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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

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Appellate Case No. 2023-000435

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The Cottages at Garden City Beach, LP, .....Appellant,

**v.**

Murrells Inlet-Garden City Fire District,..... Respondent,

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# FINAL BRIEF OF RESPONDENT

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s/Michael W. Battle_____
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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

Cases

Statutes



Regulations



Other Authorities

## STATEMENT OF THE ISSUES ON APPEAL

I. The decision of MIGC to impose a 2% fire impact fee on Swells Cottages and the Circuit Court's affirmation of that decision is correct because Swells Cottages fall within the meaning of commercial construction under Act 272 of 1985.

II. The decision of MIGC to impose a 2% fire impact fee on the Swells Cottages and the Circuit Court's affirmation of that decision is correct because MIGC's decision on the application of the 2% fire impact fee to Swells Cottages is supported by the record and worthy of judicial deference.

III. MIGC's disregard and the Circuit Court's disregard of the Opinion of an Assistant Attorney General was not arbitrary, capricious, or characterized by an abuse of discretion.

IV. MIGC has not charged other rental properties like Swells Cottages a 1% impact fee.

## STATEMENT OF FACTS

MGIC is a special purpose fire district created to provide fire protection in the Murrells Inlet-Garden City area of Horry County. It is a body politic and exercises and enjoys all the rights and privileges of such. *S.C. Code Ann. § 6-11-100.* In 1985, the General Assembly passed a Joint Resolution to empower the governing body of MIGC to impose impact fees to be used for purchase and maintenance of firefighting equipment on all buildings under construction and all future buildings. *Act 272 of 1985*. [R. 240]. The act authorized MIGC to impose in its district, one time only, a fee of one per cent of the cost of construction of single-family residences and two per cent of the costs of construction of condominiums, townhouses, high rise buildings and all commercial construction. The act did not define expressly any of the categories on which the impact fees were to be imposed. [R. 240].

Swells Cottages is a commercial real estate development similar to condominium developments, townhouse developments and apartment developments. [R. 252]. Swells Cottages features multiple detached units on a single tract of land, common areas, and amenities such as community parking, a community swimming pool, community gardens, mail kiosk, maintenance shed, storage shed, a rental office and other neighborhood amenities on its undivided tract of land. The cottages are connected by internal sidewalks and not all cottages are directly accessible to streets. None of the cottages are owned by single families. [R. 240].

In many jurisdictions, cottage courts are still not permitted by zoning codes—especially when the cottages are built for sale, rather than for rent. *See* Ross Chapin,

Creating Small-Scale Community in a Large-Scale World (2011). The density is higher than single-family zoning typically allows, and the units sit on a very small footprint—running counter to lot size and setback requirements. The houses tend to be smaller than average. The parking is grouped, rather than individual to each unit. Developers need zoning adjustments through incremental zoning changes, "cottage court" ordinances, or a form-based code. *id*.

The Swells Cottages developer/owner, The Cottages at Garden City Beach, LP (Appellant), obtained a zoning change from PDD to MRD 3 to accommodate its development plan. [R. 310]. MRD 3 districts allow for flexibility in zoning setback requirements and lot sizes. The minimum lot size for a single-family residential lot is 6000 square feet in a MRD 3 zone. However, Appellant will not subdivide the 25-acre tract into single family residential lots. By not subdividing the tract, Appellant can place several more rental cottages on the tract than would be allowed if the Appellant had subdivided the property into single family residential lots.[1] [R. 310-318].

After Swells Cottages was approved by Horry County, Appellant began constructing the cottages in the MIGC district. MIGC assessed a 2% impact fee of the cost of construction of the 221 cottages pursuant to Act 272 of 1985. [R. 253]. MIGC determined that because of the type of development scheme for the cottages, the cottages were in fact commercial construction as the term is used in Act 272 of 1985. [R4;R43]

[R.4; R 43]. In that Act all commercial construction is subject to a 2% impact fee. Appellant disagreed and claimed the cottages were single family residences to which a

[1] The additional cottages were estimated based on 6000 square foot minimum lot sizes in MRD 3 zones and the total number of square feet in 25 acres.

1% impact fee should have been applied. Appellant paid the 2% impact fees to MIGC under protest and appealed the assessment to the Board of Directors of MIGC.

That appeal was continued while the board sought advice from the S.C. Attorney General's office. An opinion was issued by an Assistant S.C. Attorney General that opined that the cottages were single family residences as defined by the International Residential Code. The appeal then came back before the MIGC Board of Directors who unanimously decided to reject the legal advice of the S.C. Attorney General's office and found the 2% impact fee should be imposed on the costs of construction for Appellant's cottages. [R. 252].

