

**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

MOUNTAINSIDE MAR, LLC, a )  
Delaware limited liability company, ) No. 1 CA-CV 21-0002  
)  
Plaintiff/Appellant, ) Coconino County Superior Court  
) No. CV-2017-00177  
v. ) No. CV-2018-00169  
) (Consolidated)  
CITY OF FLAGSTAFF, a municipal )  
corporation, *et al.*, )  
)  
Defendants/Appellees. )  
\_\_\_\_\_)  
TRAILSIDE MAR, LLC, a Delaware ) No. 1 CA-CV 21-0002  
limited liability company, )  
) Coconino County Superior Court  
Plaintiff/Appellant, ) No. CV-2020-00305  
) (Consolidated)  
v. )  
)  
CITY OF FLAGSTAFF, a municipal )  
corporation, *et al.*, )  
)  
Defendants/Appellees. )  
\_\_\_\_\_)

**BRIEF OF *AMICI CURIAE* LEAGUE OF ARIZONA CITIES AND TOWNS,  
CITY OF AVONDALE, TOWN OF QUEEN CREEK, AND CITY OF  
SHOW LOW**

Nancy L. Davidson (State Bar No. 029991)  
General Counsel, League of Arizona Cities and Towns  
1820 W. Washington Street, Phoenix, AZ 85007  
Phone: 602.258.5786  
[ndavidson@azleague.org](mailto:ndavidson@azleague.org)  
*Attorney for Amici Curiae*

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## INTEREST OF AMICUS CURIAE

Pursuant to [Rule 16 of the Arizona Rules of Civil Appellate Procedure](#), this amici curiae brief is submitted by the League of Arizona Cities and Towns (“League”), the City of Avondale, the Town of Queen Creek, and the City of Show Low in support of the City of Flagstaff (“City”). [Ariz. R. Civ. App. P. 16](#). This amici curiae brief is being lodged with a Motion for Leave to File Amici Curiae Brief in accordance with [Ariz. R. Civ. App. P. 16\(b\)](#).

The League is a voluntary association of all the incorporated cities and towns in the State of Arizona. It includes 91 member municipalities representing approximately 79% of Arizona’s total population. The League provides collective advocacy, education, training, technical assistance, and information-sharing for and among the cities and towns of Arizona. The City of Avondale, the Town of Queen Creek, and the City of Show are municipal corporations that own and operate utilities in the State of Arizona.

Arizona cities and towns have a long history of municipal utility ownership and operations, dating back over 100 years. When private companies would not or could not serve the utility needs of Arizona residents, municipal governments stepped up to provide utility services both inside and outside their boundaries as explicitly authorized by the Arizona Constitution and state law.

Amici respectfully submit this brief in support of the City because the outcome of this appeal could have far-reaching implications that extend beyond this case to all municipal utilities in Arizona. The City has long operated water and wastewater utilities in accordance with the Arizona Constitution, its charter and state law. *See* [ARIZ. CONST. art. II, § 34](#); [ARIZ. CONST. art. XIII, § 2](#); [ARIZ. CONST. art. XIII, § 5](#); [A.R.S. §§ 9-511, 9-511.01](#); [Flagstaff City Charter art. XII, § 2](#). The issue presented in this case brings directly into question the authority of the City - and all other Arizona cities and towns - to assess utility capacity fees of general applicability under [A.R.S. §§ 9-511 and 9-511.01](#). Should this Court rule that municipal utilities can no longer assess utility capacity fees of general applicability under [A.R.S. §§ 9-511 and 9-511.01](#), the ruling would have significant financial impacts on these municipal utilities in Arizona and their customers.

No person or entity made a monetary contribution for the preparation or submission of this Brief Amicus Curiae.

## **I. INTRODUCTION**

At issue in this case is the authority of the City to charge utility capacity fees for initial connections to the City's water and sewer infrastructure and for connections that substantially increase demands on the City's water or sewer systems. [Flagstaff City Code §§ 7-03-001-0011\(A\)](#) (water-system capacity fees),

[7-02-001-0041\(B\)](#) (sewer capacity fees). The City adopted the utility capacity fees under the authorities granted by the Arizona Constitution, the Flagstaff City Charter, A.R.S. § [9-511](#), and A.R.S. § [9-511.01](#).

