617 (Bankr. S.D. Ohio 1991)

CONCLUSION

The circumstantial evidence in this case is that the parties came together for a settlement because the claims made by the Ratepayer creditors had substantial merit and would have eliminated the primary basis for the bankruptcy which eliminated the receiver and the syncora fraud claims—because the warrants would have been declared a nullity. The entire strategy of the case was a bad faith end run around Applicant's claims to have the existing sewer warrant holders refinance their bonds and claim equitable mootness. The fact that exising warrant holders refinanced pre petition debt does not benefit the County since the County never owned the net revenues

to begin with. Net Revenues was not county property. Sewer warrants were in County name but no county property was used as security only net revenues secured the sewer warrants. Equitable mootness may work for private entities since they are authorized to do anything not prohibited by law. County government acting in a governmental capacity for the public benefit is only authorized to acts as expressly permitted by law—a standard that precludes a balancing of the equities. The court realizes this as evidenced by its attempt to help the County put into the record that the settlement came close to a part of the equitable remedy sought by Applicant, to wit:

atthistime.

THE COURT: This is sort of cross, you can cover something that I one of the contentions is that the potential gain that the county achieves is approximately one point four billion dollars reduction in indebtedness, versus what is an alternative that is reflected in pleadings to the contended to be one point six billion or thereabouts in savings that could be changed potentially through litigation.

How would you value the comparative values of those two numbers, if you were going to value on comparator?

THE WITNESS: Well, I think that there are -- some of the important considerations with respect to the sewer warrants that were sold yesterday, are that you basically have a deal struck and so that one point four billion dollar writedown is a certainty. The

feasibility study that we have performed employs, as we have talked about, conservative assumptions. And so I think that there is more than ample surety that the financial performance of the utility will be able to meet its financial obligations and perform well under the plan of adjustment as filed.

The one point six number is speculative and I believe must be discounted.

One particularly significant reason for discounting is that we are in a -- in an interest rate environment, if nothing else, that appears to be trending upward, such that even if one got the one point six billion dollar reduction, it may very well result in a set of revenue requirements that are no better than likely could be substantially worse and what the county

has in hand today.

THE COURT: Would you include -- when you sayinterest rate environment, I take it that is a category of what you would category as risk factors for discounting?

THE WITNESS: Yes.

THE COURT: Would there be other risk factors that you might use for discount?

THE WITNESS: Well, the one point six billion dollar number, as I understand it, is sort of predicated on notions of valuations of the system that are by no means certain.

We know that there are some challenges with the available data to support that. And with, again, with findings that are speculative at this point.

THE COURT: Would risk of loss of litigation be a factor that you would

use for a discount?

THE WITNESS: Sure.

THE COURT: Between the two

Applicant clearly contributed to force a settlement so that the argument could be made that the Ratepayers ended up in the same place they would have if they had prevailed in their adversary case. Applicant's claim should be granted.

Respectfully submitted this 23th day of February, 2014. By: /s

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following parties:

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Of Counsel

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Mark E. Lunsford et al. v. Jefferson County

1050253

SUPREME COURT OF ALABAMA

973 So. 2d 327*; *2007 Ala. LEXIS 75

May 4, 2007, Released

SUBSEQUENT HISTORY: Released for Publication January 11, 2008.

PRIOR HISTORY: [**1]

Appeal from Jefferson Circuit Court. (CV-05-3884). Helen Shores Lee.

DISPOSITION: AFFIRMED.

COUNSEL: For Appellants: Robert E. Battle, Wilson F. Green, and Michael J. Clemmer of Battle Fleenor Green Winn & Clemmer, LLP, Birmingham; and Michael R. Lunsford of Porterfield, Harper, Mills & Motlow, P.A., Birmingham.

For Appellee: Charles S. Wagner, asst. county attty., Birmingham.

JUDGES: BOLIN, Justice. Cobb, C.J., and See, Lyons, Woodall, Stuart, Smith, Parker, and Murdock, JJ., concur.

OPINION BY: BOLIN

OPINION

[*327] BOLIN, Justice.

Mark E. Lunsford, Montevallo Twin Homes, LLC, and Montevallo Square, LLC (hereinafter referred to collectively as "the landlords"), appeal from a judgment of the Jefferson Circuit Court declaring *§ 35-9-14, Ala. Code 1975* ("the statute"), unconstitutional. We affirm.