Appellant then appealed MIGC board's decision to Circuit Court where Judge Kristi F. Curtis heard the appeal and issued an order filed December 9, 2022, that affirmed MIGC's findings and dismissed the appeal. [R. 4]. Appellant filed a motion to reconsider and on February 13, 2023, Judge Curtis issued an order that denied Appellant's motion to reconsider. [R. 6]. The matter is now before this Court on appeal from the two orders issued by Judge Curtis.

Swells Cottages grounds for appeal are: 1) the 221 cottages located on the undivided 25 acre tract at Swells Cottages should be classified as single family residences; 2) MIGC's own administrative manual (as interpreted by Swells Cottages) should govern MIGC's decisions on the application of its impact fees; and 3) disregarding a legal opinion of a S.C. Assistant Attorney General is arbitrary and capricious. MIGC disputes all of Swells Cottages' grounds.

## STANDARD OF REVIEW

When an administrative agency charged with administering a statute has acted after considering all of the facts, this court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion." Gay v. City of Beaufort, 364 S.C. 252, 254, 612 S.E.2d 467 (Ct. App. 2005), Amrik Singh & SBPS, Inc. v. City of Greenville, 384 S.C. 365, 370, 681 S.E.2d 921 (Ct. App. 2009). An appellate court must not substitute its judgment for that of the reviewing body, even if it disagrees with the decision. Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 173, 72 S.E.2d 66 (1952).

An administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations is always entitled to the most respectful consideration and ought not to be overruled "unless there is a compelling reason to differ." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 33, 766 S.E.2d 707 (2014). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. Id. Also see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984);

## DISCUSSION

I. *The decision of MIGC to impose a 2% fire impact fee on Swells Cottages and the Circuit Court's affirmation of that decision is correct because Swells Cottages fall within the meaning of commercial construction under Act 272 of 1985.*

The first issue on appeal concerns the statutory interpretation of Act 272 of 1985. The primary purpose in interpreting statutes is to ascertain and effectuate the intent of the legislature. Cain v. Nationwide Prop. & Cas. Ins. Co., 378 S.C. 25, 29, 661 S.E.2d 349

(2008); Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465 (2010). When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. See Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119 (1989) ("Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation."). "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs., 357 S.C. 327, 332–33, 592 S.E.2d 335 (Ct. App. 2004), cert. granted (Jan. 7, 2005) (citing S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377 (1991); Liberty Mut. Ins. Co. v. S.C. Second Inj. Fund, 363 S.C. 612, 622, 611 S.E.2d 297 (Ct. App. 2005).

MIGC contends its findings in the present appeal should be given deference under the deference doctrine. The deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations "unless there is a compelling reason to differ." Kiawah Development Partners, II, 411 S.C. at 33. If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. Id. Also see Chevron, U.S.A., Inc., 467 U.S. at 843;

The pertinent part of Act 272 of 1985 states:

> SECTION 1. In addition to the powers and duties provided for the governing body of the Murrell's Inlet-Garden City Fire District in Georgetown and Horry counties by Act 876 of 1966, the Board may impose, one time only, an impact fee on all buildings under construction on the effective date of this act and all new construction and all new additions. The fee is one percent of the cost of construction of single-

> family residences and two percent of the cost of construction of condominiums and townhouses, high rise buildings, and all commercial construction. The fees must be used to purchase and maintain fire-fighting equipment. *Act 272 of 1985. [R.240]*

The purpose of the Act is to create an impact fee to be administered by MIGC and the Act establishes some parameters for how the impact fee burden is to be distributed. Property owners of a single-family residence pay 1% of the cost of construction. Condominium developments and townhouse developments, high rise buildings, and all commercial construction developments pay 2% of the costs of construction. Appellant claims its 221 cottages should be classified as "single family residences" triggering the 1% of the costs of construction impact fee. MIGC contends Appellant's cottages do not qualify as single-family residences as that category is used in the Act. MIGC contends that Swells Cottages are a commercial real estate development that is a hybrid extension of high rise apartment developments, condominium developments and townhouse developments that existed in 1985 when Act 272 of 1985 was enacted. The commercial developments that were being built in Horry County and Georgetown County provide the context in which Act 272 of 1985 should be interpreted. See Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004)

The phrase "single family residence" is not defined in the Act. Appellant has attempted to use an uncommon or rare permutation of the meaning of "single family residence" to determine how to distribute the financial burdens of the impact fee. Appellant claims the construction standards found in the International Residential Code controls the definition of "single family residence" as that term is used in the Act. MIGC contends that Appellant's definition of "single family residence" runs afoul of state or

federal laws and counter to court decisions when distributing an impact fee burden. See Lindbloom, Carl G.. *The Latest Illustrated Book of Development Definitions* (p. xxii). Taylor and Francis. Kindle Edition.

