THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-6613

County of Charleston, South Carolina, ... Appellant,

vs.

South Carolina Department of Transportation, ... Respondent.

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STATEMENT OF ISSUES ON APPEAL

1. DOES S.C. CONSTITUTION ARTICLE VIII, SECTION 14, EXEMPT THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION FROM COMPLYING WITH THE SOUTH CAROLINA LOCAL GOVERNMENT COMPREHENSIVE PLANNING ENABLING ACT OF 1994 AND THE CHARLESTON COUNTY ZONING AND LAND DEVELOPMENT REGULATIONS ORDINANCE?

2. DOES THE CHARLESTON COUNTY ZONING AND LAND DEVELOPMENT REGULATIONS ORDINANCE IMPOSE AN UNCONSTITUTIONAL TAX ON THE SOUTH CAROLINA DEPARTMENT OF TRANSPORATION'S MAINTENANCE OF THE STATE HIGHWAY SYSTEMS?

STATEMENT OF THE CASE

The County of Charleston ("Charleston County" or the "County") adopted Ordinance No. 1202, as amended, referred to as the Charleston County Zoning and Land Development Regulations Ordinance ("ZLDR") to regulate land use in the unincorporated areas of Charleston County. Article 9.4 of the ZLDR titled "Tree Protection and Preservation" regulates the removal of trees within the County.

On July 18, 2012, the County sent the South Carolina Department of Transportation ("SCDOT") a Notice of Tree Violation regarding the SCDOT's work on Maybank Highway (SC 700) in Charleston County because the SCDOT removed three grand trees within its right of way on Maybank Highway without a zoning permit in violation of the ZLDR. The SCDOT asserted that the County had no legal authority to order SCDOT's compliance with a local tree ordinance in regard to maintenance work within the SCDOT highway right of way.

On October 14, 2014, the County filed a declaratory judgment action pursuant to S.C. Code Ann. § 15-53-10 et seq. asking the circuit court to issue a declaratory judgment finding that the SCDOT is not exempt from the regulatory provisions of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. § 6-29-310, et seq. (the "Planning Act") or from the County ZLDR when performing maintenance of highways in Charleston County. The SCDOT filed its answer on November 17, 2014, asking the circuit court to issue a declaratory judgment declaring that the SCDOT is not an agency subject to S.C. Code Ann. § 6-29-770 and that the application of the ZLDR to the SCDOT's removal of trees violates the South Carolina Constitution.

The SCDOT filed a motion for summary judgment on January 23, 2015, and the County filed a cross motion for summary judgment on February 23, 2015. On April 7, 2015, a hearing was held before Judge R. Markley Dennis, Jr., on both of the parties' motions for summary judgment. On May 19, 2015, the Court issued its final order declaring the County's tree ordinance provision unconstitutional as applied to the State Highway System, denying the County's motion for summary judgment, granting the SCDOT's motion for summary judgment and cross-motion, and dismissing the County's complaint.

Specifically, the findings of the order are that: (1) SCDOT's compliance with local ordinances affecting the design and planning of highway projects conflicts with other federal or State regulations and the SCDOT is not required to adhere to these local ordinances; and (2) ZLDR Subsection 9.4.6E , which governs the removal of trees and a tree fund, is unconstitutional because it constitutes *ad valorem* taxation to property of the State. On June 16, 2015, the County appealed the decision of the circuit court to the South Carolina Court of Appeals.

STATEMENT OF THE FACTS

This is declaratory judgment action where the County contends that the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 requires the SCDOT to comply with Charleston Ordinance No. 1202, as amended, referred to as the County Zoning and Land Development Regulations Ordinance (ZLDR), particularly Article 9.4, titled "Tree Protection and Preservation." The County contends that since it had the power to adopt the ZLDR and its provision regarding tree protection and preservation, and that the provision is not inconsistent with the South Carolina Constitution and general laws of the State, the SCDOT must comply with the regulatory provision of ZLDR Article 9.4.

On November 20, 2001, Charleston County Council adopted the ZLDR to regulate land use in the unincorporated areas of the County pursuant to the Planning Act. Among other things, the ZLDR regulates tree removal and protection. (ZLDR, Art. 9.4, § 1 – 7, Tree Protection and Preservation). The County determined as part of its legislative finding that:

> Trees are an essential natural resource, an invaluable economic resource, and a priceless aesthetic resource. Trees play a critical role in purifying air and water, providing wildlife habitat, and enhancing natural drainage of stormwater and sediment control. They also help conserve energy by providing shade and shield against noise and glare. Trees promote commerce and tourism by buffering different land uses and beautifying the landscape. The Tree Protection and Preservation regulations of this Article are intended to enhance the health, safety and welfare of Charleston County citizens.

