IPRPD
International Journal of Business & Management Studies
ISSN 2694-1430 (Print), 2694-1449 (Online)
Volume 05; Issue no 04: April, 2024
DOI: 10.56734/ijbms.v5n4a3

IN NORTH CAROLINA, COASTAL TOWNS FACE AN ETHICAL DILEMMA AS TO WHO SHALL PAY FOR DEBT SERVICE AND OPERATING EXPENSES OF THEIR SEWER SYSTEMS

A Case Study of the Town of Oak Island That Decided to Impose a Recurring, Annual Sewer Treatment Fee/Tax Against Owners of Undeveloped Parcels, for the Availability of Sewer Service, in Violation of the Fifth/Fourteenth Amendments to the U.S. Constitution

Scott Dell, C.P.A., D.B.A[1], Brad R. Johnson, J.D., Ph.D.[2]

[1] [2] Francis Marion University, Florence, S.C, USA

Abstract

In North Carolina, coastal towns that need to generate additional enterprise revenue to pay debt service and operating expenses of their sewer systems face an ethical dilemma as to who shall pay. Certain North Carolina coastal towns, including the Town of Oak Island ("the Town"), have been delegated the authority by the North Carolina General Assembly to generate non-operating enterprise revenue by imposing a Sewer Treatment Fee/Tax against owners of parcels that "could or [do] benefit from the availability of sewage treatment." SECTION 4 of S.L. 2004-96 (as amended by S.L. 2006-54). In the alternative, to generate additional operating revenue, Towns could raise the rates that sewer users of developed parcels pay to receive sewage collection and treatment services. In this case, the sewer user and the owner of a developed parcel have a different legal relationship, although they may be the same person. The sewer user contracts with a town for the receipt of sewer collection and treatment services. In contrast, owners of undeveloped parcels pay taxes, both ad valorem taxes and taxes for a local benefit. Similar to the owner of a developed parcel, the owner of an undeveloped parcel pays taxes, both ad valorem taxes and taxes for a local benefit. However, the owner of an undeveloped parcel cannot also be a sewer user because the undeveloped parcel generates no sewage and, as a result, cannot benefit from the receipt of sewage collection and treatment services.

Keywords

Ethical Dilemma, Legal Relationship, Debt, Sewer Systems

Introduction

In North Carolina, coastal towns that need to generate additional enterprise revenue to pay debt service and operating expenses of their sewer systems face an ethical dilemma as to who shall pay. Certain North Carolina coastal towns, including the Town of Oak Island ("the Town"), have been delegated the authority by the North Carolina General Assembly to generate non-operating enterprise revenue by imposing a Sewer Treatment Fee/Tax against owners of parcels that "could or [do] benefit from the availability of sewage treatment." SECTION 4 of S.L. 2004-96 (as amended by S.L. 2006-54). In the alternative, to generate additional operating revenue, Towns could raise the rates that sewer users of developed parcels pay to receive sewage collection and treatment services. In this case, the sewer user and the owner of a developed parcel have a different legal relationship, although they may be the same person. The sewer user contracts with a town for the receipt of sewer collection and treatment services. In contrast, owners of undeveloped parcels pay taxes, both ad valorem taxes and taxes for a local benefit. Similar to the owner of a developed parcel, the owner of an undeveloped parcel pays

taxes, both ad valorem taxes and taxes for a local benefit. However, the owner of an undeveloped parcel cannot also be a sewer user because the undeveloped parcel generates no sewage and, as a result, cannot benefit from the receipt of sewage collection and treatment services.

Based upon deliberations in 2009, to generate additional enterprise revenue to pay debt service and operating expenses of its sewer system, the Town decided (1) to generate additional operating revenue by slightly raising the rates that sewer users of developed parcels pay to receive sewage collection and treatment services and (2) to generate additional non-operating enterprise revenue by executing the enabling legislation referenced above. In executing the enabling legislation referenced above, however, the Town intentionally and purposefully discriminated against owners of undeveloped parcels, in favor of owners of developed parcels, by effectively imposing a Sewer Treatment Fee/Tax against owners of undeveloped parcels, exclusively. In this article, the authors assert that the recurring, annual Sewer Treatment Fee/Tax, levied by the Town against owners of undeveloped sewer district parcels, constitutes a Fifth Amendment Taking of Property in violation of the Fifth, through the Fourteenth, Amendment to the U.S. Constitution.

Accordingly, the three primary objectives of this article are:

(1) **To establish the ethical dilemma** and factual background surrounding the imposition by the Town of a recurring, annual Sewer Treatment Fee/Tax, levied against over 3000 owners of undeveloped parcels within the boundaries of the Town's Sewer District, for the purpose of generating additional enterprise revenue, which was vital to paying debt service and operating expenses of the Town's sewer system;

(2) **To establish the law at issue** with regard to a Fifth Amendment Taking of Property claim, pursuant to Title 42 of the United States Code, Section 1983; and

(3) **To apply the law at issue to the factual background** surrounding the imposition by the Town of a recurring, annual Sewer Treatment Fee/Tax against owners of undeveloped parcels, within the boundaries of the Town's Sewer District, for the purpose of demonstrating that imposing such recurring, annual fee/tax constitutes a Fifth Amendment Taking of Property by the Town, in violation of the Fifth, through the Fourteenth, Amendment to the U.S. Constitution.

This article argues that if these objectives are met, the general public [including (1) the citizens of the Town, (2) owners of undeveloped property within the boundaries of the Sewer District, (3) the N.C. Office of the Attorney General, (4) the N.C. General Assembly, and (5) the Town's Council and administration] will have a greater understanding of the constitutional implications of Town's recurring, annual Sewer Treatment Fee/Tax levied against over 3,000 owners of undeveloped parcels within the boundaries of the Town's Sewer District. In particular, as a result of such increased understanding, and the implications thereto, it is expected that the Town will be motivated to change the manner in which it funds debt service payments and operating expenses of the Town's sewer system.

In a case study approach that employs an IRAC (**I**ssue, **R**ule, **A**pplication, **C**onclusion) structure, similar to that of an I.R.S. Revenue Ruling, this article accomplishes its purpose and objectives in a stepwise fashion, as follows.

- In Part I (Ethical Dilemma), the **factual background** surrounding the Town's decision-making process to resolutely impose a Sewer Treatment Fee/Tax against over 3000 owners of undeveloped parcels, within the boundaries of the Town's Sewer District, is presented.
- In Part II (The Law at Issue), the **constitutional paradigm** associated with a **Fifth Amendment Taking of Property claim**, pursuant to Title 42 of the United States Code, Section 1983, is presented.
- In Part III (Application), **the law at issue**, as presented in Part II, is **applied to the factual background**, as presented in Part I, for the purpose of demonstrating that the Town's imposition of a recurring, annual Sewer Treatment Fee/Tax against over 3000 owners of undeveloped parcels, within the boundaries of the Town's Sewer District, constitutes a Fifth Amendment Taking of Property in violation of the Fifth, through the Fourteenth, Amendment to the U.S. Constitution.
- In Part IV (Conclusion), **implications** of the legal findings in Part III are discussed with a view toward extending the current research to address another constitutional infirmity regarding the actions of the town, requiring a rethinking of the Town's resolution to its ethical dilemma and an imminent change in the manner in which the Town funds debt service payments and operational expenses for its sewer system.

I.
THE TOWN'S ETHICAL DILEMMA:
THE FACTUAL BACKGROUND SURROUNDING THE TOWN'S DECISION-MAKING PROCESS TO IMPOSE A SEWER TREATMENT FEE/TAX

A.
THE TOWN OF OAK ISLAND, N.C.

1. The Town is a Governmental Agency

The Town is a municipal corporation that was duly created and chartered by the N.C. General Assembly for administrative purposes, where the N.C. General Assembly retains control and supervision over the Town as a municipal corporation, limited only by N.C. Const. Art. VII, § 1 (2014).[1] The Town has those powers expressly granted by legislative enactment under N.C. Const. Art. VII, § 1 (2014) and those powers implied therefrom.[2] In particular, N.C. Const. Art. VII, § 1 (2014) does not prohibit local legislative enactments, where particular powers may be conferred upon the Town.[3] However, if there is reasonable doubt with regard to the existence of the Town's power in a particular instance, such doubt must be resolved against the Town, where said power is denied.[4]

