Burns v. Greenville County Council: What the S.C. Supreme Court's Ruling Means to South Carolina's Counties

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In the 2020-21 fiscal year all but 10 South Carolina counties imposed a county-wide fee of one type or another, collecting more than $100 million. These counties were undoubtedly relying on this revenue to fund specific services and capital needs in the 2021-22 fiscal year. The day before the start of the fiscal year, however, the Supreme Court of South Carolina issued its opinion in *Burns v. Greenville County Council,* Op. No. 28041, invalidating two county-wide fees imposed by Greenville County: a road maintenance fee and a public safety telecommunications fee. This opinion has caused counties across the state to reevaluate the fees and charges that they impose and has created disarray in some county budgets.

Authorization to Impose Fees

Counties are authorized under Section 4-9-30(5)(a) of the South Carolina Code to impose "uniform service charges," and by Section 6-1-330 of the Code to "charge and collect a service or user fee." Under South Carolina law, these terms have the same meaning. The definition of a "service or user fee" or "uniform service charge" has evolved over the years. The Supreme Court first considered the validity of local fees in *Brown v. Horry County*, 308 S.C. 180 (1992). *Brown* established a four-factor test to determine the validity of a local fee imposed under a county's Home Rule powers. As summarized by the Court five years later in, *C.R. Campbell Const. Co. v. City of Charleston*, 325 S.C. 235 (1997), a fee is valid if: "(1) the revenue generated is used to the benefit of the payers, even if the general public also benefits, (2) the revenue generated is used only for the specific improvement contemplated, (3) the revenue generated by the fee does not exceed the cost of the improvement, and (4) the fee is uniformly imposed on all the payers."

Five years after *Brown*, a definition of "service or user fee" was codified at Section 6-1-300(6) of the Code. This definition further defines a 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." *(emphasis added)*

As was the case in *Burns*, legal challenges to local fees are typically based on a claim that the fee is in fact a tax. Counties are restricted from imposing any new tax "unless specifically authorized to do so by the General Assembly." If a charge does not qualify as a fee it is by default a tax, and therefore unauthorized, unless a tax of that type has been permitted by the General Assembly. In most cases, such a ruling spells the demise of the charge.

Historically, counties assumed that by satisfying the 1992 *Brown* factors, a fee would also meet the statutory definition of a fee at Section 6-1-300(6). Counties took justifiable comfort in enacting fees similar to those that had previously been upheld by the courts. In *Brown*, the Court upheld a road maintenance fee on the grounds that the payers benefited from driving on improved roads funded by proceeds of the fee. In *C.R. Campbell Const. Co.*, where the Court clarified *Brown*, the Court upheld a fee to improve recreation facilities based on legislative findings that these facilities would increase property values, thereby benefiting the payers.

The *Burns* Ruling

The Supreme Court's ruling in *Burns* upended these assumptions by discounting the value of *Brown* and explaining that its analysis "begins and ends" with the definition of a service or user fee at Section 6-1-300(6).

At trial, Greenville County claimed that the telecommunications system funded by the public safety fee would enhance property values, as in *C.R. Campbell Const. Co*. However, the Court took issue with the fact that the ordinance enacting the fee "did not address the factual question of whether an improved telecommunications system will enhance property values." The Court acknowledged that in *C.R. Campbell Const. Co.* it had recognized enhanced property values as

a unique benefit but noted that the ordinance examined in that case included specific findings that the recreational facilities would "add to the value of real estate within the City." There were no such findings in the ordinance at issue in *Burns*. The Court was clear in its objection to Greenville County's public safety fee, stating: "[w]e hold that simply declaring a fee will enhance property value does not make the property owner paying the fee the beneficiary of some unique benefit, as required by Section 6-1-300(6)."

Given the prior ruling in *Brown*, the Court's ruling concerning Greenville County's road maintenance fee was perhaps more surprising. In *Brown*, the Court had explicitly acknowledged that a charge could still qualify as a valid fee even if the members of the general public enjoyed in some measure the same benefit as the payers of the fee—in that case improved roads. In *Burns*, however, the Court again focused on the language of Section 6-1-300(6) requiring that the payer receive a benefit "in some manner different" from those not paying the fee. The Court also noted that Section 6-1-300(6) was enacted five years after *Brown* was decided and therefore superseded *Brown*. In essence, the Court rejected the notion that Section 6-1-300(6) is satisfied if the payers of the fee receive a benefit in a greater degree than those who do not pay the fee. Driving the point home, the Court noted "[w]hile Greenville County residents who use roads every day may derive more benefit from having roads maintained in good condition, it is still the same benefit every driver gets . . . ."

Responding to *Burns*

Counties across the State are now reconsidering many existing fees, especially road maintenance fees. However, not all fees are equally at risk. Pursuant to Sections 6-1-310 and 6-1-330(A) of the Code, fees or taxes imposed prior to December 31, 1996, are grandfathered in, though any subsequent increase in the fee could be at risk. Fees for direct services—solid waste fees, landfill fees, and the like—are also unlikely to be affected by *Burns*, as are any fees that are expressly authorized by statute.

In light of *Burns*, counties should:

- **Critically review county-wide fees.** Counties should pay particular attention to those fees that support emergency services and other services typically funded from the county's general fund and those that fund capital improvements that generally benefit county residents as a whole.
- **Assess legislative findings.** Any review should assess whether the fee is supported by specific legislative findings of fact that identify the ways in which the service or capital improvement funded by the fee benefits those who pay it. Ideally, counties will also be able to identify research, reports, testimony, or other information from reliable sources that has been made available to county council to support any legislative findings.
- **Identify how the payers and others may benefit.** Assuming benefits are identified, the next consideration should be whether the payers receive a benefit of a different type, rather than a difference of degree, when compared to those who do not pay the fee.

If the county encounters an existing fee of questionable validity, or wishes to enact a new fee, it should do so with *Burns* in mind. An ordinance enacting a fee should include extensive legislative findings identifying the benefits of the service or capital improvement funded by the fee and explaining how these benefits will be unique to the payers of the fee. Findings should be supported by a robust record containing information that has been provided to county council. Counties may consider retaining consultants to prepare an analysis of the particular benefits to be derived from the fee.

Notably, the Court's opinion in *Burns* contained a concurrence in which Justice John Kittredge emphasized that the ruling in *Burns* should "deter the politically expedient penchant for imposing taxes disguised as 'service or user fees.' More importantly, he warned that in the future, courts will "carefully scrutinize" fees to ensure that they comply with Section 6-1-300(6). Regardless of one's opinion of the *Burns* decision, Justice Kittredge's warning will undoubtedly hold true.