

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

City of Myrtle Beach, Respondent,

v.

Tourism Expenditure Review Committee, Appellant.

FINAL BRIEF OF APPELLANT

John M.S. Hoefler
Chad N. Johnston
Willoughby & Hoefler, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
803-252-3300

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 2

STATEMENT OF FACTS 4

 I. Statutory Framework 4

 II. Factual Background..... 5

SUMMARY OF ARGUMENT 10

STANDARD OF REVIEW 11

ARGUMENT 13

 I. The Administrative Law Court erred in holding that all accommodation tax revenues allocated to a county or municipality’s general fund are exempt from the requirements of section 6-4-10 of the South Carolina Code (2004)..... 13

 a. A plain reading of the section 6-4-10 does not support the Administrative Law Court’s holding that all accommodation tax revenues are exempt from the chapter’s requirements once they are placed into a county or municipality’s general fund 13

 b. The Administrative Law Court erred in allowing the City of Myrtle Beach to do indirectly that which it cannot do directly 17

 c. South Carolina Department of Revenue Ruling #98-22 does not support the Administrative Law Court’s statutory exemption holding 20

 II. The Administrative Law Court erroneously relied upon the Home Rule Act as an alternative sustaining ground when, in actuality, the City of Myrtle Beach’s construction of sections 6-4-5 *et seq.* of the South Carolina Code (2004 & Supp. 2010), followed by the Administrative Law Court, violates a constitutional tenet of Home Rule 23

 III. The Administrative Law Court erred in directing the State Treasurer, who is not a party to the case in any form or fashion, to return the withheld accommodation tax funds to the City of Myrtle Beach in its next accommodations tax disbursement 26

CONCLUSION..... 27

TABLE OF AUTHORITIES

Cases

<u>Antley v. Nobel Insur. Co.</u> , 350 S.C. 621, 625, 567 S.E.2d 872, 874 (Ct. App. 2002)	12
<u>Buist v. Huggins</u> , 367 S.C. 268, 625 S.E.2d 636 (2006)	12
<u>City of Rock Hill v. Pub. Serv. Comm’n of S. Carolina</u> , 308 S.C. 175, 417 S.E.2d 562 (1992)	18
<u>Cook v. Douglas</u> , 243 S.C. 201, 133 S.E.2d 209 (1963)	18
<u>Coward Hund Constr. Co. v. Ball Corp.</u> , 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999)	18
<u>Cowden Enters., Inc. v. East Coast Millwork Distribs.</u> , 363 S.C. 540, 611 S.E.2d 259 (Ct. App. 2005)	12
<u>Dial v. Gary</u> , 14 S.C. 573, 574 (1881)	18
<u>Evins v. Richland County Historic Pres. Comm’n</u> , 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000)	17
<u>Gordon v. Phillips Utilities, Inc.</u> , 362 S.C. 403, 608 S.E.2d 425 (2005)	15
<u>Griffith v. Griffith</u> , 332 S.C. 630, 506 S.E.2d 526 (Ct. App. 1998)	12
<u>Hodges v. Rainey</u> , 341 S.C. 79, 533 S.E.2d 578 (2000)	17
<u>Hospitality Ass’n of S. Carolina, Inc. v. County of Charleston</u> , 320 S.C. 219, 464 S.E.2d 113 (1995)	24-25
<u>In re Decker</u> , 322 S.C. 215, 471 S.E.2d 462 (1995)	23
<u>In re Vincent J.</u> , 333 S.C. 233, 233, 509 S.E.2d 261, 262 (1998)	24
<u>I’On v. Town of Mt. Pleasant</u> , 338 S.C. 406, 422 526 S.E.2d 716, 724 (2000)	13
<u>Liberty Mut. Ins. Co. v. S. Carolina Second Injury Fund</u> , 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005)	21-22
<u>Lurey v. City of Laurens</u> , 265 S.C. 217, 217 S.E.2d 226 (1975)	18
<u>Morgan v. S.C. Budget & Control Bd.</u> , 377 S.C. 313, 659 S.E.2d 263 (Ct. App. 2008)	12
<u>Olson v. S.C. Dep’t of Health & Envtl. Control</u> , 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008)	11
<u>Paschal v. State Election Comm’n</u> , 317 S.C. 434, 454 S.E.2d 890 (1995)	15, 24
<u>Quality Towing, Inc. v. City of Myrtle Beach</u> , 340 S.C. 29, 530 S.E.2d 369 (2000)	24
<u>S.C. Dep’t of Corrections v. Mitchell</u> , 377 S.C. 256, 659 S.E.2d 233 (Ct. App. 2008)	12