2. The Town has no Inherent Power of Taxation

In particular, the Town has no inherent power of taxation.[5] Accordingly, all power of taxation must be derived by the Town from legislative enactment under N.C. Const. Art. VII, § 1 (2014).[6] Furthermore, all power of taxation derived by the Town from legislative enactment is subject to further restriction and regulation by legislative enactment under N.C. Const. Art. VII, § 1 (2014).[7] Because the Town derives its power of taxation from the legislature, the Town cannot argue that certain enabling legislation is "lacking in breadth."[8] Specifically, **the N.C. General Assembly has the power under N.C. Const. Art. VII, § 1 (2014) to control the finances of the Town in terms of the nature and amount of particular revenue appropriations.** More specifically, the N.C. General Assembly has the power under N.C. Const. Art. VII, § 1 (2014), **to direct that certain revenues derived by municipal enterprise funds be applied against the principal of outstanding enterprise bonds.**[9]

In North Carolina, the legislative body (i.e., the N.C. General Assembly) passes "general laws" and "local acts." A "general law" affects the public at large and applies "to all units of local government."[10] A "local act" applies to a limited number of municipalities or counties.[11] "'Local act' is interchangeable with the terms 'special act,' 'public-local act,' and 'private act'"[12] Specifically, a "'local tax is defined as 'one laid upon property in the locality, by the governing body thereof for an amount fixed by it, and for local governmental uses declared by it…' Cooley, Taxation, Vol. 1, 4th Ed., Sec. 54, p. 145."[13]

3. The Town has constructed a Sewer System Financed by Sewer Assessments Paid by All Parcels within the Boundaries of the Sewer District

The construction of the Town's sewer system was financed, in part, with sewer assessments (i.e., a tax for a local benefit) levied and collected from benefitted parcels, including those developed and undeveloped parcels within the boundaries of the Sewer District. Specifically, the Town imposed a sewer assessment of $4200 per parcel. Here, it is important to note that the recurring, annual Sewer Treatment Fee/Tax is separate from the initial, one-time sewer assessment imposed for the special benefit of potentially increasing parcel values resulting from the construction of the sewer system.

---

[1] *Town of Saluda v. County of Polk*, 207 N.C. 180, 176 S.E. 298 (1934).
[2] *Town of Grimesland v. City of Wash.*, 234 N.C. 117, 66 S.E. 2d 794 (1951).
[3] *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961).
[4] Bold added. *In re Indian Hills*, 280 N.C. 659, 186 S.E. 2d 909 (1972).
[5] *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 8-10, 18, 36 S.E.2d 803 (1946).
[6] *Id.*
[7] *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E. 2d 702 (1946).
[8] *In re Martin*, 286 N.C. 66, 74, 209 S.E. 2d 766 (1974).
[9] Bold added. *George v. City of Asheville*, 80 F.2d 50, 103 A.L.R. 568 (4th Cir. 1935).
[10] N.C. G.S. [hereinafter, "G.S."] § 160A-1(4).
[11] G.S. § 160A-1(5).
[12] Id.
[13] *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E. 2d 481 (1971).

B.
ENABLING LOCAL LEGISLATION
FOR THE TOWN'S IMPOSITION OF A SEWER TREATMENT FEE/TAX

As a local act, the N.C. General Assembly has authority to pass enabling legislation, wherein a special district may be established, within which particular services are provided, e.g., sewage collection and treatment, where such enabling legislation delineates the powers, authority and responsibilities of the Town with regard to such district, including the authority to impose local assessments.[14] In particular, local assessments are a "**class of taxes**"[15] that:

> "**are imposed only upon those owners of parcel who in respect to such ownership are to derive a special benefit in the local improvements for which they are to be expended** . . . 'to warrant the levy of local assessments, there must not only exist in the case the ordinary elements of taxation, but the object must also be one productive of special local benefits, so as to make applicable the principles upon which special assessments have hitherto been upheld.' Cooley Tax., 428. . . '**When the assessment is made upon persons in respect of their ownership of a particular species of parcel which receives a peculiar benefit from the expenditure of the tax, it is valid**, although it does not operate upon all persons and parcel in the community.' Bold added. *Dargan* v. *Boston*, 12 Allen 223." *Cain v. Commissioners of Davie County*, 86 N.C. 8, 15-16 (1882).
>
> Furthermore, they are imposed "**upon a limited class in return for a special benefit**."[16]
>
> "[T]here is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the maintenance of the general government, but are made **a charge upon parcel on which are conferred benefits entirely different from those received by the general public.** They are not imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue, but **[imposed] upon a limited class in return for a special benefit**." Bold added. *Raleigh Cem. Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952).

As an example, in S.L. 2004-96, the N.C. General Assembly enacted a local act to allow the Town of Holden Beach (and later the Town of Oak Island, pursuant to S.L. 2006-54) (1) to create a "fee supported sewer treatment district" [hereinafter "Sewer District"] and (2) to impose an annual availability fee/tax [hereinafter "Sewer Treatment Fee/Tax"] for the "**availability of sewer [treatment] service**" upon owners of property within the boundaries of the Sewer District that "**could or [do] benefit from the availability of sewage treatment**" in order "**to pay the [recurring] debt service for the sewer system**" and "**sewer services provided by the county**."[17] S.L. 2004-96 provides as follows.

Section 1. Fee-Supported District. – A municipality may create a fee-supported sewer treatment district for all parcels that are **or can be served by the sewage collection and treatment plant serving parcels within the Town**.
Section 2. Creation of Fee-Supported District. – The Town may adopt a resolution establishing a fee-supported sewer treatment district.
Section 3. Imposition of Annual Fees. – The Town may impose annual fees **for the availability of sewer service within the district**. The Board shall set same on or before July 1 each year.
Section 4. Fees. – The fees imposed by the municipality may not exceed the cost of providing the sewer collection facility within the municipality and the cost of the contract with a county to provide it with the facilities to transport, treat, and dispose of the municipality's effluent. **Said fees shall be imposed on owners** of each dwelling unit or parcel of parcel that **could or does benefit from the availability of sewage treatment**.
Section 5. Billing of Fees. – **The municipality may include a fee imposed under this section on the parcel tax bill for *each parcel of parcel lying within the municipal limits on which the fee is imposed*.** Said fee shall be collected in the same manner as provided for in the General Statutes for the collection of ad valorem taxes, and remedies available by statute for the collection of taxes shall apply to the collection of the sewer district fees.

---

[14] N.C. Const. Art. VII, § 1 (2014).
[15] Bold added. *Cain v. Commissioners of Davie County*, 86 N.C. 8, 15-16 (1882).
[16] Bold added. *Raleigh Cem. Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952).
[17] Bold added. Sections 1, 3, 4 & 6 of S.L. 2004-96 (as amended by S.L. 2006-54).

Section 6. Use of Fees. – **The Town shall credit the fees collected within the district to a separate fund to be used only to pay the debt service for the sewer system.** The governing board of the municipality shall administer the fund to provide for the payment of said sewer services provided by the county. . .” Bold and italics added. S.L. 2004-96. http://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/20032004/SL2004-96.pdf.

Here, a “class of tax” (i.e., local assessment) is imposed upon those owners of tax parcels within the boundaries of the Sewer District who, with respect to such ownership, derive a special benefit (i.e., the availability of sewer treatment services) provided by the Town in the local improvement (i.e., sewer system) for which the expenditure (i.e., the recurring payment of debt service and sewer services provided by the county) of said tax is made.[18] In other words, the owners of tax parcels within the boundaries of the Sewer District, benefited by the “**availability of sewer [treatment] service**” provided by the Town, are annually charged with an aggregate amount up to the sum necessary to secure the sewer system's debt service for the year plus sewer services provided by the county, where the **benefits conferred** upon such owners of tax parcels **are** “**entirely different from those received by the general public**.”[19]

1. Parcels “benefit from the availability of sewage treatment” When A Connection with a “residential dwelling unit or commercial establishment” is Possible

G.S. § 160A-317 provides a context for construing the meaning of the “availability of sewer service” in S.L. 2004-96 (as amended by S.L. 2006-54). In particular, with regard to the imposition of a “periodic availability charge,” G.S. § 160A-317 authorizes a municipality to:

> “**require an owner of developed parcel** on which there are situated one or more residential dwelling units or commercial establishments located within the city limits and within a reasonable distance of any water line or sewer collection line owned, leased as lessee, or operated by the city or on behalf of the city **to connect the owner’s premises with the water or sewer line or both**, and may fix charges for the connections.” Bold added. *Id*.

The statute further provides that

> “[i]n lieu of requiring connection under this subsection and in order to avoid hardship, the city may require payment of a **periodic availability charge**, not to exceed the minimum periodic service charge for parcels that are connected.” Bold added. *Id*.

