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COUNTIES AND MUNICIPALITIES GIVEN BROAD POWER TO RAISE REVENUE

In *Hospitality Association of South Carolina, Inc. v. County of Charleston*,[1] the South Carolina Supreme Court upheld the validity of county and municipal ordinances that imposed percentage charges on accommodations and on food and beverages sold by establishments holding licenses for on-premises consumption of beer, wine, or other alcoholic beverages. Plaintiffs, a trade association, a private citizen, and the businesses that would be required to collect and pay the additional charges, challenged the ordinances as conflicting with both constitutional and general statutory law.[2] The South Carolina Supreme Court, by a 3-2 vote,[3] held that (1) the local governments had the power to enact the challenged ordinances under Article VIII of the South Carolina Constitution and the Home Rule Act and (2) the ordinances were not inconsistent with either the constitution or general law of South Carolina.[4]

A. The Challenged Ordinances

The Charleston County ordinance[5] imposes a two percent charge on the gross proceeds on accommodations[6] furnished to transients in Charleston County. The provider is charged with collecting the fees from lodgers and paying them into a segregated, interest-bearing account. The ordinance further provides that collected funds are to be used for capital projects and the support of tourism.

The Town of Hilton Head's ordinance imposes a two percent charge on the gross proceeds from the rental of short-term accommodations furnished within the town to transients.[7] Again, the provider of the accommodations

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1. ___ S.C. ___, 464 S.E.2d 113 (1995).

2. *Id.* at ___, 464 S.E.2d at 116.

3. Chief Justice Chandler (retired) wrote for the majority. He was joined by Justice Waller and Acting Associate Justice Pleicones. Justices Finney and Moore wrote separate dissenting opinions.

4. *Hospitality*, ___ S.C. at ___, 464 S.E.2d at 120.

5. Charleston County, S.C., Ordinance 910 (Nov. 16, 1993).

6. The term "accommodations" is defined as all "room[s], campground spaces, recreational vehicle spaces, lodgings, or sleeping accommodations furnished to transients by any hotel, inn, condominium, motel, bed and breakfast, residence, or any other place in which rooms, lodgings, or sleeping accommodations are furnished for consideration." Accommodations supplied to the same person for a period of thirty continuous days are specifically exempt. *Id.*

7. HILTON HEAD ISLAND, S.C., MUNICIPAL CODE § 4-9-30 (1983).

collects the fees and pays the proceeds to the town. The monies collected are paid into a segregated account and are to be used for the primary purpose of beach renourishment.[8]

The City of Charleston imposes a one percent charge on the gross proceeds from the sale of food and beverages sold in establishments that maintain a license for on-premises consumption of alcohol, beer, or wine.[9] The fee is charged to the patron, and the establishment pays the collected monies into a segregated fund. Proceeds are to be used to offset costs associated with providing additional police, fire, and sanitation services to tourists.[10]

To support the first part of its decision that local governments have the power to enact the challenged ordinances, the *Hospitality* court engaged in a brief recitation of the history of local government in South Carolina.[11] This analysis, which included only recent constitutional history, failed to explain the evolution of powers granted to local governments, and as a result, the interpretation of the concept of "home rule" suffered. To fully understand the limited powers of local governments and the concept of home rule, a more thorough historical analysis is necessary.

B. Constitutional History

The supreme legislative power of the state rests with the General Assembly. In this context the South Carolina Constitution serves not as a grant of authority to the legislature, but as a limitation on its plenary powers to enact laws that are not otherwise prohibited by the federal constitution.[12] Although the county, as a unit of government, is older than either the state or the town,[13] municipal corporations "are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without their notice."[14]

Prior to the constitution of 1868, the government of South Carolina was centralized. Counties and judicial districts were administered by the legislature.[15] In contravention of this centralized scheme, the constitution of 1868 provided that judicial districts would be newly designated as counties and that

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8. *Id.* §§ 4-9-60 to -70.

9. CHARLESTON, S.C., CODE § 2-270 (Supp. 1993).

10. *Id.*

11. *Hospitality*, ___ S.C. at ___, 464 S.E.2d at 117-18.

12. Moseley v. Welch, 209 S.C. 19, 27, 39 S.E.2d 133, 137 (1946).

13. 20 C.J.S. *Counties* § 2 (1990).

14. Lillard v. Melton, 103 S.C. 10, 27, 87 S.E. 421, 428 (1915) (quoting Commissioners of Laramie County v. Commissioners of Albany County, 92 U.S. 307, 312 (1875)).

15. Gaud v. Walker, 214 S.C. 451, 463, 53 S.E.2d 316, 321 (1949).

each county would count as one election district.[16] The constitution of 1868 also provided for the popular election of a board of county commissioners for each district[17] and provided that "'the corporate authorities . . . *may be* vested with power to assess and collect taxes for corporate purposes.'"[18] By later decision this provision of the constitution of 1868 was ruled not to "embrace the power to levy taxes, except as such power is delegated by some act of the legislature."[19]

The constitution of 1895 looked much like its predecessor. An important difference was that county boards of commissioners would now be composed of two members appointed by the governor and one popularly elected county supervisor.[20] The effect of this was to restore plenary power over counties to the legislature, a change most likely prompted by the political conditions of the Reconstruction era.[21] The boards implemented the General Assembly's legislative directives for each county.

The General Assembly administered the counties' operations through County Appropriations Acts,[22] which were specially enacted laws that levied taxes on property within a county to support county officers, health departments, public buildings, and public education.[23] The county delegation to the General Assembly made all county government decisions; thus, for even minor deviations from the county supply bills (*e.g.*, an increase in pay for county employees), the citizens of a given county had to lobby their local senator or representative for the change. In sum, the counties were authorized to act only when changes were approved by both houses of the legislature and ratified by the governor. This system became cumbersome in the larger counties, and in an effort to reduce administrative burden, the legislature created local governing boards by statutory enactment.[24]

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16. *Id.*

17. *Id.*

18. *Id.* (quoting S.C. CONST. of 1868, art. IV, § 19, *repealed by* Act of Dec. 20, 1890, 1890 S.C. Acts 649) (emphasis added).