The Appellants, Mountainside MAR, LLC, and Trailside MAR, LLC, (collectively “Mountainside”) argue they are entitled to make connections to the City’s water and sewer utility systems for *free*. (Opening Br. 39-41.) Mountainside does not dispute that its connections trigger payment obligations under the Flagstaff City Code. Mountainside also does not claim that cities and towns have zero authority to charge utility capacity fees. Instead, Mountainside argues it is entitled to free connections because the utility capacity fees should have been adopted under a different statute – A.R.S. § [9-463.05](#). (Opening Br. 22-23.) The Superior Court correctly rejected Mountainside’s position and dismissed the case on the merits.

The dismissal must be affirmed for four independent reasons. First, the extreme position advocated by Mountainside to avoid payment plainly conflicts with the authorities granted to the City under the Arizona Constitution, state law, the Flagstaff City Charter, and the Flagstaff City Code. See [ARIZ. CONST. art. II, § 34](#); [ARIZ. CONST. art. XIII, § 2](#); [ARIZ. CONST. art. XIII, § 5](#); A.R.S. §§ [9-511](#), [9-511.01](#); [Flagstaff City Charter art. XII, § 2](#); [Flagstaff City Code §§ 7-03-001-0011\(A\), \(B\)](#). In particular, the City is plainly authorized by A.R.S. §§ [9-511](#) and

[9-511.01](#) to charge first-time connectors to its water and sewer utility systems a fee to offset infrastructure costs from increased capacity demands that those new connections impose on those systems. The City's utility capacity fees were adopted based on a comprehensive study as required by A.R.S. § [9-511.01](#), which led the Flagstaff City Council to conclude that its fees were reasonable and appropriate to offset the additional strain placed upon its water and wastewater system by anticipated new connections. (R.56 Ex. 3.). Consequently, this Court should not supplant the sound and reasonable conclusion of the Flagstaff City Council.

Second, contrary to Mountainside's assertion, A.R.S. § [9-463.05](#) specifically contemplates other fees related to development. *See, e.g.*, A.R.S. §§ [9-463.05\(B\)\(12\)](#) and [9-463.05\(E\)\(7\)](#). In fact, the authority granted to the City is separate and distinct from the fee authority granted to cities and towns under A.R.S. § [9-463.05](#).

Third, Mountainside's interpretation would lead to unworkable and absurd results. For example, utility capacity fees under A.R.S. § [9-511.01](#) apply to properties both inside and *outside* a municipality's boundaries, thereby accommodating a municipality's choice to provide utility service to customers outside its boundaries. *See* A.R.S. § [9-511.01\(A\)](#). In contrast, development fees

under A.R.S. § 9-463.05 apply to properties *within the municipality's territorial limits only*. See A.R.S. § 9-463.05(T)(9).

Finally, a reversal would cause negative statewide impacts on municipal utilities and their existing customers. If Mountainside is given a free pass, existing customers will be forced to bear the costs associated with Mountainside's increased demands on the utility systems. There is no such thing as a free ride, nor does the Arizona Constitution allow for such a thing. If a new rule is created prohibiting capacity fees under A.R.S. § 9-511.01, municipal utilities will also be forced to evaluate new connections from properties outside the municipal boundaries because they are not subject to development fees under A.R.S. § 9-463.05. A reversal may bring into question the validity of other utility charges and fees, as well.

For these reasons and the reasons stated in the City's briefs, the League respectfully asks this Court to affirm the Superior Court's ruling. If the Court creates a new rule and invalidates utility capacity fees, however, the League urges that the ruling be given prospective effect only.

## **II. ARGUMENT**

### **A. The City's Authority to Charge Utility Capacity Fees is Plain from Multiple Sources.**

The utility capacity fees adopted by the Flagstaff City Council come before this Court with a presumption of validity unless Mountainside carried its burden to establish otherwise. *See e.g., Home Builders Ass'n of Cent. Arizona v. City of Apache Junction*, 198 Ariz. 493, 496, ¶ 7, 11 P.3d 1032, 1035 (App. 2000). Mountainside cannot meet its burden because the City is plainly authorized constitutionally and statutorily to both operate its water and wastewater systems and charge fees related to the use of its systems. *See* ARIZ. CONST. art. II, § 34; ARIZ. CONST. art. XIII, § 2; ARIZ. CONST. art. XIII, § 5; A.R.S. §§ 9-511, 9-511.01; Flagstaff City Charter Art. XII § 2.

