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S.C. Supreme Court

The South Carolina Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT  
Carolyn C. Matthews, Administrative Law Judge

Case No. 10-ALJ-30-0421-CC

Appellate Case No. 2011-194346  
Opinion No.27356 – Filed February 5, 2014

City of Myrtle  
Beach,.....Respondent/Petitioner,

v.

Tourism Expenditure Review  
Committee,.....Appellant/Respondent,

**CITY OF MYRTLE BEACH'S  
PETITION FOR REHEARING  
RULE 221(a), SCRAP**

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Petitioner City of Myrtle Beach respectfully petitions the Supreme Court for a rehearing of the above captioned appeal and for reconsideration of its opinion in the case, *City of Myrtle Beach v Tourism Expenditure Review Committee, Opinion No.27356*, filed February 5, 2014.

1. The points that have been overlooked or misapprehended by the court are contained in the Stipulations of Facts agreed to by the parties and presented by the Tourism Expenditure Review Committee (TERC) and the City of Myrtle Beach (Petitioner) to the Administrative Law Judge. The court's findings contradict the parties agreed Stipulations of Facts. The agreed Stipulations of Facts are part of the Record on Appeal. [R. 400 – 406 & 4-10]. The court's majority opinion does not interpret or mention the parties' Stipulations of Facts.

The court overlooked or disregarded the court's own rule that "When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided." *Belue v. Fetner*, 251 S.C. 600, 164 S.E.2d 753 (1968). Petitioner asks the court to reconsider its opinion in light of the undermining effect its opinion will have on mutual cooperation and the Stipulation of Facts process in litigation in South Carolina. If the court chooses to not reconsider its opinion, Petitioner respectfully requests the court to state the reasons why consideration of the parties' Stipulations of Facts played no role in the court's decision. See Rule 220(b) SCACR.

2. The majority opinion does state: "Based on the record before us, the truth is no more complicated than the March 14, 2008 memorandum. That admission in the City's

internal documents leads this Court to conclude that the \$302,545 in questioned expenditures are unmistakably traceable and attributable to A-Tax funds, not general funds.” *City of Myrtle Beach v Tourism Expenditure Review Committee*, Op. No. 27356. That finding goes beyond and contradicts the parties stipulated fact that Petitioner expended “\$4,664,951 which was 99.65%, of the available A-Tax funds for “support of operating expenses for services above and beyond permanent population throughout the year to include additional Police, Fire and Parks personnel. This was the only expenditure from the A-Tax special fund made by the City in fiscal year 2008-2009. “<sup>1</sup> [R 402]

3. The stipulated fact that all the 65% A-Tax Fund was spent support of operating expenses for services above and beyond the permanent population throughout the year to include additional Police, Fire and Parks personnel contradicts the majority’s finding that \$302,545 or almost 7% of the 65% A-Tax Special Fund was expended on tourism related grants to outside agencies.

4. The fact that there is a contradiction between the court’s opinion and the stipulated facts is confirmed by the colloquy between the attorneys and the Administrative Law Judge:

**Mr. Hoefler:** Your Honor, I’m going to object. This doesn’t have anything to do – you’ve heard *ad nauseum* that the 4.6 million is not at issue in this case. **You can assume that was a correct expenditure.** (emphasis added) This is going toward that issue and I would object on the grounds of relevancy.

**The Court:** Mr. Battle?

**Mr. Battle:** I’m trying to give you an understanding of how the money is – we can confidently say that the State allocation was properly spent or at least was spent on additional municipal services.

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<sup>1</sup> Note that the remaining 00.35% was held in reserve in the Special A-Tax as permitted by the State. While that fact is not in the Record, TERC has not questioned the reservation of the 00.35% and TERC refers to the \$4.6 million as 99.65% of the 65% A-Tax Special Fund.

**The Court:** Well, I don't think that's an issue in this case, is it? [R.323]

**Mr. Battle:** Not really .... [R.323]

5. Petitioner contends it would fiscally impossible for Petitioner to correctly spend all of the available 65% A-Tax Special Fund on municipal services and at the same time spend almost 7% of that same 65% A-Tax Special Fund on tourism related grants to outside agencies. There was not any money left from the 65% A-Tax Special Fund to fund the disputed grants to outside agencies. Yet, that is the finding of the majority opinion: "We do not disagree with the City's construction of the Act, other than to note the A-Tax funds at issue here were spent on tourism-related grants to outside agencies."