19. Duke v. County of Williamsburg, 21 S.C. 414, 416 (1880).

20. *See, e.g.*, S.C. CODE ANN. § 3821 (1942) (providing for the composition of the county board of commissioners).

21. *Gaud*, 214 S.C. at 464, 53 S.E.2d at 321.

22. These bills were also commonly referred to as "county supply bills." BRUCE LITTLEJOHN, LITTLEJOHN'S POLITICAL MEMOIRS (1934-1988), at 94 (1989). Supply bills were very specific. For instance, the Cherokee County supply bill for 1948 designated funding for county officers' salaries, police uniforms, janitors' supplies in county buildings, boys' and girls' Four H clubs, and repairs to the old courthouse. *See infra* note 23.

23. *See, e.g.*, Act of Apr. 7, 1948, 1948 S.C. Acts 2480 (setting forth the method and the rate at which taxes were levied in Cherokee County in 1948).

24. *See, e.g.*, Act of Apr. 9, 1948, 1948 S.C. Acts 1873 (providing for a popular election to select between two alternative forms of county government with specific governing powers in Charleston County). This act withstood constitutional challenge in *Gaud v. Walker*, 214 S.C.

In April 1966 the General Assembly created a committee to study the South Carolina Constitution of 1895. The committee elected Lieutenant Governor John C. West as its chairman in 1967.[25] Acknowledging concerns about the efficiency of local government, the West committee presented its final report to the Governor in 1969.[26] Based on the West committee's recommendations, the General Assembly provided for a referendum vote to amend article VIII of the South Carolina Constitution on the general election ballot in November 1972. After a favorable referendum vote, the General Assembly ratified the amendment on March 7, 1973.[27]

The amendment essentially consolidated Articles VII and VIII of the South Carolina Constitution of 1895. A dramatic addition to new article VIII, however, allowed counties to abandon county boards of commissioners and, for the first time, allowed municipalities[28] to vote on one of a maximum of five alternative forms of government.[29] The amendment, rather reservedly, gave no immediate power to local governments. Enabling legislation giving counties and municipalities the power to establish one of five, and one of three, alternative forms of government, respectively, was not enacted until 1975.[30]

Additionally, new article VIII affected local taxation. Although article VII of the 1895 constitution did not vest the counties with a power to tax, article X,[31] dealing exclusively with finance, taxation, and bonded debt, provided that counties and municipalities "may be vested with power to assess and collect [uniform] taxes for corporate purposes."[32] Furthermore, the

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451, 53 S.E.2d 316 (1949). The court held that (1) because the constitution of 1895 did not specifically address the selection of county officers, the General Assembly in its plenary power could provide for county officer elections; (2) under article VII, section 11, and article X, section 5, of the constitution of 1895, the legislature had the authority to grant Charleston County the power to make appropriations, levy taxes, incur indebtedness, and issue bonds; and (3) because section 7233 of the 1942 Code expressly granted the police power to cities and towns exclusively, that portion of the act conferring police powers upon the county violated the uniformity requirement of the constitution of 1895.

25. FINAL REPORT OF THE COMM. TO MAKE A STUDY OF THE SOUTH CAROLINA CONSTITUTION OF 1895 (1969) [hereinafter "West Committee Report"].

26. *Id.*

27. Act of Mar. 7, 1973, 1973 S.C. Acts 67.

28. The term "municipalities" historically referred to cities and towns and not townships. *See* Askew v. Smith, 126 S.C. 159, 167-68, 119 S.E. 378, 381 (1923).

29. S.C. CONST. art. VIII, §§ 7, 9.

30. Home Rule Act, 1975 S.C. Acts 692. "Home rule" is discussed more fully below.

31. Article X was amended after the adoption of new article VIII. Act of May 4, 1977, 1977 S.C. Acts 90.

32. S.C. CONST. of 1895, art. X, § 5 (emphasis added). Corporate purposes have included the construction of a public auditorium, Cothran v. Mallory, 211 S.C. 387, 45 S.E.2d 599 (1947), a public hospital, McLure v. McElroy, 211 S.C. 106, 44 S.E.2d 101 (1947), public school buildings, Jordan v. City of Greenville, 79 S.C. 436, 60 S.E. 973 (1908), but not county

previous article VIII provided that "[t]he General Assembly shall restrict the powers of cities and towns to levy taxes . . . for public purposes."[33] Despite this seemingly more liberal grant of power to cities and towns under article VIII of the constitution of 1895, the South Carolina Supreme Court read the above provision in accordance with article X to hold that municipalities did not have an inherent power to tax.[34]

With regard to local taxation, new article VIII, worded more restrictively than old article VIII, specifically provides that "[t]he General Assembly shall provide by general law for the . . . power to tax different areas at different rates."[35] Article X, section 6, of the current South Carolina Constitution provides that "[t]he General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State." In the area of local taxation very little has changed from the constitution of 1895 to the present constitution; thus, precedent interpreting similar taxation provisions from the earlier constitution remains useful.

C. Home Rule

In addition to the concerns about the efficiency of the county boards of commissioners addressed by the West committee, a series of reapportionment decisions issued by the United States Supreme Court rendered such boards even more problematic. In response to those decisions, South Carolina abandoned the one county-one senator system[36] for a system providing equal representation according to population.[37] As a result of reapportionment, a senator often represented more than one county. These changes in representation, as well as the growing difficulty of conducting all the business of a county in the capital city, prompted discussion among local governments and in the statehouse of what is commonly referred to as "home rule."

The *Hospitality* majority emphasized this concept of "home rule." Although the court recognized that "Article VIII directed the General Assembly to implement what was popularly referred to as 'home rule' by establishing the structure, organization, powers, duties, functions, and

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sewer construction, Doran v. Robertson, 203 S.C. 434, 27 S.E.2d 714 (1943) (a public purpose).