ZLDR Art. 9.4, Tree Protection and Preservation, § 9.4.1.

Consistent with the County's legislative intent, the ZLDR prohibits the removal of trees prior to the issuance of a zoning permit by the planning director. (ZLDR Art. 9.4, § 9.4.2 and § 9.4.5). The ZLDR provides that the provisions of this Article in their entirety shall apply to all real property

in unincorporated Charleston County, except as otherwise expressly exempted. See, ZLDR Art. 9.4, § 9.4.1(B)(1). Notwithstanding this bar to tree removal, the ZLDR provides a partial exemption for the SCDOT allowing it to remove trees without prior permission or a zoning permit, except for the following:

> a. All trees species measuring 6 inches or greater DBH located in right-of-ways along Scenic Highways as designated in this Ordinance shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.
>
> b. Grand Tree Live Oak species in all present and proposed right-of-ways and easements shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.
>
> c. All Grand Trees other than Live Oak species in all present and proposed right-of-ways and easements not located on a Scenic Highway are protected but may be permitted to be removed administratively when mitigated per Article 9.4.6.

ZLDR, Art. 9.4, § 9.4.1(B)(3).[1]

In addition, the ZLDR provides that "[p]ermits for tree removal may be approved where one or more of the following conditions are deemed to exist by the Planning Director: . . . 3. Trees pose an **imminent safety hazard to** nearby buildings, or pedestrian or **vehicular traffic** (as determined by the Planning Director or a qualified arborist); . . . ." ZLDR, Art. 9.5, § 9.4.5(A)(3)(Emphasis added).

On or about July 18, 2012, the County sent a Notice of Tree Violation to the SCDOT regarding work it was performing on Maybank Highway in the County. (Letter Brooks, July 18, 2012). The SCDOT removed three Grand Trees within its right of way on Maybank Highway without obtaining a zoning permit. The removal of the Grand Trees was part of the SCDOT's

[1] A Grand Tree is defined as any tree measuring 24 inches or greater diameter breast height (DBH) except pine tree and

ongoing maintenance of Maybank Highway. The County notified the SCDOT that it must either replace trees pursuant to the schedule in the ZLDR or pay a fee to the Tree Fund as mitigation if "planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design." ZLDR, Art. 9.4, § 9.4.6(E). On August 31, 2012, the SCDOT responded to the County's Notice of Tree Violation stating that it "respectfully refuses to comply with the County's requests as set forth in the letter." (Letter from McDonald, General Counsel, Aug. 31, 2012).

The SCDOT claims that the County has no legal authority to order the SCDOT to comply with its local tree ordinance concerning maintenance work within the SCDOT highway right of way. The SCDOT contends that pursuant to S.C. Code Ann. § 57-5-10, it is charged with the duty to construct and maintain the State highway system in a safe and serviceable condition. In addition, the SCDOT believes that S.C. Code Ann § 57-3-110(1) grants it exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. Therefore, the SCDOT has stated that it will continue to construct and maintain the highway system, without any regard to or compliance with the ZLDR, particularly Article 9.4, Tree Protection and Preservation.

On November 14, 2012, the County responded with a letter to the SCDOT indicating that the County disagreed with the SCDOT's position that the County was without authority to order the SCDOT to comply with its zoning ordinance. The County relied on the Planning Act as authority. The Act provides that "[a]gencies, departments, and subdivisions of this State that use real property as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances."

Sweet Gum tree (Liquidamber styraciflua) species. ZLDR, Art. 9.4, § 9.4.1(B)(3).

(Letter Pennick, Planning Director, Nov.14, 2012, citing, S.C. Code Ann. § 6-29-770).

At summary judgment, the trial court denied the County's motion and granted the SCDOT's motion finding that: 1) "with respect to the State Highway System, [the SCDOT] is entitled to the exemption contained in article 8, section 14 of the Constitution as governmental service or function, responsibility for which rests with the State government or requires statewide uniformity", and 2) "the Ordinance is an unconstitutional tax on a State function." (Order pp. 2 and 4). The County contends that S.C. Const. art. VIII, § 14 does not exempt the SCDOT from the County's Tree Protection and Preservation ordinance and that the ordinance does not impose a tax, rather, it imposes a fee and fine for its violation. Therefore, this Court should find that the SCDOT must comply with ZLDR Article 9.4, Tree Protection and Preservation, for the following reasons.