<u>S.C. State Ports Auth. v. Jasper County</u> , 368 S.C. 388, 629 S.E.2d 624 (2006)	14
<u>Sheppard v. City of Orangeburg</u> , 314 S.C. 240, 442 S.E.2d 601 (1994)	24
<u>Sierra Club v. S.C. Dept. of Health & Envtl. Control</u> , 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010)	20
<u>State ex rel. McLeod v. Montgomery</u> , 244 S.C. 308, 136 S.E.2d 778 (1964)	15
<u>State v. Gordon</u> , 356 S.C. 143, 588 S.E.2d 105 (2003)	14, 22
<u>State v. Nelson</u> , 192 S.C. 422, 7 S.E.2d 72 (1940)	18
<u>State v. Sweat</u> , 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), <i>aff'd</i> , 386 S.C. 339, 688 S.E.2d 569 (2010)	14
<u>Stringer v. State Farm Mut. Auto. Ins. Co.</u> , 386 S.C. 188, 687 S.E.2d 58 (Ct. App. 2009), reh'g denied (Jan. 20, 2010), cert. denied (May 6, 2011)	24
<u>Town of Hilton Head Island v. Coalition of Expressway Opponents</u> , 307 S.C. 449, 415 S.E.2d 801 (1992)	25
<u>Town of Summerville v. City of North Charleston</u> , 378 S.C. 107, 662 S.E.2d 40 (2008) ...	12
<u>Unisun Ins. Co. v. Schmidt</u> , 339 S.C. 362, 529 S.E.2d 280 (2000)	23
<u>Whitner v. State</u> , 328 S.C. 1, 492 S.E.2d 777 (1997)	22

Statutes

S.C. Code Ann. §1-23-570 (xxxx).....	2
S.C. Code Ann. §1-23-610(B) (xxxx).....	11
S.C. Code Ann. §§ 6-4-5 <i>et seq.</i> (2004 & Supp. 2010)	passim
S.C. Code Ann. § 6-4-10 (2004)	passim
S.C. Code Ann. § 6-4-25 (2004)	passim
S.C. Code Ann. § 6-4-35 (2004)	passim
S.C. Code Ann. § 12-36-2630 (Supp. 2010)	4, 24
2001 Act No. 74, § 3.A of the General Assembly	21

Other Authorities

Black’s Law Dictionary 602 (7th ed. 1999)16

Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992) 17

S.C. Constitution, art. VIII, § 1423-25

South Carolina Department of Revenue Ruling #98-22passim

South Carolina Department of Revenue Ruling #05-221

STATEMENT OF ISSUES ON APPEAL

1. Did the Administrative Law Court err in bypassing the plain meaning of section 6-4-10 of the South Carolina Code (2004) by holding that all accommodation tax revenues allocated to a county or municipality's general fund are exempt from requirements of that section?
2. Did the Administrative Law Court err in finding the City of Myrtle Beach may do indirectly that which it cannot do directly?
3. Did the Administrative Law Court err in holding that South Carolina Department of Revenue Ruling #98-22 supports its finding that accommodation tax funds allocated to a county or municipality's general fund are exempt from the requirements of section 6-4-10 of the South Carolina Code (2004)?
4. Is the Administrative Law Court's holding contrary to S.C. Const. art. VIII, §14?
5. Did the Administrative Law Court erroneously direct the South Carolina State Treasurer, who was neither a party to the contested case hearing below nor this current appeal, to return the withheld funds to the City of Myrtle Beach in its next accommodation tax revenue disbursement?