33. S.C. CONST. of 1895, art. VIII, § 3.

34. *See* Carroll v. Town of York, 109 S.C. 1, 95 S.E. 121 (1918) (holding that when the Town of York enacted a license tax for the transfer of cotton in contravention of a state statute that expressly prohibited the collection of such a tax, the court, in interpreting article X, section 5 of the 1895 constitution, held that the town could not impose a tax without legislative direction and struck down the town's license tax as unconstitutional).

35. S.C. CONST. art. VIII, § 7.

36. Until 1967 each of the forty-six counties in South Carolina had one senator and at least one house member. Duncan v. County of York, 267 S.C. 327, 334, 228 S.E.2d 92, 95 (1976).

37. O'Shields v. McNair, 254 F. Supp. 708 (D.S.C. 1966).

responsibilities of local governments by general law,"[38] the court, in its failure to find specific statutory authority, implied that the term "home rule" carries with it complete local sovereignty independent of express statutory authorization. The court demonstrated in *Hospitality* and in one other case, *Williams v. Town of Hilton Head Island*,[39] that the use of the term is treacherous because it means different things in different jurisdictions.

First, it is important to distinguish between constitutional home rule, otherwise known as self-executing charters, and legislative home rule, which is present in South Carolina. In constitutional home rule states, the constitutions are basic sources of local government power and act as limitations upon legislative control.[40] Conversely, in legislative home rule states, local governments derive their powers from the legislature acting within constitutional parameters.

Some constitutional home rule states expressly provide for the power to tax in their state constitutions. For example, the Ohio Constitution grants municipalities a breadth of powers[41] which Ohio courts have held includes the authority to impose income taxes.[42] Clearly, in the absence of a uniform or graduated income tax, the Ohio legislature did not pre-empt the field.[43]

Illinois' constitution, another example of a self-executing charter, grants home rule units a broad power to tax[44] and expressly restricts the legislature

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38. *Hospitality*, ___ S.C. at ___, 464 S.E.2d at 117. It is noteworthy that the term home rule does not appear in any part of the South Carolina Constitution.

39. 311 S.C. 417, 429 S.E.2d 802 (1993).

40. 1 CHESTER JAMES ANTIEAU, MUNICIPAL CORPORATION LAW § 3.01 (1989). For example, Alaska's constitution provides: "A home rule borough or city may exercise all legislative powers not prohibited by law or by charter." ALASKA CONST. art. X, § 11. "'The test we derive from Alaska's constitutional provisions is one of prohibition . . . . A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities.'" Simpson v. Municipality of Anchorage, 635 P.2d 1197, 1200 (Alaska Ct. App. 1981) (quoting Jefferson v. State, 527 P.2d 37, 43 (Alaska 1974)). The South Carolina Supreme Court in *Williams* not only failed to recognize a distinction between constitutional and legislative home rule, it relied upon case law interpreting a brand of home rule that does not exist in South Carolina. *Williams*, 311 S.C. at 422, 429 S.E.2d at 805.

41. OHIO CONST. art. XVIII, § 3 ("Municipalities shall have authority to exercise all powers of local self-government . . . ."); OHIO CONST. art. XVIII, § 13 ("Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes . . . ."). It is noteworthy that this language is similar to language in article VIII, section 3 of the constitution of 1895. *See supra* note 34 and accompanying text.

42. *See* Angell v. City of Toledo, 91 N.E.2d 250 (Ohio 1950); Village of Ottawa Hills v. Joelson, 341 N.E.2d 611 (Ohio Ct. App. 1975).

43. Subsequent to *Angell* and *Joelson*, the Ohio legislature enacted OHIO REV. CODE ANN. § 5747.02 (Anderson 1996), establishing rates for state income taxes and explicitly providing that the levy of state income tax does not prevent municipalities from imposing income taxes.

44. ILL. CONST. art. VII, § 6(a).

from providing for the exclusive exercise of the taxing power.[45] Other constitutional home rule states, although not expressly granting the power to tax in their constitutions, nevertheless grant broad constitutional powers to municipalities and then, by statute, expressly limit the exercise of those powers.[46]

South Carolina is a legislative home rule state. Unlike constitutional home rule states in which local governments derive their powers from a broad constitutional grant, here local governments derive their powers from the legislature. Article VIII, section 7, of the South Carolina Constitution reads as follows: "The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties . . . ." Similarly, Article VIII, section 9, provides that "[t]he structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law."

The *Hospitality* majority cited the local government section of the West Committee Report in concluding that "amendments to the Constitution . . . place[d] the control and management of county and municipal affairs in the hands of duly elected local officials."[47] The West committee itself, however, had correctly recognized, the new constitution alone and in the absence of enabling legislation granted the local governments no new power[48]—the essence of legislative home rule. Notwithstanding the West committee's vague definition of "home rule,"[49] it recognized both implicitly in its report[50] and explicitly during one of its meetings[51] that local governments in South

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45. ILL. CONST. art VII, § 6(h); *see also* Chicago Park Dist. v. City of Chicago, 488 N.E.2d 968 (Ill. 1986) (holding that the state had not prohibited a city's mooring tax simply by regulating harbors).

46. *Compare* S.D. CONST. art. IX, § 2, *with* S.D. CODIFIED LAWS § 6-12-6 (Michie 1993). South Dakota's constitution grants counties and cities broad powers of self-government but expressly restricts the power of home rule units through legislation.

47. *Hospitality*, ___ S.C. at ___, 464 S.E.2d at 117.

48. "This section [article VII which later became article VIII] permits all local governments to continue under existing laws until changed by the General Assembly. . . . The authority granted in this section is broad enough for the General Assembly to disallow municipal charter powers, but such action is very unlikely." West Committee Report, *supra* note 25, at 85.