ARGUMENT

I. S.C. CONSTITUTION ARTICLE VIII, SECTION 14 DOES NOT EXEMPT THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION FROM COMPLYING WITH THE SOUTH CAROLINA LOCAL GOVERNMENT COMPREHENSIVE PLANNING ENABLING ACT OF 1994 AND THE CHARLESTON COUNTY ZONING AND LAND DEVELOPMENT REGULATIONS ORDINANCE.

A. The SCDOT is Not Exempt From Application of the Planning Act.

The trial court erred when it found that the SCDOT's compliance with the Planning Act and ZLDR provision regarding tree protection and preservation affecting the maintenance of highway projects "is entitled to the exemption contained in article 8, section 14 of the Constitution as governmental service or function, responsibility for which rests with the State government or requires statewide uniformity." (Order p. 2). To support this finding, the trial court concluded that "SCDOT has exclusive authority over the State Highway System and zoning ordinances which

conflict with this State agency are void[]", citing Law v. City of Spartanburg, 148 S.C. 299, 146 S.E. 12 (1928); Colyer v. Thomas, 268 S.C. 455, 234 S.E.2d 862 (1977). (Order pp. 2 and 3).

1. The County's ordinance does not conflict with State statute

The County's ZLDR does not conflict with Title 37, Highways, Bridges and Ferries, Chapter 3. Contrary to the conclusion of the Judge cited above, in Law v. City of Spartanburg and Colyer v. Thomas, the Court found that "[i]t is well settled that where there is a conflict between a State statute and city ordinance, as where an ordinance permits that which a statute prohibits, the ordinance is void." Colyer, 268 S.C. 458, 234 S.E.2d 863.

The facts before this Court do not present a conflict between a State statute and County ordinance where the ordinance prohibits what the statute allows. Rather, this case presents two statutes and an ordinance that regulate different subject matters: maintenance of state roads and preservation of trees as an essential natural resource pursuant to the Planning Act and local zoning.

The South Carolina Constitution provides that:

> In enacting provisions required or authorized by this article, general law provisions applicable to the following matters **shall not be set aside**: (1) The freedoms guaranteed every person; . . . and (6) **the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity**.

S.C. Const. art. VIII, § 14.

The legislature has determined that "[t]he Department of Transportation shall have the following duties and powers: (1) lay out, build, and maintain public highways and bridges, including the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges; . . . ." S.C. Code Ann. § 57-3-110. It is undisputed that the SCDOT's duties and powers do not extend to the protection or preservation of trees.

In contrast, the legislature has provided that "[a]gencies, departments, and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances." S.C. Code Ann. § 6-29-770. Pursuant to the Planning Act's authority, the County determined that:

> Trees are an essential natural resource, an invaluable economic resource, and a priceless aesthetic resource. Trees play a critical role in purifying air and water, providing wildlife habitat, and enhancing natural drainage of stormwater and sediment control. They also help conserve energy by providing shade and shield against noise and glare. Trees promote commerce and tourism by buffering different land uses and beautifying the landscape. The Tree Protection and Preservation regulations of this Article are intended to enhance the health, safety and welfare of Charleston County citizens.

ZLDR Art. 9.4, Tree Protection and Preservation, § 9.4.1.

Based on this legislative finding, the County through the ZLDR imposed regulations on the removal of trees prior to the issuance of a zoning permit by the planning director. See, ZLDR Art. 9.4, § 9.4.2 and § 9.4.5. The County's ZLDR does not set aside the structure and the administration of SCDOT's service or function as it relates to maintaining the State highway system. The ZLDR does not encroach upon or place any prohibition on SCDOT's maintenance of the roads. In fact, the ZLDR specifically allows the removal of trees if they pose an imminent safety hazard to pedestrians or vehicular traffic.

2. The SCDOT is not exempt from complying with the ZLDR

Nevertheless, the trial court found that because the SCDOT has "exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges", it is exempt from compliance with the Planning Act and the tree protection provisions in Article 9 of the ZLDR. (Order p. 3; see also, S.C. Code Ann. § 57-3-110(1)).