I. *Factual Background and Procedural History*

In 1948 Jefferson County found it necessary to make improvements to its sewer [*328] system. In order to avoid violating *§ 224 of the Alabama Constitution of 1901*, [1] Jefferson County, acting pursuant to Amendment No. 73, Ala. Const. 1901, now codified as Ala. Const. 1901 (Off. Recomp.), Local Amends. (*Jefferson County, § 4*) ("the amendment"), incurred bonded indebtedness "to pay the expenses of constructing, improving, extending and repairing sewers and sewerage treatment and disposal plants in [Jefferson] county." The amendment, proclaimed ratified on November 15, 1948, provided:

> "Said bonds shall be general obligations of Jefferson county but shall also be payable primarily from and secured by a lien upon

> [**2] the sewer rentals or service charges, which shall be levied and collected in an amount sufficient to pay the principal of and interest on such bonds, replacements, extensions and improvements to, and the cost of operation and maintenance of, the sewers and sewerage treatment and disposal plants. ... [S]uch charges or rentals shall be a personal obligation of the occupant of the property the sewerage from which is disposed of by such sewers or treated in such plants *and shall also be a lien upon such property*, enforceable by a sale thereof."

(Emphasis added.)

1 In 1948 *Section 224* provided:

> "No county shall become indebted in an amount including present indebtedness, greater than three and one-half percentum of the assessed value of the property therein .... Nothing herein contained shall prevent any county from issuing bonds, or other obligations, to fund or refund any indebtedness now existing or authorized by existing laws to be created."

Section 224 was subsequently amended by Amendment No. 342, ratified in 1976, which increased the debt limit for counties to five percent.

After specifying December 31, 1958, as the expiration date for the authority to issue bonds, the amendment provided: [**3]

> "The authority to levy and collect sewer charges and rentals shall be limited to such charges as will pay the principal of and interest on the bonds and the reasonable expense of extending, improving, operating and maintaining said sewers and plants; and when the bonds shall have been paid off, service charges and rentals shall be accordingly reduced, it being the intent and purpose of this amendment that the expenses of needed improvements and extensions and maintenance and operation of the sewers and sewerage treatment and disposal plants and no other expenditures shall be paid from such service charges and rentals."

None of the bonds issued pursuant to the amendment remains outstanding. The statute, entitled "Tenant responsible for sewer services bill," became effective August 1, 2004; it provides:

> "Notwithstanding any other provision of law, any bill for sewer service received in the name of a tenant or tenants, shall be the sole responsibility of the tenant or tenants and shall not constitute a lien on the property where the sewer service was received."

Jefferson County, before and after the passage of the [2] statute, billed landlords for the delinquent sewer charges of their tenants [**4] and placed liens on landlords' properties for the nonpayment of those charges by tenants.

2 According to Jefferson County, it ceased recording liens against landlords

> for a time during the pendency of this litigation. It resumed its former practice when the trial court declared the statute unconstitutional.

The landlords, acting on behalf of themselves and all other landlords similarly [*329] situated, commenced an action in the Jefferson Circuit Court, seeking a judgment declaring that Jefferson County's practice of imposing liens against landlords for debts for sewer service incurred by and in the name of their tenants violated the statute. The landlords further sought injunctive relief and the refund of moneys collected after the effective date of the statute. The landlords contend that once all the bonds issued pursuant to the amendment were paid, Jefferson County's special rights with respect to collection of indebtedness, including the authority to impose liens on property of landlords for sewer charges incurred by and in the name of their tenants, expired. The landlords' action was consolidated with an action brought by Jefferson County against two landlords, seeking payment for their [**5] tenants' sewer charges. The relevant facts were stipulated by the parties, and the consolidated case was submitted to the trial court on cross-motions for a summary judgment.

The trial court entered a summary judgment in favor of Jefferson County and against the landlords. The trial court concluded that the statute was inconsistent with the amendment and that the statute was therefore unconstitutional. The order consolidating the landlords' action with the proceeding commenced by Jefferson County was vacated, and the action brought by Jefferson County was placed on the trial court's administrative docket. The landlords appeal from the summary judgment entered in their action against Jefferson County.

