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THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Charles B. Simmons, Jr., Master-in-Equity

Appellate Case No.: 2018-002255

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

v.

Greenville County Council and
Greenville County, ... Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This case was initiated by the filing of a Summons and Complaint on March 23, 2017. The Defendants filed an answer and counterclaim on May 23, 2017. An Amended Summons and Complaint was filed June 23, 2017. Defendants filed an Answer to the Amended Complaint on July 7, 2017. Pursuant to cross motions an Order granting summary judgment as to certain issues was entered on October 4, 2017. The case was set for trial on October 17, 2018, the Hon. Charles B. Simmons, Special Circuit Judge, presiding. An Order was entered on November 28, 2018 finding for the Defendants and denying the relief sought by Plaintiff. A notice of appeal was filed on December 21, 2018. Appellants were represented at trial by Robert C. Childs, III, Respondents were represented at trial by Sarah Spruill of Haynsworth, Sinkler and Boyd. J. Falkner Wilkes joined Robert C. Childs, III on appeal on behalf of the Appellants.

STATEMENT OF FACTS

This case involves the enactment of four ordinances and the adoption of the Rules of County Council by Greenville County Council in the early 2017. On January 9, 2017 Greenville County Council installed its new members (or returning incumbents) from the November 2016 elections. (R. p. 455). On January 24, 2017 Greenville County Council unanimously adopted the revised Rules of County Council which incorporated a provision, which had commonly been a part of the Rules of County Council since 2004 known as the "Taxpayer Protection Provision." It stated as follows:

> (4) Votes Required for Passage – (Note – Some actions require 3/4 vote per Section 3 of Ordinance No. 3867, See Appendix A to these Rules)
> (a) A Majority of all Council Members shall be required to pass ordinances, amendments, and resolutions, except as provided herein.
> (b) A vote of two-thirds (2/3) of the Members of Council shall be required for passage of:
>
> (i) Any ordinance or amendment authorizing a supplemental appropriation
> (ii) Authorization for the issuance of general obligation bonds,
> (iii) Any increase in the tax levy for Greenville County or any special purpose district or political subdivision which requires Council approval
> (iv) Approval of rezoning a property or text amendment to the zoning ordinance wherein action of council is contrary to the recommendation of the Planning Commission or the Planning and Development Committee.
>
> (c) Any matter receiving a tie vote fails.
> (d) Abstentions shall be counted as positive votes unless a written statement of a conflict is given to the Chairman

(R. p. 467 - 468).

Section 3 of Ordinance No. 3867 was enacted on or about December 13, 2004 by the Respondent Council known as the "Taxpayer Protection Provision", as follows:

> A three-fourths vote by the full membership of County Council shall be required to take any action, which would raise taxes or fees or harm the County's AAA credit rating. Such actions include the following: to approve the issuance of General Obligation Bonds (bonds pledging the full faith and

> credit of Greenville County); in increase Ad Valorem Property Tax Levies for the County General Operating Millage; to increase the amount of any fee assessment established by County Council; to implement any new fee or tax assessment; to increase County expenses if such increase would, during the budget period in which the expenses would be incurred, lower County reserves to a level less than the greater of 30% of operating expenses of three months of operating expenses; and to approve Supplemental Appropriations.

(R. p. 475).

These provisions were unanimously adopted as of the Rules of Greenville County Council for 2017-2018. Therefore, according to the Taxpayer Protection Provision any new fee required 9 votes in favor and the Taxpayer Protection Provision increased the voting requirements for tax increases from 8 to 9 votes. The Rules of County Council also adopted the following provision.

> (A) Amendment
> Certain of these rules are provisions of South Carolina statutory law and cannot be amended. Except for those provisions, two-thirds of the members of Council may vote to amend these rules at any regular meeting if notice of the proposed amendment is given at the previous regular meeting.
> (B) Suspension
> Rules stated in a South Carolina statute and rules governing quorum and vote requirements cannot be suspended. Notice requirements can be suspended by two-thirds of the members of Council. Rules relating to priority of business or to procedure may be suspended by a majority vote of the members of Council. A motion to suspend the rules may not be amended nor may it have any subsidiary motions applied to it. A motion to suspend shall specify which rule or rules are to be suspended.

(R. p. 473).

Therefore, the Rule of County Council enacted on January 24, 2017 provides that 8 members must vote to change the rules.

At the County Council meeting on February 7, 2017, Chairman Kirven presented by title only for first reading an ordinance to establish a uniform charge for the provision of upgraded, county-wide public safety tele-communications services to all real property within Greenville County and to amend Ordinance No. 2474, as amended, so as to increase the county road

maintenance fees. (R. p. 484). The Greenville County Road Maintenance Fee is set forth in Greenville County Code §14-11 and was set at $15.00 in 1993. This county road maintenance fee was applied at a flat rate to each vehicle registered for taxes in Greenville County. No judicial challenge has ever been raised about the original road maintenance fee although a subsequent $200.00 per plate fee on all automobile dealer and wholesaler license tags in 1994 for road maintenance was found to be violative of equal protection because no special benefit was conferred upon the payors of the uniform service charge. *Fairway Ford, Inc. v. County of Greenville*, 324 S.C. 84, 476 S.E.2d 490 (S.C., 1994).

The Ordinance was presented for second reading on February 21, 2017. The minutes of the meeting reflect the following:

> Vice-Chairman Meadows moved for approval at second reading an ordinance to establish a uniform charge for the provision of upgraded county-wide public safety telecommunication services to all real property within Greenville County; and to amend Ordinance No. 2474, as amended, so as to increase the County Road Maintenance Fee.
>
> AMENDMENT:
>
> Councilor Fant moved to amend the ordinance in regards to the effective date; in compliance with SC Code Section 6-1-330, this ordinance shall take effect upon the date of its adoption by a positive majority vote of the Greenville County Council.
>
> Councilor Ballard stated he took issue with Councilor Fant's proposed amendment. The statute cited by Councilor Fant stated a County could adopt an ordinance by a plurality, which was seven votes for Greenville County, to deal with taxes, fees and other issues. He stated that in 2004, Greenville County Council passed Ordinance No. 3867 and the last section of Ordinance No. 3867 indicated any action, which raised taxes or fees or would harm the County's AAA credit rating, required nine (9) votes to pass. He added since he had served on Council, an amendment to an existing ordinance required three readings and a public hearing.
>
> Councilor Cates asked Councilor Fant if he would be willing to accept a friendly request to withdraw his proposed amendment in order to determine if the ordinance could be split into two separate sections.
>
> Chairman Kirven stated it was inadvisable to split the ordinance. Depending on which way Council voted on the proposed splitting, the question needed to be settled because it would apply to either section of the ordinance as it moved forward.

Councilor Cates asked for clarification of Chairman Kirven's comment.

Chairman Kirven stated the question needed to be settled regarding the ordinance as presented. If Council divided the question, it would still need to apply to whichever way it went after that time. Chairman Kirven stated the question needed to be settled and then it would be sent forward by Council to deal with the remainder of the issue.

Councilor Cates asked if Councilor Fant's amendment, which called for a simple majority vote to pass the ordinance, was settled, could Council then vote to split the ordinance.