*Fn. 6, City of Myrtle Beach v Tourism Expenditure Review Committee, Opinion No.27356, filed February 5, 2014.*

6. Petitioner asks the court to compare its finding with the colloquy between the Administrative Law Judge and the parties and TERC's Reply Brief:

**Colloquy:**

**Mr. Hoefler:** ... "But the point that we make simply is, is that what we are dealing here with is 302,000 dollars' worth of discreet expenditures, not the \$4.6 million."

**The Court:** Well, insofar as its been background at this point – I understand what you're trying to do and I think its relevant, Mr. Battle, but I don't think any further inquiry into that subject is relevant because I'm having to assume for the purposes of this case that the 4.6 million expenditure, total expenditure, that went to the general fund was valid.

**Mr. Hoefler:** Right.

**The Court:** So I guess what we need to do is look at is how you handle the rest of the grants.

**Mr. Battle:** So, let's talk about , then, the – how can you confidently say that general funds were spent on and maybe I'm saying the same thing indirectly what

I couldn't be saying and that may be true. But, I mean, is there any question in your mind the general funds were spent on these four grants?

**Mr. Hoefler:** Same objection, Your Honor.

**The Court:** I sustain. [R 324 -325]

**TERC's Reply Brief:**

Contrary to the COMB's assertion, TERC does not dispute the COMB's accounting procedures or the account out of which the four grants were made. [TERC Reply Brief pg. 4]

....

As provided above, TERC has never disputed the account out of which the COMB made the four questioned disbursements that are the subject of this appeal. Nor has TERC made the assertion that the COMB has caused its 65% Fund to be one and the same with its general fund. [TERC Reply Brief pg. 5]

7. Petitioner respectfully contends that it appears from the court's opinion that the majority chose to find that its independent interpretation of an unofficial e-mail from a staff member to private parties justifies disregarding the parties' agreed Stipulation of Facts. Petitioner contends that at the very least there is a significant difference between the court's interpretation of the e-mail and the Stipulation of Facts.

First, the e-mail in question specifically lists the outside grants to which it was referring that were made to the several agencies requesting accommodations funding. The four grants questioned by TERC do not appear in that e-mail list of grants. There was an outside grant to the Children's Museum for \$90,000 mentioned in the e-mail in question. TERC questioned a grant made to the Children's Museum. However, the Children's Museum grant questioned by TERC in this appeal was a separate grant from the general fund for \$20,000. [R. 404]

Second, the statement “sweeping A-Tax funds to the General Fund to cover tourism related public services” is different from the expenditure of those same A-Tax funds on tourism-related grants to outside agencies. Tourism related public service expenditures are for operating expenses for services above and beyond permanent population throughout the year to include additional Police, Fire and Parks personnel. [R 401] See SC Code Ann. § 6-4-10(4)(b) Tourism related public service expenditures are an entirely separate category of expenditures from tourism-related grants to outside agencies. *Id.* It bears repeating that once 99.65% of the 65% A-Tax Special Funds were expended on tourism related municipal services there was nothing left in the 65% A-Tax Special Fund to be expended for grants to outside agencies.

8. Petitioner respectfully contends that the court’s preference of its interpretation of a staff member’s unofficial e-mail over agreed Stipulations of Fact constitutes an unprecedented sea level change for the conduct of litigation. Stipulations of Facts are encouraged by appellate courts in South Carolina. See *Belue v. Fetner*, 251 S.C. 600, 164 S.E.2d 753 (1968); *McCrea v. City of Georgetown*, 384 S.C. 328, 681 S.E.2d 918 (Ct. App. 2009). In tax revenue cases such as the case now before the court Stipulations of Fact are mandated where possible. See S.C. Code Ann. § 12-60-3320. (“In order to increase the efficiency and reduce the costs of contested cases, parties to a contested case hearing, in good faith, shall do their best to stipulate the facts and issues upon which they can agree.”) Petitioner respectfully contends the court’s decision in the present case will not increase the efficiency and reduce the costs of contested cases. *Id.*