Specifically, the authority delegated to a municipality to impose a “periodic availability charge” under **G.S. § 160A-317 applies exclusively to developed *residential* or *commercial* properties located *within* the municipality.** Such delegated authority **does not apply to undeveloped properties *within* the municipality.**[20] Under **G.S. § 160A-317**, the exercise of the power of classification by the N.C. General Assembly in identifying which parcels are subject to the “periodic availability charge” (i.e., developed *residential* or *commercial* parcels located *within* the municipality) includes the exercise of the power of classification in identifying which parcels are not subject to the “periodic availability charge” (i.e., undeveloped parcels located *within* the municipality). The power of classification **to include** incorporates the power of classification **to exclude**. *Southern Ry. v. City of Raleigh,* 277 N.C. 709, 713, 178 S.E. 2d 422 (1971). By providing that G.S. § 160A-317 applies exclusively to developed *residential* or *commercial* parcels *within* the municipality (and not to undeveloped parcels), the N.C. General Assembly has exercised its power of classification **to exclude** undeveloped parcels from those parcels upon which a “periodic availability charge” may be imposed. *Id*., 86 N.C. at 17. Based upon the foregoing, G.S. § 160A-317 does not support the existence of the “availability of sewer service” [as a condition precedent to the operation of the enabling statute], in a case where the Town merely places sewer lines in the street bordering upon undeveloped property, because the “availability of sewer service” contemplates that a connection to “a residential dwelling unit or commercial establishment” is possible in the present tense.

Moreover, because the N.C. General Assembly, in enacting S.L. 2004-96 (as amended by S.L. 2006-54) has “declare[d] the policy of the law, fix[ed] legal principles which are to control in given cases, and provide[d] adequate standards for the guidance of the [Town] empowered to execute the law,” S.L. 2004-96 (as amended by S.L. 2006-54) does not violate N.C. Const. art. II, § 1 (2014), which prohibits the N.C. General Assembly from unlawfully delegating a portion of its legislative power to the Town. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 119, 195 S.E. 2d 517 (1973). Furthermore, the N.C. General Assembly “**cannot vest in a subordinate agency the power to apply *or withhold* the application of the law in its absolute or unguided discretion**.” Bold and italics added. *Id*. Specifically, under S.L. 2004-96 (as amended by S.L. 2006-54), the Town

---

[18] *Cain v. Commissioners of Davie County*, 86 N.C. 8, 15-16 (1882).

[19] Bold added. Id.

[20] G.S. § 160A-317. Also, see Millonzi, K. “Water and Sewer Availability Fees.” Coates’ Canons: NC Local Government Law, February 10, 2012. Available online at: http://canons.sog.unc.edu/?p=6305/.

was "delegate[d] the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend" (i.e., the identification of those tax parcels within the boundaries of the Sewer District for which there exists the "availability of sewer [treatment] service"). *Id*. Notwithstanding the foregoing, in general, **the determination by the Town, i.e., that the Town has complied with the conditions precedent to the exercise of its statutory authority in a specific instance, is the Town's determination of a question of law, where such determination is subject to a court's judicial review**. *Id*., 283 N.C. at 120. In particular, the determination by the Town that the Town confers a special benefit upon undeveloped parcels within the boundaries of the Sewer District (i.e., undeveloped parcels "**could or [do] benefit from the availability of sewage treatment**") is a question of law subject to a court's judicial review. *Id*.

2. Undeveloped Parcels do NOT "benefit from the availability of sewage treatment" Because these Parcels are NOT Parcels to Which Sewer Services are "Available"

In addition, a string of cases originating in the State of Washington provide a context for construing the meaning of the "availability of sewer [treatment] services" in S.L. 2004-96 (as amended by S.L. 2006-54). In particular, the Washington Supreme Court in *Holmes Harbor Sewer District v. Holmes Harbor Home Bldg., LLC*[21] held that owners of undeveloped properties within the Sewer District were not subject to charges for the "availability" of sewer services because undeveloped properties are not properties to which sewer services are "available."[22] In *Holmes Harbor*, similar to the case at hand, a special assessment (i.e., a tax for a local benefit) was imposed on all owners of parcels within the Sewer District to pay for the construction of the sewer system. *Id*. In the case at hand, the amount of the special assessment was $4200 per parcel. Also, similar to N.C. state law (i.e., G.S. § 160A-317), the Sewer District in *Holmes Harbor* could compel a parcel owner within said district to connect to the sewer system when a dwelling or other structure used by humans was situated on said parcel. *Holmes Harbor*, at 155 Wn.2d 860. In *Holmes Harbor*, again similar to G.S. § 160A-317, under Wash. Rev. Code § 57.08.081(1), sewer districts are authorized to fix rates and charges "for furnishing sewer and drainage service and facilities to those to whom service is available." *Holmes Harbor*, at 155 Wn.2d 862. "These charges are separate from the initial assessment imposed for the special benefit of potentially increased parcel values resulting from the construction of the sewer system." *Holmes Harbor*, at 155 Wn.2d 866 (footnote 5). In interpreting Wash. Rev. Code § 57.08.081(1), the Washington state supreme court held that "the language of the statute requires districts to furnish some level of sewer and drainage service and facilities," which "requires more than an uncertain opportunity for an unimproved parcel to connect to the system, especially in this case where under the resolution the parcel owners have no right or duty to connect." *Holmes Harbor*, at 155 Wn.2d 865. More specifically, the Washington state supreme court held that sewer service is not "available" to a tax parcel that (1) is unimproved, (2) is not connected to the sewer system, and (3) for which there is no guaranteed right to connect upon improvement. *Holmes Harbor*, at 155 Wn.2d 866. Accordingly, in *Holmes Harbor*, sewer service was not "available" to undeveloped parcels within the Sewer District under Wash. Rev. Code § 57.08.081(1). *Holmes Harbor*, at 155 Wn.2d 859. Similarly, in the case at hand, sewer treatment services are not "available" to undeveloped parcels within the boundaries of the Sewer District. Such undeveloped parcels cannot and do not "**benefit from the availability of sewage treatment**" within the meaning of Section 4 [Fees] of S.L. 2004-96 (as amended by S.L. 2006-54).

C.
THE TOWN'S EXECUTION OF ENABLING LEGISLATION AND IMPOSITION OF A SEWER TREATMENT FEE/TAX

In 2009, the Town needed to generate additional enterprise revenue to pay debt service and operating expenses of its sewer system. In so doing, the Town faced an ethical dilemma as to who shall pay. As referenced above, in S.L. 2004-96 (as amended by S.L. 2006-54), the Town had been delegated the authority to generate non-operating enterprise revenue by imposing a Sewer Treatment Fee/Tax against owners of parcels that "could or [do] benefit from the availability of sewage treatment." SECTION 4 of S.L. 2004-96 (as amended by S.L. 2006-54). In the alternative, to generate additional operating revenue, the Town could raise the rates that sewer users of developed parcels pay to receive sewage collection and treatment services. In this case, the sewer user and the owner of a developed parcel have a different legal relationship, although they may be the same person. The sewer user contracts with a town for the receipt of sewer collection and treatment services. In contrast, owners of

[21] 155 Wn.2d 858, 123 P.3d 823 (2005).

[22] *Holmes Harbor*, 155 Wn.2d at 859.

> "[t]hough the District and parcel owners expect the District to maintain the sewer system's capacity and to approve connections when parcels assessed the special benefit are improved, neither of these events is guaranteed. Before authorizing connection, the District must approve the hookup application, and upon approval by the District, parcel owners must pay for the installation of on-site facilities and connection to the sewer system. In addition, unforeseen events may operate to reduce the District's ability to serve all assessed parcels." *Id.*

undeveloped parcels pay taxes, both ad valorem taxes and taxes for a local benefit. Similar to the owner of a developed parcel, the owner of an undeveloped parcel pays taxes, both ad valorem taxes and taxes for a local benefit. However, the owner of an undeveloped parcel cannot also be a sewer user because the undeveloped parcel generates no sewage and, as a result, cannot benefit from the receipt of sewage collection and treatment services.