Chairman Kirven stated Council could vote to split the ordinance at that time.

Councilor Cates stated the proposed amendment would change the County's normal rule of nine (9) votes for approval to seven (7) votes for any action which would raise taxes, fees or harm the County's AAA credit rating.

Chairman Kirven stated the proposed amendment would recognize State Law which required seven votes as opposed to Greenville County's requirement of nine votes in the case of ordinances such as the item on the floor. He added that legal opinions hold that State law took precedence over County law.

Councilor Cates stated Council would be going against a County ordinance, already in place, in order to approve the ordinance.

Chairman Kirven stated Ordinance No. 3867 could have technically expired at the end of the budget year that it amended.

Councilor Cates asked if the State Law that required seven votes was in place in 2004.

Chairman Kirven confirmed it was in place at that time. The last time the County raised any fees was in 2002.

Councilor Fant stated the nine vote threshold had not been used since it was passed. The intent of his proposed amendment was to get the County rule in compliance with State Law.

Councilor Taylor asked if the County rule was in conflict with the State Law and, therefore, invalid.

Mark Tollison stated the County's authority to levy service fees came from the State. The General Assembly has prescribed a particular method by which a County may adopt a service fee, which was the State law referenced in the amendment. He stated this was the first time Council had undertaken a fee since passing the 2004 ordinance and the first time a question had been asked concerning the number of votes required under State Law.

Councilor Taylor stated the nine vote rule was applied when Council voted on a Schedule A Hospitality Tax.

Mark Tollison confirmed the nine vote rule did apply in that situation and also applied in the adoption of General Obligation debt. The

General Assembly has said fees are adopted by a positive majority vote, which is seven (7) for Greenville County.

Councilor Dill stated he remembered when Council approved the ordinance in 2004 and it was for the taxpayers' protection. He stated Council was advised, at that time, that the ordinance could be changed by a vote of seven in favor; now it was being proposed to change it and not follow proper procedure. The only way to get a true understanding was to consult with the Attorney General's Office. Councilor Dill stated he would accept what the Attorney General's office said.

Chairman Kirven asked if there was an Attorney General's opinion on the issue.

Mark Tollison stated in 2008, the Attorney General issued an opinion in Allendale County, stating that with respect to State Statute 6-1-330, the Legislature had prescribed a particular methodology for the adoption of fees.

Councilor Dill asked about the proper procedure to change an ordinance.

Mark Tollison stated that Council could address the nine vote ordinance amendment as a stand-alone ordinance or recognize State Law.

Vice-Chairman Meadows stated the State statute did exactly what Mr. Tollison indicated, but, it did not indicate that the County could not require more votes. He stated several State statutes indicated the Counties must follow exactly what was dictated in the statute. He cited the ordinance that dealt with texting while driving, as an example. Vice-Chairman Meadows stated he agreed with Councilor Dill's suggestion to consult with the Attorney General's office.

Mark Tollison stated that, if Council directed, he would seek an opinion from the Attorney General's office.

Chairman Kirven asked Mark Tollison if there was a conflict between State law and County law, which took precedence.

Mark Tollison stated that under Home Rule, State law took precedence over County law.

Vice-Chairman Meadows asked if the County was following proper procedure in attempting to amend or change an ordinance without a public hearing and three readings.

Mark Tollison stated the issue before Council was in regards to the amount of votes, as it related to State law. As with all of the County's ordinances, there was a repeal section already in the ordinance that says any ordinance in conflict with the provisions presented was repealed. Mr. Tollison also stated that Council has always had the ability to exempt itself, or set another level, or amend directly the 2004 Amendment that was itself an amendment to a Supplemental Appropriation.

Vice-Chairman Meadows asked if it was proper to bring an amendment, without prior knowledge, to the agenda.

Mark Tollison stated the issue was currently at second reading and open to amendments.

Chairman Kirven announced a roll call vote regarding Councilor Fant's amendment.

Motion was denied by a roll call vote of six in favor (Roberts, Norris, Seman, Fant, Kirven and Payne) and six in opposition (Meadows, Cates, Taylor, Ballard, Dill and Barnes).

ACTION:

Councilor Cates moved to divide the question into two separate issues.

Councilor Fant asked if nine votes in favor were still needed.

Mark Tollison stated it was his opinion that the original amendment could still probably be passed with seven votes in favor at this time. He recommended Council go into Executive Session for additional legal advice.

Chairman Kirven asked if the ordinance passed with less than nine votes, could a complaint be filed indicating passage not in accordance with State law. He suggested Council go into Executive Session to discuss the legalities.

Councilor Taylor asked who could challenge the passage of an ordinance or amendment with seven votes as opposed to nine votes.

Mark Tollison stated a Council member could possibly challenge a vote. He added if Council moved forward under State law that the amendment was to confirm Council's desire to have passage with seven votes. The State statute has established authority for putting in a service fee and the General Assembly has prescribed the method.

Vice-Chairman Meadows stated he felt the original motion violated the State Constitution in that it encompassed two separate subjects. This was called bob-tailing or log rolling. The Supreme Court has ruled this practice was illegal. He recommended supporting Councilor Cates motion.

Motion to split the question was denied by a roll call vote of six in favor (Meadows, Cates, Taylor, Ballard, Dill and Barnes) and six in opposition (Roberts, Norris, Seman, Fant, Kirven and Payne).

EXECUTIVE SESSION (legal matter)

ACTION:

Councilor Fant moved to go into Executive Session for legal advice related to pending, threatening, or potential claims.

Motion to go into Executive Session carried by a roll call vote of seven (Roberts, Taylor, Norris, Seman, Fant, Kirven and Payne) in favor and five (Meadows, Cates, Ballard, Dill and Barnes) in opposition. County Council entered into Executive Session at 7:14 p.m.

RECONVENE

Mr. Tollison reported Greenville County Council out of Executive Session stating no action was taken during the session.

The meeting reconvened at 7:42 p.m.

ACTION:

Councilor Seman called the question.

Motion to call the question carried unanimously.

Motion as originally presented carried by a roll call vote of seven (Roberts, Taylor, Norris, Seman, Fant, Kirven and Payne) in favor and five (Meadows, Cates, Ballard, Dill and Barnes) in opposition.

Chairman Kirven stated the conflict between the State law which required seven (7) votes to pass and the County ordinance which required nine (9), still existed. He ruled that until the conflict was resolved, State law took precedence over the County ordinance, and the item would move forward for third reading. (Emphasis Added)

(R. p. 509 - 513).

At third reading according to the minutes of County Council on March 7, 2017 the following colloquy took place:

PUBLIC SAFETY TELECOMMUNICATIONS AND ROAD MAINTENANCE FEES

Without objection, Chairman Kirven stated Item 9 (c) Public Safety Telecommunications and Road Maintenance Fees would be heard before Item 9 (b) Hospitality Tax / Supplemental Appropriation – SC Children's Theatre and Greenville Center for Creative Arts as Councilor Taylor had to leave the meeting early.

