SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000383-T
COURT OF APPEALS NO. 2014-CA-001076

GREATER CINCINNATI/NORTHERN KENTUCKY APARTMENT ASSOCIATION, INC. ET AL. — APPELLANTS

v.

ON APPEAL FROM
CAMPBELL CIRCUIT COURT, DIV. II
CASE NO. 13-CI-00956

CAMPBELL COUNTY FISCAL COURT ET AL. — APPELLEES

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served via U.S. Mail, postage prepaid, this 9th day of April, 2015 on the following: Steven J. Franzen and Thomas Edge, Campbell Co. Attorney, 319 York St., Newport, KY 41071; Robert E. List, Campbell Co. Attorney, 526 Greenup St., Covington, KY 41011; Jack Conway, Attorney General, 700 Capitol Ave., Ste. 118, Frankfort, KY 40601; Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Fred A. Stine, V, Judge, Campbell Circuit Court Division II, 330 York St., Newport, KY 41071; and Taunya Nolan Jack, Clerk, Campbell Circuit Court, Campbell Co. Courthouse, 330 York St., Newport, KY 41071; Timothy A. Sturgill, Kentucky Association of Counties, 400 Englewood Dr., Frankfort, KY 40601; Mike Troop, 178 Colston Ln., Frankfort, KY 40601; and Laura M. Ross, 100 E. Vine St., Ste. 800, Lexington, KY 40507. I further certify that the record on appeal was not withdrawn by Appellants.

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STATEMENT OF POINTS AND AUTHORITIES

Campbell County Ordinance 0-01-13 ("Ordinance") enacted by the Campbell County Fiscal Court ("County") in August 2013 is unlawful because the Ordinance fails to comply with Kentucky's user fee statute, KRS 91A.510. The Ordinance imposes an annual, flat fee or charge of $45.00 on each occupied individual residential and commercial unit in Campbell County ("Property Charge"). This reply brief addresses three fundamental errors made by Appellees in their brief.

First, Appellees misapply basic rules of statutory construction to achieve their desired result. Second, Appellees mistakenly argue Appellants' interpretation and application of the statutes results in KRS 65.760 being meaningless or facially unconstitutional. Finally, Appellees misguidedly refer to, "Kentucky case law that has developed for the statutory definition of 'user fee'" when there is no case law applying Kentucky's user fee statute, KRS 91A.510.

I. ARGUMENT

The funding of 911 service via "any special tax, license, or fee not in conflict with the Constitution and statutes of this state" is authorized by KRS 65.760. Appellees claim the Property Charge constitutes a valid "fee". The only recognized "fee" a county may impose is a "user fee". "User fee" is defined by KRS 91A.510 as "the fee or charge imposed by a local government of a public service for the use of any particular service not also available from a nongovernmental provider." Because KRS 65.760 expressly incorporates the limits of the constitution and statutes of the state, the Court is faced with a question of first impression— what are the limits imposed by KRS 91A.510 on "fees" imposed in accordance with KRS 65.760?

A. Appellees wrongly apply well-established canons of statutory construction in their attempt to defend the County's Ordinance.

The construction and application of the 911 funding statute, KRS 65.760, and the user fee statute, KRS 91A.510, are at the heart of this case. In particular, it appears this case boils down to the meaning of "use" and "user" in KRS 91A.510. When construing statutes, courts "first look at the language employed by the legislature itself, relying on *the common meaning* of the particular words chosen, which meaning is often determined by reference to dictionary definitions."[1] The circuit court and Appellees rely, not on the common meaning of "use", but on an expansive and unlikely alternative definition.[2]

Additionally, Appellees argue that statutes must be "liberally construed" to carry out the intent of the legislature.[3] While this is a correct statement of a general rule, this case involves a grant of power by the legislature to a county. As a result, any ambiguity in the grant of power must be construed to *limit* the authority of Appellees.[4] Furthermore, in construing the scope of the KRS 65.760, the Court must consider the meaning, priority and application of KRS 91A.510.[5]

1. "Use" as employed in KRS 91A.510 must be construed to mean "*actual* use".