"The burden of proving the entitlement to an exemption is on the party asserting the exemption." Bovain v. Canal Ins., 383 S.C. 100, 110, 678 S.E.2d 422, 427 (2009). "In general, exemptions are an act of legislative grace and, as such, they are to be strictly and reasonably construed. See State v. Life Ins. Co., 254 S.C. 286, 293-94, 175 S.E.2d 203, 206-07 (1970) (noting exemptions are provided as an act of legislative grace and are to be construed strictly; a party must meet the specified conditions to obtain the benefit conferred by the exemption)." Id. "The words used in legislation 'must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand [their] operation.' Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); see Owen Indus. Prods., Inc. v. Sharpe, 274 S.C. 193, 195, 262 S.E.2d 33, 34 (1980) (stating the general rule that a statutory exemption 'must be given its plain, ordinary meaning and must be construed strictly against the claimed exemption'); State v. Hood, 49 S.C.L. (15 Rich.) 177, 185 (1868) ('Every exemption must be couched in such plain and unambiguous language as to satisfy the Court beyond doubt that the Legislature intended to create the exemption. Such a right can never arise by mere implication, and all laws granting the exemption are to be most strictly construed.' (citation omitted))". Id.

Charleston County has the power to regulate, preserve, and protect trees in the unincorporated county, and this exercise of power is not in direct conflict with State law. "Determining whether a local ordinance is valid is a two-step process. The first step is to determine whether the [county] had the power to adopt the ordinance. If no power existed, the ordinance is invalid. If the [county] had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State." McKeown v. Charleston County Bd. of Zoning Appeals, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct.App.2001). Charleston County has the power

to adopt the provision in dispute here. The Planning Act provides in pertinent part that:

> Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare. To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable . . . (3) to facilitate the creation of a convenient, attractive, and harmonious community; (4) to protect and preserve scenic, historic, or ecologically sensitive areas . . . and (8) to further the public welfare in any other regard specified by a local governing body.

S.C. Code Ann. § 6-29-710.

The trial court did not find that the County lacked the power to adopt ZLDR Article 9.4, Tree Protection and Preservation. Rather, the trial judge concluded that the SCDOT was exempt from the Article's jurisdiction pursuant to S.C. Const. art. VIII, § 14. For Article 9.4 to pass constitutional muster, it must be consistent with the Constitution and general law of the State. The SCDOT concedes the application of S.C. Code Ann. § 6-29-770 for all non-highway uses of real property such as section sheds and equipment depots, but not for the highway right of way.[2] (Order p. 2).

The South Carolina State Ports Authority made a similar challenge to the Planning Act regarding whether it had to comply with the City of Charleston's Zoning Ordinance claiming an exemption as a State agency.[3] The South Carolina Supreme Court opined in City of Charleston v. S.C. State Ports Auth. that:

> we clarify any earlier intimations we may have made previously on this issue and explicitly hold that we know of no law allowing a school district or other similar

[2] The SCDOT in its memorandum of law states that it fully complies with all local zoning ordinances as owner or tenant with respect to section sheds, district headquarters, equipment depots, and other non-highway uses of real property. (Def.'s Mot. for Summ. J. p.4, Jan. 21, 2015). However, the SCDOT claims that it is unconstitutional for the County to require SCDOT to obtain a permit and/or pay a fine or mitigation fee for tree removal citing S.C. Const. art. X, 3. Permit fees and fines/mitigation costs are not taxes, and therefore are not applicable to the constitutional prohibition cited by the SCDOT. (See Def.'s Mot. for Summ. J. p.8, Jan. 21, 2015).

[3] Prior to the adoption of the Planning Act, S.C. Code Ann. § 6-29-770(A) was codified as S.C. Code Ann. § 6-7-830 (Supp. 1991).

> agency to ignore valid, local zoning requirements and therefore they may not ignore such.' Under S.C. Code Ann. § 6-7-830 (Supp. 1991) and Charleston County School District, supra, the Ports Authority must comply with local zoning ordinances; and, if the Ports Authority refuses to comply, the City may seek injunction through the Circuit Court.

City of Charleston v. S.C. States Ports Auth., 309 S.C. 118, 120-121, 420 S.E.2d 497, 499 (1992).

While it is true that pursuant to S.C. Code Ann. § 57-5-10 the SCDOT is charged with the duty to construct and maintain the State highway system in a safe and serviceable condition, the construction and maintenance of a highway is inherently different than abiding by a local government's tree regulations ordinance. In addition, S.C. Code Ann § 57-3-110(1) grants the SCDOT exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. These statutory provisions do not create a tree protection and preservation exemption for the SCDOT. Nevertheless, the SCDOT asserts that ZLDR Article 9.4 and by extension S.C. Code Ann. § 6-29-770 are in violation of S.C. Const. art. VIII, § 14, S.C. Code Ann § 57-3-110(1), and S.C. Code Ann. § 57-5-10, and therefore, are unconstitutional.