ACTION:

Vice-Chairman Meadows moved for adoption at third reading an ordinance to establish a uniform charge for the provision of upgraded county-wide public safety telecommunication services to all real property within Greenville County; and to amend Ordinance No. 2474, as amended, so as to increase the County Road Maintenance Fee.

ACTION:

Councilor Fant moved to suspend Council Rules to allow for amendments at third reading.

Councilor Dill stated Council previously voted on the same issue at second reading. He inquired if the issue could be brought to the table continuously.

Chairman Kirven stated as an amendment, the issue could be brought to the table again. If Council voted to suspend the rules, the amendment would be in order.

Vice-Chairman Meadows asked Mark Tollison for further verification.

Mark Tollison stated if Council voted in favor to suspend the rules, the ordinance was susceptible to the amendment.

Councilor Dill asked even if a vote had already occurred on the issue. He added that Councilor Fant had presented a motion but did not recall the previous action of the Council.

Mark Tollison stated he did not feel there was a limitation on amendments at second or third reading under Council Rules.

Councilor Dill stated if Council Rules were suspended other amendments could be put on the floor.

Motion to suspend Council Rules was denied by a roll call vote of six (Roberts, Norris, Seman, Fant, Kirven and Payne) in favor and five (Taylor, Ballard, Dill, Barnes and Meadows) in opposition. Councilor Cates was absent.

Councilor Ballard stated the Attorney General had been asked to render an opinion to clarify a difference of opinion between the County Attorney and six Council Members. Councilor Ballard stated the County Attorney had stated that State Statute 6-1-330, which indicated fees could be approved by a majority of the body, superseded County Ordinance No. 3867, which required nine votes for approval. Councilor Ballard stated it was understood by the Home Rule Act that ordinances were the governing vehicle for Council.

ACTION:

Councilor Ballard moved to hold the item until the Attorney General had rendered an opinion regarding the number of votes needed for approval.

Motion to hold the item was denied by a roll call vote of five (Taylor, Ballard, Dill, Barnes and Meadows) in favor and six (Roberts, Norris, Seman, Fant, Kirven and Payne) in opposition. Councilor Cates was absent.

Vice-Chairman Meadows stated it appeared Council was not fully aware of what the ordinance entailed. He stated the first part of the ordinance dealt with public safety telecommunications and was vetted over a two-year period of time. He stated the Fire Chiefs, Commissioners and Fire Districts came together and worked out their differences, and came up with an ordinance they could all agree on. He stated there had been no such discussions with the second part of the ordinance dealing with the Road Maintenance Fee. Vice-Chairman Meadows stated there were some good projects proposed and items that Council should certainly consider. He stated the item could be looked at as if the County invested 15% and received 85% back in returns. In that respect, it was a good investment and was a wise use of the County's money and the taxpayers' money. Vice-Chairman Meadows added there were a lot of questions that needed to be answered. He stated Council should defeat the ordinance and bring the items back up separately.

Councilor Roberts stated if Council waited to move forward on all the issues until all questions were answered, they would never be able to get anything accomplished. He stated he had heard from many of his constituents, as well as area business leaders, to get something done about the roads in Greenville County. Councilor Roberts stated many potential business leaders could decide not to locate or relocate their business in Greenville County due to the condition of the roads.

Councilor Fant stated the nine-vote passage requirement was antithetical to a democracy and ran counter to the principles of a republic form of government. He added that Council did not need a Council from 15 years ago to protect the citizens of Greenville County. He stated the citizens

of District 25 elected him to represent them, to change the status of their community, and to carve a better future for them as well as their children and generations yet unborn. Councilor Fant stated both established and prospective business owners have expressed frustration with Council's lack of commitment to roads and infrastructure. Businesses that were already here did not want to expand and potential businesses have questioned Council's commitment. Councilor Fant stated the current roads program was approximately $6 million per year with $4.4 million spent for road resurfacing and $1.6 million spent for intersections, improvements, widenings and some match for outside funding. Councilor Fant stated $6 million came from the road fees from approximately 400,000 vehicles at $15 per vehicle. Over the last 10 years, the number of vehicles registered in Greenville County had increased 2.26% or 321,000 vehicles in 2007 to 400,000 in 2017. Councilor Fant stated the current budget allowed for the resurfacing of 23 miles of roads per year, of the approximately 1600 miles of roads in Greenville County. He stated at that rate, County roads could be resurfaced every 69 years. Councilor Fant stated 302 miles of roads had been added to the County road system since the $15 road user fee was put in place. Resurfacing costs approximately $185,700 per mile. He added the $15 fee implemented in 1993 had lost 40.8% of its purchasing power while the cost of asphalt had increased from $220 per ton to $495 per ton in the last 10 years. Councilor Fant stated a $10 increase in the road user fee would increase the County road program by $4 million per year. He stated half of the money could be used to resurface over 10 miles per of roads year and the other half could be used for County road-widening projects, intersection improvements, and to bring in outside funds mainly for large-scale projects to address major congested areas and traffic bottlenecks that affected all drivers in Greenville County. He strongly urged his colleagues to pass the ordinance.

Vice-Chairman Meadows stated the County was operating under many ordinances that were much older than the item in question. He stated the number of registered vehicles has risen 2.5% every year for an increase of more than 11%. Vice-Chairman Meadows stated the $4 million generated yearly from the road user fees was equal to 2 mils. He stated when Council did not vote to change the nine-vote requirement during the last Council meeting, then that meant that Ordinance No. 3867 was still in effect and, therefore, the ordinance did not pass with seven votes. Vice-Chairman Meadows stated he supported contacting the Attorney General for clarification. Vice-Chairman Meadows stated there were some serious problems with the ordinance and Council needed to take time and work out the details. He urged his colleagues to vote against the ordinance.

Councilor Dill stated there was another way to pay for the telecommunications services and that was through the Stormwater money, which was already on the books. He added it would be a simple process and if the Stormwater money fell short in the future, Council could address the situation at that time. Councilor Dill cited a situation concerning an elderly

female living in his area who wanted to stay in her home as long as possible. He stated the $25 increase for both aspects of the ordinance could affect her greatly. Councilor Dill stated he was in favor of the telecommunications aspect of the ordinance and he wanted the roads to be fixed. He stated Council should sit down and discuss the road user tax or fees. He stated he would be voting against the ordinance.

Councilor Seman called for the question.

Motion to call the question carried unanimously by Council Members present.

Motion as presented carried by a roll call vote of seven (Roberts, Taylor, Norris, Seman, Fant, Kirven and Payne) in favor and four (Ballard, Dill, Barnes and Meadows) in opposition. Councilor Cates was absent.

Chairman Kirven stated by a ruling of the chair, the motion was approved by a vote of seven in favor and four in opposition. He stated Council would abide by the Attorney General's decision regarding the nine-vote requirement.

Councilor Fant asked how Council should move forward in regards to the nine-vote requirement for passage.

Mark Tollison stated the nine-vote requirement could be amended in the ordinance that just passed or it could be amended in a stand-alone ordinance. He added that any Council Member was free to introduce an ordinance at first reading and have the proposed ordinance referred to the appropriate committee. (Emphasis Added)

(R. p. 527 - 530).