The "fee or charge imposed by a local government ***on the user*** of a public service ***for the use*** of any particular service not also available from a nongovernmental provider" is the definition of "user fee" set forth in KRS 91A.510. (Emphasis added.) The parties

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[1] *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 719 (Ky. 2014) (citations and footnote omitted)(emphasis added).
[2] Appellees' Brief, pp. 9-10 ("Appellees' Br. at __").
[3] *Id.* at 5, 9.
[4] *City of Horse Cave v. Pierce*, 437 S.W.2d 185 (Ky. 1969); *Board of Education v. Scott*, 224 S.W. 680 (Ky. 1920).
[5] *Russell County Fiscal Court v. Kelley,* 823 S.W.2d 941 (Ky. App. 1991); *Butcher v. Adams*, 220 S.W.2d 398 (Ky. 1949).

have presented competing dictionary definitions. Appellants submit the legislature intended "actual use" when employing the words "user" and "use". Appellees argue that "use" in KRS 91A.510 means: "the privilege or benefit of using something"; "the ability or power to use something"; "the ability or power to exercise or manipulate something"; or "value or advantage of something".[6] These definitions, however, do not reflect the common meaning of the word "use". Furthermore, the definitions do not make sense when viewed in the context of the entire statute.

The first dictionary cited by Appellees is the Merriam-Webster Online Dictionary. The following is an excerpt from its definition of "use":

> **1 a:** the act or practice of employing something: employment, application <he made good *use* of his spare time>
>
> **b:** the fact or state of being used <a dish in daily *use*>
>
> **c:** a method or manner of employing or applying something <gained practice in the *use* of the camera>
>
> ***
>
> **3 a:** the privilege or benefit of using something <gave him the *use* of her car>
>
> **b:** the ability or power to use something (as a limb or faculty)
>
> **c:** the legal enjoyment of property that consists in its employment, occupation , exercise or practice[7]

Appellants advance the first definition above; definition 1. a.[8] The definition argued for by Appellees is the third definition. This distinction is important because the ordering of definitions in dictionaries can be indicative of what constitutes the most common meaning of words.

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[6] Appellees' Br. at 9-10.

[7] *Id.* at 9-10 and Exhibit F, citing Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/use (last visited March 21, 2015).

[8] Appellants' Br. at 7-8.

The New American Oxford Dictionary ("Oxford Dictionary"), used by both parties, explains in its introduction that the ordering of its definitions reflect the most common usage of the word. The introduction states that the first definition is the "core sense" or "core meaning" which, "represent typical, central uses of the word in question in modern standard English, ..."[9] Subsequent definitions of the same word are described as "subsenses".[10] The Appellees cite to three definitions from the Oxford Dictionary. Two of the three are from the definition of "use" when the word is used as a noun.[11] Here is the relevant portion of the entry:

> *n.* /yoos/ **[1]** the action of using something or the state of being used for some purpose: *a member of staff is present when the pool is in use | theater owners were charging too much for the use of their venues.* ■**[2]** the ability or power to exercise or manipulate something, esp. one's mind or body: *the horse lost the use of his hind legs.* ■**[3]** a purpose for or way in which something can be used: *the herb has various culinary uses.* ■**[4]**the value or advantage of something: *it was no use trying to persuade her | what's the use of crying?*

Again, the first definition—the action of using something or the state of being used for some purpose—is the one advocated by the Appellants and, as can be seen from the examples, clearly supports Appellants' argument that "use" means "actual use".[12] Definitions [2] and [4] are cited by Appellees, but neither represents the common

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[9] The New American Oxford Dictionary xiii (2d Ed. 2005) (attached as Appendix A).
[10] *Id.* at xiv.
[11] The third Oxford Dictionary definition cited by Appellees' is from the verb tense of "use" and is misleading. Appellees cite the definition as "one would ... benefit from". The actual definition is: "■ (one could use) *informal* one would like or benefit from: *I could use another cup of coffee.*" A review of the full definition, without Appellees well-placed ellipse, reveals the great stretch that Appellees must make to prevail, *and* the complete inapplicability of the definition to this case. Appellees' Br. at 9-10, citing Oxford Dictionary at 1853 (Appendix A).
[12] Appellants' Br. at 7-8.

meaning.[13] Thus, Appellants' definition reflects the primary and common understanding of the word.

Additionally, a *full* citation of the second definition proposed by Appellees and the examples following the second and fourth definitions illustrate these definitions could not express the meanings contemplated by the General Assembly in KRS 91A.510. When citing the second definition, the Appellees omitted "esp. one's mind or body". The complete citation is: "the ability or power to exercise or manipulate something, esp. one's mind or body."[14] By adding this phrase, the definition is completely inapplicable to the statute. This is further supported by the example set forth – *the horse lost the use of his hind legs*. Similarly, the examples for the fourth definition—*it was no use trying to persuade her | what's the use of crying?*—demonstrate the clear inapplicability of this definition.[15]

Finally, the interpretation of KRS 91A.510 cannot be limited to the word "use"; the statute also references the "*user* of a public service".[16] The Oxford Dictionary