The SCDOT cites Brashier v. S.C. DOT, 327 S.C. 179, 490 S.E.2d 8 (1997) (overruled on other grounds) and Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1992)[4] for this proposition. In Brashier, the opponents of a toll road argued

[4] In Town of Hilton Head Island, proponents of the cross-island expressway sought to limit the Town and SCDOT's authority to plan, construct, and finance the expressway by requiring a referendum before a toll road could be considered. The Town of Hilton Head Court held that:

> The legislature has declared that collecting tolls is an appropriate method of financing highways and appurtenant facilities. See S.C. Code Ann. § 12-27-1290 (Supp. 1991); see also S.C. Code Ann §§ 57-5-1310 to -1490 (1991). We find that the initiated ordinance is facially defective in its entirety because it sets aside the structure and administration of the statewide highway scheme by attempting to limit the authority granted to the SCDHPT to consider the collection of tolls as a method of financing the construction of state roads. When a municipality enacts an ordinance which conflicts with state law, the ordinance is invalid. State v. Solomon, 245 S.C. 550, 141 S.E.2d 818 (1965). An electorate

that the SCDOT failed to comply with S.C. Code Ann. § 57-3-615 which required certain toll projects to be initiated by counties pursuant to S.C. Code Ann. § 4-37-10 et seq. The Supreme Court in Brashier held that

> Article VIII, section 14 "precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subjects encompassed by that section." Robinson v. Richland County Council, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987). When construing Article VIII, section 14, this Court has consistently held a subject requiring statewide uniformity is effectively withdrawn from the field of local concern. See, e.g., Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94, 96 (1996) ("Article VIII, § 14 limits the powers local governments may be granted"); Kramer v. County Council, 277 S.C. 71, 282 S.E.2d 850 (1981) (per curiam); Douglas v. McLeod 277 S.C. 76, 282 S.E.2d 604 (1981). We have already held that "the planning, construction, and financing of state roads is a governmental service which requires statewide uniformity." Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992).

Brashier v. S.C. DOT, 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997).

The Court found that S.C. Code Ann. § 57-3-615 was an unconstitutional delegation of authority pursuant to S.C. Const. art. VIII, § 14. It struck down the statute.[5] However, the statutes S.C. Code Ann § 57-3-110(1) and § 57-5-10 upon which the SCDOT relies do not require statewide uniformity

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> has no greater power to legislate than the municipality itself. City & County of San Francisco v. Patterson, 202 Cal. App. 3d 95, 248 Cal. Rptr. 290 (1988). An initiated ordinance which is facially defective cannot be cured by adoption by the electorate. [citation omitted]

Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992).

[5] It is interesting to note that the SCDOT does not challenge a municipalities' right to approve its design and construction of highways within its jurisdiction pursuant to S.C. Code Ann. § 57-5-820 or its constitutionality. The municipal consent statute S.C. Code Ann. § 57-5-820 provides:

> All work to be performed by the Department on state highways within a municipality **must be with the consent and approval of the proper municipal authorities,** except that work performed or to be performed on a bridge and its approaches, certified by the Department as functionally obsolete or structurally deficient, to remove, replace, or improve such bridge and its approaches shall not require prior consent and approval of a municipal authority if the bridge crosses the intracoastal waterway.

If S.C. Const. art. VIII, § 14 and S.C. Code Ann § 57-3-110(1) create the exemption articulated by SCDOT and adopted by the trial court in this case, then a municipality could not veto the SCDOT's design, construction, or maintenance of a road in its jurisdiction.

of protection and preservation of trees along its highways; therefore, the subject is not withdrawn from the field of local concern.

3. The County's preserving and protection of trees do not set aside the duties and powers of SCDOT to maintain highways

It is undisputed that the SCDOT is charged with the duty to construct and maintain the state highway system in a safe and serviceable condition. See, S.C. Code Ann. § 57-5-10. In addition, it is undisputed that the SCDOT has exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. See, S.C. Code Ann. § 57-3-110(1). However, the services and functions enumerated here do not expressly include tree protection and preservation, except where the tree poses an **imminent safety hazard to** nearby buildings, or pedestrian or **vehicular traffic**, which in those situations the trees may be removed. See, ZLDR, Art. 9.4, § 9.4.5(A)(3). As argued above, tree protection and preservation are not subjects encompassed or embodied by S.C. Code Ann. § 57-3-110(1) and S.C. Code Ann. § 57-5-10. Thus, the County ordinance does not set aside the SCDOT's state road maintenance responsibilities. Rather, it regulates the protection of trees within the right-of-way. "A local government ordinance conflicts with a State law when its conditions, express or implied, are inconsistent and irreconcilable with the State law." Hospitality Ass'n v. County of Charleston, 320 S.C. 219, 228, 464 S.E.2d 113, 119 (1995).