STATEMENT OF THE CASE

This case was commenced by the May 12, 2010, request of the City of Myrtle Beach (“COMB”) for a hearing before the Administrative Law Court (“ALC”) pursuant to Rule 33 of the Rules of Procedure for the Administrative Law Court (“RPALC”).¹ At issue was the May 6, 2010, determination of the Tourism Expenditure Review Committee (“TERC”) that five separate disbursements of state accommodations tax (“A-Tax”) revenues in fiscal year 2008-2009 by the COMB, totaling \$312,545, were not reviewed by the local advisory committee pursuant to the requirements of section 6-4-25 of the South Carolina Code (2004). Based upon this determination, the TERC certified to the State Treasurer, pursuant to section 6-4-35(B)(1)(a) of the South Carolina Code (2004), that the disbursements were non-compliant and that \$312,545² worth of future distributions of State A-Tax revenues should be withheld from the COMB.

In accordance with section 1-23-570 of the South Carolina Code (Supp. 2010), the matter was assigned to the Honorable Carolyn C. Matthews, Administrative Law Judge, as a contested case by notice dated June 1, 2010. **(R.pp. 199)**. Pursuant to Rule 12, RPALC, TERC timely

¹ Prior to submitting its fiscal year 2008-2009 A-Tax expenditure forms to TERC, and thus prior to TERC’s knowledge or review of the COMB’s state accommodations tax disbursements for that year, the COMB first filed a separate action with the ALC, Docket No. 09-ALJ-30-0435-IJ, seeking a “petition for a declaratory judgment” as to the meaning of section 6-4-10(4)(b), as well as a temporary and permanent injunction preventing TERC from certifying the COMB’s entire fiscal year 2008-2009 A-Tax disbursement as non-compliant. **(R.pp. 107-135)**. TERC objected to the COMB’s filing in the ALC, arguing, *inter alia*, that the ALC does not have jurisdiction to issue a declaratory judgment. **(R.pp. 137-189)**. The ALC ultimately determined that it would not consider COMB’s declaratory judgment filing in that Court. **(R.pp. 104-106)**. However, TERC agreed with the premise of the COMB’s declaratory judgment filing – i.e., that the best course of determining the meaning of section 6-4-10(4)(b) would be through a declaratory judgment action; therefore, TERC filed an action for a declaratory judgment in the circuit court seeking a declaration as to the meaning of section 6-4-10(4)(b). **(R.pp. 528—539)**. The circuit court denied TERC’s requested declaration and issued its order denying TERC’s Rule 59(e), SCRCP motion on August 31, 2011. It is likely that the result in the circuit court will be appealed to this Court; therefore, there is a possibility that the two actions could be consolidated on appeal.

² TERC thereafter determined that one of the five expenditures withheld, in the amount of \$10,000, had been reviewed by the local advisory committee, and informed the State Treasurer to credit that amount back to COMB. See Stipulation No. 16. **(R.pp. 8, 404)**. Thus, the amount at issue before the ALC and this Court on appeal is \$302,545.

filed with the ALC a notice of the COMB's request for a hearing along with a transmittal form and the requisite documentation on June 3, 2010. **(R.p. 200-205)**.

The matter was brought on for hearing before the ALC on December 2, 2010,³ with a witness from the COMB and a witness from TERC each testifying. The parties also entered into the record joint Stipulations and stipulated exhibits pursuant to Rule 25(C), RPALC. **(R.pp. 4-10, 15-103, 397-495)**. Additional exhibits filed by COMB with the ALC pursuant to Rule 27, RPALC, were entered into the record and the ALC took judicial notice of certain other exhibits.⁴ Thereafter, the parties submitted proposed orders for consideration by the ALC. On April 18, 2011, the ALC issued its order ("Order") in which it held that the A-Tax statute⁵ did not apply to disbursements made out of the COMB's general fund, TERC's certification of \$302,545 to the State Treasurer as non-compliant was therefore in error, and this amount should be released to the COMB by the State Treasurer in a future distribution of A-Tax revenues. **(R.pp. 3-103)**.