9. If the court disagrees with the Administrative Law Judge’s interpretation of the Stipulation of Facts, the suggestion made in the dissent’s opinion of a remand for the

purpose of receiving additional evidence on the issue framed by the court is well stated. If the court believes the issue in the present case, notwithstanding the Stipulations of Fact, that should be decided is whether Petitioner improperly engaged in a de facto process of regrating the 65% Special A-Tax Funds, Petitioner agrees with the dissent's finding that the court should remand the issue to the Administrative Law Judge to receive further evidence on that issue. As demonstrated above, Petitioner was prohibited from presenting the evidence to prove that issue at the Administrative Law Court because of TERC's objection that such evidence was not relevant to the issues framed before the court. In other words, the parties and the Administrative Law Judge assumed for purposes of the case the 65% A-Tax Special Funds (\$4.6 million) were correctly spent. [R 323 & 324 -325]. The court has disregarded that assumption and finds that Petitioner should have offered more proof that the 65% A-Tax Special Funds (\$4.6 million) were correctly spent. Petitioner contends that any deficiencies in its proffer of evidence were due to Petitioner's understanding that the correctness of the expenditure of the 65% A-Tax Special Fund would be assumed and taken at face value by the court. Petitioner did not consider that the court would want go beyond the parties' stipulation of facts. *Belue v. Fetner*, 251 S.C. 600, 164 S.E.2d 753 (1968); *McCrea v. City of Georgetown*, 384 S.C. 328, 681 S.E.2d 918 (Ct. App. 2009).

10. Petitioner acknowledges that the court has clearly expressed its displeasure at the way the case was framed by TERC, the Petitioner and the Administrative Law Judge. However, petitioner respectfully asks to the court to consider that the Stipulations of Facts in the present appeal were entered by agreement of the parties in good faith and in a spirit of cooperation to limit the issues to be decided by the Administrative Law Judge

and avoid the duplication of the judicial effort being expended in a parallel case filed by the Tourism Expenditure Review Committee (TERC) in Circuit Court. See *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371 (2013)(reversing the lower court’s decision that the City of Myrtle Beach could use all of the 65% A-Tax Special Fund for police and fire protection expenditures related to tourism and dismissing the case for lack of subject matter jurisdiction).

11. Petitioner would also respectfully request that the court reconsider its “two bites at the apple” justification for denying the dissent’s suggestion of a remand of the case to the Administrative Law Judge to take additional evidence on the issues framed by this court. The cases cited by the court in support of its justification involve actual trials, formal hearings and explicit instructions from this court. In the present case, Petitioner did not consider TERC’s request for documents to be part of a formal adversarial proceeding.

The procedure set forth in the Accommodations Tax Act is that if a local government does not provide documents or an explanation for the expenditure of funds, TERC may instruct the State Treasurer to withhold funds from future A-Tax allocations. However, if a local government disagrees with TERC’s decision, it is entitled to appeal the decision in the Administrative Law Court. SC Code Ann § 6-4-35. TERC and the Administrative Law Court have interpreted that section to mean that a local government is entitled to a full evidentiary hearing before the Administrative Law Judge if the local government appeals TERC’s decision. See *City of Myrtle Beach v Tourism Expenditure Committee* Docket No. 04-ALJ-30-0382-CC. The court’s application of a “two bite rule” to a local government’s responses to TERC’s requests for information suggests that a local

government may lose its right to a full evidentiary hearing on issues to be determined by the Administrative Law Court if TERC claims the information submitted was refused.

As the court noted in *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371 (2013), over the years, the City of Myrtle Beach and TERC have occasionally disputed the meaning of various provisions of SC Code Ann. §6-4-10(4)(b). In the present case, Petitioner chose to protect its legal position that TERC had no authority to demand Petitioner's general fund information under the Accommodations Tax Act. Petitioner contends that TERC and Petitioner were aware that the general fund information could be obtained through a Freedom of Information Act request. Petitioner contends a FOIA request was the proper procedure and TERC's attorney chose that procedure when Petitioner responded to TERC's request for additional information. [R. 404] Petitioner's legal position was not intended to show disrespect for TERC or its responsibilities. [R. 523] Petitioner provided the requested information to TERC without objection upon receiving the proper request under FOIA. Petitioner respectfully contends that the court's determination that Petitioner's brazen position causes it to forfeit its right to present evidence on appeal to the Administrative Law Court is contrary to the Administrative Law Court's established procedure for handling appeals from TERC's decisions. See *City of Myrtle Beach v Tourism Expenditure Committee* Docket No. 04-ALJ-30-0382-CC.