49. The West Committee Report stated:

> The term "home rule" as used here is a legal term applied in municipal and county government in this country. Legally, the term means a system of government developed by local people and approved by the local voters rather than a system prescribed by state law. The term should not be confused with the current colloquial use referring to the practice whereby county government is controlled under a local board rather than by the legislative delegation.

Id. at 89.

50. *See supra* note 48 and accompanying text.

51. In response to a question from Mr. Ouzts, a representative from the Municipal Association, as to whether income and sales taxes were exclusively for the use of state

Carolina derive their powers not from the constitution, but from express statutory authority enacted pursuant to the constitution.

D. Service Charge or Tax?

The majority in *Hospitality* did not conclusively designate the charges as either fees or taxes.[52] The distinction is a critical one because according to the statutes granting specific powers to counties[53] and municipalities,[54] local governments are authorized to levy only two kinds of taxes: (1) ad valorem property taxes and (2) business license taxes.[55] These statutes contain no grant, either express or implied, of a power to impose a sales tax. The only statutory authority allowing imposition by local governments of a sales tax is contained in the local option sales tax law.[56]

Counties and municipalities are authorized by statute to enact uniform service charges.[57] The charges imposed by the *Hospitality* ordinances, however, are not characteristic of a service charge. In *Brown v. County of Horry*[58] the South Carolina Supreme Court defined a service charge as a charge "imposed upon those for whom the service is primarily provided."[59] At issue in *Brown* was a vehicle registration fee assessed on all motor vehicles registered in Horry County. The revenues collected were for the purpose of maintaining county roads. In upholding the validity of these fees, the court examined three factors that distinguish a fee or uniform service charge from a tax: (1) whether the charge is "an enforced contribution to provide for the

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government, Mr. West responded: "Yes. . . . I don't believe that the municipalities under the existing law have a right to levy an income or a sales tax." Mr. Ouzts then asked, "You have also excluded it again, haven't you?" Mr. West replied, "Right. . . . In other words, there is nothing in this provision to say that the State shall not provide that municipalities with home rule can add a 1% sales tax, but you couldn't do it without express State permission since the sales tax is presently preserved for collection by the State." *Minutes of the Committee to Make a Study of the South Carolina Constitution of 1895*, Jan. 19, 1968, 41-42 (S.C. 1968).

52. The word "fees" appears throughout the majority's opinion a number of times, and all three ordinances refer to the charges as fees. A designation alone, however, is not determinative. Brown v. County of Horry, 308 S.C. 180, 184, 417 S.E.2d 565, 567 (1992).

53. *See* S.C. CODE ANN. § 4-9-30 (Law. Co-op. 1986 & Supp. 1995).

54. *See* S.C. CODE ANN. § 5-7-30 (Law. Co-op. Supp. 1995).

55. *See* S.C. CODE ANN. § 4-9-30 (5)(a), (12) (Law. Co-op. Supp. 1995); S.C. CODE ANN. § 5-7-30 (Law. Co-op. Supp. 1995).

56. *See* S.C. CODE ANN. §§ 4-10-10 to -100 (Law. Co-op. Supp. 1995). The local option sales tax provisions allow local governments to levy a one percent sales and use tax, provided that certain requirements are met, including approval of the tax in a county-wide referendum and adherence to strict formulas for distributing and spending the taxes collected.

57. S.C. CODE ANN. § 4-9-30 (Law. Co-op. Supp. 1995) (counties); S.C. CODE ANN. § 5-7-30 (Law. Co-op. Supp. 1995) (municipalities).

58. 308 S.C. 180, 417 S.E.2d 565 (1992).

59. *Id.* at 184, 417 S.E.2d at 567.

support of government" or "a charge for a particular service"; (2) whether "the portion of the community which is required to pay it receives some benefit as a result of the improvement made with the proceeds of the charge"; and (3) "the objective in imposing the fee."[60]

It is generally recognized that a fee differs from a tax in that it is voluntary. That is, the person paying the fee may elect whether to accept the benefit or service being offered.[61] The charges imposed by all three ordinances in *Hospitality* are not voluntary in the sense that the person paying may not choose whether to accept the benefit purportedly offered by the local governments. All persons staying in short-term accommodations on Hilton Head Island must pay the beach preservation fee regardless of whether they use the beach. Likewise, the county and city ordinances are such that persons subject to the fees cannot avoid paying them by electing not to accept the improvements or services provided. Persons staying in Charleston County accommodations must pay the fee regardless of whether they choose to utilize the "tourism-related" projects to be supported by the fee. The fee is exacted not in exchange for particular services rendered, but as an enforced contribution toward the cost of traditional governmental functions—the hallmark of a tax.[62]

Although a charge is not a tax merely because the general public may obtain some benefit, a charge does not constitute a service charge unless the person paying it receives a special benefit not shared by the rest of the community. As noted above, a service charge is "imposed upon those for whom the service is *primarily* provided."[63] Unlike the *Brown* court,[64] the Special Master[65] in *Hospitality* found that for all three charges the persons

60. *Id.* at 184-85, 417 S.E.2d at 568.

61. Executive Aircraft Consulting, Inc. v. City of Newton, 845 P.2d 57, 62 (Kan. 1993); *see also* National Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1974) ("A fee, however, is incident to a voluntary act . . . ."); Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) ("[T]hey are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge . . . ."); Powell v. Chapman, 260 S.C. 516, 520, 197 S.E.2d 287, 289 (1973) ("The essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution . . . .").

62. *See* City of North Little Rock v. Graham, 647 S.W.2d 452, 453 (Ark. 1983).

63. *Brown*, 308 S.C. at 184, 417 S.E.2d at 567 (emphasis added); *see also Emerson College*, 462 N.E.2d at 1105 ("[T]hey are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society . . . .'" (quoting *National Cable Television Ass'n*, 415 U.S. at 341)).