II. *Standard of Review*

As this Court stated in *Payton v. Monsanto Co., 801 So. 2d 829, 832-33 (Ala. 2001)* (quoting *Ex parte Alfa Mut. Gen. Ins. Co., 742 So. 2d 182, 184 (Ala. 1999)*):

> "The standard by which this Court will review a motion for summary judgment is well established:
>
> > "'The principles of law applicable to a motion for summary judgment are well settled. To grant such a motion, the trial court must determine that the evidence does not create a genuine issue of material fact and [**6] that the movant is entitled to a judgment as a matter of law. *Rule 56(c)(3), Ala. R. Civ. P.* When the movant makes a prima facie showing that those two conditions are satisfied, the burden shifts to the nonmovant to present "substantial evidence" creating a genuine issue of material fact. *Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989)*; *§ 12-21-12(d)[,] Ala. Code 1975*. Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the ex-

istence of the fact sought to be proved." *West v. Founders Life Assur. Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)*.

"'In our review of a summary judgment, we apply the same standard as the trial court. *Ex parte Lumpkin, 702 So. 2d 462, 465 (Ala. 1997)*. Our review is subject to the caveat that we must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. *Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412 (Ala. 1990)*.'"

This Court has further stated, in reviewing a constitutional challenge to a statute:

"The standard of review for determining the constitutionality of a statute [**7] was stated in *State Board of Health v. Greater Birmingham Ass'n of Home Builders,* [*330] *Inc., 384 So. 2d 1058, 1061 (Ala. 1980)*:

"'Before turning to the constitutional issue posed in this case, it is appropriate to reiterate the fundamental proposition that validly enacted legislation is presumed to be constitutional. As we stated in *Mobile Housing Board v. Cross, 285 Ala. 94, 97, 229 So. 2d 485, 487 (1969)*:

"'"Every presumption is in favor of the constitutionality of an act of the legislature and this court will not declare it invalid unless in its judgment, the act clearly and unmistakably comes within the inhibition of the constitution."

"'We will not invalidate a statute on constitutional grounds if by reasonable construction it can be given a field of operation within constitutionally imposed limitations. See *Ex parte Huguley Water System, 282 Ala. 633, 213 So. 2d 799 (1968)*.'

"In *Home Indemnity Co. v. Anders, 459 So. 2d 836, 840 (Ala. 1984)*, this Court stated:

"'In determining whether the act is constitutional, we are bound by the following presumption:

"'"[I]n passing upon the constitutionality of a legislative

> act, the courts uniformly approach the question with every presumption [**8] and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of government. All these principles are embraced in the simple statement that it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law."
>
> "'*Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944).*'
>
> See *Crosslin v. City of Muscle Shoals, 436 So. 2d 862, 863 (Ala. 1983).*"

Town of Vance v. City of Tuscaloosa, 661 So. 2d 739, 742-43 (Ala. 1995).

III. *Challenges to a Statute on Constitutional Grounds*

In *Rice v. English, 835 So. 2d 157, 162 (Ala. 2002)*, this Court, citing *Ex parte Selma & Gulf R.R., 45 Ala. 696 (1871)*, reiterated "the settled principle that the people have forbidden the Legislature from conducting itself in a manner inconsistent with their constitution and when it does, it is incumbent upon the judiciary to nullify a legislative enactment contrary to the constitution." We there stated that "the [**9] authority of this Court to review challenges to acts of the Legislature on constitutional grounds is a bedrock principle of our State's legal heritage." *835 So. 2d at 163*.

However, in *Ex parte Selma & Gulf R.R.*, this Court cautioned:

> "*No power of this grave nature* [i.e., judicial review of legislative acts] *is expressly given*. Considering its importance, it is a little strange that *it has been wholly omitted*. But, grant that it exists. It can not be permitted to rest upon mere inference and argument; because, if the inference is a mistake, or the argument is false, its exercise is an usurpation by one branch of the government against the authority of another. *Did the people mean to grant such a power, unless some express clause of the constitution was clearly disregarded? I think not.*"

45 Ala. at 728 (emphasis added).

IV. *Juxtaposition of the Statute Against the Amendment*

We turn to the question whether in enacting the statute "some express clause of the constitution was clearly disregarded." [*331] *Ex parte Selma & Gulf R.R., 45 Ala. at 728*. The landlords contend that the collection powers conferred on Jefferson County by the amendment expired with the payment of the last bond outstanding. [**10] They refer to the unambiguous provision terminating Jefferson County's authority to issue bonds pursuant to the amendment on December 31, 1958. They then contend that the phrase in the amendment, "it being the intent and purpose of this amendment that the expenses of needed improvements and extensions and maintenance and operation of the

sewers and sewerage treatment and disposal plants and no other expenditures shall be paid from such service charges and rentals," requires the conclusion that all power to collect charges for the maintenance and operation of the sewer system financed by the bonds ceased upon the payment of the bonds. Specifically, the landlords state: "It follows, then, that since the County has no powers of issuance today, and since no bonds issued under [the amendment] are outstanding, the County can have no collection powers thereunder today." (Landlords' brief, p. 19.)

