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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001309

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

v.

South Carolina Department of Transportation ..... Respondent.

BRIEF OF RESPONDENT

South Carolina Department of
Transportation

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Columbia, S.C.
November 12, 2015

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STATEMENT OF ISSUES ON APPEAL

1. Whether Article VIII, §14 of the South Carolina Constitution prevents Charleston County from regulating the design and maintenance of the State Highway System within its borders?
2. Whether the imposition of a fine for the necessary removal of trees within the limits of State Highway rights-of-way constitutes a tax on State property prohibited by Article X, §3 of the Constitution.

STATEMENT OF THE CASE

Respondent asserts the following exceptions to Appellant's Statement of the Case:

At the bottom of page 2, Appellant characterizes our defense below as an argument that the Department is not an agency subject to local zoning ordinances as stipulated by S.C. Code Ann. §6-29-770 (Rev. 2004). Rather, our position as affirmed by the Circuit Court is that the Department is indeed subject to such ordinances as an owner or tenant of land put to non-highway uses. However, the construction, operation, and maintenance of the State Highway System is a function of State government that is withdrawn from the field of local control per Article VIII, §14, of the South Carolina Constitution.

Likewise, Appellant's characterization of Judge Dennis's Order that the zoning ordinance conflicts with other state and federal regulations is not completely accurate. Rather, the Court relied on precedent of our Supreme Court that the governmental service of planning, constructing, and financing State roads requires statewide uniformity. The entire subject matter is thus outside local government powers to regulate. Brashier v. South Carolina Department of Transportation, *et al.*, 327 S.C. 179, 185, 490 S.E.2d 8, 11

(1997); Town of Hilton Head v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992).

STATEMENT OF THE FACTS

Respondent has no objections to Appellant's Statement of the Facts except as to those that attempt to conclude the ultimate issues herein.

ARGUMENT

I. The design, construction, and maintenance of the State Highway System is a function or service of the State government that requires statewide uniformity and is thus withdrawn from the field of local concern.

In section I. A. 1. of its argument, Appellant contends that there is no conflict between the exclusive authority of the Department to establish design criteria, construction specifications, and standards to construct and maintain highways and bridges and the County ordinance's objective of preserving trees because the ordinance allows the removal of trees where they pose "an imminent safety hazard to pedestrian or vehicular traffic." Of course, the Department does consider trees. Roadside vegetation management is one of the many factors considered in highway design and covered under the Department's internal policies and well as part of the NEPA process under which the Department designs its highways. Decisions to remove or retain trees in the clear zone[1] of highways are given careful consideration in highway design and maintenance based upon well settled engineering standards.

[1] "Clear Zone" is defined as, "The unobstructed, traversable area provided beyond the edge of the through traveled way for the recovery of errant vehicles." AASHTO *Roadside Design Guide,* 4th edition, July 2015.

Appellant's no-conflict argument is belied in any event by the facts of this case. The Department determined that the trees in question presented a hazard to the travelling public and removed them. The County disagreed, issued a citation, and attempted to collect a fine. However, our argument, based on Brashier, supra, is that case-by-case factual inquiries are inappropriate in that a regulation encroaching on State authority is void *ab initio.* Similar conflicts will inevitably occur in the future if the ordinance is allowed to stand. The County's attempt to assert authority in this area is unconstitutional.

In subsection I, A. 2. of their brief, pp. 9-10, Appellant argues that the Department has not established its entitlement for an "exemption" from the tree ordinance under the case law governing exemptions from legislation. However, Respondent is not seeking an exemption from the County as a matter of legislative grace. Rather, it is challenging the authority of the County to regulate in this area to begin with. SCDOT's authority to regulate with regard to highway design is exclusive. S.C. Code Ann. §57-3-110(1).

Our argument is the same in response to Appellant's argument concerning the case law tests for determining the validity of a local ordinance. The Circuit Court need not have engaged in the two-step analysis Appellant sets forth beginning on page 10 because the ordinance cannot pass either of the tests: The County does not have the power to legislate in an area reserved to State control and the ordinance is unconstitutional under Article VIII, §14 as encroaching on a governmental service reserved by the State.