TERC timely filed a motion for reconsideration of the ALC's Order pursuant to Rule 29(D), RPALC, on April 28, 2011. **(R.pp. 237-251)**. No order, either granting or denying TERC's motion for reconsideration, was issued by the ALC; therefore, pursuant to Rule 29(D)(2)-(4), RPALC, and Rule 203 of the South Carolina Appellate Court Rules, TERC filed and served its timely notice of appeal on June 20, 2011.

³ Prior to the hearing, the parties held a conference call with the Judge Matthews to discuss issues related to the connection between the pending contested case and the circuit court declaratory judgment action. The parties agreed, and the ALC ultimately concurred, that the limited issues of the efficacy of the four (4) disbursements deemed by TERC to be non-compliant could be determined independent of the more global issue pending before the circuit court in the declaratory judgment action, which involves whether or not a county or municipality may place the entirety of the A-Tax funds available to it in a given year into its general fund. **(R.p. 270, lines 8-19, pp. 277-278, 287-291)**.

⁴ TERC's quarterly newsletter, "The A-Tax Update", for the first and third quarters of 2006 <http://www.atax.sc.gov/newsletter.htm>; COMB's original filing and exhibits in this action, titled a "Petition for Declaratory Judgment" **(R.pp. 107-135)**; the record on appeal of Case No. 2005-CP-40-06505, involving the same parties, which is currently on appeal with this Court; and South Carolina Department of Revenue Ruling #98-22, **(R.pp. 541-555)**.

⁵ Sections 6-4-5 *et seq.* of the South Carolina Code (2004 & Supp. 2010).

STATEMENT OF THE FACTS

I. Statutory Framework

Under section 6-4-35 of the South Carolina Code (Supp. 2009), TERC oversees tourism-related expenditures of A-Tax revenues to ensure compliance with sections 6-4-5 *et seq.* A-Tax revenues are generated in South Carolina by the additional two percent (2%) sales tax applied to lodging in the State under section 12-36-2630 of the South Carolina Code (Supp. 2010). Although TERC ultimately determines whether expenditures are in compliance with the statute, the initial review of tourism-related expenditures from the A-Tax revenues begins on the local level. All municipalities and counties which are: (1) located in county areas where more than fifty thousand dollars (\$50,000) in A-Tax revenues are collected annually; and (2) which annually receive in excess of fifty thousand dollars (\$50,000) in A-Tax revenue distributions, are required to appoint a local advisory committee ("Committee"). See § 6-4-25. The Committee consists of seven members, the majority of whom must be appointed from the hospitality industry, including two representatives of the lodging industry. Id. Under section 6-4-25, the Committee's function is to review applications for disbursements of the A-Tax revenues received by the city or county and make recommendations regarding such applications to the city's or county's governing body. After the governing body of these cities and counties considers the recommendations of the Committee, it makes a decision as to whether to grant an application. Only then are funds to be disbursed to the successful applicants.

Under sections 6-4-5 *et seq.*, the first twenty-five thousand dollars (\$25,000) of A-Tax Funds allocated to a county or municipality is taken off the top and allocated to the general fund of the receiver. See § 6-4-10(1). Thereafter, an additional five percent (5%) of the A-Tax Fund allocation is also placed in the general fund. See § 6-4-10(2). Thirty percent (30%) of the

remaining balance is then allocated to a “special fund” under section 6-4-10(3) and used for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity. Any remaining A-Tax Funds (sixty-five percent (65%) of the allocation) are then allocated to a separate, special fund (“65% Fund”) that must be used for tourism-related expenditures. § 6-4-10(4).

