

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

S.C. Supreme Court

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

City of Myrtle Beach, Respondent,

v.

Tourism Expenditure Review Committee, Appellant.

RETURN TO PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240(e) of the South Carolina Appellant Court Rules (“SCACR”), Appellant Tourism Expenditure Review Committee (“TERC”) submits the within Return in opposition to the Petition for Rehearing (“Petition”) of this Court’s February 5, 2014, Opinion No. 27536 (“Opinion”), filed by Respondent City of Myrtle Beach (“COMB”) on February 14, 2014. For the reasons discussed herein, TERC submits that the Court should deny the Petition.

I. The Petition mischaracterizes the parties’ stipulations of fact, their effect in the contested case before the Administrative Law Court (“ALC”), and this Court’s holdings vis-à-vis the stipulations.

In essence, the Petition asserts that the Court has overlooked or misapprehended the point that the stipulations of fact entered into by the COMB and TERC prior to the contested case completely resolved the dispute between the parties. However, even assuming that this Court is disposed to search for the COMB’s argument to that effect in

the record below or in its brief, such a search would be in vain. The COMB did not argue before the ALC that the stipulations were dispositive.¹ Nor did it make the argument to this Court. In fact, the COMB's Respondent's Brief does not even mention the stipulations of fact *at all*. The Petition's suggestion that the stipulations of fact determine the issues presented in this appeal and contradict holdings in the Opinion is simply a mischaracterization of the stipulations below. TERC submits that for this reason alone, the Court should deny the Petition, as it is apodictic that a Court cannot overlook or misapprehend an argument that has never been made.²

Notwithstanding, the crux of the Petition is that, because the parties stipulated to the fact that the City Council appropriated essentially all of the available A-Tax revenues to the COMB's general fund, it precludes the Court from considering the clear evidence of record showing that the COMB simultaneously re-granted those funds to outside entities for tourism-related expenditures, four of which—amounting to \$302,545—were not reviewed by the Local Advisory Committee. At bottom, this is simply a repackaging of the COMB's general fund exemption argument which was found dispositive by the ALC, but rejected by both the Majority and the Dissent in the Opinion. With the

¹ The COMB argued to the ALC that “[t]he sole question before the Court is whether possible tourism-related grant applications for money from the City's general fund are required to be reviewed by the local advisory committee by the Act. The City contends that the Act does not apply to the City's general fund.” (R.p. 229). This is precisely the issue framed and answered by the Opinion.

² See, e.g., *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) (“[A] party may not raise an issue for the first time in a petition for rehearing.”) (citing *Kennedy*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.”)).

COMB's sole argument having been discredited, the Petition now seeks to selectively³ pull quotations from the Majority Opinion and the parties' stipulations, out of context,⁴ in an effort to create a conflict between the two that does not exist. As the Majority noted, this argument was not raised by the COMB before the ALC, and the record on appeal was limited by the COMB's failure "to provide additional substantiating information." *See* Opinion at 5, n.5.

The dissenting opinion proposed granting relief to COMB for its deficient presentations below and on appeal—a point picked up on and perpetuated in the Petition⁵

³ This Court has held that a stipulation is to be construed like a contract. *See Porter v. S.C. Public Service Commission*, 333 S.C. 12, 30, 507 S.E.2d 328, 337 (1998). TERC submits that, similar to a contract, portions of stipulated facts may not be read in isolation, but should be read as a whole in order to give the stipulations their full effect. *See, e.g., S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (holding that, in construing contractual language, the contract must be read as a whole and sections thereof must be construed together and not read in and isolation) (citations omitted).