**i. The Arizona Constitution Plainly Grants Authority to the City.**

The City's constitutional authority with respect to its utility systems derives from three independent provisions of the Arizona Constitution. Articles XIII and II of the Arizona Constitution give the City broad rights to engage in business activities, including water and wastewater businesses and enterprises. *See* ARIZ. CONST. art. II, § 34; ARIZ. CONST. art. XIII, § 5. As far back as 1926, these constitutional provisions have been recognized as specifically granting to cities and towns rights to engage in any kind of business, which cannot be modified by the legislature. *See, e.g., Crandall v. Town of Safford*, 47 Ariz. 402, 409, 56 P.2d 660, 663 (1936) (describing the Arizona Constitution as giving municipalities "the right to engage in industrial pursuits, without specifying any limitation whatever as to

kind or character”); *City of Tombstone v. Macia*, 30 Ariz. 218, 231, P. 677, 682 (1926); *see also City of Phoenix v. Wright*, 52 Ariz. 227, 232, 80 P.2d 390, 391 (1938).

The home rule provision of the Arizona Constitution also authorizes the City to “frame a charter for its own government.” ARIZ. CONST. art. XIII, § 2. After the charter is ratified by the voters, the governor must approve it unless it conflicts with the “laws of the state.” *Id.*; accord A.R.S. § 9-284(B). Once approved by the governor, the charter becomes the “organic law” of the city, effectively, a local constitution. *See City of Tucson v. State*, 229 Ariz. 172, 174 ¶ 10, 273 P.3d 624, 626 (2012); *Paddock v. Brisbois*, 35 Ariz. 214, 220, 276 P. 325, 327 (1929) (noting that unlike a state constitution, which limits state government's power, a city charter “is a grant of power”); *see also*, A.R.S. § 9-240(B)(28)(a) (granting to local governing bodies broad authority to enact, amend or repeal laws that are "necessary or proper" to implement those powers that are granted to them).

In *City of Tucson v. Polar Water Co.*, 76 Ariz. 126, 133-34, 259 P.2d 561, 566–67 (1953), *opinion modified on reh'g*, 76 Ariz. 404, 265 P.2d 773 (1954), the Arizona Supreme Court concluded that provisions of a charter authorizing the City of Tucson to acquire, own, and operate waterworks were equivalent to an act of the legislature granting such powers, which automatically enabled the City of Tucson to engage in business of furnishing water service to its inhabitants. The Court held

that the City of Tucson “had the constitutional right to engage in the business of furnishing water service to its inhabitants” and provisions of its charter prevailed and operated as a repeal or suspension of a conflicting state law that attempted to place restrictions upon the constitutional grant of authority. *Polar Water Co.*, 76 Ariz. at 134, 259 P.2d at 567.

Here, the Flagstaff City Charter (“Charter”) was ratified by the voters and approved by the Governor of Arizona on October 3, 1958. *See generally* [Flagstaff City Charter](#) (noting the Charter’s approval date in the preamble). The Charter authorizes the City to adopt fees related to its water and wastewater businesses and “provide for the extension, enlargement, or improvement of existing utilities, and provide reasonable reserve for such purpose.” [Flagstaff City Charter Art. XII § 2](#). In accordance with its Charter, the City has for many years—both *before* and after the Legislature adopted A.R.S. § [9-511.01](#) and amended A.R.S. § [9-463.05](#)—charged fees for use of its water and wastewater systems. It is incredulous to argue that the City lacked any authority to charge utility fees prior to the adoption of A.R.S. § [9-511.01](#), especially water and wastewater utilities are constitutionally permitted business activities. When engaging in these utility business activities, the City is presumed to act under the same obligations and restrictions as a private person. *See, e.g., City of Phoenix v. Kasun*, 54 Ariz. 470, 476, 485, 97 P.2d 210, 213, 216 (1939); *Wright*, 52 Ariz. at 232, 80 P.2d at 392 (noting a municipality