Based upon deliberations in 2009, to generate additional enterprise revenue to pay debt service and operating expenses of its sewer system, the Town decided (1) to generate additional operating revenue by slightly raising the rates that sewer users of developed parcels pay to receive sewage collection and treatment services and (2) to generate additional non-operating enterprise revenue by executing the enabling legislation referenced above. In executing the enabling legislation referenced above, however, the Town intentionally and purposefully discriminated against owners of undeveloped parcels, in favor of owners of developed parcels, by effectively imposing a Sewer Treatment Fee/Tax against owners of undeveloped parcels, exclusively. The Town describes the Sewer Treatment Fee/Tax, as follows

> "Included on Town of Oak Island parcel tax bills is a Sewer District Fee. The Town established a Sewer District in 2009, which includes all parcel on the island where sewer service is capable of being provided by the Town (excludes mainland area where sewer service is provided by others). The Sewer District Fee is a part of the financing for sewer system improvements and expansion in the community. The fee is combined with sewer service rates and special assessments **to benefitted parcel** to finance and pay the obligations of the Town's utility system.
>
> *The purpose of the fee is to better equalize costs between developed parcel which pay utility system costs through rates, and undeveloped parcel whose contribution may be limited to payment of special assessments.* This better distributes costs to all who benefit. All parcel in the Sewer District is charged a fee, but **developed parcel receives a credit for the fee** [hereinafter, "Credit"] since developed parcel also contributes through rates. The fee will be evaluated on an annual basis." Bold and italics added. Town of Oak Island, Form 5482 SDF.

According to the Town and Mayor Wallace, the Town issues the Credit against the Sewer Treatment Fee/Tax charged to developed parcel owners because **undeveloped parcel owners were paying less than their fair share in previous years.**

> "While all parcel owners are billed for the sewer district fee, *a credit is issued at the end of the year for parcel owners with developed lots* who are hooked into the system, Mayor Betty Wallace said in an email Monday. That's because they pay the fee in installments as part of their monthly bills.
>
> **What the sewer district fee increase does is increase the debt service paid by undeveloped parcel owners, who were paying less into the system in previous years. Wallace noted the increase helps institute a fairer debt payment plan amongst all residents**." Bold and italics added. Cantwell, S. "Why did Oak Island raise the sewer tax for only vacant lots?" *Star News, MyReporter.com,* October 3, 2012. Available online at: http://www.myreporter.com/?p=16019.

Furthermore, as reported by the Star News (November 11, 2013):

> "Town officials have said all parcel owners pay the sewer district fee, but in different ways. Last year, the town increased the amount owners of undeveloped parcel pay because officials said that they had been paying less than their fair share.
>
> **While all parcel owners are billed for the sewer district fee, a credit is issued at the end of the year for parcel owners of developed lots who are hooked into the system. *That's because they pay the fee in installments as part of their monthly bills, town officials have said.*"** Bold and italics added. Gonzales, J. "Oak Island man files lawsuit over sewer fee." *Star New Online*, November 11, 2013. Available online at:
> http://www.starnewsonline.com/article/20131111 /articles/131119966.

In executing the power granted to the Town by the enabling legislation,[23] the Town found facts and determined the existence of a factual situation or condition upon which the operation of S.L. 2004-96 (amended by

[23] S.L. 2004-96 (amended by S.L. 2006-54).

S.L. 2006-54) depends.[24] Specifically, the Town determined that it confers a special benefit upon undeveloped properties within the boundaries of the Sewer District in that said undeveloped properties "**could or [do] benefit from the availability of sewage treatment**" pursuant to SECTION 4 [Fees] of S.L. 2004-96 (amended by S.L. 2006-54). This determination is a **question of law subject to a court's judicial review**[25] where, if there is reasonable doubt with regard to the existence of the Town's power in a particular instance, such doubt must be resolved against the Town, where said power is denied.[26]

Longitudinal comparison of the Town's Sewer Treatment Fee/Tax

	2009	**2010**	**2011**	**2012**	**2013**	**2014**
Sewer District Fee	$146.15	$146.15	$139.13	$576.00	$643.68	$719.31
	2015	**2016**	**2017**	**2018**	**2019**	
Sewer District Fee	$803.82	$803.82	$803.82	$601.78	$601.78	

Based upon the above discussion of the Town's execution of enabling legislation and imposition of a Sewer Treatment Fee/Tax, the authors assert that the Town's determination of the existence of a requisite condition upon which the operation of S.L. 2004-96 (amended by S.L. 2006-54) depends (i.e., that undeveloped parcels within the boundaries of the Sewer District are parcels for which there exists the "availability of sewer [treatment] service") is:

(1) Contrary to the intent of the N.C. General Assembly in G.S. § 160A-317, which **provides a context for construing the meaning of "availability" in S.L. 2004-96** (as amended by S.L. 2006-54). Under G.S. § 160A-317, the N.C. General Assembly has expressly exercised its power of classification in finding that existing "water or sewer line[s]" were not "available" to undeveloped parcels *within* the Town.

(2) Contrary to the meaning of "availability" as that term is construed by a string of appellate court cases in the State of Washington, which **provides a similar context for construing the meaning of "availability" in S.L. 2004-96 (as amended by S.L. 2006-54).**

(3) Accords the enabling statute an absurd meaning and produces an absurd result. Specifically, by imposing a Sewer Treatment Fee/Tax upon undeveloped parcels within the boundaries of the Sewer District, the Town is levying a tax for a local benefit, **without conferring a special benefit onto the subject parcel**, thereby causing such levy to be **unconstitutional**. *Southern Ry. v. City of Raleigh*, 277 N.C. 709, 713, 178 S.E. 2d 422 (1971).

Within the context of a court's judicial review of the Town's determination regarding undeveloped parcels within the boundaries of the Sewer District (i.e., that undeveloped parcels are parcels for which there exists the "availability of sewer [treatment] service"), statutory rules of construction require a court to consider not only the language ("availability of sewer [treatment] service") used in S.L. 2004-96 (as amended by S.L. 2006-54), but also (1) the mischiefs sought to be avoided (i.e., default by the Town on recurring, annual debt service payments), and (2) the remedies intended to be applied (i.e., revenue generation to fund recurring, annual, sewer system debt service payments). *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948); *Hunt v. Eure*, 188 N.C. 716, 125 S.E. 484 (1924); *Alexander v. Johnston*, 171 N.C. 468, 88 S.E. 785 (1916). Finally, "the language of a statute will be interpreted so as to avoid an absurd consequence." *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966). In applying these principles to S.L. 2004-96 (amended by S.L. 2006-54), the authors assert that a court must find that the N.C. General Assembly intended to exclude undeveloped parcels *within* the boundaries of the Sewer District from those parcels for which there exists the "availability of sewer [treatment] service," within the meaning of S.L. 2004-96 (amended by S.L. 2006-54). On July 2, 2019, the Court of Appeals of North Carolina agreed, wherein it held that the Town had:

> "exceeded its statutory authority because it imposed sewer service availability fees on owners' undeveloped property that could not or did not benefit from the availability of the [T]own's sewer system." *Boles, et al. v. Town of Oak Island*, 830 S.E. 2d 878, 2019 N.C. App. LEXIX 593 (July 2, 2019).

[24] *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 119, 195 S.E. 2d 517 (1973).
[25] *Id.*, 283 N.C. at 120.
[26] *In re Indian Hills*, 280 N.C. 659, 186 S.E. 2d 909 (1972).

II
THE LAW AT ISSUE:
THE CONSTITUTIONAL PARADIGM ASSOCIATED WITH A FIFTH AMENDMENT TAKING OF PROPERTY CLAIM, PURSUANT TO TITLE 42 OF THE UNITED STATES CODE, SECTION 1983

The Fifth Amendment to the U.S. Constitution provides that private property may not be "taken" by the federal government without just compensation. To establish a regulatory takings claim under the Fifth, through the Fourteenth, Amendment to the U.S. Constitution pursuant to 42 U.S.C.S. § 1983, a plaintiff must show (1) a property interest; (2) that has been taken under color of state law; (3) without just compensation. *Monterey v. del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), the Supreme Court established a two prong test for determining the ripeness of takings claims. First, the plaintiff must show that it has received a "final decision" from the government entity administering the regulation at issue. Second, the plaintiff must have demanded compensation from the state in instances where the state provides a "reasonable, certain and adequate provision for obtaining compensation." *Id.* at 473 U.S. 186.

However, **an exception exists if further efforts otherwise required by the plaintiff in demanding compensation would be futile**. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1013-14, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). Under this futility exception to *Williamson*'s demand requirement, a plaintiff need not demand compensation if such demand would have been an "idle and futile act." *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455-56, *modified on other grounds*, 830 F.2d 968 (9th Cir. 1987), *cert denied*, 484 U.S. 1043 (1988). In addition, plaintiffs are not required to comply with such demand requirements if such demand would have resulted in the deprivation of another constitutionally protected right.

The Constitution guarantees that private property shall not be taken for public use without just compensation. The Supreme Court, however, has not adopted a single precise formula for determining when a challenged government action is properly characterized as a taking. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 175, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (whether regulation of property constitutes a "taking" depends in part on "the extent to which the regulation has interfered with distinct investment-backed expectations"). Instead, the inquiry turns on the particular circumstances of each case [*United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 2 L. Ed. 2d 1228, 78 S. Ct. 1097 (1958)] with special emphasis on the **character of the government action** and the **degree of interference** with private property. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-84, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980). In particular, when "regulation reaches a certain magnitude" there may be a regulatory taking requiring compensation under the takings clause. *See Penn Central*, 438 U.S. at 127. Accordingly, the takings analysis involves an "**essentially ad hoc, factual inquiry**." Bold added. *Penn Central*, 438 U.S. at 124.