12. Petitioner contends the court's decision in the above captioned appeal overlooked or misapprehended the intent of the parties and the significance of the Stipulations of Facts in several other particulars:

a. **The court stated: “The ALC's acceptance of the City's characterization of the funds as "general funds" was error, for the City's internal documents unmistakably reveal that it "decided to sweep accommodations tax funds to the General Fund to cover tourism related public services.”**

Agreed Stipulations of Fact [R. 4-10; 400-406]

6. Council voted to use \$4,664,951, which was 99.65%, of the available A-Tax funds for “[s]upport of operating expenses for services above and beyond permanent population throughout the year to include additional Police, Fire and Parks personnel.” *This was the only expenditure from the A-Tax special fund made by the City in fiscal year 2008-2009. (emphasis added)*

b. **The court stated: “Twenty-five organizations submitted grant applications seeking \$2,253,586 for tourism-related expenditures from the 65% Funds.”**

Agreed Stipulations of Fact [R. 4-10; 400-406]

5. During fiscal year 2008-2009, twenty-two (22) total applications for tourism-related expenditures from the A-Tax special fund were submitted to the Committee for review...

c. **The court stated: “The City, however, submitted only twenty-one of those applications to the local advisory committee. Four requests from outside organizations totaling \$302,545 were not forwarded to the local advisory committee for review and recommendation and were not reported to TERC in the City’s annual report.”**

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Agreed Stipulations of Fact [R. 4-10; 400-406]

12. For the 2008-2009 fiscal year, the local advisory committee considered *all applications* for grants from the special fund of A-Tax revenues. (emphasis added)

d. **The court stated: “The ALC found that the four questioned grants totaling \$302,545 were disbursed from the City's general funds, a finding with no support in the record.”**

Agreed Stipulations of Fact [R. 4-10; 400-406]

17. In fiscal year 2008-2009, the Children's Museum of South Carolina submitted a Uniform Grant Application to the City, but not to the Committee. Council adopted Motion M2008-78 and thereby approved the appropriation of \$20,000 to the "Children's Museum of South Carolina" as an outside agency from its general fund.

18. The document attached as Stipulation Exhibit "1" is a true and correct copy of the \$20,000 grant application filed by the Children's Museum of South Carolina.

19. In fiscal year 2008-2009, the Coast Rapid Transit Authority submitted a Uniform Grant Application to the City, but not to the Committee. Council adopted Motion M2008-80 and thereby approved the appropriation of \$252,545 to the "Coast Rapid Transit Authority", as an outside agency from its general fund.

20. The document attached as Stipulation Exhibit "2" is a true and correct copy of the grant application filed by the Coast Rapid Transit Authority.

[Note Exhibit 2 lists the donations account as the source of funding]  
[R.433]

21. In fiscal year 2008-2009, the Coastal Carolina University for Tourism submitted a Uniform Grant Application to the City, but not the Committee. Council adopted Motion M2008-81 and thereby approved the appropriation of \$15,000 to the "Coastal Carolina University for Tourism", as an outside agency from its general fund.

22. The document attached as Stipulation Exhibit "3" is a true and correct copy of the grant application filed by the Coastal Carolina University for Tourism.

[Note Exhibit 3 refers to source of funding as the local accommodations tax fund. The local accommodations tax fund is a different fund from the 65% Special A-Tax Fund.] [R 449]

23. In fiscal year 2008-2009, the South Carolina Hall of Fame submitted a Uniform Grant Application to the City, but not the Committee. Council adopted Motion M2008-95 and thereby approved the appropriation of \$15,000 to the "South Carolina Hall of Fame."

24. The document attached as Stipulation Exhibit “4” is a true and correct copy of the grant application filed by the South Carolina Hall of Fame.