State roads and highways are not at issue here. The issue here is the preservation and protection of trees along scenic highways and preservation and protection of grand trees, both of which are not within the SCDOT's power to regulate. South Carolina Constitution article VIII, § 14, "preclude the legislature from delegating to counties the responsibility for enacting legislation

relating to the subjects encompassed by that section." Robinson v. Richland County Council, 293 S.C. 27, 30, 358 S.E.2d 392, 394 (1987). It does not limit the power of the legislature to create alternate means, by general law, for counties to exercise constitutional powers. Id. Under Home Rule:

> All counties of the State . . . have authority to enact regulations, resolutions, and ordinances . . . respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them.
>
> This broad grant of power is 'in addition to the powers conferred to [a county's] specific form of government [under S.C. Code Ann. § 4-9-30],' and is limited only by the requirement that the regulation, resolution, or ordinance be consistent with the Constitution and general law of this State.

Hospitality Ass'n v. County of Charleston, 320 S.C. 219, 226, 464 S.E.2d 113, 118 (1995).

"A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. [Citation Omitted]. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the constitution." Robinson, 293 S.C. 27, 30, 358 S.E.2d 392, 394. The County's legislative enactment of ZLDR Article 9.4 pursuant to the Planning Act is not adverse to the South Carolina Constitution. ZLDR Article 9.4 simply advances the goals of the Planning Act and the legislative intent of Charleston County Council to protect and preserve grand trees as aesthetic resources and enhancements to scenic roads, natural drainage, and wildlife habitat, to name a few.

What is truly at issue here is the SCDOT's ardent unwillingness to seek review and approval from counties prior to the removal of a certain class of trees, to include the mitigation of replanting or paying a mitigation fee. Nothing in State law gives the SCDOT exclusive authority over tree

protection and removal. Instead, the Planning Act specifically mandates that the SCDOT comply with local zoning. In fact, the SCDOT routinely applies for and receives permits from other state and federal regulatory agencies when planning, designing, and constructing roads.[6]

"Where an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law. In order for there to be a conflict between a State law and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict." McKeown, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct.App.2001). Since the ZLDR Ordinance Article 9.4 is not inconsistent with State law, this Court should reject the SCDOT's unconstitutionality defense and find that it must comply with the ZLDR provisions.

B. The Legislature Has Not Preempted the Field of State Road Maintenance to Preclude Local Tree Preservation and Protection Laws Within the Road Right-Of-Way.

For argument's sake and considering ZLDR Article 9.4 is harmonious with S.C. Const. art. VIII, 14, the SCDOT does not have exclusive jurisdiction over the rights-of-way under the State Highway System such that it precludes application of the County's tree protection and preservation initiatives. To preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way. S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006). "In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together

[6] The SCDOT must coordinate with and receive approval from a variety of entities prior to constructing a road. These entitles can include: the Department of Health and Environmental Control, Ocean and Coastal Resource Management, local governments, landowners, the Army Corps of Engineers, the State Highway Commission, the State Historic Preservation Office, railroad companies, and utility companies. While the SCDOT is charged with building and maintaining highways, they do not have carte blanche to do so.

and each one given effect. [Citation Omitted] A statute should not be construed by concentrating on an isolated phrase." Id. South Carolina courts have generally followed the same preemption analysis in deciding whether a state law preempts a local law as it has applied in deciding whether a federal law preempts a state law or regulation. Id. For example:

> [F]ederal law may preempt a state law as follows: (1) Congress may explicitly define the extent to which it intends to preempt state law, (2) Congress may indicate an intent to occupy an entire field of regulation, or (3) federal law may preempt state law to the extent the state law actually conflicts with the federal law, such that compliance with both is impossible or the state law hinders the accomplishment of the federal law's purpose. . . . We find it appropriate to address the SCSPA's preemption arguments using the three categories previously recognized when discussing federal law preemption, any of which is a method by which the General Assembly's intent may be made manifest.