64. The court in *Brown* did not address the fact that people living outside of the county who were not subject to the road maintenance fee had equal access to the public roads in Horry County. *But see* Fairway Ford, Inc. v. County of Greenville, No. 24496, 1996 WL 543846 (S.C. Sept. 23, 1996) (holding a $200 per plate fee on all automobile dealer and wholesaler license tags designated for road maintenance was an illegal service charge when asserted special benefit of greater profits as a result of fewer paint repairs from flying road debris found to be a benefit shared by all car owners and not just those owners with dealer tags).

65. The plaintiffs commenced the action by filing a petition for original jurisdiction pursuant

paying the fees received no special or designated benefits different from others in the community and that the services or improvements provided would be equally available to persons who are not subject to the fees.[66]

The final factor to be analyzed in determining whether a fee constitutes a uniform service charge is the objective for which it is imposed. In *Brown* the court held that the fact that road maintenance fees were to go into the county's general fund did not automatically render the collection a tax.[67] Therefore, the fact that the fees involved in *Hospitality* were earmarked for certain purposes does not, in and of itself, make them service charges. As the South Carolina Supreme Court has stated: "'In determining the nature of the tax or fee, the distribution of the fund obtained . . . is one element which may be considered along with others, but it is not the determinative factor.'"[68] The critical question is whether the charges are imposed to raise revenue for the local government or to compensate the local government for expenses incurred in providing a particular service. Here, because of the lack of a nexus between the money collected and the provision of governmental services, it appears that the objective of the ordinances is merely to raise revenue for the county and municipal governments. Under such circumstances the fees are taxes, not service charges.[69] Moreover, the ordinances' denominating their charges as

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to S.C. App. Ct. R. 229(c). The defendants filed returns consenting to and joining in the petition for original jurisdiction. On January 19, 1994, the court granted the petition and appointed retired Circuit Judge Walter J. Bristow, Jr., as Special Master with authority to conduct an evidentiary hearing and to issue a report containing factual findings and any stipulations of the parties. An evidentiary hearing was held before Judge Bristow on March 7, 1994, and he issued his report setting forth his findings of fact and the parties' stipulations on March 25, 1994.

66. Special Master's Report, Mar. 25, 1994, at 10, 16, 23 [hereinafter Report]. To these findings, the local governments took no exceptions.

67. *Brown*, 308 S.C. at 185, 417 S.E.2d at 568 (noting that the money collected was "specifically allocated" for road maintenance).

68. State v. Life Ins. Co. of Ga., 254 S.C. 286, 292, 175 S.E.2d 203, 206 (1970) (quoting 53 C.J.S. *Licenses* § 3 (1955)); *see also* Bray v. Department of State, 341 N.W.2d 92, 97 n.4 (Mich. 1983) ("Earmarking the proceeds of a tax for a specific fund or special purpose, as is frequently the case in Michigan's scheme of taxation, rather than the general fund does not make the exaction any less a tax."). Revenues received under the local option sales tax and the state accommodations tax must be allocated by the local governments to special funds. *See* S.C. CODE ANN. § 4-10-90(B) (Law. Co-op. Supp. 1995); S.C. CODE ANN. § 6-4-10 (Law. Co-op. Supp. 1995).

69. *See* Executive Aircraft Consulting, Inc. v. City of Newton, 845 P.2d 57, 62 (Kan. 1993) (finding a fuel flowage fee intended to replace revenues lost by municipal airport to competing fuel distributors was a tax); Audubon Ins. Co. v. Bernard, 434 So. 2d 1072 (La. 1983) (holding an assessment to strengthen firefighters' retirement system lacked the essential link to improvement in the quality of fire protection for the public); Radio Common Carriers of N.Y., Inc. v. State, 601 N.Y.S.2d 513 (N.Y. Sup. Ct. 1993) (concluding that a fee on paging devices passed to compensate for budgetary shortfall was a tax); Hillis Homes, Inc. v. Snohomish County, 650 P.2d 193 (Wash. 1982) (en banc) (pointing out that "development fees" imposed on new residential subdivisions were intended to raise money rather than to regulate residential

"fees," does not alter the analysis when they are, in reality, taxes. "[I]f revenue is the primary purpose for an assessment and regulation is merely incidental, or if the imposition clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed, the imposition is a tax."[70] The nature of a charge is determined by its characteristics, not by its designation.[71]

In *Reed v. City of New Orleans*,[72] the Supreme Court of Louisiana identified four attributes of a sales tax: (1) it "is due and payable at the time of the sale"; (2) it "is levied on the purchaser and collected by the seller"; (3) it "is calculated as a percentage of the retail sales price"; and (4) the ordinance creating it "tracks the form and substance of the state general sales and use tax."[73] When examined in light of these four characteristics, the charges in *Hospitality* constitute taxes: (1) each of the three ordinances requires the charge to be paid at the time of sale; (2) all three ordinances impose a charge upon the purchaser of the goods or services and require collection by the seller;[74] (3) all three ordinances calculate the charge imposed as a percentage of the sales price—two percent of the gross proceeds from the accommodations rental under the county and town ordinances and one percent of the gross proceeds from the sale of the food or beverage under the city ordinance;[75] and (4) the county, town, and city ordinances track provisions of the state sales and use tax statutes.[76]

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development—such fees constituted constitutionally impermissible taxes).

70. *Audubon Ins. Co.*, 434 So. 2d at 1074; *see also* Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) ("[T]he charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses."); Powell v. Chapman, 260 S.C. 516, 520, 197 S.E.2d 287, 289 (1973) ("The essential characteristics of a tax are that it is . . . payable in money, and imposed, levied, and collected for the purpose of raising revenue, to be used for public or governmental purposes.").

71. *See Brown*, 308 S.C. at 184, 417 S.E.2d at 567; *Powell*, 260 S.C. at 520, 197 S.E.2d at 289.

72. 593 So. 2d 368 (La. 1992).