On March 14, 2017 the South Carolina Attorney General rendered his opinion that Greenville County Council was required to follow the voting requirements of Ordinance 3867 (The Taxpayer Protection Provision) which required 9, not 7 votes to pass.) (R. p. 540 - 546). Despite this opinion no effort was made to repeal the invalidly enacted ordinance until this suit was filed on March 23, 2017. Instead on March 21, 2017 the Respondents introduced an ordinance to repeal the Taxpayer Protection Provision. (R. p. 550 - 552). While, the Respondents in their answers to Appellants' Complaint denied that the first ordinance was invalidly enacted and have continued to assert it was validly enacted.

While continuing to assert the validity of the first ordinance on April 18, 2017 the Respondents passed an "Ordinance to abolish the taxpayer protection provision" by a vote of seven

in favor and four opposed. (R. p. 584). The County Council Rules adopted in January of 2017 incorporating the taxpayer protection provision were not amended because the County Council Rules require that once they are adopted 8 votes are required to amend the Rules. Chairman Kirven has never had the 8 votes necessary to amend the Rules of Council to delete this requirement.

On June 6, 2017 a separate ordinance to increase in County Road Maintenance Fee Ordinance and repealing the original combined ordinance that the Attorney General found invalidly enacted passed on a seven to five vote. (R. p. 621).

The rules of County Council still required a vote of nine in favor and those rules were never suspended. At the same meeting while considering the separate ordinance to establish the telecommunications fee and repealing the original combined ordinance this colloquy also happened;

> ORDINANCE TO ESTABLISH A UNIFORM CHARGE FOR COUNTY-WIDE PUBLIC SAFETY COMMUNICATION SERVICES
> ACTION:
> Vice-Chairman Meadows moved for adoption at third reading an ordinance to establish a uniform charge for the provision of upgraded County-wide public safety communication services to all real property within Greenville County.
> Councilor Cates asked if a taxpayer could lose their home for non-payment if they chose not to pay the fee, but did pay all other fees attached to their tax bill.
> Joe Kernell stated the Tax Office would not accept partial payments and any checks received for partial payments would be returned. If the individual did not pay the total amount including the fee, their home could go to the tax sale.
> (Per Councilor Dill's request, his comments in regards to the Uniform Charge for County-Wide Public Safety Communication Services are stated verbatim.)
> Councilor Dill stated, "Because I've brought up options, repeatedly, of ways, other ways that we can raise this money. I've got friends in the fire service that, uh, have really been upset with me because I've been voting against this. And, I cannot bring myself to charge, ev, I mean it says here 'uniform charge'. This is not a uniform charge. You can call it a duck but it's not a duck. You, you, it's not uniform, you're charging a pass, a person that owns a lot, it can have a pasture on it, it can have a cow on it. You're

going to charge them $14.95. You're gonna have a man with a hotel and he's got a hundred rooms and it's gonna be $15.00, $14.95. You're gonna charge the Bi-Lo $15.00. I have never been able to understand why nobody wants to under, be able to implement this fee in a uniform way. I've got a lot of old people in my district as well as you do. I've got some rich people, too. I'm gonna, if we approve this, we're going to approve charging that little woman that wants to live the rest of her life in her home 15, $14.95. And we're gonna charge the millionaire $14.95. There's no way I can rationalize this. There's other ways that we can fund this. I'm all for the communications. I would vote tonight to take the $2.3 million right out of the reserve. I'd vote to take it from anywhere except the uniform method, that's not uniform, that we're talking about here. This is to me not fair, it's not equitable, and I can't bring myself to vote for it. Now I voted for everything coming and going to help fire districts. I voted the other day on a bond to build a fire station knowing, and I brought it to y'all's attention, knowing that Spartanburg County Council was not going to approve it. I knew that. They said they was going to require a referendum. I support fire districts. I support firemen. I support this communication, but, I can't support charging people that, you know, you can say, well, they gonna, they gonna need the fire department, they gonna need the Sheriff's Office, they're gonna have to call, they're gonna have to do these things but it's not fair to charge this way. It's not equitable and, uh, and, because of that, I can't vote for it. But, I would vote in a minute, to do this communication system, if they, if we sold a bond, if we could do it any other way, I would go along with it, but, I can't go along with it with the way it's presented and the way that we're gonna be voting on it tonight."

Chairman Kirven stated he and Councilor Dill had previously discussed possible ways that could potentially be substituted for the proposed method; however, Council was up against the clock. If the proposed ordinance was approved, it would be implemented sometime in the fall. Chairman Kirven stated that, in the meantime, Councilor Dill and Staff could review alternative methods. If there was a viable alternative, it could be reviewed by Council later.

Councilor Dill stated, "I would do it. Well, see, what the problem here Mr. Cates is, the Administrator knows he needs to go ahead. He needs to either know we're gonna support it or we're not gonna support it. And, you know, I would make a motion to hold it but the, that's not gonna tell him and they've got to implement this thing. It started, now the method of payment, we can decide that later, I hope. And, I, I'm encouraged about what you said."

Vice-Chairman Meadows stated he wanted his vote to reflect that he fully supported the Communication System, but, he could not support the proposed funding method.

Councilor Dill stated, "One more thing. I think, I'm, I don't want to beat a dead horse, but, the thing about it is, when you, when you put a fee on. Now, I had a fellow call me and he says, 'Listen, if ya'll put that fee on, I can take

> the rest of my income, my property tax off my income tax, but, that fee, I can't do that'. Now, we're gonna put it on a man's property but he cannot deduct it off of his income tax. And, that's just a one, but I would love to be able to support an alternative way."
> Chairman Kirven stated Council would work hard to find an alternative funding methods.
> Councilor Dill stated, "Well, I would sure support it. You've got my word."
> Councilor Fant stated he wanted the record to show his support for the firefighters and added it was imperative they were able to communicate. Considering the equipment currently being used would be obsolete at the end of 2018, he stated Council's only option was to approve the ordinance.
> Councilor Fant stated he was against the uniform fee but felt he had to support the ordinance, as it was needed.
> Motion carried by a roll call vote of nine (Cates, Roberts, Taylor, Norris, Seman, Fant, Ballard, Kirven and Payne) in favor and three (Dill, Barnes and Meadows) in opposition. (Emphasis Added).

(R. p. 620 - 623).

On June 22, 2017 the Appellants filed their amended summons and complaint challenging the enactment of the new ordinances. (R. p. 64 - 73).

ARGUMENT

I. THE ORDINANCES AT ISSUE WERE NOT VALIDLY ENACTED.

South Carolina Code Section 6-1-330 requires the approval of a "positive majority" of local council is "authorized to charge and collect a service or user fee." A "positive majority" is defined as "a vote for adoption by the majority of the members of the entire governing body, whether present or not..." By requiring a positive majority, the General Assembly required that a majority of a local governing body must vote in favor of such a fee instead of simply requiring quorum and a majority of the votes cast. There is no clear statement of legislative intent expressed in the text of the statute to prohibit a local governing body from requiring a super majority, in the enabling legislation, or subsequent amendments. See 1997 Act No. 138, § 7; 2009 Act No. 75, §2.