The case Appellant cites in support of its theory, City of Charleston v. S.C. State Ports Auth., 309 S.C. 118, 420 S.E.2d 497 (1992), although we believe correctly decided,

is inapt. There the Supreme Court held that the City's architectural review board had the authority to reject the Port's façade design for one of its buildings. This is clearly a matter that is covered by the mandate of S.C. Code Ann. §6-29-770 that State agencies as owners or tenants of real property abide by local zoning ordinances. The result may have been different, however, had the City attempted to regulate the method of unloading containers for example. Maintenance and operation of a State Highway, including tree removal, is a service or function—not ownership of real property.[2]

Finally, in this subsection, Appellant argues that the enabling acts for SCDOT do not require that the highway system be constructed to uniform standards across all local jurisdictions. This argument is counter to the foundational concept of a uniform interconnected system of highways under central control in South Carolina. The General Assembly has specified the minimum width of highways, S.C. Code Ann. §57-5-330, the location of drive entrances, §57-5-1090, and has otherwise stipulated that highways in the system be constructed to standards commensurate with the amount and types of traffic services to rendered by the highways in the respective systems. §57-5-720. The geometric design of highways is generally set by various national engineering standard-setting bodies—primarily the American Association of State Highway and Transportation Officials (AASHTO). The Federal Highway Administration requires these standards to be followed to qualify for federal-aid-to-highways assistance. The General Assembly, in turn, mandates that SCDOT cooperate with the federal government to receive aid under the federal-aid-to-highways acts. S.C. Code Ann. §§57-3-110(6), 57-3-670 (Rev. 2006).

[2] A highway is termed an incorporeal hereditament, an easement. Edgefield Co. v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E.801 (1916).

In subsection I. A. 3., Appellant continues its argument that the ordinance and the statutes granting SCDOT exclusive authority over highway design are not inconsistent. Our response in general is that the Code's instruction that the Department's powers regarding the State Highway is "exclusive" is an express preemption of locals law that attempt to legislate in this area. S.C. State Ports Authority v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006). In any event, there is an inherent conflict.

In highway planning, the Department generally follows the NEPA[3] process. That law requires consideration of a wide range of environmental factors including vegetation, wildlife refuge, and human impacts such as dividing communities. The goal of NEPA is to find the least damaging practical alternative when designing highways. The elevation of tree protection to a preeminent factor pursuant to local law, would upset this process and potentially cause the loss of federal funds which is clearly a high priority of our General Assembly.

In subsection 1. B., Appellant continues its argument that "exclusive" does not mean exclusive arguing that the Department's discretion in highway planning and maintenance is not absolute. It cites a number of entities with the power to affect the Department's decisions in this regard. This argument is unavailing with respect to the County's defense of its ordinance. The General Assembly, acting as the sovereign, is vested with a plenary police power and may delegate that power to agencies of the government. S.C. Code Constitution, art. XII, §1 (Rev. 2009). Often legislation requires that the Department seek approval of other State agencies for certain aspects of its functions. See, e.g., S.C. Code §57-23-800 (D) (Rev. 2006) (SCDNR may approve

[3] The National Environmental Policy Act of 1969, P.L. 910-190, 42 U.S.C. §§4321-4327.

mowing of interstate medians). The Department must deal with private landowners including railroads and utilities under the takings clause, S.C. Const. art. 1, §13, and with regulations of federal agencies under the U.S. Constitution's spending clause, South Dakota v. Dole, 483 U.S. 203, 205–206, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). However, the General Assembly has never given local governments the right to regulate the State Highway System--rather it has reserved that subject matter to itself acting through the Department of Transportation.

In an opinion discussing the relative condemnation power between the Highway Commission and public service corporations and municipalities, our Supreme Court declared that the Commission acts as the sovereign as an agency of the State for the State's own purposes. It is the alter ego of the legislature and not a mere subordinate. Riley v. S.C. State Highway Dep't, 238 S.C. 19, 25, 118 S.E.2d 809, 810 (1961). Had the General Assembly decided to cede some of its power over State highways to local governments, it would have said so expressly. It may not be implied from the grant of power to zone land.

Appellant cites the statutes requiring the Department to obtain the consent of municipalities prior to working on State highways within city boundaries in support of its argument that the General Assembly did not preempt the entire field with regard to the State Highway System. These Code sections, S.C. Code Ann. §§57-5-820, 830 (Rev. 2006), are in deference to the city planning obligations of municipal governing bodies. Cities and Towns may reject proposed highway projects within their jurisdictions. The status of counties vis-à-vis the Department of Transportation is far different. The State Highway System predates the establishment of a central highway department to