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[13] Appellees' Br. at 10, citing the Oxford Dictionary at 1853 (Appendix A).
[14] Oxford Dictionary at 1853 (Appendix A).
[15] Also, Appellees' definition of "use" is inconsistent with the definition adopted previously by Kentucky courts in the context of a will contest. In *Rice v. Fields*, 232 S.W. 385, 386 (Ky. 1921), the testator's will provided: "I desire to bequeath to my wife, … all my property … to be held and controlled by her and used by her …." Citing to Webster's New International Dictionary, the court stated "use" was defined as: "[t]o make use of; to convert to one's service; to avail one's self of; to employ; as to use a plow, a chair, a book." *See also, Dennis v. Trustees of Choateville Christian Church*, 290 S.W.2d 601, 602 (Ky. 1956); and *Hopkins v. Howard's Ex'x*, 99 S.W.2d 810, 812 (Ky. 1936).
[16] *Fell*, 391 S.W.3d at 719 ("The particular word, …, must also be viewed in context rather than in a vacuum; ….").

defines a "user" to be "a person who uses or operates something."[17] Thus, a "user" is a person that is doing something or is engaged in an action. In KRS 91A.510, a "use" does not occur until the "user" deploys or employs the public service. That is, no "use" takes place until a person dials 9-1-1, and when the person dials 9-1-1, there is a "use" of a governmental service. There can be no doubt but that "use" in KRS 91A.510 means "actual use", and a user fee is valid only where it is imposed on the *actual* use of a governmental service—in this case, dialing 9-1-1.[18]

2. A liberal construction of KRS 91A.510 is inappropriate because any doubts about the powers delegated to local governments must be construed against the existence of the power.

Appellees maintain "[a]ll statutes of this state must be liberally construed" to promote the intent of the legislature.[19] This is true, but not when the statute is a grant of authority to a local government. Local governments possess only those powers delegated by the Kentucky Constitution and the Kentucky Revised Statutes. Specifically, "county government in Kentucky is based on the premise that all power exercised by the fiscal court must be expressly delegated to it by statute."[20] The applicable rule of statutory construction is that any doubt about the existence of a particular power is resolved against

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[17] Oxford Dictionary at 1853 (Appendix A) (emphasis added). The word "use" within the definition of "user" is a verb and is defined as to "take, hold, or deploy (something) as a means of accomplishing a purpose or achieving a result; employ." *Id.*

[18] Appellees complain it would be impractical to charge only those who actually use the 911 service. Appellees' Br. at 9. Any impracticality, however, may explain why KRS 65.760 provides the County with the authority to impose an ad valorem tax. Furthermore, although a per use charge may prove difficult, other jurisdictions impose user fees on individual users for actual use of a governmental service. *See* City of Lyndon Resolution No. 102, Series 2011 (imposing fees for emergency services delivered by the fire department on a per use basis)(attached as Appendix B).

[19] Appellees' Br. at 5, 9.

[20] *Fiscal Court of Jefferson Cnty. v. City of Louisville*, 559 S.W.2d 478, 481 (Ky. 1977).

the existence of the power.[21] By virtue of the parties two conflicting definitions of "use" in KRS 91A.510, a doubt has arisen about the extent of the County's authority. This doubt must be resolved against the County.

In *Smeltzer v. Messer*,[22] a city enacted an ordinance restricting the use and regulating the capacity of structures. The ordinance authorized the zoning commission to regulate areas outside of the city limits where appellee's property was located. The appellee challenged the purported authority to zone outside the city limits as being beyond the power of the city. The Court of Appeals, then the state's highest court, held "[a]s a general rule, the exercise of [police powers], delegated to a municipality, should be strictly construed, particularly where it encroaches upon the rights of an individual".[23] The Court found the city lacked power outside its own limits and the city's ordinance was unenforceable.

Appellees argue KRS 91A.510 provides a broad-based power to impose user fees "if the user has a specific government service available for their use or that user is specifically benefited by the service being available."[24] Appellants argue KRS 91A.510 provides a limited power to impose user fees solely for the *actual use* of a governmental

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[21] *City of Horse Cave v. Pierce*, 437 S.W.2d 185, 186 (Ky. 1969); *see also Board of Education v. Scott*, 224 S.W. 680, 681 (Ky. 1920)(This universal rule is so favored by the courts that where there is any fair or reasonable doubt concerning the existence of a particular power that doubt will be resolved against its existence."); *Allen v. Hollingsworth,* 56 S.W.2d 530, 531 (Ky. 1933)("[T]he Legislature has plenary powers in respect to the establishment and regulation of the government of municipalities.... Doubt concerning the existence of a particular power will be resolved against its existence."); *Griffin v. Paducah*, 382 S.W.2d 402, 404 (Ky. 1964); *729, Inc. v. Kenton Cnty. Fiscal Court*, 515 F.3d 485, 494 (6th Cir. 2008)("only when a power is *expressly* granted to a county government may it exercise that power...")(emphasis in original).