The purpose of an impact fee is to fairly distribute the capital improvement costs of growth and development among those who are generating the need for the impact fee services. See J.K. Const., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 172, 519 S.E.2d 561 (1999); Also see Roger K. Dahlstrom, Roger K. Dahlstrom, Roger K. Dahlstrom, Development Impact Fees: A Review of Contemporary Techniques for Calculation, Data Collection, and Documentation, 15 N. Ill. U. L. Rev. 557 (1995). Two principles are implied in Act 272 of 1985 on how to distribute the financial burdens of the impact fee. Those principles are: 1) the benefits principle, and 2) the ability-to-pay-principle. The benefits principle suggests that people should pay impact fees based on the benefits they receive. The ability-to-pay principle states that the financial burden of the impact fee should be imposed on people according to how well they can carry the burden.

MIGC contends Act 272 of 1985 is intended to distribute the impact fee based on the ability to pay principle and/or on the receipt of benefits. MIGC contends commercial real estate developers generally have a better ability to pay impact fees. They control the price, design, and profit to be made from the type of commercial developments they choose to build. The intent to impose a 2% impact fee on real estate developers can be inferred from the specific categories contained in Act 272 of 1985. In 1985 condominium developments, townhouse developments and high-rise buildings for apartments or hotels were the provenance of commercial real estate developers who sold the units to investors or second homeowners. Most of those real estate developments required changes in

zoning ordinances. On the other hand, single family residences were traditionally non-income producing structures on single family lots typically owned by one family. The families who own single family residences generally depend upon their homes for shelter and not for profit.

MIGC contends the consideration of benefits received can be inferred in the Act from the additional expense and difficulty incurred by MIGC in fighting fires in the specific categories of condominiums, townhouses or high-rise buildings included in Act 272 of 1985. MIGC contends those same additional expenses and difficulties can be found in fighting fires involving Swells Cottages. Although the cottages in Swells Cottages are detached and they appear to be constructed using the building standards required for single family residences, they are not located on single family lots. Appellant's 221 cottages are crammed together with reduced setback requirements and many of Appellant's cottages are not readily accessible to streets that can be used by MIGC's firefighting equipment.

MIGC contends the commercial nature of Appellant's Swells Cottages development and the additional expenses caused by the close proximity of its cottages, supports MIGC's distinction of Appellant's cottages from single family residences. Other S.C. authorities tend to support MIGC's position.

The *South Carolina Abandoned Buildings Revitalization Act* declared that the construction of a single-family residence is not an income producing purpose. *S.C. Code Ann. § 12-67-130*. In the present case, the sole purpose for the construction of Appellant's cottages is to produce income for the Appellant. The *South Carolina Resilience Revolving Fund* act states "Primary single-family residence" means a single detached dwelling that

is occupied as the main home by the owners for the majority of the year. *S.C. Code Ann. § 48-62-310.* In the present case, Appellant's cottages are not occupied by their owners.

MIGC's determination that the cottages in Swells Cottages are not single-family residences is supported also by the Horry County zoning ordinances which govern the MIGC fire district. The previous Horry County zoning code stated: "Single-family residence—separately built means a noncommercial dwelling that is occupied exclusively by one (1) family and not part of a residential subdivision development." *Horry County Ordinances Sec. 17.7-27. – Definitions.* In the present case, Appellant's cottages are not defined as single family residences under the County's previous zoning ordinance because they are commercial income producing cottages. *Id.*

The zoning district for Appellant's development was changed from a Highway Commercial zoning district to a MRD-3 zoning district to accommodate Appellant. Although MRD-3 does allow single family residences, Appellant's development would not be allowed to be built in a single-family residential zoning district in Horry County. The zoning use of property in a single-family residential zoning district is controlled by § 505 of the current Horry County Zoning Code. That section provides the following limitation:

> 505. - One principal building on a single-family residential lot.
>
> Only one (1) principal building and its customary accessory buildings may hereafter be erected on any single-family residential lot unless otherwise specified in Section 619. The connection of two (2) buildings by means of an open porch, breezeway, carport, or other such open structure, with or without a roof, shall not make them one (1) building.