administer it. The System had previously been the responsibility of the counties for the highway segments within their boundaries. Centralization of control over the System by a single highway department spawned one of the greatest political and legal battles of the 20th Century that culminated in the last *en banc*[4] sitting of our Supreme Court and an oral argument on a *certiorari* petition to the U.S. Supreme Court. In 1929, the General Assembly enacted a statute allowing the State Highway Commission to issue bonds backed in part by the motor fuels tax for the purpose of completing the State Highway System. 36 Stat. at Large, P. 670 (March 14, 1929). Opponents of the "Bond Act" sued and the majority of the *en banc* Court upheld the Act. State v. Moorer, 152 S.C. 455, 150 S.E. 629 (1929) cert. denied sub nom Johnson v. State Highway Commission of South Carolina, 281 U.S. 691, 50 S.Ct. 238, 74 L.Ed. 1120 (1930). The U.S. Supreme Court denied *certiorari* after Justice Van Devanter asked the attorney for the opponents, L.G. Southard, whether the South Carolina Supreme Court was not the final arbiter of the State's constitution? The Court adjourned without hearing from the respondent. Moore, The South Carolina Highway Department 1917-1987 (1987). A tree ordinance of a single county is not a sufficient cause to overturn this long-settled principal of State government organization.

II. The Ordinance is a tax on the property of the State.

State Highways exist on various property interests vested in the Department and obtained by gift, purchase, and condemnation. The property is titled in the State, operated exclusively for the benefit of the public and not for revenue and, thus, is exempt from taxation under Article X, § 3 of the Constitution. Benjamin v. Housing Authority of

[4] Supreme Court justices plus all active Circuit Court judges.

Darlington County, 198 S.C. 79, 15 S.E.2d 737, 739 (1941). The tree ordinance requires a payment to the County of the value of each tree removed. Because removal of trees for highway travel lanes and clear zones is unavoidable and inescapable, the mandatory "contribution" to the tree fund constitutes a tax on State property that is prohibited by Article X, §3.

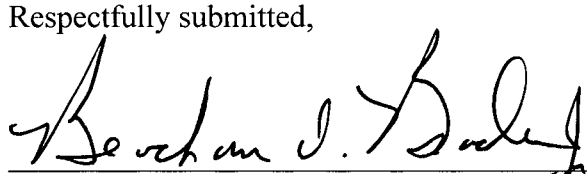
Appellant seeks to save the Ordinance from the constitutional prohibition by arguing that the contribution, arbitrarily set by the zoning administrator, is a fee and not a tax. As support for this argument, it cites case law distinguishing "service charges" from taxes. The hallmark of a service charge is that the portion of the community required to pay it receives some benefit from the improvements made with proceeds of the charge. As a benefit, Appellant cites the beautification resulting from planting trees with the proceeds. However, a highway is not a person who benefits from beautification in Charleston County. The payer is the taxpayers of other counties who pay into the State Highway Fund through the uniform statewide motor fuels tax. The beneficiaries presumably are the residents of Charleston County. While the General Assembly may be within its rights to appropriate moneys for tree planting in Charleston County from any source including the State Highway Fund, Charleston County is not entitled to unilaterally draw from it or tax it.

Conclusion

The County's ordinance encroaches on a service and function of State Government requiring statewide uniformity and it thus void under Article VIII, §14 of the Constitution. Alternately, because payments by the State under the ordinance are

unavoidable and inescapable where trees must be removed for highway safety purposes, the fines or charges mandated by the ordinance constitute a tax on State property prohibited by Article X, §3. The Court should affirm the Circuit Court.

Respectfully submitted,



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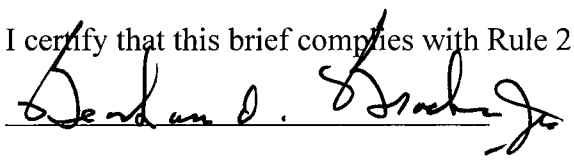
I certify that this brief complies with Rule 211 (b), SCACR.



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PROOF OF SERVICE

I certify that I have served the BRIEF OF RESPONDENT on Appellant by depositing a copy in the Unites States Mail, postage prepaid, on November 15, 2015, addressed to its attorneys of record as follows:

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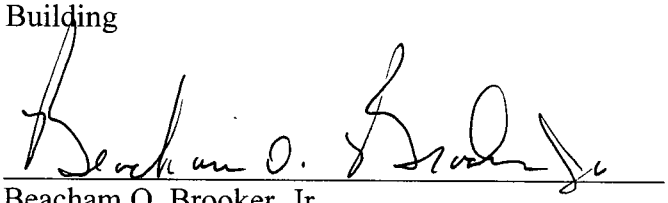

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