73. *Id.* at 371; *see also* Cox Cable New Orleans, Inc. v. City of New Orleans, 624 So. 2d 890 (La. 1993) (five percent amusement tax determined to be a sales tax); Circle Food Stores, Inc. v. City of New Orleans, 620 So. 2d 281 (La. 1993) (five percent tobacco tax held to be a sales tax and not an "ownership" tax); Radiofone, Inc. v. City of New Orleans, 616 So. 2d 1243 (La. 1993) (one percent telecommunications sales tax inconsistent with state constitutional provisions).

74. Report, *supra* note 66, at 9, 15-16, 22.

75. *Id.* at 8, 16, 22.

76. For example, a review of the ordinances reveals that many of the collection, remittance, and reporting requirements are very similar to those under the state sales tax. *Cf.*, *e.g.*, S.C. CODE ANN. §§ 12-36-2540 to -2570, 12-54-90 to -100 (Law. Co-op. Supp. 1995). Indeed, the city ordinance requires establishments collecting the fee to file a return with the city at the same time that they file state sales tax returns. *Cf.* S.C. CODE ANN. § 12-36-2570 (Law. Co-op. Supp. 1995). Moreover, the county and town ordinances contain definitions of accommodations

If the court had found that the charges constituted a tax, it could not have interpreted article VIII without discussing its relationship to article X. "A constitution is not to be construed item by item, but must be harmonized."[77] As Justice Finney pointed out in his dissent, the majority opinion is at odds with prior decisions construing article X, section 6, that require that the General Assembly delegate its taxing power by *express permission*. In *Crow v. McAlpine*,[78] decided after the adoption of the new article VIII, the court observed: "The people of this State, in their sovereign capacity have, by the Constitution, entrusted the taxing power to the General Assembly and except by express permission of the sovereign authority, this power cannot be delegated to any subordinate agency."[79] *Crow* is consistent with earlier precedent construing similar provisions of the constitutions of 1895[80] and 1865.[81]

E. Interpretation of Police Powers

The majority in *Hospitality* concluded that the failure to effectuate the "broad grant" of power from sections 5-7-30 and 4-9-25 would "directly contradict" the statutory admonition that "'the specific mention of particular powers shall not be construed as limiting in any manner the general powers of . . . municipalities.'"[82] Because the general *police powers* granted by these statutes do not include a *power to tax*, the specific taxing powers granted by sections 5-7-30 and 4-9-25 (*i.e.*, for ad valorem property taxes and business license taxes) would not in any way be so construed as limiting a broad grant of police power.[83] Furthermore, the majority placed added weight on language in sections 4-9-25 and 5-7-30 granting to counties and municipalities

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identical to the state accommodations statute, and both largely track the language of that statute. *See* S.C. CODE ANN. § 12-36-920(A) (Law. Co-op. Supp. 1995).

77. Knight v. Salisbury, 262 S.C. 565, 570, 206 S.E.2d 875, 877 (1974).

78. 277 S.C. 240, 285 S.E.2d 355 (1981).

79. *Id.* at 243, 285 S.E.2d at 357 (citing Gaud v. Walker, 214 S.C. 451, 53 S.E.2d 316 (1949)); *see also* Southern Bell Tel. & Tel. Co. v. City of Aiken, 279 S.C. 269, 272, 306 S.E.2d 220, 222 (1983) (holding that the power to impose a municipal license tax is to be strictly construed and exercised in strict conformity with the terms of its grant). Article X, section 6, provides: "The *General Assembly may* vest the power of assessing and collecting taxes in all of the political subdivisions of the State." S.C. CONST. art. X, § 6 (emphasis added).

80. Carroll v. Town of York, 109 S.C. 1, 95 S.E. 121 (1918); Lillard v. Melton, 103 S.C. 10, 87 S.E. 421 (1915).

81. Duke v. County of Williamsburg, 21 S.C. 414 (1880).

82. *Hospitality*, ___ S.C. at ___, 464 S.E.2d at 118 (quoting S.C. CODE ANN. § 5-7-10 (Law. Co-op. 1976)); *see also* S.C. CODE ANN. § 4-9-25 (Law. Co-op. Supp. 1995).

83. *See also* Ivy Club Investors Ltd. Partnership v. City of Kennewick, 699 P.2d 782, 784-85 (Wash. Ct. App. 1985) (broad grant of police powers under WASH. CONST. art. XI, § 11, did not include the power to tax).

the "authority to enact regulations, resolutions, and ordinances . . . respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties [or municipalities] or for preserving health, peace, order, and good government in them."[84] This broad grant of power, however, historically has been interpreted to confer upon local governments only police power,[85] not the power to tax.[86] For a century, the General Assembly has utilized virtually identical language in delegating police power to municipalities.[87]

The majority in *Hospitality* blurred a distinction the court had previously recognized between police powers granted to local governments by the broad language of sections 4-9-25 and 5-7-30, enacted pursuant to article VIII, and the taxing power, which is controlled by article X of the state constitution. In *Williams v. Town of Hilton Head Island*,[88] the court interpreted the same police powers language to uphold a one-fourth of one percent real estate transfer fee on all property sold within the Town of Hilton Head. The issue, as phrased by the court, was whether article VIII alone conferred the power on the town to enact the ordinance or whether express statutory authority was necessary.[89] The *Williams* court held that the legislature abolished Dillon's

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84. S.C. CODE ANN. § 4-9-25 (Law. Co-op. Supp. 1995).

85. In *City of Charleston v. Jenkins*, 243 S.C. 205, 208-209, 133 S.E.2d 242, 243 (1963) (emphasis added) (citations omitted), the court stated:

> This grant of [police] power [pursuant to section 47-61] for purposes of municipal legislation is as broad and comprehensive as it was within the power of the State to delegate. It is a grant of the *sovereign police power* of the State itself limited alone (1) by the territorial confines of a municipality authorized to exercise it, and (2) by the proviso that legislation thereunder shall not be inconsistent with the laws of the State. Any and all ordinances enacted under Section 47-61 of the Code must be in the exercise of the *police power* thus granted.