The only permitted zoning use allowed in an Horry County single family residential zoning district is one principal building on a single-family residential lot. *§505 Zoning*

*Code.* Appellant's cottages do not qualify as single-family residences under the present Horry County zoning code. Appellant is placing 221 principal buildings on a single parcel. For that reason Appellant's zoning district was changed from Highway Commercial to Multi-Family Residential instead of Single Family Residential.

For mortgage lenders the ordinary and customary use of the phrase "commercial construction" is a phrase that is commonly used to differentiate between commercial construction loans and residential construction loans. See *Office of the Comptroller of the Currency (OCC)* Acquisition, Development, and Construction Lending, 2013 WL 4628579, at *2.[2] The OCC defines loans to developments containing 5 or more apartments to be commercial real estate loans where the primary source of repayment is from rental income associated with the property. 12 C.F.R. § 373.14 MIGC contends that rental payments from Appellant's 221 cottages would be the primary source of repayment for its loans and those loans would be classified as commercial construction loans by the OCC. Commercial construction loans are a class of loans designed to provide funding for supplies and labor on buildings, develop the land, or acquire acreage to develop it. MIGC contends Appellant's financing must come in the form of a commercial construction loan to finance the Swells Cottages development. Appellant cannot obtain individual residential financing for each cottage because the tract is not subdivided into individual lots.

[2] The Office of the Comptroller of the Currency (OCC) charters, regulates, and supervises all national banks and federal savings associations as well as federal branches and agencies of foreign banks. The OCC is an independent bureau of the U.S. Department of the Treasury and is led by the Comptroller of the Currency. A bank's commercial construction lending activities can encompass a wide variety of projects ranging from apartment, condominium, and office buildings, to shopping centers and hotels. Construction Lending, 1995 WL 903077, at *3.

Act 272 of 1985 does not contain any reference to building codes or construction standards for its distribution of the impact fee burden. Appellant claims the fact that the cottages meet the standards for single family residential construction in the International Residential Code (IRC) supports its position that its cottages are single family residences. However, MIGC's fire chief stated at the hearing that townhouses also meet those same single family residential construction standards and are referenced in the IRC. The Act expressly includes townhouses in the category that should be charged a 2% service impact fee. The IRC does not distinguish between townhouses and single family residences. The IRC governs construction standards. MIGC contends it was never intended to govern the distribution of impact fees.

The construction costs of individual cottages are only used in the Act to determine the basis for assessing the amount of the impact fee for each cottage. The purpose of the Act is to provide money to MIGC to purchase firefighting equipment. One look at the pictures of Swells Cottages' layout shows that different firefighting equipment will be needed to access several of the cottages and supply the means to fight fires in those cottages. MIGC contends that if the impact fee burden is distributed considering the amount of service provided, Swells Cottages' owner should pay more for fire protection than single family residence owners which have separate ingress and egress to public streets. [R. 203-206].

Appellant claims that MIGC and the Circuit Court classified Appellant's cottages as commercial construction under Act 272 of 1985, primarily because Appellant rented the cottages instead of selling them. MIGC disputes Appellant's claim. As stated by the Circuit Court Judge MIGC looked at Swells Cottages as a whole and determined it was a

commercial enterprise with many of the same features of condominium developments and townhouse developments. [R. 4] MIGC contends that if the Appellant actually sold the cottages in Swells Cottages instead of renting them, they would be need to be sold as townhouses or condominiums to properly account for common ownership rights to the unsubdivided land, with common areas, amenities and thoroughfares. Otherwise, the owners of the 221 cottages would be tenants in common with no obligation to pay for maintenance or with no means to regulate use of the common areas and amenities. MIGC contends that such ownership would not be feasible for zoning purposes or for economic realities.

Citing Cmty. Servs. Assocs., Inc. v. Wall, 421 S.C. 575, 585, 808 S.E.2d 831, 836 (Ct. App. 2017) and Kinard v. Richardson, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014) Appellant claims those cases support its claim that renting residences instead owning them does not change the status of the residence from single family residential to commercial residential. The two cases cited by Appellant are not applicable to the present appeal. Those cases construe specific restrictive covenants that contain written restrictions that are different from Act 272 of 1985. In addition, the cases cited by Appellant address individual restrictive covenants and enforcing restrictions on the freedom of use of private property. In interpreting such restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891 (1987); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 374, 628 S.E.2d 902 (Ct. App. 2006). In the present appeal, MIGC is not attempting to enforce restrictive covenants or limit Appellant's use of its property. MIGC is distributing the burden of its service impact

fee created by Act 272 of 1985. MIGC's decision on distributing the impact fee burden is supported by the record and worthy of deference.