⁴ The Petition contends the Opinion misapprehends or disregards the stipulations of fact, citing in support of this contention isolated statements from the stipulations but disregarding other stipulations which undercut the very point the Petition is attempting to make. For example, the Petition quotes the Opinion's statement that "[t]wenty-five organizations submitted grant applications seeking \$2,253,586 for tourism-related expenditures from the 65% Funds," by quoting from Stipulation of Fact 5, which states that "twenty-two (22) total applications ... were submitted to the Committee for review ..." *See* Petition at 10. However, the source of this putative "error" is that the Opinion more thoroughly dissects the Record on Appeal than does COMB's Petition. As Stipulation Exhibit 8 shows, *see* (R.pp. 478-79), the COMB reported to TERC that twenty-two (22) organizations submitted applications for A-Tax Funds in FY 2008-09. However, the crux of this case involves the re-granting of \$302,545 to four (4) additional organizations, one of which, the Children's Museum of South Carolina, made two requests (only one of which was reviewed by the local advisory committee) and is already listed on the COMB's report, leaving three additional applicant-organizations and exactly comprising the "twenty-five organizations" described by the Majority.

⁵ The Petition alternatively seeks relief in the form of the Dissent's suggested remand of the action for further evidence. However, as the party bringing the contested case and

by citation to several colloquies between counsel and the ALC in the transcript of the hearing—by stating the COMB advanced, but was prevented by the ALC’s sustaining of TERC’s objection to questions by COMB of its witness, the theory that the Dissent now proposes⁶ for determining whether a municipality circumvented the Act. *See* Opinion at 11-13, Hearn, J. dissenting. However, TERC would respectfully submit that under longstanding case law, arguments of counsel are not evidence. *See Ex parte Morris*, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (“It is well established that counsel’s statements regarding the facts of a case and counsel’s arguments are not admissible evidence.”). Moreover, the COMB failed to proffer⁷ the excluded testimony, even over TERC’s justifiable objection; therefore, as correctly determined by the Majority, the COMB’s argument is unpreserved for this Court’s review. *See City of Columbia v. Ervin*, 330 S.C. 516, 500 S.E.2d 483 (1998) (holding that a party objecting to the exclusion of evidence at trial must make a proffer of the excluded evidence in order to preserve the issue for appeal) (citing *State v. Cabbagestalk*, 281 S.C. 35, 314 S.E.2d 10

asserting that TERC improperly certified the disputed expenditures to the State Treasurer as non-compliant, the COMB bears the burden of proof by a preponderance of the evidence. *See City of Myrtle Beach v. Tourism Expenditure Review Committee*, Docket No. 04-ALJ-30-0382-CC (Nov. 7, 205) (Kittrell, J.). The Opinion found the COMB failed to meet its burden, advancing an exemption theory which was unanimously rejected by the Court, and the Court is correct to not award the COMB a “do-over.”

⁶ It should be noted that the proposed new standard would require the Court to judicially draft into the Act—which has not been found, nor argued to be, ambiguous—language that does not exist and finds no support in its plain meaning. *See* Opinion at 11, Hearn, J. dissenting (“If the City failed to spend the full amount of the 65% Funds it allocated to itself for this purpose, the City has granted the 65% Funds without the review of the local advisory committee and thus, has circumvented the Act.”).

⁷ Not only did the COMB fail to proffer this evidence, it chose not to cross appeal the ALC’s determination to exclude the testimony or argue that the ALC’s ruling was an error that provided an additional sustaining ground to this Court to affirm the ALC.

(1984) (failure to make an offer of proof precludes consideration of an issue on appeal); *State v. Roper*, 274 S.C. 14, 260 S.E.2d 705 (1979) (a reviewing court may not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been)).

Further, even under the Dissent's proposed standard of evaluating whether a municipality "failed to spend the full amount of the 65% Funds it allocated to itself for this purpose," *see* Opinion at 11, the evidence of record in this case shows that the COMB circumvented the Act. Regardless of the arguments advanced by the COMB's counsel, should the Court have any doubt about the procedures employed by COMB to comply with the intent of the Act, it need look no further than the COMB's Respondent's Brief. Therein, the COMB stated:

The City may decide that the estimated revenues from other sources will be down for the coming year and that all of the A-Tax special fund should be allocated to tourism public safety. Subsequent to the adoption of the budget, City Council may discover during the year that more revenue has been collected than anticipated and the City may at that time decide to make grants to outside recipients for tourism related events.

Resp. Brief at 14. Translation: the COMB views the Act, as well as the statutorily mandated oversight of the Local Advisory Committee and TERC, as meaningless, and views the State A-Tax Fund as its own "rainy day" fund that can be used to make up for the COMB's revenue shortfall. The above statement is an express admission and acknowledgment that the COMB may not even meet the standard proposed by the Dissent.