86. In *Owens v. Owens*, 193 S.C. 260, 265, 8 S.E.2d 339, 341 (1940), the court stated:

> We think that it is clearly the law that a regulatory measure of this kind may produce only such revenue as is reasonably necessary to defray the expense connected with its operation, and that an ordinance passed for the real purpose of raising revenue, under the guise of obtaining funds for the enforcement of a police regulation, is invalid.

87. *See* Act of Feb. 19, 1901, 1901 S.C. Acts 648, 652; Act of Feb. 19, 1898, 1898 S.C. Acts 820; Act of Mar. 5, 1896, 1896 S.C. Acts 67, 70-71; *see also* Lomax v. City of Greenville, 225 S.C. 289, 297, 82 S.E.2d 191, 195 (1954) ("'It is a grant of the sovereign police power of the state itself . . . .'" (quoting Clegg v. City of Spartanburg, 132 S.C. 182, 185, 128 S.E. 36, 37 (1925))); Southern Fruit Co. v. Porter, 188 S.C. 422, 428, 199 S.E. 537, 539 (1938) ("It is entirely clear that any and all ordinances enacted under this section must be in the exercise of the police power thus granted.").

88. 311 S.C. 417, 429 S.E.2d 802 (1993).

89. *Williams*, 311 S.C. at 420, 429 S.E.2d at 803-04. The issue of whether the real estate transfer fee constituted a fee or a tax was neither briefed nor argued before the supreme court.

Rule[90] by the passage of section 5-7-30, which taken with article VIII gives municipalities the following power:

> to enact regulations . . . deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirements for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state.[91]

In reaction to *Williams*, the General Assembly passed legislation requiring counties and municipalities to remit to the state treasurer all monies collected as real estate transfer fees.[92]

Justice Finney, who authored the *Williams* opinion, dissented in *Hospitality* and stated that he would overrule the decision in *Williams* to the extent it was inconsistent with his *Hospitality* dissent.[93] He objected to the majority's refusal, once again, to engage in a fee/tax analysis and to its interpretation of the statutory grant of police powers to counties and municipalities as empowering those local governments to also impose taxes.[94] He found this conclusion, which would effectively "vest unlimited taxing powers in local government,"[95] contrary to the home rule amendments and article X of the South Carolina Constitution. In light of Justice Finney's analysis in *Hospitality*, he would probably now require the Town of Hilton Head to point to express statutory authority to impose its property transfer tax.

As suggested by the *Hospitality Association* plaintiffs at oral argument, the omission of this basic and highly relevant issue indicates that the *Williams* suit was friendly. Interview with William J. Quirk, Professor of Law, U.S.C. School of Law, in Columbia, S.C. (May 24, 1996).

90. Prior to the enactment of section 5-7-30, the powers of municipal corporations were interpreted according to Dillon's Rule:

> A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; Third, those essential to the accomplishment of the declared objects and purposes of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

Id. at 421, 429 S.E.2d at 804.

91. *Id.* at 422, 429 S.E.2d at 805. The *Williams* court failed to articulate the significance of the abolition of Dillon's Rule. The liberal rule of construction in article VIII, section 17, cannot be read to grant local governments any more powers than expressly given under article VIII and accompanying legislation. *See* Sheppard v. City of Orangeburg, 314 S.C. 240, 442 S.E.2d 601 (1994).

92. *See* S.C. CODE ANN. § 6-1-70 (Law. Co-op. Supp. 1995).

93. *Hospitality*, ___ S.C. at ___ n.4, 464 S.E.2d at 122 n.4 (Finney, J., dissenting).

94. *Id.* at ___, 464 S.E.2d at 120-21.

95. *Id.* at ___, 464 S.E.2d at 121.

F. Liberal Rule of Construction

The court in *Hospitality* also emphasized the liberal rule of construction found in article VIII, holding that striking the ordinances as unconstitutional would be "inconsistent with the liberal rule of construction mandated by Article VIII, [section] 17."[96] This rule of liberal construction does not, however, grant powers to local government.[97] Thus, interpretation of the statutes in accordance with established precedent construing the powers of local governments does not violate the rule of liberal construction required by article VIII, section 17.

G. Ordinances Inconsistent with the General Law

The majority concluded that the only limitation placed upon the broad grant of power in the applicable statutes is that the "regulation, resolution, or ordinance be consistent with the Constitution and general law of this State."[98] Once it concluded that the county and the municipalities had the power to impose the charges pursuant to the broad grant of police power, the majority also concluded that the ordinances were not pre-empted by or in conflict with the local option sales tax, state accommodations tax, or beer, wine, and alcohol tax statutes because there was no attempt to "change or circumvent" the statutory requirements.[99] In so concluding, the majority overlooked statutes governing beer, wine, and alcoholic beverage taxes that specifically prohibit "all other taxes" including county and municipal taxes.[100] This application of article VIII, section 14, of the South Carolina Constitution and sections 4-9-25 and 5-7-30 conflicts with recent decisions of the court applying those provisions.[101]

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96. *Id.* at ___, 464 S.E.2d at 118.

97. *See* Sheppard v. City of Orangeburg, 314 S.C. 240, 244, 442 S.E.2d 601, 604 (1994) (holding liberal construction of § 5-7-30 may not lead to absurd result; thus, municipalities cannot operate a cable television system).

98. *Hospitality*, ___ S.C. at ___, 464 S.E.2d at 118.

99. *Id.* at ___, 464 S.E.2d at 119.

100. S.C. CODE ANN. § 12-21-1080 (Law. Co-op. 1976); S.C. CODE ANN. § 12-33-20 (Law. Co-op. 1976).

101. *See, e.g.*, Crenco Food Stores, Inc. v. City of Lancaster, ___ S.C. ___, 457 S.E.2d 338 (1995) (holding a city license fee on video poker machines that exceeded the amount a municipality could impose according to state statute to be inconsistent with the general law and in violation of the constitution); City of N. Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) (finding a city ordinance denying the opportunity to pay a fine in lieu of imprisonment to those convicted of simple possession of controlled substances to be inconsistent with state statute that allowed such alternative).