The Ordinance to repeal the Taxpayer Protection Provision did not reference an amendment to the Rules of Greenville County Council. The Rules of Greenville County Council

required two-thirds of members of Council (8 members) to vote to suspend or amend the Rules of Greenville County Council. (R. p. 473)

The Ordinance to repeal the Taxpayer Protection Provision could not amend the Rules of Greenville County Council either expressly or impliedly since it passed with only seven (7) votes. Even if Appendix A of the Rules of Greenville County Council was impliedly amended by the Ordinance to repeal Ordinance No. 3867, the Rules of County Council state that a two-thirds (8 members) vote is required to increase any tax for Greenville County. (Rules, B(4)(b)(iii). The Road Maintenance Ordinance and the Telecommunications Ordinance amount to an increase in taxes.

The Ordinance increasing the Road Maintenance Tax passed by a mere majority of 7 votes. At the time the ordinances in question were enacted, the Rules of Greenville County stated that increases in taxes and fees required 9 votes. (R. p. 467 - 468). Therefore, the Road Maintenance Fee Ordinance was never validly approved by Greenville County Council either as a tax or a fee increase since it neither had a 2/3rds vote as a fee or a tax as 3/4rds vote as a tax. Even without considering the Taxpayer Protection Provision, the Rules of County Council still required more than a majority vote since as discussed below since the Road Maintenance Fee is a tax.

The South Carolina Code of Laws grants a county council the authority to "determine its own rules and order of business." S.C. Code Ann. § 4-9-110. In *McSherrv v. Spartanburg Ctv. Council.* 371 S.C. 586, 589, 641 S.E.2d 431, 433 (2007), the South Carolina Supreme Court found\ it had neither a constitutional nor a statutory basis to invalidate a county council's rules and procedures which otherwise complied with general law. *See also Lambries v. Saluda Ctv. Council.* 409 S.C. 1, 16, 760 S.E.2d 785, 792 (2014) ("A council must conduct its meetings in accordance with the general state law affecting the meetings of public bodies, but it is entitled 'to determine

its own rules and order of business.'"); *Sloan v. Greenville Ctv.*. 356 S.C. 531, 555-56, 590 S.E.2d 338, 351 (Ct. App. 2003).

Since, Greenville County Council must follow its own rules, the Road Maintenance Fee increase was never been validly enacted. Even if one or both Ordinances were properly enacted concerning the voting requirements of Council the increased road maintenance fee and the telecommunications fee both replace funding that was previously provided by property tax revenue. The Telecommunications fees was to improve the communications system and the road fee is to increase funding that was already provided by property tax revenue.

Further, following *Brown v. Horry County* the legislature expressly prohibited new local taxes and limited the imposition of fees. The clear legislative intent of South Carolina Code Ann. Section 6-1-300 et. seq. is to limit the authority of local government to assess taxes and fees. Not only does it prohibit new local taxes after December of 1996 (S.C. Code 6-1-310) but it provides for "Local fee imposition limits" (S.C. Code 6-1-330).

South Carolina Code Ann. 6-1-330(C) provides: "If a governmental entity proposes to adopt a service or user fee to fund a service that was previously funded by property tax revenue, the notice required pursuant to Section 6-1-80 must include that fact in the text of the published notice."

SC Code 6-1-80 provides:

> (A) A county, municipality, special purpose or public service district, and a school district shall provide notice to the public by advertising the public hearing before the adoption of its budget for the next fiscal year in at least one South Carolina newspaper of general circulation in the area. This notice must be given not less than fifteen days in advance of the public hearing and must be a minimum of two columns wide with a bold headline.
> (B) The notice must include the following:
> (1) the governing entity's name;
> (2) the time, date, and location of the public hearing on the budget;

(3) the total revenues and expenditures from the current operating fiscal year's budget of the governing entity;
(4) the proposed total projected revenue and operating expenditures for the next fiscal year as estimated in next year's budget for the governing entity;
(5) the proposed or estimated percentage change in estimated operating budgets between the current fiscal year and the proposed budget;
(6) the millage for the current fiscal year; and
(7) the estimated millage in dollars as necessary for the next fiscal year's proposed budget.
(C) This notice is given in lieu of the requirements of Section 4-9-130.

Here the Notices of Public hearings failed to provide the requisite notice that the service or user fees were to fund a service previously funded by property tax revenue. (R. p. 282 - 284). As a result, the ordinances at issue were not properly enacted.

II. THE ORDINANCES AT ISSUE WERE NOT A VALID EXERCISE OF THE COUNTY'S AUTHORITY.

The South Carolina Supreme Court has a two-step analysis to determine the validity of a local ordinance. *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 394-95, 629 S.E.2d 624, 627 (2006) (citing *Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000)). First, a court must determine "whether the county had the power to enact the ordinance." Id. at 395, 629 S.E.2d at 627. "If the state has preempted a particular area of legislation, then the ordinance is invalid," and "[i]f no such power existed, the ordinance is invalid and the inquiry ends." Id. Where a court finds the county did "ha[ve] the power to enact the ordinance," then it must "ascertain[] whether the ordinance is inconsistent with the Constitution or general law of this state." Id. (citations omitted).

The ordinances at issue impose neither a service or user fee pursuant to S.C. Code Section 6-1-330 (2004) nor a uniform service charge pursuant to art. X, Section 6 and S.C. Code Section 4-9-30. Instead they impose charges levied against real or personal property rather than on the users of the service. The Telecommunications Fee is not even for the benefit of the County

Government itself as Greenville County itself provides no fire services whatsoever. This alleged fee is for the various fire districts which are separate political subdivisions from the County which are authorized to levy taxes and fees without supervision by the County. In 2014 Greenville County sought to levy a fire service fee on tax exempt real property on behalf of the special purpose fire districts and remit such fee to the special purpose districts. This attempt failed as it also ran afoul of S.C. Code § 12-37-235 which provides:

> Each county and municipality in this State may charge the owners of all real property exempt from ad valorem taxation under the provisions of items (2), except property of the State, counties, municipalities, school districts and other political subdivisions where such property is used exclusively for public purposes, (3) except public libraries, and (4) of§ 12-37-220 of the 1976 Code, which is located within their respective boundaries, reasonable fees for fire protection; provided, that no fees may be charged by a county for protection or service provided to such owners by a municipality. All such fees shall be based on the protection and services provided and which are maintained in whole or in part by funds from ad valorem taxes. No fees shall exceed the amount of taxes that would be levied on any of the subject property for any one service if the subject property were subject to ad valorem taxation.
>
> S.C. Code § 12-37-235 (1976 Code, as amended) (emphasis added)

In a related opinion the South Carolina Attorney General found that "this Office believes a court is likely to find S.C. Code§ 12-37-235 only authorizes such a fire service fee for counties and municipalities, which this Office believes does not include a county acting on behalf of a special purpose district under the doctrine of '*expressio unius est exclusio alterius*' " S.C. Attorney General Op. Jan. 15, 2014. Despite the failure of its 2014 effort to impose a fee on behalf of the Fire Districts the County has again imposed a fee on all real property in Greenville County, including tax exempt property, on behalf of the Fire Districts.