S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 395-396, 629 S.E.2d 624, 627-628 (2006).

The Legislature has not manifested intent to preempt the entire field of the SCDOT's planning, construction and maintenance of the State Highway System. "Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." Id. Equally, "[u]nder implied preemption, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." Id. Neither doctrine is applicable in this case. Although S.C. Code Ann. § 57-5-10 provides that "[t]he state highway system shall consist of a statewide system of connecting highways that shall be constructed to the Department of Transportation's standards and that shall be maintained by the department in a safe and serviceable condition as state highways", nowhere does the Act refer to tree protection or exclusive control over any area that touches the road system. SCDOT's maintenance responsibilities on Maybank Highway are not prohibited by ZLDR, Article 9.4. Instead, they are regulated by it.

> Where an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law. In order for there to be a conflict between a State law and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict. [Citations Omitted] As a general rule, 'additional regulation to that of [the] State law does not constitute a conflict therewith.'

McKeown v. Charleston County Bd. of Zoning Appeals, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct.App.2001).

More compelling is the fact that the Legislature has adopted provisions requiring the review and approval of local governments before work can begin on roads within their jurisdictions. For instance, South Carolina law provides that:

> All work to be performed by the Department on **state highways within a municipality must be with the consent and approval of the proper municipal authorities**, except that work performed or to be performed on a bridge and its approaches, certified by the Department as functionally obsolete or structurally deficient, to remove, replace, or improve such bridge and its approaches shall not require prior consent and approval of a municipal authority if the bridge crosses the intracoastal waterway.

S.C. Code Ann. § 57-5-820 (Emphasis added).[7]

It is clear that the Legislature did not intend expressly or impliedly to preempt the entire field of maintenance of the State Highway System by mandating that all work on State highways must be done with municipal consent and approval. Moreover, State law does not mention tree protection as part of the duties and responsibilities of SCDOT. Therefore, this Court should reject SCDOT's interpretation of the State Highway System statute that it has exclusive jurisdiction over the rights-of-way and find that it does not preclude application of the County's tree protection and preservation ordinance.

[7] See also, S.C. Code Ann. § 57-5-830 (where a municipal authority may review and approve proposed permanent improvement, construction, reconstruction, or alteration by the Department of any highway within a municipality).

II. THE CHARLESTON COUNTY ZONING AND LAND DEVELOPMENT REGULATIONS ORDINANCE DOES NOT IMPOSE AN UNCONSTITUTIONAL TAX ON THE SOUTH CAROLINA DEPARTMENT OF TRANSPORATION'S MAINTENANCE OF THE STATE HIGHWAY SYSTEMS.

A. The Tree Mitigation Fee is Not a Tax.

The Court erred when it found in the alternative that the County's Ordinance is an unconstitutional tax on a State function. The ZLDR Article 9.4, § 9.4.6 B titled "Protected Trees Removed in Violation" provides:

> When trees of 8 inches DBH or greater have been removed in violation of this Ordinance, replacement trees shall be planted in the same general area according to a replacement schedule approves by the Planning Director.

ZLDR Article 9.4, § 9.4.6 E titled "Tree Fund" provides:

> The Tree Fund is a fund established to receive monies exacted from tree removal violation fines to include, but not to be limited to, removal, damage, destruction, or as defined in Section 9.4.1.C of this Chapter, and as a form of mitigation when planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design. The Planning Director shall imposes a Tree Mitigation fee based on the current market retail value of two-to-three- inch caliper trees installed to the American Association of Nurserymen Standards. . . . All Tree Mitigation fees collected shall be paid to the County Treasurer and placed in an account established exclusively for public beautification through the planting of trees in Charleston County.

The County's tree fund does not impose an unconstitutional tax. "Although a service charge may possess points of similarity to a tax, it is inherently different and governed by different principles. A service charge is imposed on the theory that the portion of the community which is required to pay the charge receives some special benefit as a result of the improvement made with the proceeds of the charge. A charge does not become a tax merely because the general public obtains a benefit." Brown v. County of Horry, 308 S.C. 180, 184-85, 417 S.E.2d 565, 568 (1992) citing Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987). "First, the