II. *The decision of MIGC to impose a 2% fire impact fee on the Swells Cottages and the Circuit Court's affirmation of that decision is correct because MIGC's decision on the application of the 2% fire impact fee to Swells Cottages is supported by the record and worthy of judicial deference.*

The Board of MIGC was granted the authority in Act 272 of 1985 to impose the service impact fee in issue in the present appeal. MIGC's board's authority is controlled by the terms of the Act. The Act does not require MIGC to impose the service impact fee pursuant to rules or regulations it has adopted pursuant to the S.C. Administrative Procedures Act. MIGC's disputes Appellant's claim that MIGC's authority to impose impact fees is controlled by a manual it adopted for guidance in the consistent and equitable collection of Fire Impact Fees.

Even if the manual did control MIGC's authority to impose impact fees, the manual expressly gives the MIGC board the authority to adjust fire impact fees on a case by case basis.

> "Fire impact fees on a case-by-case basis may be adjusted in **the sole opinion and determination of the Board of Directors** for special circumstances determined by the Board of Directors to be with merit." (emphasis added).
>
> *See 7.0 Adjustment of Fire Impact Fees Murrells Inlet - Garden City Fire District Fire Impact Fee Administration Manual Rev. 1, January 1, 2020.*

As shown above the cottages at Swells Cottages are a different case from single family residences as customarily defined by state statutes, zoning ordinances or banking regulations.

MIGC does agree with the Appellant's claim that in this State, the construction given to enabling legislation by an administrative agency is always entitled to the most

respectful consideration and ought not to be overruled without cogent reasons. Kiawah Development Partners, II, 411 S.C. at 34. MIGC contends the same deference should be given to MIGC's decision that in the case of Swells Cottages the fee should be set at 2% of the costs of construction. Swells Cottages is marketed as a commercial apartment complex. [R. 43]. The development was built for profit. As stated above, one look at Appellant's layout of Swells Cottages shows the same difficulty in accessing the internal cottages by fire trucks and firefighting equipment as may exist with apartments, condominiums or townhouses. [R. 203-206]. One may reasonably anticipate that additional firefighting equipment will be necessary to fight fires with no direct access to the internal cottages.

Appellant also claims any substantial doubt in the application of the 2% impact fee should be considered a tax and resolved in favor of the Appellant. Appellant cites Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue, 399 S.C. 313, 731 S.E.2d 869 (2012) to support its claim that ambiguities in tax statutes must be resolved in favor of the taxpayer. MIGC contends *Alltel* is distinguishable from the present case. See Mead v. Beaufort Cnty. Assessor, 419 S.C. 125, 139, 796 S.E.2d 165, 173 (Ct. App. 2016). Alltel Communications, Inc., 399 S.C. at 321, holds that the enforcement of tax statutes should be construed in favor of the taxpayer if the statutes are ambiguous. However, Centex Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) clarifies that decision by holding statutes regarding tax credits or exemptions should construed against the taxpayer if the statutes are ambiguous. MIGC contends that the 1% impact fee is most closely akin to a homestead exemption and the cases concerning tax exemptions. The

policies supporting homestead exemptions are similar to the policies supporting a 1% impact fee on single family residences.

MIGC contends also that Alltel Communications, Inc., 399 S.C. 313 is distinguishable because it applies to tax assessments. Act 272 of 1985 applies to imposition service impact fees. Generally, taxes are imposed on all property for the maintenance of government while assessments are placed only on the property to be benefited. Hagley Homeowners Ass'n, Inc. v. Hagley Water, Sewer, & Fire Auth., 326 S.C. 67, 485 S.E.2d 92 (1997). A "charge" is "the price of, or rate for something." *Hagley* quoting *Black's Law Dictionary 233* (6th ed.1990). Unlike taxes, charges and assessments are similar in that a person receives something specific in exchange for payment of a charge and/or assessment. In Hagley Homeowners Ass'n, Inc. v. Hagley Water, Sewer, & Fire Auth., 326 S.C. 67, 485 S.E.2d 92 (1997), the S.C. Supreme Court held that the imposition of a charge in exchange for a service does not constitute taxation for constitutional purposes. Also see Ford v. Georgetown Cnty. Water & Sewer Dist., 341 S.C. 10, 13, 532 S.E.2d 873, 875 (2000).