S.C. Code § 12-37-235 and § 6-1-300 *et. seq.* along with the extensive constitutional and statutory schemes of how and when charges may be imposed on real or personal property (as discussed further below) the State has preempted this particular area as to how a County may

impose a fee for fire protection. "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." *Ports Auth.*, 368 S.C. at 395, 629 S.E.2d at 627. (*citing Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 552, 397 S.E.2d 662, 663 (1990)). In *South Carolina Ports Authority v. Jasper County*, South Carolina Supreme Court discussed federal preemption concepts and premised its finding on express preemption, implied field preemption, and implied conflict preemption. 368 S.C. at 395-96, 629 S.E.2d at 627-28 (explaining that in federal court, preemption may be had on grounds of express preemption, implied field preemption, and implied conflict preemption).

"Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." *Ports Auth.*, 368 S.C. at 397, 629 S.E.2d at 628 (citations omitted). Implied field preemption occurs "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." *Ports Auth.*, 368 S.C. at 397, 629 S.E.2d at 628 (*citations omitted*). "[Implied] [c]onflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." *Ports Auth.*, 368 S.C. at 400, 629 S.E.2d at 630 (*citations omitted*).

Clearly the County has in this case imposed a fee for fire protection services. That fee is for the benefit of special purpose districts. That fee includes fees against tax exempt property. (R. p. 286 - 287). The only method defined by the South Carolina Legislature for imposition of a fee for fire protection services on tax exempt property is S.C. Code § 12-37-235 (1976 Code, as amended). Despite the express prohibition of the statute that no fee can be imposed on property of the State, counties, municipalities, school districts and other political subdivisions where such

property is used exclusively for public purposes the County's Telecommunications Ordinance imposes just such a fee. (R. p. 285).

The Supreme Court has consistently interpreted Article VII, Section 14 of the South Carolina Constitution broader than only prohibiting local governments from adopting ordinances that conflict with state general law. *Diamonds v. Greenville County*, 325 S.C. 154, 480 S.E.2d 718 (S.C., 1996) *See also Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996) (Construing Article VIII, Section 14(4) as effectively withdrawing the subject "from the field of local concern"*); Robinson v. Richland County Council*, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987) (stating Article VIII, Section 14 "precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subject encompassed by that section"); *Beachfront Enter. v. Sullivan's Island*, 666 S.E.2d 912, 379 S.C. 602 (S.C., 2008).

The County's characterization of fees as user fees or uniform service charges is contrary to applicable law. Service or user fee as applicable here is defined by statute. S. C. Code Ann. § 6-1-300(6) defines a "service or user fee" as "a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee". *See also Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (S.C., 2015). The Telecommunications Ordinance clearly imposes a fee for fire protection services on tax exempt property. [*Here property owners pay for the service and receive no special service over any member of the general public. The highlighted doesn't seem to match the point being made.]* 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 it 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. See *Robinson v. Richland County Council*, 293 S.C. 27, 358 S.E.2d 392 (S.C., 1987); *Casey v. Richland County Council*, 282 S.C. 387, 320 S.E.2d 443 (1984).

As stated above, an ordinance is preempted under implied field preemption when the state statutory scheme so thoroughly and pervasively covers the subject as to occupy the field or when the subject mandates statewide uniformity. *See South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006). Article X of the South Carolina Constitution and Title 12, Chapter 37 of the South Carolina Code of Laws covers everything related to levying assessments on real or personal property. South Carolina Code 6-1-300(6) defines a "Service or user fee" means a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee. "Service or user fee" also includes "uniform service charges". State Law expressly prohibits the impositions of any new taxes by local government after December 31, 1996. S.C. Code 6-1-310. S.C. Code 6-1-330 (C) imposes limitations on local service or user fees.

Neither the road fee nor the telecommunications fee benefits the owners of real or personal property in some manner different than the members of the general public not paying the fee. Unlike a tax, a service charge or user fee is imposed on those members of the community who receive a special benefit from the proceeds of the charge. *Skyscraper Corp. v. County of Newberry*, 323 S.C. 412, 475 S.E.2d 764 (S.C., 1996). No one gets anything special by paying these fees. Persons who do not own cars and who do not own parcels of land get all the same benefits of the roadways and fire protection. The fees provide a general benefit to everyone in or passing through Greenville County.

The United States Supreme Court has dealt with the "user fee" phrase in determining that a legitimate user fee must "lack the attributes of a generally applicable tax or duty and is, instead a charged designed as compensation for government supplied services, facilities or benefits. *U.S. v. United States Shoe Corporation*, 523 U.S. 360, 118 S.Ct. 1290, 130 L.Ed.2d 453 (1998). There the Court held that a "user fee" must fairly match the payor's use of government services and facilities.

The U.S. Fourth Circuit Court of Appeals has held that a municipal fire protection service fee was a tax where the fee was based on property ownership not use of the service. *Folio v. City of Clarksburg. WV*, 134 F .3d 1211 (1998). Under the County's view in this case, each political subdivision would be free to impose virtually any tax or fee, which it wishes, from income tax to sales tax to excise tax. This represents an unprecedented rewriting of the history of the South Carolina Constitution.

The Home Rule Amendments mandate that the General Assembly provide by general law the powers of counties and municipalities. S.C. Const. art. VIII, § 7 (counties); § 9 (municipalities). Since the Home Rule Amendments do not confer any inherent or plenary powers upon local governments, the ordinances at issue here can be sustained only if authorized by statute.

With a few statutory exceptions, the only charges authorized against the real or personal property of an individual, corporation or other entity is the imposition of *ad valorem* taxation (a tax based upon the assessed value the property). In determining the power of local governments to raise revenue, the power at the heart of this case, we must look not only at the Home Rule Amendments but also at Article X of the State Constitution. This is so because the Constitution vests the power to tax in the General Assembly which may delegate that power to political subdivisions. S.C. Const. art. X, § 6; *Crow v. McAlpine*, 277 S.C. 240, 285 S.E.2d 355 (1981).

Although, the South Carolina Supreme Court distinguished uniform service charges from ordinary taxes in *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992), It is clear in a more general sense that any revenue raising measure enacted by the government is a tax. *See, e.g., Columbia Gaslight Co. v. Mobley*, 139 S.C. 107, 137 S.E. 211 (1927). The only taxing power at issue here is that related to property taxes. Under the Constitution, ad valorem property taxes may be imposed by political subdivisions if the General Assembly so provides. S.C. Const. art. X, § 1. The General Assembly has delegated this property taxing power to local governments in § 4-9-30(5)(a) and in the second phrase of § 5-7-30, not in § 4-9-25 nor in the first phrase of § 5-7-30 as may be asserted by the County. *See Ex parte Yeargin*, 295 S.C. 521, 369 S.E.2d 844 (1988) (recognizing § 4-9-30(5) is statutory delegation of ad valorem property authority taxing to counties pursuant to art. X, § 6). That the specific language of these statutes, and not the general "police powers" language relied upon by the County represent the General Assembly's delegation of its *ad valorem* property tax power is clear when § 4-9-30(5)(a) and § 5-7-30 are read in light of the second sentence of art. X, § 6. *See also Ex parte* Yeargin, *supra*. This second sentence mandates uniformity in property tax levies, except that areas receiving special benefits may be burdened with special levies. See also art. VIII, § 7 (counties to be given power to tax different areas at different rates according to services provided). This uniformity requirement, and its exception, has been imposed upon county and municipal governments by the General Assembly in § 5-7-30 and § 4-9-30(5)(a).