required payment primarily benefits those who must pay it because they receive a special benefit or service as a result of improvements made with the proceeds." J.K. Constr., Inc. v. Western Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563-64 (1999) citing Brown v. County of Horry, 308 S.C. 180, 184-85, 417 S.E.2d 565, 568 (1992) (holding that road maintenance fee imposed on all motor vehicles registered in county was a service charge, not a tax). In the case before this Court, that special benefit is the protection and preservation of trees in the County. "It is true that the entire area may benefit from improved and expanded sewage service, but a charge does not become a tax merely because the general public obtains some benefit." J.K. Constr., Inc., supra, citing Robinson v. Richland County Council, 293 S.C. 27, 33, 358 S.E.2d 392, 396 (1987) (holding that required payment imposed to fund installation and maintenance of sewer facility was assessment, and not tax, regardless of whether general public obtained health benefit from elimination of sewage problem). The required payment of the Tree Fund mitigation fee is a charge and imposed on those who are required to pay it when trees of 8 inches in or greater in diameter have been removed in violation of the ZLDR. The required payment benefits those that pay it because they receive a special benefit of public beautification as a result of planting trees with the proceeds.

"Courts have also looked at the objective in imposing the fee. . . . the Missouri Supreme Court considered whether the revenues generated by the fees were to be paid into the general fund of the government to defray customary governmental expenditures. . . . the Massachusetts Supreme Court held that when the revenue from fees is destined for the general fund this indicates that the fee is a tax." Brown v. County of Horry, 308 S.C. 180, 184, 417 S.E.2d 565, 567 (1992). "The proceeds are not placed in a general fund to be spent on Authority's ongoing expenses and maintenance, which is a hallmark of a tax. Hagley Homeowners Ass'n v. Hagley Water, Sewer, and Fire Auth., 326 S.C.

67, 75, 485 S.E.2d 92, 96 (1997) ('generally, taxes are imposed on all property for the maintenance of government'); Brown v. County of Horry, supra (revenue from fees destined for general fund indicates a tax)." J.K. Constr., Inc. v. Western Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563-64 (1999). The County's Tree Fund provision provides that the mitigation fees are paid to the County Treasurer and placed in an account established exclusively for public beautification through the planting of trees in Charleston County. Therefore, because the money collected is specifically allocated for planting trees, the fee is service charge, not a tax.

B. The Fee is Uniform.

The Tree Fund established a fee that is uniform. It is a fund established to receive monies from those that remove, damage, or destroy trees in violation of the ZLDR as a form of mitigation when planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design. There is no inequality or discrimination which would render the fee invalid.

C. The SCDOT is Not Exempt from Fees and Fines.

The SCDOT is not exempt from paying local fees and, if it fails to do so, local fines. Although the SCDOT claims to have exclusive authority with respect to the State Highway System and compliance with local ordinances affecting the design and planning of highway projects may conflict with other federal or State regulations, the SCDOT "does not contest that, as a department of State government, it is subject to all local zoning ordinances as owner or tenant of real property." (Order p. 2). By way of analogy, the SCDOT pay fees the various levels of local, State, and federal governments to obtain permits for a variety of functions. For example, SCDOT pays fees to local governments for land disturbance permits prior to beginning work on land it does not own; to State

agencies for wetland and tidal permits; and to federal agencies for stormwater and wastewater permits.

CONCLUSION

For the reasons set forth above, the Honorable Court should reverse the trial court's Order and find that the SCDOT is not exempt from the regulatory provisions of the Planning Act and ZLDR regarding the protection and preservation of trees when it is performing its duty to construct and maintain highways within its rights of way in Charleston County; and find that fees paid into the Tree Mitigation Fund do not constitute an unconstitutional tax.

Respectfully submitted,

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August 27, 2015
North Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-6613

County of Charleston, South Carolina, ... Appellant,

vs.

South Carolina Department of Transportation, ... Respondent.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Appellant** and **Designation of Matter to be Included in the Record on Appeal** on the all counsel of record by depositing a copy of the same in the United States Mail, postage prepaid, on August 27, 2015, addressed as follows:

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August 27, 2015

Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: County of Charleston v. South Carolina Department of Transportation
Appellate Case No. 2015-001309

Dear Ms. Kitchings:

I have enclosed for filing pursuant to Rules 208 and 209, SCACR, the original and two copies of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal. I would appreciate your acknowledging receipt of these documents by date-stamping the extra copies of the enclosed and returning them to me in the enclosed envelope.

By copy of this letter, I am serving counsel for Respondent with these documents and enclose a Proof of Service to that effect. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

CHARLESTON COUNTY ATTORNEY'S OFFICE

Austin A. Bruner

AAB/ad
Enclosures
cc: Linda C. McDonald, Esquire
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