engaging in a private enterprise for profit “should have the same rights and be subject to the same liabilities as private corporations or individuals”); *City of Tucson v. Sims*, 39 Ariz. 168, 175, 4 P.2d 673, 675 (1931) (noting the holding in *Sumid v. City of Prescott*, 27 Ariz. 111, 230 P. 1103, 1104 (1924) that the city’s operation of a water system was carried out in its proprietary capacity as distinguished from its governmental power, and as a result, the city was liable to the same extent a private corporation). Accordingly, since nothing in state law expressly prohibits a private utility owner from charging utility capacity fees, then nothing prohibits the City from doing so regarding its own water and wastewater systems. *See, e.g., McMann v. City of Tucson*, 202 Ariz. 468, 472, ¶ 11, 47 P.3d 672, 676 (App. 2002); 12 McQuillin Mun. Corp. § 35:56 (3d ed.) (“When a municipality owns its own water, electric or other utility plant, it has the right to charge consumers who make use of its services just as does a privately operated public utility.”).

**ii. State Law Plainly Grants Authority to the City.**

Nearly one hundred years ago, the legislature statutorily authorized municipalities to own, acquire, construct, and operate various types of utility businesses and enterprises within and outside the corporate limits of a municipality. *See Laws 1921, Ch. 31, § 1* (now A.R.S. § 9-511); *see also Polar Water Co.*, 76 Ariz. at 130, 133-34, 259 P.2d at 564, 566–67 (discussing *Laws*

1921, Ch. 31, § 1). Ten years later, the Arizona Supreme Court recognized that a municipal utility may anticipate its growth.

“Before it could furnish its own residents with water it was necessary that it secure from some source a supply sufficient in quantity for this purpose and that it install a system for distributing it. . . Its distributing system was built to meet the needs of a growing population and was, therefore, at that time capable of carrying water to a greater number of people than lived within its boundaries . . . The city of Tucson, as a result of placing itself in a position to serve its own users found itself in ownership and control of a surplus of domestic water which could with little if any additional cost be supplied to those outside its limits and its income thereby increased.”

*Sims*, 39 Ariz. at 176-77, 4 P.2d at 675. See also *Citizens Utilities Water Co. v. Superior Court In & For Pima County*, 108 Ariz. 296, 300, 497 P.2d 55, 59 (1972).

In 1989, the Arizona Supreme Court considered a challenge to the reasonableness of water charges applicable to nonresident customers who sought to connect to the City of Phoenix water system. See *Jung v. City of Phoenix*, 160 Ariz. 38, 39, 770 P.2d 342, 343 (1989) (“*Jung*”). At no point did the Arizona Supreme Court in *Jung* question the fee authority granted to municipal utilities. *Jung*, 160 Ariz. at 41, 770 P.2d at 345 (“any of the plaintiffs who reside in a

municipality to which the City of Phoenix provides water, the charges for the water will be made in accordance with [A.R.S. § 9-511].”) (citation omitted).

In 1992, Section 9-511.01 was adopted to require a municipal utility that intends to alter its utility fees or impose a new fee to: (1) prepare a written report justifying the increase and making that report available to the public; (2) adopt a notice of intention to increase or impose the fee at a public meeting; (3) publish a notice of a public hearing; (4) hold a public hearing on the matter; and (5) adopt an ordinance or resolution to impose the new fee. *See* A.R.S. § 9-511.01(A)-(B); *see also*, 1992 Ariz. Legis. Serv. Ch. 257 (H.B. 2396) (WEST). After these procedures have been followed, the rate or fee cannot become effective until “thirty days after adoption of the ordinance or resolution.” A.R.S. § 9-511.01(C). Substantively, the “rate . . . , fee or service charge” must “be just and reasonable.” A.R.S. § 9-511.01(E). Further, subsection (F) authorizes the charging of a “fee” for new sewer and water connections, subject only to the limitation that such fees cannot be used to offset the costs of acquiring a utility via eminent domain. A.R.S. § 9-511.01(F). In *City of Phoenix v. Harnish*, 214 Ariz. 158, 150 P.3d 245 (2006), this Court analyzed the placement of A.R.S. § 9-511.01 in Article 2 of Title 9, its stated subject matter, and the focus of all the statutes in Article 2 (A.R.S. §§ 9-511 to -520). This Court concluded that Article 2 “comprehensively addresses municipal ownership of public utilities.” *Id.* (citation omitted).

