PAUL W. DILLINGHAM
SPENCER & SPENCER, P.A.

"User Fee or Tax?"

August 19, 2021

Greenville News

LOCAL

SC Supreme Court says Greenville County road and telecommunications fees are illegal taxes

Kirk Brown Greenville News

Published 3:23 p.m. ET Jun. 30, 2021 | **Updated 9:21 p.m. ET Jun. 30, 2021**

The South Carolina Supreme Court struck down a pair of measures Wednesday that Greenville County used to increase its road maintenance fee and establish a telecommunications assessment.

The court found that the $25 yearly fee on registered vehicles and the annual $14.95 telecommunications fee charged to property owners in the county are illegal taxes.

The financial implications of the ruling remained unclear Wednesday afternoon, but they may range from nearly $7 million to as much as $16 million in lost revenue each year.

"We are evaluating the impact," county spokesman Bob Mihalic said.

There also is a possibility that the county may spend millions on refunds to taxpayers.

"Definitely the taxpayers are going to have to be refunded," County Councilman Joe Dill said.

The county imposed an annual $15 vehicle fee in 1993 to pay for road maintenance. The County Council increased that fee to $25 in 2017, which is the same year that the telecommunications fee was approved to enhance the county's public-safety communications network.

Three Republican legislators from Greenville County — state Reps. Mike Burns and Garry Smith and state Sen. Dwight Loftis — challenged the legality of the county's vehicle and telecommunications fees.

"If it looks like a tax and it acts like a tax, it's a tax," said Smith, who is chairman of the county's legislative delegation. He joined Dill in calling for refunds to taxpayers.

DEVELOPMENT OF HOME RULE IN SOUTH CAROLINA

In the 1880s, a national movement made headway in many other states, which granted local governments more freedom, flexibility, home rule and less state control. Just emerging from reconstruction after the Civil War, South Carolina was not a part of that movement. It was not until the 1970s, that South Carolina amended the 1895 state constitution to better define and to expand the powers of local governments, especially counties.

Since that time, the General Assembly has both expanded and restricted the powers of local governments, particularly in fiscal areas. The General Assembly has continued to exercise authority over a variety of local government appointments and legislation.

The 1895 Constitution

The 1895 constitution provided for counties, cities, and school districts. Until the 1970s, municipalities, the oldest form of local government in South Carolina, had more autonomy than other local governments.

The authority for local government is summarized in Article VIII, Section 17, which provides that "all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this constitution and by law shall include those fairly implied and not prohibited by this Constitution."

Prior to 1974, the county delegation, which consisted of the senator and the House members from that county, was the county governing body. County delegations made appointments and prepared the supply bill (or budget) for their respective counties. Each supply bill was then enacted into law by the General Assembly. At the request of the county delegation, the General Assembly also approved requests from school districts, to levy taxes for school purposes.

Even though the county delegation now often includes non-resident senators and representatives who serve part of a county, remnants of the county delegation system persist today in local legislation and in the involvement of legislators from another county in appointments to county boards and commissions.

The Home Rule Act

During the 1970s, large parts of the 1895 Constitution were modified on an article-by-article basis, with voters asked to vote yes or no on entire articles. In 1973, voters approved of changes in Article VIII of the Constitution, which expanded home rule for local governments. Elected and autonomous county government in South Carolina emerged in 1974.

Challenge to Delegation Government

The motivation for this legislation was federal court decisions that required proportional representation for both houses of state legislatures. In the South Carolina Senate, districts had to be redrawn that crossed county lines, leaving some small counties with no resident senator, some large counties with multiple senators, and most counties sharing part of one or more senators with neighboring counties. In the House, it was no longer possible to confine House districts to a single county, so these districts also spilled over county lines.

As a result, some House members represented parts of two counties (sometimes three), and served in more than one county delegation. A part of a county would often be represented in both House and Senate by legislators who did not reside in the county. This situation represented a challenge to the role of county delegations in controlling county government.

Major Changes Under the Home Rule Act

The General Assembly passed the Home Rule Act in 1975, which implemented the specific changes authorized by the revision of Article VIII. Municipalities and school districts, whose powers were already well defined either by the constitution or in statutory law, experienced few changes as a result of the Home Rule Act.

To the contrary, the powers of counties were significantly expanded. Existing special purpose districts continued to operate, but new districts could no longer be created.

The structure, functions, and financing of counties and municipalities were spelled out in the Home Rule Act. For the first time, the act also made intergovernmental cooperation possible, because municipal and county governments now had similar powers.

The governance, function and financing of school districts are set up in the constitution and general law, but they were not included in the provisions of the Home Rule Act. The General Assembly specifically established the structure and financial authority of each individual county's school district in legislation, so their structures and fiscal powers are diverse.