Counties or municipalities meeting the criteria above are also required to file a report with TERC, no later than October 1 of each year. § 6-4-25(D)(3). These reports detail how A-Tax Funds received by a city or county have been spent, whether or not the expenditures were recommended for approval by the Committee, and a list of the members of the Committee. TERC, in turn, reviews these reports to determine if the disbursements comply with the statute as contemplated by section 6-4-35(B)(1)(a). If, after that review is conducted, TERC finds an expenditure to be questionable, the affected county or municipality is notified of the question in writing and offered an opportunity to submit any additional information which it desires TERC to consider in making a determination of whether a questioned expenditure complies with the requirements of the statute. Id. After considering any such additional information, the Committee makes a final determination of compliance, or non-compliance, which is also communicated to the affected city or county. In the event that TERC determines that an expenditure is non-compliant, it certifies that determination to the State Treasurer who, in turn, withholds the amount of the non-compliant expenditure from subsequent distributions of A-Tax revenues to that city or county. Id.

II. Factual Background

The history of this and other pending actions between these parties emanates from several years of divergent and opposing opinions as to the meaning and application of the State’s A-Tax

statute. The facts leading to TERC's certification of five (5) of the COMB's fiscal year 2008-2009 disbursements as non-compliant actually begins with disbursements made by the COMB in fiscal year 2007-2008; therefore, in order to paint a clearer picture as to the parties' opposing viewpoints, the factual recitation will begin with disbursements and correspondence between the parties prior to the year in which the disbursements in question were made.

2007-2008 COMB EXPENDITURES

After reviewing the report submitted by the COMB pursuant to section 6-4-25(D)(3), which detailed the expenditure of A-Tax revenues for fiscal year 2007-2008, TERC notified the COMB, by January 27, 2009 letter, that it questioned the expenditure of substantially all of the A-Tax Funds available to it on operating expenses for police, fire and parks personnel, and stated that it was informed and believed that "a variety of expenditures for 'tourism related' projects were funded out of the City's general fund," in contravention of section 6-4-5 et seq. **(R.pp. 496-497)**. The COMB responded, by February 9, 2009 letter, wherein it relied principally on South Carolina Department of Revenue Ruling #98-22 ("Revenue Ruling #98-22"), asserting that the COMB should be able to use the available A-Tax revenues for qualifying municipal operating expenses and that TERC lacked oversight jurisdiction of "tourism-related" expenditures from its general fund. **(R.pp. 498-500)**.

TERC, in turn, responded in an April 22, 2009 letter, questioning whether COMB's grant of 100% of the A-Tax revenues expended to the COMB's general fund, when combined with the City's own grant process that funds "tourism-related" activities from the general fund, was appropriate. **(R.pp. 501-504)**. TERC maintained this was an extra-statutory process of funding tourism-related activities, which circumvented the statutorily prescribed oversight of the local advisory committee and TERC. Id. TERC requested additional information regarding the

tourism-related projects funded by the COMB out of its general fund in fiscal year 2007-2008; however, it received no response. Id. By this series of correspondence, the COMB had notice that TERC was questioning its practices with respect to “tourism-related” grants from the COMB’s general fund.⁶

2008-2009 EXPENDITURES

On September 30, 2009, the COMB submitted its annual report, pursuant to section 6-4-25(D)(3), detailing its expenditures of A-Tax revenues in fiscal year 2008-2009. Stipulation Exhibit 8, (R.pp. 84-94, 476-486, 505-515). The report, which is at the heart of the instant case, detailed that the Myrtle Beach City Council had granted all of the available A-Tax revenues for fiscal year 2008-2009, approximately \$4.6 Million, to the COMB’s general fund for police, fire and parks personnel expenses, and had made no grants to outside organizations. Notably, as further detailed in this report, the City Council’s grant was approximately \$700,000 more than the COMB requested for support of these personnel expenses. Id. The COMB had requested \$3,977,794 in A-Tax revenues in fiscal year 2008-2009, which represented 84.97% of the \$4,681,464 in available A-Tax revenues. Id. The Committee recommended that the COMB receive \$3,065,294 in A-Tax revenues in fiscal year 2008-2009, which represented 65.48% of the available A-Tax revenues. Id. The COMB City Council, charged with the duty of disbursing available A-Tax revenues in a given year, voted to disburse \$4,664,951 to the COMB general fund, which represented 99.65% of the available A-Tax revenues. Id. By January 4, 2010 letter, TERC notified the COMB that it questioned whether or not the City Council’s grant of substantially all of the A-Tax revenues expended in fiscal year 2008-2009 to the COMB general fund complied with section 6-4-10(4)(b) and whether, by disbursing this amount to the COMB