In sum, Mountainside has failed to establish that the City’s fees are illegal. As a municipal corporation engaged in the business of a public utility, the City is plainly authorized by A.R.S. §§ [9-511](#) and [9-511.01](#) to charge first-time connectors to its water and sewer utility systems a fee to offset infrastructure costs from increased capacity demands that those new connections impose on those systems. Flagstaff undertook a comprehensive study of its capacity fees as required by A.R.S. § [9-511.01](#), which led the City Council to conclude that its fees were reasonable and appropriate to offset the additional strain placed upon its water and wastewater system by anticipated new connections. (R.56 Ex. 3.). This Court should not supplant the sound, study-based decision of the Flagstaff City Council, especially when courts are not statutorily authorized to set utility fees and are far-removed from the day-to-day operations of a municipal utility. This type of judicial intervention would incentivize all disgruntled utility customers to file lawsuits over disagreements over fees that do not warrant judicial review.

**B. A.R.S. § 9-463.05 Specifically Contemplates Other Fees.**

Every word and provision of a statute must be given meaning. See *Nicaise v. Sundaram*, [245 Ariz. 566, 568, ¶ 11, 432 P.3d 925, 927 \(2019\)](#) (“A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.”). The Court

must give effect to each word in the statutes. *See, e.g., In re Estate of Gottier*, 250 Ariz. 104, ¶ 6, 475 P.3d 1144, 1146 (App. 2020), *review denied* (Apr. 15, 2021).

Mountainside argues it is entitled to free ride simply because the City’s utility capacity fees should have been adopted under A.R.S. § 9-463.05. (Opening Br. 10.) To support its argument, Mountainside asserts the legislature intended for A.R.S. § 9-463.05 to prescribe only one method by which cities and towns could adopt development-related fees. (Opening Br. 30-31.) Mountainside’s interpretation is not consistent with the plain language of A.R.S. § 9-463.05.

Nothing in A.R.S. § 9-463.05 says it is the only method by which cities and towns can adopt development-related fees. As pointed out by Mountainside, “[as] of 2011, the statute took up 16 pages in the Session Laws with several hundred lines.” (Opening Br. 34.) Nowhere in these several hundred lines does it say A.R.S. § 9-463.05 is the exclusive means of adopting or imposing development fees.

Similarly, nothing in A.R.S. § 9-463.05 expressly prohibits the charging of fees under A.R.S. § 9-511.01 or under any other fee-authorizing statute. To the contrary, Section 9-463.05 explicitly contemplates other revenue sources and fees. For example, it specifically requires a municipality to forecast other contributions made by a property owner “in cash or by taxes, *fees, assessments or other sources of revenue derived from the property owner.*” A.R.S. § 9-463.05(B)(12) (emphasis

added). Put another way, if a municipality opts to assess a development fee under A.R.S. § 9-463.05, it obviously cannot “double dip”; the municipality must account for *other development-related fee revenues from the property owner* when determining the extent of the burden imposed by development. The statute also requires “a forecast of *revenues generated by new service units other than development fees*” including “the capital recovery portion of *utility fees* attributable to development . . .” A.R.S. § 9-463.05(E)(7) (emphasis added and citations omitted). The forecast must be incorporated into “a plan to include these contributions in determining the extent of the burden imposed by the development.” A.R.S. § 9-463.05(E)(7) (citations omitted). In other words, the plain language of A.R.S. § 9-463.05 evidences a clear understanding that “revenues” may be generated by sources “other than development fees,” including “utility fees,” but it also recognizes the need to reduce the development fees adopted under A.R.S. § 9-463.05 to account for the capital-recovery portion of utility fees adopted under other statutes, such as A.R.S. § 9-511.01.<sup>1</sup>

Despite the clear language of A.R.S. § 9-511.01 authorizing the City’s utility capacity fees, however, Mountainside argues that the *sole purpose* of A.R.S. § 9-

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<sup>1</sup> Another statute under Title 9 clearly distinguishes between the types of fees adopted under A.R.S. § 9-463.05 and the types of fees adopted under A.R.S. § 9-511.01. See A.R.S. § 499.15(F).