The delegation of *ad valorem* property taxing authority to municipalities is found in the second phrase of § 5-7-30, which gives them "the authority to levy and collect taxes on real and personal property and as otherwise authorized in this section, 3 make assessments, and establish uniform service charges related to them...." This portion of § 5-7-30 authorizes municipalities to do three things: (1) to levy ad valorem taxes on real and personal property; (2) to make assessments

on that property; and (3) to impose uniform service charges related to such property. The authority to enact "uniform service charges" is the power to impose non-uniform property taxes on those receiving a special benefit as permitted by S. C. Const. art. X, § 6. *See Brown v. Horry County, supra.* Uniform service charges, which derive from the delegation of the State's ad valorem property tax power, must relate to the ownership of real or personal proper.

The relevant statute delegating the General Assembly's property taxing power to the County gives county governments the power:

> .....to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution; sewage collection and treatment; courts and criminal justice administration; correctional institutions; public health; social services; transportation; planning; economic development; recreation; public safety, including police and fire protection, disaster preparedness, regulatory code enforcement; hospital and medical care; sanitation, including solid waste collection and disposal; elections; libraries; and to provide for the regulation and enforcement of the above....
> S.C. Code § 4-9-30(5)(a)

Counties have three distinct powers with regard to property: (1) the authority to make assessments; (2) to levy ad valorem taxes; and (3) to impose uniform service charges. See S. C. Code § 4-9-30; § 5-7-30. The funds generated under this statutory scheme must be used for the functions and operations of the county. That "uniform service charges" must relate to the ownership of real or personal property. When they do, State law requires them to be imposed according to their value.

Therefore, the "fees" imposed by these ordinances are all taxes since they relate to the ownership of real or personal property and their imposition is improper as they are not assessed according to the value of the property. The fact that the ordinance at issue refers to the fee as a

"road maintenance fee" or "telecommunications fee" rather than a tax is not determinative. The question of whether a particular charge is a tax depends on its real nature and not its designation. *Powell v. Chapman*, 260 S.C. 516, 197 S.E.2d 287 (1973); *Jackson v. Breeland*, 103 S.C. 184, 88 S.E. 128 (1915) (in distinguishing assessments from taxes the court held that courts will look behind mere words).

Another way the Federal Courts have determine if a "fee" is a tax is to look at the federal Tax Injunction Act where local governments seek to impose the protection of the Tax Injunction Act. The Act is one sentence long: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. This broad restriction on federal court jurisdiction over state and local tax matters reflects the importance of the taxing power to the operation of state governments as well as the desire of the Congress to restrain federal courts from unduly interfering with state revenue collection. *See Arkansas v. Farm Credit Serv. of Cent. Arkansas*, 117 S.Ct. 1776 1780, 138 L.Ed.2d 34 (1997) ("The States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation."); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586, 115 S.Ct. 2351 2354, 132 L.Ed.2d 509 (1995) (" 'It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.' "(quoting *Dows v. City of Chicago,* 78 U.S. (11 Wall.) 108, 110, 20 L.Ed. 65 (1871))).

Various federal circuit court decisions provide guidance for considering the second question--whether the law is a "tax" or a "fee." *See Cumberland Farms, Inc. v. Tax Assessor*, 116 F.3d 943 (1st Cir.1997); *Hager v. City of West Peoria*, 84 F.3d 865 (7th Cir.1996*); Bidart Bros. v.*

California Apple Comm'n, 73 F.3d 925 (9th Cir.1996); *San Juan Cellular Tel. Co. v. Public Serv. Comm'n,* 967 F.2d 683 (1st Cir.1992). These cases make a general distinction between broader-based taxes that sustain the essential flow of revenue to state (or local) government and fees that are connected to some regulatory scheme. It has long been established that the Tax Injunction Act applies to local taxes as well as state taxes. See, e.g., *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981) (applying Tax Injunction Act to county property tax); *Hager v. City of West Peoria*, 84 F.3d 865, 868 n. 1 (7th Cir.1996).

The 4th Circuit has expanded on this analysis *Folio v. City of Clarksburg, W.Va.*, 134 F.3d 1211 (4th Cir., 1998) A tax is generally a revenue-raising measure, imposed by a legislative body, that allocates revenue "to a general fund, and[is] spent for the benefit of the entire community." Id. (quoting *San Juan Cellular Tel. Co. v. Public Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir.1992)). A user fee, by contrast, is a "payment [ ] given in return for a government provided benefit" and is tied in some fashion to the payor's use of the service. *United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir.1993). Generally speaking, a special assessment imposed by a municipality qualifies as a tax within the meaning of the Tax Injunction Act. See, e.g., *Burris*, 941 F.2d at 720; *Indiana Waste Sys., Inc. v. County of Porter*, 787 F.Supp. 859, 865 (N.D.Ind.1992) (collecting cases). The 4th Circuit considered an essentially indistinguishable West Virginia municipal ordinance imposing fire service protection fees, and there they concluded that it constituted a tax within the meaning of the Tax Injunction Act because liability for the fee was based upon a resident's property owner status instead of his use of the city service. See *City of Huntington*, 999 F.2d at 73-74.

In *U.S. v. City of Huntington, W.Va.*, 999 F.2d 71 (4th Cir., 1993) the 4th Circuit used analyzed the U.S. immunity to local taxes to declare a "fire service fee" a tax. "User fees are

payments given in return for a government-provided benefit. Taxes, on the other hand, are "enforced contribution[s] for the support of government." *United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 280, 75 L.Ed. 551 (1931). Liability for the "user fee" charged by the City arises from GSA's and USPS's status as property owners and not from their use of a City service. 6 See *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 287, 96 S.Ct. 535, 541, 46 L.Ed.2d 495 (1976) ("[Ad valorem] property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth ...")."

S.C. Const. Art. X, Sec. 1, "The assessment of all property shall be equal..." The General Assembly shall provide for the assessment of all property for taxation, whether for state, county, school, municipal or any other political subdivision. All taxes shall be levied on that assessment. (1976 (59) 2217; 1977 (60) 90.)

III. THE ORDINANCES AT ISSUE VIOLATE EQUAL PROTECTION.

No person shall be denied equal protection of the law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3; *Sunset Cay, L.L.C. v. City of Folly Beach*, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004). "The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 293, 737 S.E.2d 601, 608 (2013); *Sunset Cay,* 357 S.C. at 428–29, 593 S.E.2d at 469. To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose. *Dunes W.*, 401 S.C. at 293–94, 737

S.E.2d at 608;*Bibco Corp. v. City of Sumter*, 332 S.C. 45, 53, 504 S.E.2d 112, 116 (1998).To satisfy the Equal Protection Clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. *D.W. Flowe & Sons, Inc. v. Christopher Constr. Co.*, 326 S.C. 17, 23, 482 S.E.2d 558, 562 (1997).