[22] 225 S.W.2d 96 (Ky. 1949).

[23] *Id.* at 98.

[24] Appellees' Br. at 3, citing R. at 250.

service. To the extent the Court finds an ambiguity exists in the scope of KRS 91A.510, the authority delegated must be narrowly construed against the County. Therefore, the Ordinance must be held unlawful.

3. KRS 91A.510 controls the application of KRS 65.760.

Pursuant to KRS 65.760(3), the County may levy "any special tax, license or fee *not in conflict with the Constitution and statutes of this state*."[25] As found by the Court of Appeals in *Russell County Fiscal Court v. Kelley*,[26] in which identical language was at issue, the italicized language is language of limitation. In *Kelley*, the statute at issue was KRS 67.083, which provides counties with the authority to impose taxes "not in conflict with the Constitution and statutes of this state." The court held this language prohibited the county from imposing a restaurant tax where that attempted imposition interfered with the authority granted in KRS 91A.400 to two cities in Russell County to impose the same tax.

In this case, by the express terms of KRS 65.760, any user fee imposed must not conflict with the user fee statute, KRS 91A.510. To comply with KRS 91A.510 a user fee must be imposed on the user for the actual use of a governmental service. The "user fee" imposed by Appellees, however, is wholly disconnected from actual use. Therefore, the fee is in conflict with KRS 91A.510 and is unlawful.

Furthermore, while Appellants reconcile and harmonize the two statutes, if the statutes could not be reconciled "[i]t is an elementary rule of statutory interpretation" that when conflicting statutes on the same subject cannot be reconciled, the later statute

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[25] KRS 65.760(3)(emphasis added).
[26] 823 S.W.2d 941 (Ky. App. 1991).

controls.[27] Enacted in 1984, KRS 65.760 establishes and outlines funding of 911 services. Two years later, in 1986, KRS 91A.510 was enacted specifically defining the requirements of a user fee. As the later enacted statute, KRS 91A.510 would control over the earlier enacted KRS 65.760.

B. Appellees mistakenly argue Appellants' interpretation and application of the statutes results in meaningless or facially unconstitutional statutes.

With no explanation or analysis, Appellees' argue the interpretation and application of KRS 91A.510 and KRS 65.760 posited by Appellants renders them meaningless.[28] To the contrary, Appellants construction preserves the meaning of both statutes. Specifically, Appellants interpret the plain language of KRS 65.760 to include the requirements of KRS 91A.510. Appellants do not strip the statutes of meaning; instead, Appellants harmonize the statutes.[29]

Appellees also err in arguing Appellants' interpretation and application of KRS 91A.510 results in KRS 65.760 being facially unconstitutional.[30] Appellees sole support for this assertion is the claim that "under Appellants' definition of 'user' the subscriber fee would be facially unconstitutional."[31] However, the validity of the subscriber charge is not at issue in this action. Appellants recognize the validity of KRS 65.760 in authorizing the imposition of a "subscriber charge" or "any special tax, license, or fee". However, any "fee" imposed must be in accordance with KRS 91A.510.

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[27] *Butcher v. Adams*, 220 S.W.2d 398, 400 (Ky. 1949).
[28] Appellees' Br. at 4-6.
[29] *Fell*, 391 S.W.3d at 725 ("[H]armony and consistency are both factors frequently noted in statutory construction cases as further evidence of the appropriateness of a particular interpretation of a statute.")
[30] Appellees' Br. at 9.
[31] *Id.*

C. There is no Kentucky case law that defines "user fee" as that term is used in KRS 91A.510.

In their briefs, the parties have argued at length over the cases each considers controlling. This case law has created a morass of the analysis of special assessments, user fees, and taxes. Importantly, however, no Kentucky court has construed the meaning of KRS 91A.510. Therefore, despite Appellees' contentions, there is no "Kentucky case law that has developed for the statutory definition of 'user fee.'"[32]

II. CONCLUSION

For the reasons set forth herein, the Appellants request this Court reverse the judgment of the circuit court and declare the Property Charge and the Ordinance unlawful, unconstitutional, and void *ab initio*.

Respectfully submitted,

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[32] *Id.*