511.01 is to outline a process for “increases” in “rates”<sup>2</sup> charged pursuant to the A.R.S. § 9-463.05. Nothing in the plain language of the statutes supports this argument. Neither A.R.S. § 9-511.01 nor its legislative history mentions A.R.S. § 9-463.05, even though A.R.S. § 9-511.01 was adopted years *after* the development impact fee language in A.R.S. § 9-463.05. Similarly, neither A.R.S. § 9-463.05 nor its legislative history mentions anything about A.R.S. § 9-511.01. To the contrary, A.R.S. § 9-463.05 expressly provides that its requirements and specific definitions apply to fees adopted under A.R.S. § 9-463.05 *only*. *See, e.g.*, A.R.S. § 9-463.05(T) (“For the purpose of *this section*”). The statute also emphasizes its requirements apply to fees under A.R.S. § 9-463.05 *only*. *See, e.g.*, A.R.S. §§ 9-463.05(A) (“. . . development fee *pursuant to this section*”), 9-463.05(B) (“Development fees assessed . . . *under this section* . . .”), 9-463.05(B)(2) (“The municipality shall calculate the development fee based on the infrastructure improvements plan adopted pursuant to this section.”), 9-463.05(B)(9) (“Monies received from development fees assessed pursuant to this section.”), 9-463.05(C) (“A development fee assessed pursuant to this section. . .”), 9-463.05(D)(10) (“. . . when a new or modified development fee is assessed pursuant to this section . . .”), 9-463.05(G)(1) (“Before the adoption of proposed or updated . . . development

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<sup>2</sup> The only “rates” mentioned in A.R.S. § 9-463.05, however, are excise tax rates and transaction privilege tax rates, which have no application to this case and are governed by Title 42. A.R.S. § 9-463.05(B)(12). *See also* A.R.S. § 42-17107(A).

fees as prescribed in subsection D of this section . . .”); 9-463.05(H)(3) (“ . . . the development fee is not spent as authorized by this section. . .”); 9-463.05(K) (“ . . . for which development fees can be assessed pursuant to this section . . .”) (citations omitted). Regardless, the references in A.R.S. § 9-511.01(A) to increases in rates, fees, and service charges necessarily reflect a municipality’s power to impose or adopt them in the first instance.

Mountainside conveniently omits to mention that A.R.S. § 9-463.05 already outlines a process for increasing development fees adopted under A.R.S. § 9-463.05. Fees under A.R.S. § 9-463.05 can be increased by either amending the infrastructure improvement plan in accordance with subsections (D)(1) through (D)(9) or by following the expedited process in subsection (D)(10) if the proposed change “individually or cumulatively . . . cause[s] a development fee increase of greater than five per cent.” A.R.S. § 9-463.05(D)(10). *See also* A.R.S. § 9-463.05(D)(1)-(9). If the latter applies, the city or town must provide 30-day prior notice of the change, post the change on its website (or the League’s website if it does not have a website), and provide notice to its advisory committee. *See* A.R.S. §§ 9-463.05(D)(10), 9-463.05(G). Nothing in A.R.S. § 9-463.05 indicates that a third process in A.R.S. § 9-511.01 may apply.

Mountainside also ignores several other subsections of A.R.S. § 9-463.05. For example, the statute defines “infrastructure improvements plan” as “a written

plan that identifies each necessary public service or facility expansion that is proposed to be the “*subject of a development fee* and otherwise complies with the requirements of [A.R.S. § 9-463.05].” A.R.S. § 9-463.05(T)(5) (citation omitted and emphasis added). It also specifies that any right to available capacity is limited to developments for which a development fee under A.R.S. § 9-463.05 “has been *paid.*” A.R.S. § 9-463.05(B). Here, Mountainside never paid any development fee under A.R.S. § 9-463.05 because the capital costs associated with new connections are *not* part in the City’s infrastructure improvements plan. Instead, the City’s capital costs associated with new connections are covered by utility capacity fees under A.R.S. § 9-511.01. (Ordinance No. 1681, 169 R.16 Ex. 2.).