Additionally, as pointed out by Justice Moore in his dissent in *Hospitality*, the ordinances at issue exceed the statutory parameters for the procedure, amount, scope, and use of the taxes authorized by the local option sales tax and the accommodations tax statutes. Justice Moore concluded that the consequence of the majority's holding is to eviscerate the local option sales tax:

> The General Assembly also restricted the amount of proceeds which each county can receive and required the funds be used to roll back property taxes. A county would have no incentive to follow the more rigorous and limiting procedure set forth by the General Assembly if it could simply impose a service charge of a higher percentage upon a limited number of commodities raising greater proceeds to be used as it deems fit.[102]

Notwithstanding his recognition that the "ordinances levy what is in reality a tax,"[103] Justice Moore further concluded, regardless of whether the charges were taxes or fees, that the ordinances conflicted with the general law of the state. He reasoned: "These local governments can not circumvent the statutory limitations placed upon counties and municipalities for levying and collecting the [local option sales tax] and the State Accommodations Tax by imposing almost identical charges upon a narrow category of commodities."[104]

H. Equal Protection Challenge

The court rejected the plaintiffs' argument that the ordinances violated the Equal Protection Clause of both the South Carolina and the United States Constitutions. In order to reach this result, the court held that the challenged ordinances bore a "reasonable relation to the legislative purpose to be effected."[105] The court, however, did not apply the three standard requirements for meeting an Equal Protection challenge[106] to the facts before it.

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102. *Hospitality*, ___ S.C. at ___, 464 S.E.2d at 123 (Moore, J., dissenting).

103. *Id.* at ___, 464 S.E.2d at 123. Justice Moore wrote the majority opinion in *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992), concluding that the road maintenance charge at issue was a uniform service charge.

104. *Id.* at ___, 464 S.E.2d 123-24.

105. *Id.* at ___, 464 S.E.2d at 120.

106. The requirements are: "(1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis." *Brown*, 308 S.C. at 186, 417 S.E.2d at 568.

I. Conclusion

As pointed out by Justice Finney, the result of the *Hospitality* decision is "to effectuate a wholesale transfer of the taxing power from the General Assembly to local government" and to grant each political subdivision the authority "to impose virtually any tax which it wishes, from income tax to sales tax to excise tax."[107] Another consequence of the decision, as observed by Justice Moore, is to render null and void the statutory requirements for the procedure, amount, scope, and use of the taxes authorized by the local option sales tax and the accommodations tax statutes.[108]

The *Hospitality* decision represents a clear break with over one hundred years of precedent interpreting the powers of local governments—precedent unaffected by the adoption of home rule in the early 1970s. The controversial decision has generated both criticism[109] and praise.[110] The decision's consequences have become readily apparent[111] with at least two bills having been introduced in the General Assembly to limit the amount and imposition of the "charges" local governments may impose upon its citizens.[112]

Although the General Assembly failed to pass either bill, the precedential value of the decision is nonetheless doubtful. The court's recent decision in *Fairway Ford, Inc. v. County of Greenville* demonstrates not only the court's refusal to expand *Hospitality*, but perhaps, as indicated by Justice Finney's reliance on his dissent in *Hospitality*,[113] the court's willingness to reconsider *Hospitality*. In addition, the South Carolina Supreme Court has undergone

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107. *Hospitality*, ___ S.C. at ___, 464 S.E.2d at 120 (Finney, J., dissenting). The majority opinion also could be read to shift to the local level other sovereign powers of the state, such as raising a militia, establishing terms and conditions for the exercise of the franchise, and regulating alcoholic beverages. *But see* Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994).

108. *Hospitality*, ___ S.C. at ___, 464 S.E.2d at 123 (Moore, J., dissenting).

109. *See* William J. Quirk, *State Denies Rehearing in* Hospitality Association *Decision*, 9 STATE TAX NOTES 1747 (1995); William J. Quirk, *State High Court Grants Unlimited Taxing Power to Local Governments*, 9 STATE TAX NOTES 1465 (1995); Dawn Hinshaw et al., *Justices Draw Fire for Tax Ruling*, THE STATE, Nov. 15, 1995, at A1.

110. *See* Jim Stone, Editorial, *Court Ruling Solidifies Home Rule, Emphasizes Need to Study Proposals*, THE STATE, Jan. 18, 1996, at A11. Mr. Stone is the chairman of the Darlington County Council.

111. *See* Skyscraper Corp. v. County of Newberry, ___ S.C. ___, 475 S.E.2d 764 (1996) (upholding county ordinance imposing a solid waste disposal fee and requiring multi-tenant property owners to pay the fees of their tenants); William J. Quirk, *State Supreme Court Uphold Garbage "Fee,"* 11 STATE TAX NOTES 1289 (1996); *Charleston Joins Cities Seeking Tax Increase Before Option Closes*, THE STATE, Feb. 15, 1996, at B7.

112. H.R. 4492, 111st General Assembly, 2d Sess. (S.C. 1996); H.R. 3901, 111st General Assembly, 2d Sess. (S.C. 1996).

113. Fairway Ford, Inc. v. County of Greenville, No. 24496, 1996 WL 543846, at *1 (S.C. Sept. 23, 1996); *see supra* note 64.

significant personnel changes since the *Hospitality* decision. Only one justice who joined the majority remains on the court; meanwhile, both dissenters continue their tenure.[114] Thus, if the identical issue once again comes before the court, the *Hospitality* decision may be just one vote away from being overturned.

Jenny Anderson Horne

114. Justice Waller is the only remaining member of the majority. Chief Justice Chandler, who wrote the majority opinion, retired, and circuit judge Costa M. Pleicones sat as Acting Associate Justice.