The bedrock principle of the Takings Clause is that it is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960); *accord Pennell v. City of San Jose,* 485 U.S. 1, 9, 99 L. Ed. 2d 1, 108 S. Ct. 849 (1988); *First English Lutheran Evangelical Church v. County of Los Angeles,* 482 U.S. 304, 318-19, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 163, 66 L. Ed. 2d 358, 101 S. Ct. 446 (1980); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 123, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

A long line of Supreme Court decisions emphasizes that the government may compel a private party to surrender its funds without providing compensation if the government's use of those funds confers a significant, concrete, and disproportionate benefit on that party. As long as the amount taken is "'a fair approximation of the cost of the benefits supplied,'" additional compensation is not required. *United States v. Sperry Corp.,* 493 U.S. 52, 60, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989) (quoting *Massachusetts v. United States,* 435 U.S. 444, 463, 55 L. Ed. 2d 403, 98 S. Ct. 1153, 41 A.F.T.R.2d (P-H) 1565 n.19 (1978)). For example, the Takings Clause under the Fifth, through the Fourteenth, Amendment to the U.S. Constitution is transgressed (i.e., there a compensable taking) **when governmental regulations do not serve a legitimate governmental interest**. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980).

Moreover, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922), the gravamen of plaintiff's complaint was that the law at issue merely protected the rights of a small group of private parties at the expense of other private parties. Justice Holmes, writing for a majority of the Court, agreed with the company's characterization of the law's purpose. *Id.* 260 U.S. at 414. In particular, the U.S. Supreme Court found that **the law at issue was not legislation intended to promote a public purpose pursuant to the state's police power**. 260 U.S. at 394-404. Accordingly, the Supreme Court held that the law lacked substantial police power justifications. *Id.* at 414; Also, *see* McGinley and Barrett, "Pennsylvania Coal Co. v. Mahon Revisited: *Is the*

Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking," 16 Tulsa L.J. 418, 430 (1981).

Furthermore, in *HBP Assocs. v. Marsh*, 893 F. Supp. 271, 279 (S.D.N.Y. 1995), the district court found "an **annual** special assessment for the construction and maintenance of the sewer facility" would create an entitlement to sewer services. Such a charge is a benefits-based tax, as opposed to an *ad valorem* tax. An "*ad valorem* tax" is "[a] tax imposed proportionally on the value of something (esp. real property), rather than on its quantity or some other measure." Black's Law Dictionary 1496 (8th ed. 2004) *See also USA Recycling Inc. v. Town of Babylon*, 66 F.3d 1272, 1286 (2d Cir. 1995) (distinguishing between taxes on property owners on an "*ad valorem* basis" or in proportion to the value of the property and those on a "benefit basis" or in proportion to the actual benefit conferred on the property).

> '[A]lthough money 'raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment, so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them.' Nashville, C. and St. L. Ry. v. Walters, 294 U.S. 405, 429-430, 55 S. Ct. 486, 79 L. Ed.
> 949 (1935); see also Norwood v. Baker, 172 U.S. 269, 279, 19 S. Ct. 187, 191, 43 L. Ed. 443 (1898). . . ." *HBP Associates v. Marsh*, 893 F. Supp. 271, 278-79 (S.D.N.Y. 1995).

Finally, in *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 60 L. Ed. 392, 36 S. Ct. 204 (1916), the U.S. Supreme Court invalidated the inclusion of certain property in a Drainage District that had no need of drainage and therefore could derive no benefit from the construction of drainage ditches. The Supreme Court held that when a special assessment district is "formed to include property which is not and cannot be benefited directly or indirectly, . . . there is an abuse of power and an act of confiscation." *Id.* at 485. In other words, a town may not force a charge for sewer services upon an owner of property that, while valuable to others, is useless to him. *Id*.

III.
THE LAW AT ISSUE, AS PRESENTED IN PART II, IS APPLIED TO THE FACTUAL BACKGROUND, AS PRESENTED IN PART I

A.
THE TOWN'S CLASSIFICATION SCHEME IMPERMISSIBLY INTERFERES WITH THE FUNDAMENTAL RIGHT TO BE FREE FROM A REGULATORY TAKING OF PROPERTY WITHOUT JUST COMPENSATION PURSUANT TO THE FIFTH (THROUGH THE FOURTEENTH) AMENDMENT TO THE U.S. CONSTITUTION

1. The Town Levies the Sewer Treatment Fee/Tax (a Benefits-Based Tax) Upon Owners of Undeveloped Parcels Without Providing a Special Benefit to such Undeveloped Parcels

Based upon the factual background surrounding the imposition by the Town of a Sewer Treatment Fee/Tax, as set forth above in Part I, on a recurring, annual basis, the Town provides no sewer collection or treatment services to undeveloped parcels within the boundaries of the Sewer District. But more importantly, undeveloped parcels, within the boundaries of the Sewer District, cannot avail themselves of the Town's sewer treatment services because they are undeveloped. *See* G.S. § 160A-317; *Holmes Harbor Sewer District v. Holmes Harbor Home Bldg.,LLC*[27]. Under G.S. § 160A-317, the exercise of the power of classification by the N.C. General Assembly in identifying what type of tax parcel is subject to the "periodic availability charge" (i.e., developed *residential* or *commercial* parcels located *within* the municipality) includes the exercise of the power of classification in identifying what type of parcel is NOT subject to the "periodic availability charge" for water and sewer services (i.e., undeveloped parcels located within the municipality). The power of classification **to include** incorporates power of classification **to exclude**. *Southern Ry. v. City of Raleigh,* 277 N.C. 709, 713, 178 S.E. 2d 422 (1971). By providing that G.S. § 160A-317 applies exclusively to developed *residential* or *commercial* parcels *within* the municipality (and not to undeveloped parcels), the N.C. General Assembly has exercised its power of classification **to exclude** undeveloped parcels from those parcels upon which a "periodic availability charge" for water and sewer services may be imposed. *Id.*, at 86 N.C. 17. Furthermore, in a case that parallels the facts of the case at hand, the Washington Supreme Court in *Holmes Harbor Sewer District v. Holmes Harbor Home Bldg., LLC*[28] held that

[27] 155 Wn.2d 858, 123 P.3d 823 (2005).
[28] 155 Wn.2d 858, 123 P.3d 823 (2005).

owners of undeveloped properties within the Sewer District were not subject to charges for the "availability" of sewer services because undeveloped properties are not properties to which sewer services are "available."[29]

Specifically, the court held that **sewer service is not "available" to a tax parcel** that (1) is unimproved, (2) is not connected to the sewer system, and (3) for which there is no guaranteed right to connect upon improvement. *Holmes Harbor*, at 155 Wn.2d 866. Accordingly, on these bases, the authors assert that the Town levies the Sewer Treatment Fee/Tax (a benefits-based tax) upon owners of undeveloped tax parcels **without providing any special benefit to these undeveloped parcels.** On July 2, 2019, the Court of Appeals of North Carolina agreed, wherein it held that the Town had:

> "exceeded its statutory authority because it imposed sewer service availability fees on owners' undeveloped property that could not or did not benefit from the availability of the [T]own's sewer system." *Boles, et al. v. Town of Oak Island*, 830 S.E. 2d 878, 2019 N.C. App. LEXIX 593 (July 2, 2019).

2. Without a Special Benefit Flowing to the Undeveloped Tax Parcel, The Town's Levy of a Recurring, Annual Sewer Treatment Fee/Tax (a Benefits-Based Tax) Against Owners of Undeveloped Parcels Is Confiscatory in Nature and Thereby a Regulatory Taking of Property Without Just Compensation In Violation of the Fifth (through the Fourteenth) Amendment to the U.S. Constitution

The bedrock principle of the Takings Clause is that it is "designed to bar the Town from forcing a selected number of tax parcel owners to exclusively bear public burdens that, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960). A long line of Supreme Court decisions emphasizes that the Town may compel a private party to surrender its funds **without providing compensation**, but only if the Town's use of those funds confers a significant, concrete, and disproportionate benefit on that party. In particular, as long as the amount taken is "'a fair approximation of the cost of the benefits supplied,'" additional compensation is not required. *United States v. Sperry Corp.,* 493 U.S. 52, 60, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989) (quoting *Massachusetts v. United States,* 435 U.S. 444, 463, 55 L. Ed. 2d 403, 98 S. Ct. 1153, 41 A.F.T.R.2d (P-H) 1565 n.19 (1978)).