**C. Mountainside’s Interpretation Leads to Absurd Results.**

Mountainside also ignores practical distinctions between A.R.S. §§ 9-511.01 and 9-463.05. The City serves water and wastewater customers *inside and outside* its municipal boundaries. A.R.S. § 9-511.01 takes this into consideration and authorizes municipal utilities to charge fees on properties both inside and outside their boundaries, thus accommodating the City’s choice to provide utility service to customers outside its boundaries. A.R.S. § 9-511.01(A) (“within or without its corporate limits”). In contrast, A.R.S. § 9-463.05 authorizes a municipality to charge a “development fee” to properties *within the municipality’s territorial limits only.* See A.R.S. §§ 9-463.05(T)(9) (“service area” for purposes of a development

fee means “a specified area within municipal boundaries”), [9-463.05\(B\)\(4\)](#) (in setting development fees “under this section,” costs made necessary by new development must be based on same level of service provided to existing development in “the service area”), [9-463.05\(D\)](#) (requiring adoption of plan for designated “service area”). Under Mountainside’s interpretation, municipal utilities would somehow have no authority to charge utility capacity fees to properties located outside their boundaries. This result would contradict state law, which explicitly authorize municipal utilities to own and operate utilities outside their boundaries. *See* A.R.S. § [9-511.01\(A\)](#) (applicable to properties “within or without its corporate limits”). If a municipal utility has no authority to charge fees to properties outside its boundaries, it will be forced to either deny connection requests from outside properties or approve the requests and push the costs onto existing customers by raising their rates. This would neither be fair to existing customers nor to prospective customers. This Court should presume that the legislature did not intend such absurd results and construe the statutes to avoid such consequences. *State v. Medrano-Barraza*, 190 Ariz. 472, 474, 949 P.2d 561, 563 (App.1997); *see also* A.R.S. § [1-211\(B\)](#) (“Statutes shall be liberally construed to effect their objects and to promote justice.”).

In short, not only does A.R.S. § [9-463.05](#) fail to say it is the exclusive means of imposing fees, but it also explicitly contemplates other revenue sources, including

utility fees that may be properly assessed against new development. The Court should reject Mountainside’s proposal to exempt itself from fees based on assertions that are not supported by the plain language of A.R.S. § [9-463.05](#).

**D. Reversing Would Significantly Harm Municipal Utilities and Their Customers.**

Water and wastewater infrastructure must have adequate capacity to support increased demands from the booming population growths and rapidly changing market demands. Municipal utilities must also be prepared to adapt to regulatory changes and technological advances. Municipal utilities, however, face staggering public investment needs to support the steadily increasing demands. The American Society of Civil Engineers (ASCE) and the Value of Water Campaign produced a 2020 report on the economic impacts of closing the water infrastructure gap, and the cost of inaction if we fail to do so. *See [American Society of Civil Engineers & The Value of Water Campaign, \*The Economic Benefits of Investing in Water Infrastructure: How a Failure to Act Would Affect the U.S. Economic Recovery\* \(2020\) \(“Report”\)](#)*. According to Report, there is growing need for capital investment in the distribution lines, conveyance systems, treatment plants, and storage tanks that keep US water systems working. *Id.* at 12. For example, only 37 percent of the nation’s total water infrastructure capital needs were met in 2019. *Id.* If the significant funding needs and investment trends continue, the

Report projects that the drastic underfunding in critical water infrastructure will grow to \$136 billion by 2039. *Id.*

In 2020, local engineers with the Arizona Section of the American Society of Civil Engineers (ASCE) conducted an extensive evaluation of Arizona's water and wastewater infrastructure. *See Arizona Section of the American Society of Civil Engineers, 2020 Report Card for Arizona's Infrastructure (2020)* ("Report Card"). Arizona's water infrastructure and wastewater infrastructure both scored C- grades. *Id. at 33, 68.* The Report Card indicates that most of Arizona's water infrastructure is over 30 years old and more than 2,600 miles of water transmission and distribution mains are currently in need of rehabilitation or replacement. *Id. at 33.* For Arizona's wastewater sector to maintain the state's economic and projected population growth, the Report Card concludes that 25 to 50% of the wastewater network needs rehabilitation, 10% of its wastewater treatment plants need rehabilitation, and more than a dozen wastewater treatment plants must be expanded. *Id. at 68.*

The Report notes that Arizona's population has experienced droughts and a 315% growth since 1970. *Id. at 69* (referencing U.S. Census Bureau data). This growth has significant impacts on water supply and capacity. *See Id. at 34.* Section § 9-511.01 recognizes that a municipal utility must be able to offset costs necessitated by this explosive growth and the new demands on utility systems.