⁶ In fact, this notice of TERC’s position likely prompted, even prior to TERC’s receipt of the COMB’s yearly report, the COMB’s filing of its initial declaratory judgment action before the ALC, which was consolidated with this action. (R.pp. 104-135).

general fund and subsequently approving grants for tourism-related expenditures from the general fund, the COMB was employing a procedure inconsistent with section 6-4-25(A-C). **(R.p. 516)**. TERC therefore requested further information from the COMB regarding its procedures. See Stipulation No. 7, **(R.pp. 6, 402)**. The COMB responded by January 7, 2010 letter, asserting that it could use A-Tax revenues in the manner that it did, based on its comparison of operating expenses to other counties and municipalities with similar permanent populations. Stipulation No. 8, **(R.pp. 6, 402, 517-519)**. COMB also stated in this letter that it properly considered the recommendations of the local advisory committee for applications of A-Tax revenues when it “subsequently considered the allocation of grant money from its General Fund.” Id. This latter statement caused TERC to inform the COMB in a January 11, 2010 letter that it intended to further review the COMB report. **(R.pp. 520-521)**. In a follow-up February 11, 2010 letter, TERC specifically requested information from COMB regarding the amount of A-Tax revenues used to fund grant applications out of COMB’s general fund. Stipulation No. 10, **(R.pp. 7, 403, 522)**. By letter dated February 10, 2010 [sic], the COMB responded that the City’s use of monies in its general fund are not considered to be expenditures of A-Tax revenues, and that those expenditures, tourism-related or not, are outside the scope of TERC’s statutory authority. **(R.p. 523)**. The COMB therefore refused to provide the information requested by TERC. Id.

Thereafter, TERC filed a Freedom of Information Act (FOIA) request with the COMB, seeking any and all documentation of “tourism-related” grants out of the COMB’s general fund, communications pertinent thereto, as well as any grant applications submitted for funds in fiscal year 2008-2009 and the accompanying recommendation of the Committee. See Stipulation No. 14, **(R.pp. 8, 404, 524)**. The results of the FOIA request confirmed TERC’s suspicions that

COMB was granting A-Tax revenues to its general fund, and then subsequently “re-granting”⁷ some of those funds to outside entities including entities which had not applied for grants of A-Tax revenues and whose applications had not been reviewed by the local advisory committee.

Specifically, letters and emails obtained by TERC in the FOIA request reveal that the COMB’s City Council consciously and specifically decided to “sweep” available A-Tax Funds into its general fund, and then utilize those funds, in part, to fund outside agency requests for tourism-related expenditures. See Stipulation Exhibits No. 1-10, **(R.pp. 15-103, 407-495)**. A February 25, 2008 electronic mail message within the COMB Office of Budget & Evaluation reveals the true nature of the COMB’s actions: “[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. 82-83, 474-475)**. Documentation obtained in COMB’s FOIA response showed that the COMB received, and ultimately funded out of COMB’s general fund, grant applications from four (4)⁸ outside entities comprising the \$302,545 that is at issue in this case. See Stipulations 17-24, 26, **(R.pp. 8-9, 404-405)**; Stipulated Exhibits 1-4, **(R.pp. 15-78,**

⁷ “Re-granting” refers to the situation where an applicant submits an application for disbursement of A-Tax revenues for a tourism-related expenditure, is awarded these funds by the governing body of a city or county following a review and recommendation by the Committee in that city or county, and then subsequent to receiving those funds, the entity awards a portion of those funds to a separate outside entity. TERC provided notice of its “re-granting” position in its official newsletter, “The A-Tax Update”, which was mailed to all counties and municipalities receiving A-Tax Funds and maintaining a local advisory committee, and was also posted on TERC’s website, in the first and third quarters of 2006. See <http://www.atax.sc.gov/newsletter.htm>.