These Ordinances create distinct classes. First is the class of Greenville County real property parcel owners (Including those exempt from ad valorem taxation.) vs. Persons or Entities that own no real property in Greenville County but which live, work or travel through Greenville County and may need the services of a Fire District (the Telecommunications Ordinance). The Second is the class of Persons or Entities that register a vehicle in Greenville County vs. Persons or Entities that own no vehicle in Greenville County but use the county roads or benefit from the use of county roads through the delivery of goods and services over those roadways. (the Road Fee Ordinance).

These Ordinances then create two distinct subclasses of those upon which the fees are imposed. First, the class of owners of a single or a few parcels of little value, perhaps tax exempt or homestead exempt vs. the class of owners of expensive tracts of land valued in the multi-millions of dollars (the Telecommunications Ordinance). Second, the owner of a low valued car vs. the owner of an expensive car.

In respect to the Telecommunications fee the classification of property parcel owners does not bear a reasonable relation to improving the radio equipment to the numerous fire districts throughout Greenville County. Second, in respect to the class of parcel owners they are not treated alike under similar circumstances. According to Chairman Kirven the payer of the assessment on

the parcel of property receives some type of improvement in fire response services. A person who owns a 1/10th acre lot is under a far different circumstance that a corporation that owns 800 acres.

Both Ordinances are unduly burdensome on low income resident who own vehicles and/or real estate of a lesser value than residents who own expensive vehicles and high value real estate. The taxpayer that owns a $500.00 car and a $30,000.00 house pays the same as the owner of a $100,000.00 car and $1,000,000.00 house. The nonresident owner of a vacant lot and a parked car receives absolutely no benefit from either Ordinance. The owner of a single parcel 800 occupant apartment complex gets the very same service as the owner of 1/10 of an acre parking spot.

Pursuant to the Telecommunications Ordinance the owners of multiple parcels of a small size will pay higher assessments than owners of a few vastly larger single parcels and the owner of a small parcel would pay the same as the owner of extremely large parcels.

None of the persons who are to be paying the assessments receive a special benefit from the proceeds of the charge under either Ordinance. Persons not paying the assessments all receive the very same benefits. Equal protection requires a classification not be arbitrary and there be reasonable relationship between the classification and a proper legislative purpose. *Carll v. South Carolina Jobs-Economic Development Authority*, 284 S.C. 438, 327 S.E.2d 331 (1985).

Lastly, in respect to the Telecommunications Fees the ownership of a "parcel" of land has no rational relationship to improving the radio equipment.

IV. THE COURT ERRED IN DENYING APPELLANTS ATTORNEY FEES.

A party prevailing in defending an action against the State or its political subdivisions in a civil action may recover reasonable attorney's fees if: "(1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust." S.C. Code

Ann. § 15-77-300. "An agency acts with 'substantial justification' within the meaning of the statute when its position has a 'reasonable basis in law and fact.'" *Cornelius v. Oconee Cnty.*, 369 S.C. 531, 539, 633 S.E.2d 492, 497 (2006). Substantial justification means "justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person." *Heath v. Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (citation and internal quotation marks omitted).

Therefore, S.C. Code Ann. 15-77-300 permits the prevailing party in a civil action to recover attorneys' fees from an opposing political subdivision party under certain conditions. Attorneys' fees may be awarded if the court finds the agency acted without substantial justification in pressing its claim, and if there are no special circumstances that would make an attorney's fee award unjust. Id. Here, the "claim" pressed by the Respondents was that the Fees Ordinance was validly enacted.

The South Carolina Attorney General on March 18, 1980 gave an opinion to Assistant Greenville County Attorney Edward B. Latimer as to whether Greenville County Council could establish rules requiring a two-thirds or three-fourths majority vote for the passage of ordinances. Op. S.C. Atty. Gen.. 1980 WL 121101 (March 18, 1980). The opinion stated "Section 4-9-120, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, providing for the method of enacting ordinances by county councils, does not require that ordinances be adopted by any specified affirmative vote. Instead, Section 4-9-110 of the Code provides in part: 'The Council shall determine its own rules and order of business.' The opinion concluded, "[I]n the absence of statutory directive to the contrary, it would appear that a county council has the authority to require more than a simple majority vote for the enactment of

ordinances." Id.

Therefore, Greenville County has known since 1980 that super-majority requirements were perfectly legal and binding and yet passed an Ordinance without the required votes in derogation of its own rules and ordinances and declared it valid and declared that the Attorney General's Opinion that the Chairman vowed to follow was only an opinion that they no longer wished to follow.

An agency acts with "substantial justification" within the meaning of the statute when its position has a "reasonable basis in law and fact." *McDowell v. SCDSS*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Contrary to the County's contention, the fact that the County repealed the Taxpayer Protection Provision and then enacted newer separate Fee Ordinances that repealed the original Fees Ordinance does not mean the County was substantially justified in contending the Fees Ordinance was a valid and lawful exercise of its authority. Declaratory judgment actions by their very nature often present novel questions. See, e.g. *Eargle* v. *Horry County,* 335 S.C. 425, 517 S.E.2d 3 (S.C. App., 1999) (authority of county administrator to suspend elected official's employees); *United Oil Marketers*, supra (constitutionality of license tax incentive statute for gas/ethanol blend); *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (to define relationship between sheriff's office and county council). Moreover, County will cite no viable authority supporting its position that the Fees Ordinance was properly enacted. The County acted without substantial justification, and no special circumstances render the attorneys' fee award unjust.

CONCLUSION

Greenville County violated its own rules and ordinances in enacting the Fees Ordinance which was subsequently repealed while the County had not substantial justification in contending

it was validly enacted. Greenville County continued to violate its own rules in attempting to pass the new Ordinances.

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Circuit Court Judge

Case No. 2017-CP-23-01914
Appellate Case No. 2018-002255

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

v.

Greenville County Council and Greenville County.....Respondents.

CERTIFICATE OF COMPLIANCE

I certify that *Final Brief of Appellants* in this matter complies with Rule 211(b), SCACR.

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December 5, 2019

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PROOF OF SERVICE

I certify that on December 5, 2019, I served the *Final Brief of Appellants* by placing a copy of same into the United State Mail, first class postage pre-paid, addressed to counsel of record as indicated below:

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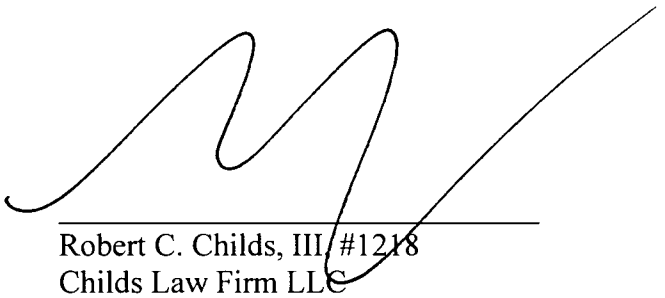

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