As shown above in Part I, the Town levies a recurring, annual Sewer Treatment Fee/Tax (a benefits-based tax) upon owners of undeveloped tax parcels, without providing a special benefit to those undeveloped parcels. As supported below, without a special benefit to the undeveloped tax parcel, the authors assert that the Town's levy of a recurring, annual Sewer Treatment Fee/Tax (a benefits-based tax) against owners of undeveloped parcels is confiscatory in nature and thereby a regulatory taking of property, without just compensation, in violation of the Fifth (through the Fourteenth) Amendment to the U.S. Constitution. In particular, the authors assert that the Town's levy of a recurring, annual Sewer Treatment Fee/Tax upon undeveloped tax parcels "**is unconstitutional and invalid**," and thereby *ultra vires* and void, since such recurring, annual levy is confiscatory in nature, where no special benefit accrues to such undeveloped properties.[30]

To establish a regulatory takings claim under the Fifth (through the Fourteenth) Amendment to the U.S. Constitution pursuant to 42 U.S.C.S. § 1983, in the instant case, the authors shows that (1) a property interest (money); (2) that has been taken under color of state law (the Town's imposition of a Sewer Treatment Fee/Tax); (3) without just compensation,[31] where the takings analysis involves an "**essentially ad hoc, factual inquiry**." Bold added.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). In particular, by relying upon a string of cases that dates back to *Norwood, infra*, in 1898, the authors assert that the Town's imposition of a recurring, annual Sewer Treatment Fee/Tax upon undeveloped parcel owners, within the boundaries of the Sewer District, transgresses the Fifth Amendment Takings Clause, since owners of undeveloped parcels, within the boundaries of the Sewer District, are subject to the Town's recurring annual Sewer Treatment Fee without any benefit from the "availability of sewer [treatment] service within the district." Section 6 of S.L. 2004-96 (as amended by S.L. 2006-54).

Also, similar to the facts in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922), where the law at issue benefitted a small group of private parties, at the expense of other private parties, the Town's imposition of a Sewer Treatment Fee/Tax, effectively upon only owners of undeveloped parcels within the boundaries of the Sewer District, for the sole benefit of owners of developed parcels within the Sewer District, lacks substantial police power justifications. *Id.*, 260 U.S. at 414. Within this context, he Town's imposition of a Sewer Treatment Fee/Tax **is not legislation intended to promote a public purpose pursuant to the state's police power**. *Id.*, 260 U.S. at 394-404. Accordingly, on this basis, the Sewer Treatment Fee/Tax law lacks substantial police power justifications. *Id.*, 260 U.S. at 414.

---

[29] *Holmes Harbor*, 155 Wn.2d at 859.

[30] Bold added. *Southern Ry. v. City of Raleigh*, 277 N.C. 709, 713, 178 S.E.2d 422 (1971).

[31] *Monterey v. del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

Furthermore, similar to the facts in *HBP Assocs. v. Marsh*, 893 F. Supp. 271, 279 (S.D.N.Y. 1995), where "an **annual** special assessment" was levied upon tax parcels "for the construction and maintenance of the sewer facility," the Town's imposition of a Sewer Treatment Fee/Tax, effectively upon only owners of undeveloped tax parcels within the boundaries of the Sewer District created an entitlement to sewer services. *Id*. Accordingly, such a recurring, annual charge is a benefits-based tax, as opposed to an *ad valorem* tax, where a "benefit basis" tax must be laid in proportion to the actual benefit conferred on the property. *Id*. Furthermore, where there is a benefits-based tax without a benefit, the tax is confiscatory in nature. *Id*.

> "[A]lthough money 'raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment, so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them.' Nashville, C. and St. L. Ry. v. Walters, 294 U.S. 405, 429-430, 55 S. Ct. 486, 79 L. Ed.
> 949 (1935); see also Norwood v. Baker, 172 U.S. 269, 279, 19 S. Ct. 187, 191, 43 L. Ed. 443 (1898). . . ." *HBP Associates v. Marsh*, 893 F. Supp. 271, 278-79 (S.D.N.Y. 1995).

Moreover, similar to the facts in *Thomas v. Kansas City Southern Railway Co.*, 261 U.S. 481, 43 S. Ct. 440, L. Ed. 758 (1923), where a railroad company received no direct or immediate benefit from drainage ditches, undeveloped tax parcels within the boundaries of the Sewer District receive no benefit from the "availability of sewer [treatment] service within the district." Section 6 of S.L. 2004-96 (as amended by S.L. 2006-54). In *Thomas*, the U.S. Supreme Court specifically held that a special district tax to improve the drainage ditches violated the Equal Protection Clause, U.S. Const. amend. XIV, § 1, because "the tax levied is grossly discriminatory" in that "[t]he tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit, are required to bear only a very small part of the burden." *Id.*, 261 U.S. at 484. Similarly, the Town's levy of a Sewer Treatment Fee/Tax (a benefits-based tax), which is effectively borne entirely by owners of undeveloped parcels, even though the benefit of sewer collection and treatment services accrues entirely to owners of developed parcels, "is grossly discriminatory" and violates the Fifth Amendment Takings Clause, but also the Equal Protection Clause, U.S. Const. amend. XIV, § 1. *Id.* Also, see *United States v. Sperry Corp.,* 493 U.S. 52, 60, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989) (quoting *Massachusetts v. United States,* 435 U.S. 444, 463, 55 L. Ed. 2d 403, 98 S. Ct. 1153, 41 A.F.T.R.2d (P-H) 1565 n.19 (1978)) (additional compensation is required if a private party's surrender of his funds is NOT "'a fair approximation of the cost of the benefits supplied'").

Finally, and most importantly, similar to the facts in *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 60 L. Ed. 392, 36 S. Ct. 204 (1916), where certain property that had no need of drainage (and therefore could derive no benefit from the construction of drainage ditches) was included in a Drainage District, the Town includes undeveloped tax parcels within the Town's Sewer District, even though such parcels cannot benefit from the "availability of sewer [treatment] service within the district" [Section 6 of S.L. 2004-96 (as amended by S.L. 2006-54)]. Accordingly, based upon the rationale as set forth by the U.S. Supreme Court in *Myles Salt Co.*, the Town's inclusion of undeveloped tax parcels within the Town's Sewer District, which was formed of tax parcels that purportedly benefit from the "availability of sewer [treatment] service within the district" [Section 6 of S.L. 2004-96 (as amended by S.L. 2006-54)], is a situation in which a special district is "formed to include property which is not and cannot be benefited directly or indirectly." *Id.*, 239 U.S. at 485. In this case, the U.S. Supreme Court held that "there is an abuse of power and an act of confiscation," [*Id.*], thereby resulting in such a flagrant and palpable inequality between the burden imposed and the benefit received as to effectively amount to the confiscatory taking of property without just compensation, in violation of the Fifth (through the Fourteenth) Amendment to the U.S. Constitution. In other words, the Town may not force a levy of a Sewer Treatment Fee/Tax for the "availability of sewer [treatment] service within the district" [Section 6 of S.L. 2004-96 (as amended by S.L. 2006-54)] upon owners of undeveloped tax parcels that, while valuable to others, is useless to these owners. *Id.* Also, *see Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986) (the Fourteenth Amendment comprehends a challenge to a special tax assessment only if it is so palpably punitive or arbitrary as to confer no benefit on the landowner or "force[s] a landowner to make an improvement that, while valuable to others, is useless to him.").

IV. CONCLUSIONS: IMPLICATIONS OF THE LEGAL FINDINGS IN PART III

A. EXTENDING THE CURRENT RESEARCH TO ADDRESS ANOTHER CONSTITUTIONAL INFIRMITY REGARDING THE ACTIONS OF THE TOWN, REQUIRING A RETHINKING OF THE TOWN'S RESOLUTION TO ITS ETHICAL DILEMMA

As shown above, within the context of the Town's recurring, annual levy of a Sewer Treatment Fee/Tax on tax parcels within the boundaries of the Sewer District, the Town has executed a tax classification scheme, which is based upon a tax parcel's status as developed or undeveloped, where the disparate effects of such classification scheme facially and impermissibly interfere with the fundamental right of undeveloped parcel owners, within the boundaries of the Sewer District, to be free from a regulatory taking of property, without just compensation, which is protected by the Fifth (through the Fourteenth) Amendment to the U.S. Constitution. However, such analysis can be extended to address another constitutional infirmity regarding the actions of the Town.