The landlords' construction, however, contradicts the plain language of the amendment. The cessation of the authority to issue bonds and the cessation of the authority to collect sewer charges are not inexorably linked as the landlords contend. The last paragraph of the amendment speaks directly to [**11] cessation of the authority to issue bonds. The first sentence of that paragraph, dealing solely with issuance of bonds, states: "The authority to issue bonds shall cease December 31, 1958." The next sentence in that paragraph deals exclusively with the separate subject of the authority to collect certain charges. It provides: "The authority to levy and collect sewer charges and rentals shall be limited to such charges as will pay the principal of and interest on the bonds and the reasonable expense of extending, improving, *operating and maintaining* said sewers and plants ...." (Emphasis added.) Obviously, operation and maintenance are activities that do not necessarily terminate upon the payment of the last of the bonded indebtedness. The necessity for operation and maintenance of the sewer system continues today. Speaking directly to what occurs after the bonds have been paid off, the amendment provides: "[S]ervice charges and rentals shall be accordingly *reduced*, it being the intent and purpose of this amendment that the expenses of needed improvements and extensions and *maintenance and operation* of the sewers and sewerage treatment and disposal plants and no other expenditures shall [**12] be paid from such service charges or rentals." (Emphasis added.) Clearly, the amendment does not contemplate the elimination of charges; in fact, it contemplates the continuation of the collection of service charges and rentals after the payment of the last of the bonded indebtedness. As this Court stated in *Shell v. Jefferson County, 454 So. 2d 1331, 1335-36 (Ala. 1984)*, construing the amendment: "[W]e do not agree that the language of the last paragraph of [the amendment] refers to a sewerage system frozen in time."

We return to the statute, *§ 35-9-14*, which provides: "*Notwithstanding any other provision of law, any bill for sewer service received in the name of a tenant or tenants,* shall be the sole responsibility of the tenant or tenants and *shall not constitute a lien* on the property where the sewer service was received." (Emphasis added.) As previously noted, the amendment provides:

> "[S]uch charges or rentals [for, among other things, the cost of operating and maintaining the sewers and sewerage treatment and disposal plants] shall be a personal obligation of the occupant of the property the sewerage from which is disposed of by such sewers or treated in [*332] such plants *and shall* [**13] *also be a lien upon such property*, enforceable by a sale thereof."

(Emphasis added.) It is axiomatic that the inclusion in a statute of the phrase "notwithstanding any provision of law" cannot trump a constitutional provision. See *Opinion of the Justices No. 206, 287 Ala. 337, 341, 251 So. 2d 755, 759 (1971)* ("We have said that 'no legislation may restrict or alter a self-executing constitutional provision.' *In re Opinion of the Justices [No. 94], 252 Ala. 199, 40 So. 2d 330 [(1949)*], and authorities cited; *Opinion of the Justices [No. 164], 269 Ala. 127, 111 So. 2d 605*

[(1959)]."). See also *City of Bessemer v. McClain, 957 So. 2d 1061, 1092, 2006 Ala. LEXIS 310, *8 (Ala. 2006)*(opinion on second application for rehearing) ("However, '[w]hen the Constitution and a statute are in conflict, the Constitution controls ....' *Parker v. Amerson, 519 So. 2d 442, 446 (Ala. 1987)*."). The provision of the statute depriving Jefferson County of the right to impose liens on landlords for charges for sewer services incurred in the name of a tenant clearly conflicts with the amendment, and the amendment controls.

V. *Conclusion*

The statute clearly disregards an express clause in the amendment. [**14] *Ex parte Selma & Gulf R.R.* The presumption of the constitutionality of the statute has been overcome by the plain language of the amendment. We affirm the judgment of the trial court declaring *§ 35-9-14* unconstitutional as applied to Jefferson County in this case.

AFFIRMED.

Cobb, C.J., and See, Lyons, Woodall, Stuart, Smith, Parker, and Murdock, JJ., concur.