Local Legislation

The Home Rule Act prohibited the General Assembly from passing bills related to a single political subdivision, although the courts have ruled that school districts are not included in that provision. Legislators still find ways to draft these bills, known as local legislation, to accomplish a particular local purpose. As a courtesy, legislators from other counties often abstain from voting on the measure and instead voting that they are present. In this way, the only votes cast are by members of that county's delegation. Sometimes the governor chooses to veto local legislation, and occasionally there is a court challenge to the procedure.

In the House, each legislator representing some portion of a county has an equal vote on legislation affecting that county. Under Senate rules, however, if a county delegation includes more than one senator, the votes are apportioned based on the percentage of the county's population that each Senator represents.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph Azar, Frank J. Cumberland, Jr., and Michael A. Letts, Individually and as Class Representatives, Appellants,

v.

City of Columbia, Respondent.

Appellate Case No. 2014-000032

Appeal from Richland County
J. Ernest Kinard, Jr., Circuit Court Judge
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27573
Heard April 7, 2015 – Filed September 9, 2015

REVERSED AND REMANDED

Charles D. Lee, III, of McLaren & Lee, of Columbia, and Gene M. Connell, Jr., of Kelaher Connell & Connor, PC, of Surfside Beach, for Appellants.

M. McMullen Taylor, of Mullen Taylor LLC, of Columbia, for Respondent.

JUSTICE KITTREDGE: The City of Columbia generates approximately $110 million in revenue from user fees each year by providing water and sewer services. For more than a decade, the City has been allocating substantial amounts of this revenue to its General Fund and for economic development purposes. Appellants

ALAN WILSON
ATTORNEY GENERAL

March 14, 2017

The Honorable Dwight A. Loftis
South Carolina House of Representatives
District No. 19
P.O. Box 14784
Greenville, SC 29610

The Honorable J.M. "Mike" Burns
South Carolina House of Representatives
District No. 17
P.O. Box 142
Columbia, SC 29202

Dear Representative Loftis and Representative Burns:

Attorney General Alan Wilson has referred your letter to the Opinions section concerning an ordinance before the Greenville County Council that is pending for a third and final reading. Your letter describes the issues to be addressed as follows:

> The Ordinance has two separate, distinct and unrelated parts. The first part provides for a fee to pay the service charge for a new communications system and the radios associated with it. This is a defined cost. The second part provides for an increase in the current road maintenance fee but with no specified use for the revenue.
>
> The first question concerns the number of votes required to pass this Ordinance. Does [S.C. Code Ann. §] 6-1-330, prevent Greenville County Council from requiring a three-fourths vote as provided by Greenville County Ordinance 3867, Section 3, "A three-fourth vote by the full membership of County Council shall be required to take any action… to implement any new fee or tax assessment…" Since [S.C. Code Ann. §] 6-1-330 does not prohibit requiring more than a positive majority, is a three-fourths vote requirement acceptable as a positive majority? Also does [S.C. Code Ann. §] 6-1-330 violate the Home Rule Statute?
>
> The second question is, does the attached Greenville County Ordinance violate Article 3 Section 17 of the South Carolina Constitution relating to bobtailing…

Law/Analysis

Does S.C. Code Ann. § 6-1-330 prohibit a county council from enacting an ordinance which requires a "super majority" vote to authorize the charge or collection of a service or user fee?

Initially, we note that the courts have consistently recognized the basic principle that a local ordinance, just like a state statute, is presumed to be valid as enacted unless or until a court declares it to be invalid. See McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional."), citing Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984); Op. S.C. Atty. Gen., 2003 WL 21471503 (June 4, 2003). An ordinance will not be declared invalid unless it is clearly inconsistent with general state law.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Mikell "Mike" Burns, Garry R. Smith and Dwight A. Loftis, Appellants,

v.

Greenville County Council and Greenville County, Respondents.

Appellate Case No. 2018-002255

Appeal from Greenville County
Charles B. Simmons Jr., Circuit Court Judge

Opinion No. 28041
Heard August 20, 2020 – Filed June 30, 2021

REVERSED

Robert Clyde Childs III, Childs Law Firm; J. Falkner Wilkes, both of Greenville for Appellants.

Sarah P. Spruill and Boyd Benjamin Nicholson Jr., Haynsworth Sinkler Boyd, PA, both of Greenville for Respondents.

JUSTICE FEW: Greenville County Council implemented what it called a "road maintenance fee" to raise funds for road maintenance and a "telecommunications fee" to upgrade public safety telecommunication services. The plaintiffs—three members of the South Carolina General Assembly—claim the two charges are taxes and, therefore, violate section 6-1-310 of the South Carolina Code (2004). We agree.