The COMB's selective adherence to the stipulations is clearly evident in its attempt to now avoid, or at least diminish, its own characterizations of its actions which

reveals the true nature of the COMB's intent. In the March 14, 2008 memorandum, describing the City Council's review of A-Tax applications, COMB staff member Michelle Shumpert acknowledges that "[the COMB] Council decided to sweep accommodations tax funds to the General Fund to cover tourism related public services. Subsequent to the decision to utilize accommodations tax funds in the General Fund, council awarded outside grants to several agencies originally requesting accommodations funding." Stipulation Exhibit 7, (R.pp.474-75).⁸

The Petition seeks to lessen the import of the COMB memorandum, arguing that it was merely "an unofficial e-mail from a staff member to private parties." See Petition at 5, ¶7. This contention is not credible. First, the March 14, 2008 memorandum distinctly bears the COMB's official letterhead. (R.p. 474). Second, far from "private parties," the Court can easily take notice that the sender was an employee of the COMB and the recipients of the memorandum included the very members of the Local Advisory Committee tasked with reviewing A-Tax applications submitted to the COMB; clearly, these indisputable facts evidence the memorandum's intent of notifying the committee members of the official actions taken by the City Council in appropriating the available A-Tax revenues.⁹ Compare E-Mail Recipients, (R.p. 474), with the official listing of

⁸ This same admission is repeated in the handwritten notes of City Clerk Joan Grove in Stipulation Exhibit 6. (R.pp. 472-73).

⁹ The COMB's suggestion that the absence, in the memorandum, of the four disputed grants at issue in this litigation somehow confirms the insignificance of the memorandum, is further evidence of the very point of TERC's challenge. See Petition at 7, ¶7. TERC did not challenge the additional grants to outside entities referenced in the memorandum because those applications were reviewed by the Local Advisory Committee, as prescribed by the Act. See S.C. Code Ann. § 6-4-25. The four disputed grants, by contrast, were made to applicants for A-Tax revenues whose applications were *not* reviewed by the Local Advisory Committee. See Stipulations of Fact 17-24,

Local Advisory Committee Membership, (R.p. 480). Finally, contrary to the Petition's allegation that the Majority's recognition of the importance of the COMB's official characterization of its own actions "justifie[d] disregarding the parties' agreed Stipulation of Facts," the March 14, 2008 memorandum, as well as the preceding correspondence that culminates in the memorandum, *is itself a stipulated exhibit*. See Stipulation of Fact 27, (R.p. 10) ("The documents attached hereto as Stipulation Exhibits "5" through "7" are true and correct copies of public records of the City produced to TERC pursuant to a request under the South Carolina Freedom of Information Act.") (emphasis added).¹⁰

Moreover, the Petition grossly overstates the opinion's "sea level change" on litigation and parties' willingness to enter into stipulations. See Petition, *passim*. To the contrary, the Petition tellingly acknowledges that the Majority Opinion does not rest on a misapprehension of the stipulations of fact. See Petition at 2, ¶1 ("The court's majority

Stipulation Exhibits 1-4, (R.pp. 8-9). Stipulation of Fact 25 makes this point clear: "The [Local Advisory] Committee did not review the specific grants referenced in Stipulation numbers 17-24 above." *Id.* In view of the putative grounds for its Petition, it is ironic that the only entity misapprehending or overlooking the stipulated facts apparently is the COMB.