Section § 9-511.01 recognizes also allow for some flexibility in adjusting fees to accommodate changing demands and withstand the effects of extreme weather conditions, such as droughts.

Here, Mountainside ignores the important role of A.R.S. § 9-511.01.

Mountainside's interpretation also deprives the City and other municipal utilities of the ability to charge utility capacity fees for new connections inside and outside their municipal boundaries. Utility capacity fees help ensure that first-time connections pay their fair share and the costs associated with the increased demands are adequately recovered. If the Court exempts properties from paying fees under A.R.S. § 9-511.01 to connect to utility systems, the costs will likely be borne by existing customers. Moreover, municipal utilities will be forced to reconsider whether they are willing to allow new connections from properties outside the municipal boundaries because these properties are not subject to development fees under A.R.S. § 9-463.05.

Reversing the trial court's ruling would subject the City and other municipalities in Arizona to uncertainty and untold financial harm. The degree to which each municipality would be affected would differ based on each municipality's circumstances, but the likely negative impacts are undeniable. A reversal could also bring into question the validity of scores of other sewer, garbage charges, and other fees. Municipal utilities should be able to rely on the

fact that a legislatively authorized and reasonable fee that is imposed on a broad class of property owners cannot be challenged under an unrelated statute. They should also be able to rely on the fact that the money from these fees will help ensure there is adequate capacity and infrastructure for all its citizens.

### **III. CONCLUSION**

The League of Arizona Cities and Towns respectfully asks this Court to uphold the trial court ruling. If the Court creates a new rule and invalidates utility capacity fees, the ruling be given prospective effect only.

**RESPECTFULLY SUBMITTED** this 6th day of July 2021 by:

/s/ Nancy L. Davidson  
Nancy L. Davidson (029991)  
League of Arizona Cities and Towns  
1820 W. Washington Street, Phoenix, AZ 85007  
602.258.5786  
[ndavidson@azleague.org](mailto:ndavidson@azleague.org)  
*Attorney for Amici Curiae*

## **Certificate of Compliance**

This certificate of compliance concerns an Amicus Curiae Brief and is submitted under Rules 14 and 16 of Arizona Rules of Civil Appellate Procedure. I certify that the Amicus Curiae Brief to which this Certificate is attached uses Times New Roman of at least 14 points, is double-spaced, and contains 5,048 words. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14.

DATED this 6<sup>th</sup> day of July 2021

/s/ Nancy L. Davidson  
Nancy L. Davidson (029991)  
League of Arizona Cities and Towns  
1820 W. Washington Street  
Phoenix, AZ 85007  
602.258.5786  
[ndavidson@azleague.org](mailto:ndavidson@azleague.org)  
*Attorney for Amici Curiae*

## Certificate of Service

The undersigned certifies that on July 6, 2021, the foregoing Amici Curiae Brief was electronically filed with the Clerk of the Court, Division One, Arizona Court of Appeals, and a copy of the Amici Curiae Brief was served on July 6, 2021, by email to the following:

Jeffrey D. Gross (011510)  
BERRY RIDDELL LLC  
6750 East Camelback Road, Suite 100  
Scottsdale, Arizona 85251  
Telephone: (480) 385-2727  
Facsimile: (480) 385-2757  
[jg@berryriddell.com](mailto:jg@berryriddell.com)  
*Attorney for Plaintiffs/Appellants*

Bennett Evan Cooper (010819)  
Timothy M. Strong (021345)  
Vail C. Cloar (032011)  
DICKINSON WRIGHT PLLC  
1850 N. Central Avenue, Suite 1400  
Phoenix, Arizona 85004  
(602) 285-5000  
[bcooper@dickinsonwright.com](mailto:bcooper@dickinsonwright.com)  
[tstrong@dickinsonwright.com](mailto:tstrong@dickinsonwright.com)  
[vcloar@dickinsonwright.com](mailto:vcloar@dickinsonwright.com)  
*Attorneys for Defendants/Appellees*

DATED this 6<sup>th</sup> day of July 2021

/s/ Nancy L. Davidson  
Nancy L. Davidson (029991)  
League of Arizona Cities and Towns  
1820 W. Washington Street  
Phoenix, AZ 85007  
602.258.5786  
[ndavidson@azleague.org](mailto:ndavidson@azleague.org)  
*Attorney for Amici Curiae*