As shown above, pursuant to enabling local legislation,[32] the Town (1) created a "**fee supported sewer treatment district**" and (2) imposed a recurring, annual Sewer Treatment Fee/Tax for the "**availability of sewer service**" upon owners of developed and undeveloped property within the boundaries of the Sewer District, where said parcels purportedly "**could or [do] benefit from the availability of sewage treatment**" in order "**to pay the [recurring] debt service for the sewer system"** as well as contemporaneous "**sewer services provided by the county**."[33] The recurring, annual Sewer Treatment Fee/Tax is imposed on each year's property tax statement. However, without any authority from the N.C. General Assembly pursuant to N.C. Const. Art. VII, § 1 (2014), delegated or otherwise, on each year's property tax statement, the Town issues a credit to the private owners of developed tax parcels in the amount of the Sewer Treatment Fee/Tax. In other words, without any delegated power of classification from the N.C. General Assembly pursuant to N.C. Const. Art. VII, § 1 (2014), the Town has created a tax classification scheme based upon a tax parcel's status as developed or undeveloped, where the Town issues a credit in the amount of the Sewer Treatment Fee/Tax to private owners of developed parcels on each year's property tax statement. The Town issues no credit to owners of undeveloped parcels within the boundaries of the Sewer District. As a result, the Town's recurring, annual levy of a Sewer Treatment Fee/Tax upon both developed and undeveloped parcels within the boundaries of the Sewer District is discriminatory in that such levy creates a tax classification scheme, which requires the owners of undeveloped parcels to pay the Sewer Treatment Fee/Tax, but effectively exempts owners of developed parcels from paying said fee/tax. Here, within the context of the Town's recurring, annual levy of a Sewer Treatment Fee/Tax on tax parcels within the boundaries of the Sewer District, the authors hypothesize that the Town's tax classification scheme, which is based upon a tax parcel's status as developed or undeveloped, **facially and impermissibly** violates the Equal Protection Clause, U.S. Const. amend. XIV, § 1.

B. THE TOWN'S IMMINENT CHANGE IN THE MANNER IN WHICH THE TOWN FUNDS DEBT SERVICE PAYMENTS AND OPERATIONAL EXPENSES FOR ITS SEWER SYSTEM.

The Town must change the manner in which it funds debt service payments and the operational expenses of its sewer system. As shown above, the **Town's tax classification scheme**, which is based upon a parcel's status as developed or undeveloped, where the Town issues a recurring, annual credit, in the amount of the Sewer Treatment Fee/Tax, to private owners of developed parcels on each year's property tax statement, **facially and impermissibly interferes with the exercise of a fundamental right to be free from a regulatory taking of property without just compensation.** Within this context, the Town cannot demonstrate that these actions were necessary to promote a compelling governmental interest. The compelling governmental interest that was to be promoted was the generation of non-operating enterprise revenue for the recurring payment of the Town's "debt service for the sewer system," as well as "sewer services provided by the county," from those owners of parcels that benefit from the "availability of sewer [treatment] service within the district." Section 6 of S.L. 2004-96 (as amended by S.L. 2006-54). The Town's council could have ensured the recurring, annual payment of such obligations by establishing a proportional, annual Sewer Treatment Fee/Tax equal to the expected total obligation divided by the number of parcels within the boundaries of the Sewer District for which sewer collection and treatment services are available.

[32] S.L. 2004-96 (as amended by S.L. 2006-54).
[33] Bold added. Sections 1, 3, 4 & 6 of S.L. 2004-96 (as amended by S.L. 2006-54).

For this purpose, it was not necessary or rational to have parcels within the boundaries of the Sewer District classified into developed and undeveloped so that the developed parcel owners could receive a credit in the amount of the Sewer Treatment Fee/Tax, thereby effectively paying no fee/tax, while, at the same time, undeveloped parcel owners receive no credit, thereby effectively bearing the entire burden of the Sewer Treatment Fee/Tax. The Town must change its priorities so that its conduct is aligned with promoting a compelling governmental interest.

D.
PRESENTATION OF DECLARATORY JUDGMENT ACTION: THE TOWN'S EXECUTION OF ENABLING LEGISLATION AND IMPOSITION OF A SEWER DISTRICT FEE/TAX [ON ITS FACE] VIOLATES THE EQUAL PROTECTION CLAUSE, U.S. CONST. AMEND. XIV, § 1

Allegedly pursuant to enabling local legislation,[34] the Town (1) created a "**fee supported sewer treatment district**" and (2) imposed a recurring, annual Sewer District Fee/Tax for the "**availability of sewer service**" upon owners of developed and undeveloped property within the boundaries of the Sewer District that purportedly "**could or [do] benefit from the availability of sewage treatment**" in order "**to pay the [recurring] debt service for the sewer system**."[35] The recurring, annual Sewer District Fee/Tax is shown on each year's property tax statement. However, without any authority from the N.C. General Assembly pursuant to N.C. Const. Art. VII, § 1 (2014), delegated or otherwise, on each year's property tax statement, the Town issues a credit to the private owners of developed tax parcels in the amount of the Sewer District Fee/Tax. In other words, without any delegated power of classification from the N.C. General Assembly pursuant to N.C. Const. Art. VII, § 1 (2014), the Town has created a tax classification scheme based upon a tax parcel's status as developed or undeveloped, where the Town issues a credit in the amount of the Sewer District Fee/Tax to private owners of developed parcels on each year's property tax statement. The Town issues no credit to owners of undeveloped parcels within the boundaries of the Sewer District. As a result, the Town's recurring, annual levy of a Sewer District Fee/Tax upon both developed and undeveloped parcels within the boundaries of the Sewer District is discriminatory in that such levy creates a tax classification scheme, which requires the owners of undeveloped parcels to pay the Sewer District Fee/Tax, but effectively exempts owners of developed parcels from paying said fee/tax.

1. With Respect to the Recurring, Annual Sewer District Fee/Tax - In General

With respect to the recurring, annual Sewer District Fee/Tax levied by the Town upon both developed and undeveloped properties within the boundaries of the Sewer District pursuant to S.L. 2004-96 (as amended by S.L. 2006-54), the annual Sewer District Fee is a "species of tax," i.e., a tax on property levied by the Town for a local benefit, i.e., the "availability of sewer service within the district."[36] However, the recurring, annual Sewer District Fee/Tax is distinguished from a tax on property levied by the Town for general revenue in that "**a special or local assessment is justified and authorized by, and is unconstitutional and invalid without, a special benefit to the property assessed**, resulting from a special or local public improvement."[37]

> "'These [local] assessments . . . proceed upon the theory that when a local improvement enhances the value of neighboring parcel, it is reasonable and competent for the Legislature to provide that such parcel shall pay for the improvement [or benefit].' *Tarboro v. Forbes*, 185 N.C. 59 (citing many authorities)." *Southern Ry. V. City of* Raleigh, at 277 N.C. 712-13.

Notwithstanding the foregoing, the legislative purpose underlying the imposition of a recurring, annual Sewer District Fee/Tax is revenue generation "to pay the debt service for sewer system." Section 6 [Use of Fees] of S.L. 2004-96 (as amended by S.L. 2006-54). As such, the Sewer District Fee is a tax. *State v. Dannenberg*, 151 N.C. 718, 721, 66 S.E. 301 (1909). Also, *see* Section 5 [Billing of Fees] of S.L. 2004-96 (as amended by S.L. 2006-54), wherein such section provides that the Sewer District Fee "shall be collected in the same manner as provided for in the General Statutes for the collection of ad valorem taxes, and remedies available by statute for the collection of taxes shall apply to the collection of the sewer district fees."

2. With Respect to the Recurring, Annual Credit Issued by the Town to Private Owners of Developed Parcels

With respect to the recurring, annual credit issued by the Town to private owners of developed parcels in the amount of the Sewer District Fee/Tax, the recurring, annual credit

[34] S.L. 2004-96 (as amended by S.L. 2006-54).

[35] Bold added. Sections 1, 3, 4 & 6 of S.L. 2004-96 (as amended by S.L. 2006-54).

[36] Section 3 [Imposition of Annual Fees] and Section 5 [Billing of Fees] of S.L. 2004-96 (as amended by S.L. 200654); Southern Ry. V. City of Raleigh, 277 N.C. 709, 712, 178 S.E. 2d 422 (1971).

[37] Bold added. Southern Ry. V. City of Raleigh, 277 N.C. at 713.