¹⁰ It is also worth noting that the Petition goes to great length to convince the Court that COMB acted reasonably in responding to TERC's request for additional information regarding the municipality's 2008-2009 expenditures of A-Tax and thereby overcome what the Court rightly saw as a brazen refusal to cooperate. See Petition at 8-9, ¶11. In actuality, the exact opposite is true. Not only was TERC forced to file a Freedom of Information Act ("FOIA") Request in order to fulfill its statutory duties as noted by the Majority, but the fact is that the COMB filed a preceding FOIA Request of TERC on January 8, 2010, seeking meeting minutes, A-Tax reports of every county and municipality in the State with a high concentration of tourism, and written notes and comments of the TERC members. See Stipulation of Fact 9 (R.p. 7). Of course, TERC complied with this request (*id.*), which request demonstrates two things: first, that COMB was not merely obstreperous in its refusal to provide information to TERC but also aggressive in its efforts to create a basis in law or fact to justify the four non-compliant expenditures and, second, that COMB was unable to do so.

opinion does not interpret or mention the parties' Stipulation of Facts.”). In reality, the Majority saw through the very selective-citation argument advanced in the Petition—demonstrating conclusively that no point was overlooked or misapprehended—and recognized that COMB's attempt to render the Act, and indeed TERC, a nullity.

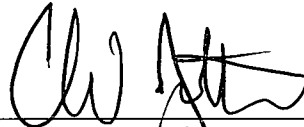
In fact, the Majority expressly limits its holding and any precedential or preclusive effect it may have going forward, stating unequivocally that “[w]e emphasize the narrow reach of our holding today to the funding of outside entities with 65% Funds.” The Majority clearly recognizes the essence of the issue before it: the COMB consciously and deliberately chose to circumvent the statutory procedures established in the Act for distributions of A-Tax revenues for tourism-related purposes by doing indirectly that which it could not do directly. *See* Opinion at 8 (“Based on the record before us, the truth is no more complicated than the March 14, 2008 memorandum”); *see also* Opinion at 9, Hearn, J. dissenting (“I also agree with the majority's implied holding that a municipality may not do indirectly what it cannot do directly.”) (citing *City of Rock Hill v. Pub. Serv. Comm'n of S.C.*, 308 S.C. 175, 178, 417 S.E.2d 562, 564 (1992)).¹¹

¹¹ The Petition's citation to the Revenue Procedures Act (RPA), *see* Petition at 6, ¶8 (citing to S.C. Code Ann. § 12-60-3320), and its encouragement to parties in tax revenue cases to stipulate to facts is irrelevant and inapplicable to this case. While accommodation “taxes” are at issue here, the procedures for disputing a determination of TERC that an expenditure of A-Tax revenues is clearly governed by the Act, S.C. Code Ann. § 6-4-35(B)(1)(a), not the RPA. *See also* S.C. Code Ann. § 12-60-20 (explicating legislative intent of the RPA to provide a procedure for determining disputes with the Department of Revenue or concerning property taxes). Moreover, this case involves the distribution of state tax revenues to a municipality, not the collection of state taxes. *Cf. Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995) (holding constitutional requirements for uniformity in property tax assessments to be inapplicable to distribution of tax revenues by way of tax credits). Irrespective, the Majority did not

CONCLUSION

The Petition fails to satisfy COMB's burden of identifying issues or arguments that this Court overlooked or misapprehended. Instead, the Petition mischaracterizes the Stipulations of Fact between the parties in order to distort the holdings of the Majority Opinion. This provides no basis for relief to COMB. Further, the Petition alternatively requests a remand to the ALC in order to have a second attempt to prove its case, but cites nothing to support the proposition that the Majority's contrary decision was in error as a matter of law or fact. Accordingly, the COMB has failed to identify a point that was overlooked or misapprehended, and TERC respectfully contends that the Court should deny any of the relief sought in the Petition.

Respectfully submitted,



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disregard or “go beyond” the parties’ stipulations of fact, see Petition at 7, ¶9, and the COMB’s assumption—which the Petition now blames for the deficiency of the COMB’s proffer of evidence—is a conflation between what was argued by counsel and what was stipulated by the parties. *But see Ex parte Morris*, 367 S.C. at 65, 624 S.E.2d at 653-54 (“It is well established that counsel’s statements regarding the facts of a case and counsel’s arguments are not admissible evidence.”).

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PROOF OF SERVICE

This is to certify that I, a paralegal of the law offices of Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the TERC's **Return to the Petition for Rehearing** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Michael W. Battle
Battle, Vaught, PA
Post Office Box 530
Conway, South Carolina 29528


Breanna M. Karns

This 24th day of February, 2014.