In the present appeal, because the issue involves the imposition of a service impact fee and not taxes, the construction given to Act 272 of 1985 by MIGC is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. Kiawah Development Partners, II, 411 S.C. at 34.

III. *MIGC's disregard and the Circuit Court's disregard of the Attorney General's opinion was not arbitrary, capricious, or characterized by an abuse of discretion.*

The law in South Carolina is well settled that although it may be persuasive authority, an Attorney General's opinion is not binding on this Court, and if the Court disagrees

with the reasoning, the Court may decline to adopt it. See Charleston Cnty. Sch. Dist. v. Harrell, 393 S.C. 552, 560–61, 713 S.E.2d 604, 609 (2011) ("Attorney General opinions, while persuasive, are not binding upon this Court."). State v. Ramsey, 409 S.C. 206, 212, 762 S.E.2d 15, 18 (2014).

MIGC respectfully disagrees with the reasoning of the Attorney General's opinion. The opinion contains the following reasoning: a detached one-family dwelling not more than three stories with a separate means of egress is considered residential and is regulated by the International Residential Code. Accordingly, it is our opinion that a detached single-family house not more than three stories with a separate means of egress can be rented or leased to be occupied for living purposes, without it constituting commercial use. However, MIGC's Fire Chief pointed out to MIGC's Board during the appeal hearing that construction of townhouses is also regulated by the International Residential Code and he stated Act 272 of 1985 charges a 2% impact fee on townhouses. See *R. 101.2 International Residential Code* (This comprehensive code comprises all building, plumbing, mechanical, fuel gas and electrical requirements for one- and two-family dwellings and townhouses up to three stories.)

For the reasons stated above, The International Residential Code is not relevant to the distribution of impact fees. Further, the distinction between renting and owning a cottage in a commercial development does not determine how Act 272 of 1985 should be interpreted. The Act does not distinguish between owning and renting. The Act does distinguish single family residences from townhouses, condominiums and all commercial construction. The zoning use, legal forms, development model and commercial use of Swells Cottages more closely resemble those used for townhouses and condominiums.

In addition, MIGC rejects the Attorney General's opinion because it contains a misstatement of the facts of the development. The inhabitants of Swells Cottages do not have a separate means of egress. Photographs of the cottages show that many inhabitants do not have direct egress to public streets and they share parking with other inhabitants of other cottages.

MIGC contends the General Assembly intended to charge single family homeowners an impact fee of 1% of construction costs and to charge developers of multi-unit commercial developments an impact fee of 2% of construction costs. Cottage developments like Swells Cottages probably did not exist in 1985. However, townhouse and condominium developments were prevalent.

IV. *MIGC has not charged other rental properties like Swells Cottages a 1% impact fee.*

MIGC contends there are not any other cottage developments like Swells Cottages in the Murrells Inlet - Garden City Fire District. MIGC disagrees with Appellant's claim that the structures in the Swells Cottages are in the same class as other developments selling single family residences on single family lots. Real property taxes focus on the use of the lot or tract. As stated above, Appellant's use of its tract is a commercial use. There are not any single-family residential lots in the Swells Cottages development. The 221 dwelling places in the Swells Cottages are all located on Appellant's 25 acre tract of land. Appellant rents out all of the cottages, provides a commercial rental office, commercial amenities, and common parking areas for its tenants. [R. 203; R. 252]

MIGC further contends that impact fees are not taxes and they are not subject to the same constitutional limitations as taxes. See Ford v. Georgetown Cnty. Water & Sewer

Dist., 341 S.C. 10, 13, 532 S.E.2d 873, 875 (2000). Impact fees charges are imposed on services rendered. Act 272 of 1985, authorizes MIGC to charge a 2% impact fee on commercial construction developments, townhouse developments and condominium developments. After considering Swells Cottages on a case by case basis, MGIC's board determined Appellant's cottages at Swells Cottages should be charged an impact fee of 2% of the costs of construction. MGIC's determination should be given deference because it is the entity authorized to impose Act 272 of 1985's impact fees in the Murrells Inlet Garden City Fire District. MIGC's determination is supported by the record, and it is worthy of deference.

## CONCLUSION

For the forgoing reasons, Respondent Murrells Inlet Garden City Fire District requests that the orders of the Honorable Kristi F. Curtis be affirmed and Appellant The Cottages at Garden City Beach, LP's appeal be dismissed.

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