"implies the [recurring, annual] imposition of some new financial liability upon the [Town]," thereby resulting in "the [recurring, annual] creation of a [Town] debt for the benefit of private enterprises," i.e., private owners of developed parcels.[38] "[T]o have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody."[39] Within this context, the Town's issuance of a recurring, annual credit to private owners of developed parcels in the amount of the Sewer District Fee/Tax imposes a recurring, annual debt upon the Town in favor of private owners of developed parcels, which is satisfied each year with the use of public funds, i.e., the foregone Sewer District Fee/Tax revenue.[40] In other words, in issuing the credit, **the Town has contracted a debt secured by a pledge of the Town's faith and credit** (i.e., a pledge of the taxing power of the Town) within the meaning of N.C. Const. Art. V, § 4(5) (2014). In the alternative, the recurring, annual credit constitutes a recurring, annual **loan of credit** within the meaning of N.C. Const. Art. V, § 4(5) (2014), since, in issuing the recurring, annual credit, the Town (1) effectively **exchanges its obligations with an individual, association, or private corporation** or (2) effectively **guarantees the debts of an individual, association, or private corporation**.[41]

3. Based upon the Factual Background Surrounding the Town's Imposition of a Sewer District Fee/Tax: The Town's Imposition of a Sewer District Fee/Tax (on its Face) Violates the Equal Protection Clause, U.S. Const. amend. XIV, § 1

As shown above in discussing the factual background surrounding the imposition by the Town of a Sewer District Fee/Tax, the burden of the Town's facially discriminatory tax classification scheme falls by design in a predictably disproportionate way on owners of undeveloped parcels within the boundaries of the Sewer District, which is asserted to have a pernicious effect on those owners' rights to equal protection. This sort of discrimination is at the very core of tax classifications forbidden by the Equal Protection Clause, U.S. Const. amend. XIV, § 1. Under the Equal Protection Clause, U.S. Const. amend. XIV, § 1, the Town may not indiscriminately tax an owner of a tax parcel within the boundaries of the Sewer District more heavily than another like owner of a tax parcel.[42] As shown above, the Town initially subjects all tax parcels within the boundaries of a Sewer District to a uniform property tax for the "availability of sewer [treatment] service," but then engages in intentionally and systematically disparate tax treatment, based upon whether the tax parcel is developed or undeveloped, where such treatment is asserted below in Part V to be in violation of the enabling legislation and the N.C. Constitution. Within this context, Plaintiff asserts that the Town's tax classification scheme on its face, as reflected above, violates the Equal Protection Clause, U.S. Const. amend. XIV, § 1. In particular, as shown below in Subpart B of Part V, Plaintiff asserts that the Town's tax classification scheme:

(1) is arbitrary and irrational as measured by (a) the avowed, legitimate interest of the enabling legislation (i.e., the generation of revenue "**to pay the debt service for the sewer system**"),[43] and (b) the Town's avowed interest/concern (i.e., that undeveloped parcel owners within the boundaries of the Sewer District have paid less in prior years) and
(2) can be rationally related to NO legitimate Town interest because said classification scheme **facially and impermissibly** violates the enabling legislation and the N.C. Constitution.

Furthermore, as shown below in Subpart A of Part V, Plaintiff asserts that the disparate effects of the Town's tax classification scheme **facially and impermissibly** jeopardize the exercise of two (2) fundamental rights. In particular, the imposition of the Sewer District Fee/Tax on undeveloped parcels (2) **facially and impermissibly** constitutes a Fifth Amendment (through the Fourteenth Amendment) taking without just compensation and (2) is facially and impermissibly an instance of taxation without representation and a taxation scheme involving a pattern of unequal voting rights. Here, a review of the Town's property tax scheme employing equal protection principles is appropriate because such scheme classifies tax parcels within the boundaries of a Sewer District for disparate treatment as between developed and undeveloped.

[38] Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 121, 195 S.E. 2d 517 (1973).
[39] Id.
[40] Id.
[41] N.C. Const. Art. V, § 4(5) (2014).
[42] Hillsborough v. Cromwell, 326 U.S. 620, 623, 66 S. Ct. 445, 90 L. Ed. 358 (1946).
[43] S.L. 2004-96 (as amended by S.L. 2006-54).

II.
THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION AND THE CONSTITUTIONAL PARADIGM ASSOCIATED WITH AN EQUAL PROTECTION CLAUSE CLAIM PURSUANT TO TITLE 42 OF THE UNITED STATES CODE, SECTION 1983

A.
EQUAL PROTECTION PARADIGM

"The Equal Protection Clause of the Fourteenth Amendment provides that 'no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const. amend. XIV, § 1. The Clause 'does not take from the States all power of classification,' *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979) but 'keeps governmental decision makers from treating differently persons who are in all relevant respects alike,' *Nordlinger v. Hahn*, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992). *See also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) (holding that the Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike').

To succeed on an equal protection claim, Plaintiffs must first demonstrate that (a) they have been treated differently from others with whom they are similarly situated and (b) such unequal treatment was the result of intentional or purposeful discrimination. Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001).

With regard to the different levels of scrutiny in an Equal Protection Clause [U.S. Const. amend XIV, cl. 1] review, in *Nordlinger v. Hahn*, 505 U.S. 1, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992), the U.S. Supreme Court held as follows.

> "[T]his Court's cases are clear that, unless a classification warrants some form of heightened review **because it jeopardizes exercise of a fundamental right** or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification **rationally further a legitimate state interest**. See, *e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-441, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985); *New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976)." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992).

Also, in *Nordlinger v. Hahn*, 505 U.S. 1, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992) (Justice Stevens, *dissenting*), Justice Stevens discussed the characteristics of "a legitimate state interest," as referenced by the majority opinion in *Nordlinger*, as follows.

> "A *legitimate* state interest must encompass the interests of members of the disadvantaged class and the community at large as well as the direct interests of the members of the favored class. It must have a **purpose or goal independent of the direct effect of the legislation** and one 'that we may reasonably presume to have motivated an impartial legislature.' *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452, n.4, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) (STEVENS, J., concurring) (quoting *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 180-181, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980) (STEVENS, J., concurring in judgment)). That **a classification must find justification outside itself** saves judicial review of such classifications from becoming an exercise in tautological reasoning.
>
> 'A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps. 'The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes.' *Rinaldi v. Yeager*, 384 U.S. 305, 308, 16 L. Ed. 2d 577, 86 S. Ct. 1497 (1966).' *Williams v. Vermont*, 472 U.S. 14, 27, 86 L. Ed. 2d 11, 105 S. Ct. 2465 (1985).

If the goal of the discriminatory classification is not independent from the policy itself, 'each choice [of classification] will import its own goal, each goal will count as acceptable, and the requirement of a 'rational' choice-goal relation will be satisfied by the

very making of the choice.' Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1247 (1970).

A classification *rationally* furthers a state interest when there is some fit between the disparate treatment and the legislative purpose." Bold added. *Nordlinger v. Hahn*, 505 U.S. 1, 34, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992) (Justice Stevens, *dissenting*).

1. Equal Protection Clause Analysis to Determine Whether a State Property Tax System Violates the Equal Protection Clause of the of the Fourteenth Amendment to the U.S. Constitution Under Strict Scrutiny (i.e. When the State Tax Scheme Jeopardizes Exercise of a Fundamental Right)

A.
UNDER STRICT SCRUTINY,
THE TOWN FAILS TO JUSTIFY THE TOWN'S TAX CLASSIFICATION SCHEME

Within the context of the Town's recurring, annual levy of Sewer District Fee/Tax on tax parcels within the boundaries of the Sewer District that purportedly benefit from the "availability of sewer [treatment] service within the district" [Section 6 of S.L. 2004-96 (as amended by S.L. 2006-54)], as shown above in Part II, the disparate effects of the **Town's tax classification scheme**, which is based upon a tax parcel's status as developed or undeveloped, where the Town issues a recurring, annual credit in the amount of the Sewer District Fee/Tax to private owners of developed parcels on each year's property tax statement, **facially and impermissibly interferes with the exercise of a fundamental right:**

(1) the Right to be free from a Regulatory Taking of Property Without Just Compensation pursuant to the Fifth (through the Fourteenth) Amendment to the U.S. Constitution**.** In this case, the Town's tax classification scheme, based upon a tax parcel's status as developed or undeveloped, where the Town issues a recurring, annual credit in the amount of the Sewer District Fee/Tax to private owners of developed parcels, must be narrowly tailored to promote a compelling interest. Because the Town cannot show that its tax classification scheme promotes a compelling Town interest, as a matter of law under strict scrutiny review, the Town's recurring, annual levy of a Sewer District Fee/Tax on tax parcels within the boundaries of the Sewer District, incorporating such classification scheme, **facially and impermissibly** violates the Equal Protection Clause, U.S. Const. amend. XIV, § 1.