[Note Exhibit 4 refers to source of funding as the general fund. [R 467]

**f. The court stated: “The fact remains that the City granted admitted A-Tax funds to outside agencies as tourism-related expenditures, and the Act requires a specific process to be followed when doing so.”**

Agreed Stipulations of Fact. [R. 4-10; 400-406]

6. Council voted to use \$4,664,951, which was 99.65%, of the available A-Tax funds for “[s]upport of operating expenses for services above and beyond permanent population throughout the year to include additional Police, Fire and Parks personnel.” This was the only expenditure from the A-Tax special fund made by the City in fiscal year 2008-2009.

12. For the 2008-2009 fiscal year, the local advisory committee considered all applications for grants from the special fund of A-Tax revenues.

13. City Council decided to disburse 99.65% of the special fund to the City for the purpose of providing additional municipal services including, but not limited to, law enforcement, traffic control, public facilities, and highway and street maintenance and provide those facilities and services which enhanced the ability of the City to attract and provide for tourists. The City made its report of its use of the special fund of A-Tax revenues to TERC September 30, 2009.

The Administrative Law Court and TERC’s position:

**Mr. Hoefler:** Your Honor, I’m going to object. This doesn’t have anything to do – you’ve heard ad nauseum that the 4.6 million is not at issue in this case. **You can assume that was a correct expenditure.** (emphasis added)

....

**The Court:** Well, insofar as its been background at this point – I understand what you’re trying to do and I think its relevant, Mr. Battle, but

I don't think any further inquiry into that subject is relevant because I'm having to assume for the purposes of this case that the 4.6 million expenditure, total expenditure, that went to the general fund was valid.

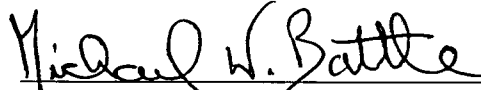
**Mr. Hoefler:** Right.

13. Petitioner respectfully contends that the majority opinion has overlooked or disregarded the importance of preserving the integrity Stipulations of Fact in the litigation process. This court and the SC Court of Appeals have stated in other cases: "When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided." *Belue v. Fetner*, 251 S.C. 600, 164 S.E.2d 753 (1968); *McCrea v. City of Georgetown*, 384 S.C. 328, 681 S.E.2d 918 (Ct. App. 2009). An appellate court is only allowed to review whether the trial court properly applied the law to those facts. *J.K. Const., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 519 S.E.2d 561 (1999). In the present appeal the court went beyond the parties' stipulations to determine its own version of the facts upon which the appeal was decided.

14. Petitioner respectfully requests the court to reconsider the practical impact its opinion will have on the use of Stipulations of Facts by parties and trial courts in future cases. If courts can overlook, go beyond or disregard Stipulations of Facts with which they disagree, Stipulations of Facts do not serve any purpose in litigation. Further, such impact will undermine the general assembly's stated requirement in tax revenue cases: "In order to increase the efficiency and reduce the costs of contested cases, parties to a contested case hearing, in good faith, shall do their best to stipulate the facts and issues upon which they can agree." S.C. Code Ann. § 12-60-3320.

## CONCLUSION

Petitioner City of Myrtle Beach respectfully requests that the court reconsider its decision in the above captioned case and affirm the Administrative Law Judge based upon the parties agreed stipulation of facts or in the alternative remand the case to the Administrative Judge to receive additional evidence on the question of whether the Petitioner actually used the 65% A-Tax Special Funds to fund grants to outside agencies without following the procedure required by the Accommodations Tax Act.



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February 14, 2014

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM ADMINISTRATIVE LAW COURT  
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PROOF OF SERVICE

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Sherri Benninga certifies that she is an employee with Battle Law Firm, LLC attorneys for Respondent/Petitioner City of Myrtle Beach, and that she has mailed the Petition for Rehearing on behalf of City Myrtle Beach to the addressees shown this 14th day of February, 2014, with proper postage attached thereto.

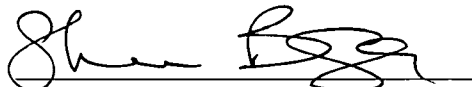
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