⁸ As stated above, TERC determined that one of the five expenditures withheld, in the amount of \$10,000, had been reviewed by the Committee; therefore, TERC requested the State Treasurer to credit that amount to the COMB, leaving \$302,545 in controversy between the parties. See Stipulation No. 16. **(R.pp. 8, 404)**. The four outside entities comprising the \$302,545 to whom the COMB granted funds are: (1) the Children’s Museum of South Carolina in the amount of \$20,000; (2) the Coast Rapid Transit Authority in the amount of \$252,545; (3) the Coastal Carolina University for Tourism in the amount of \$15,000; and (4) the South Carolina Hall of Fame in the amount of \$15,000. See Stipulations 17-24; Stipulation Exhibits 1-4. **(R.pp. 8-9, 15-78, 404-405, 407-470)**.

407-470). Each of the four grant applications listed the category of the outside entity's request, on the form provided by the COMB, as being tourism-related. Id.⁹

Based on the information produced by the COMB in its FOIA response, TERC determined that the four (4) grants totaling \$302,545 were for tourism-related activities. However, none of the four applications in question were submitted or reviewed by the Committee, as required by section 6-4-25, and neither the applications nor evidence of the COMB's subsequent grants to these organizations were reported to TERC in the COMB's fiscal year 2008-2009 report pursuant to section 6-4-25. See Stipulation 25, (R.pp. 9, 405). Consequently, by its May 6, 2010 letter, TERC notified the COMB of its determination that COMB had made re-grants of A-Tax funds in the amount of \$312,545 which had not complied with the statutory mandate that those applications be reviewed by the local advisory committee. (R.pp. 525-527). Therefore, TERC subsequently certified to the State Treasurer to withhold those funds.

SUMMARY OF ARGUMENT

The ALC erred, as a matter of law, in finding that a municipality is exempt from the local advisory committee review and TERC oversight of tourism-related expenditures of State A-Tax revenues, which are clearly delineated in the A-Tax statute, by the expedient of first disbursing the State A-Tax revenues that it receives to its general fund for putative additional municipal services and then subsequently funding tourism-related expenditures from its general fund. The ALC's holding is contrary to the plain language of the statute and violates the General Assembly's clear legislative intent. In so holding, the ALC sanctioned the COMB's practice of

⁹ In fact, three (3) of the four (4) applications indicated categories or areas that are expressly listed as tourism-related under section 6-4-10(4)(b): (1) Children's Museum of South Carolina, "advertising and promotion of tourism" and "promotion of the arts and cultural events"; (2) Coast Rapid Transit Authority, "tourist shuttle transportation"; (3) South Carolina Hall of Fame, "construction, maintenance, and operation of facilities for civic and cultural activities." See Stipulated Exhibits 1-2, 4. (R.pp. 15-44, 61-78, 407-436, 453-470).

doing indirectly that which it cannot do directly. Furthermore, the ALC's Order violates a basic tenet of the Home Rule provided for in the Constitution, in that it endorses the COMB's circumvention and frustration of the purpose of the legislatively-created body charged with the oversight of our State's A-Tax revenues. Finally, the ALC erred in instructing the State Treasurer, a non-party in the underlying case, to take specific action regarding the withheld future distributions of A-Tax revenues to COMB, such a directive being clearly erroneous in light of the plain language of the statute.

STANDARD OF REVIEW

The Administrative Procedures Act explicates this Court's standard of review for cases decided by the ALC and is set forth in Section 1-23-610(B) of the South Carolina Code (Supp. 2010), which provides:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Therefore, a decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008) ("[T]his court can reverse

the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion.”). Although the factual findings below are presumed correct and the Court may not substitute its judgment as to the weight of the evidence on questions of fact, see Morgan v. S.C. Budget & Control Bd., 377 S.C. 313, 659 S.E.2d 263 (Ct. App. 2008), the Court is free to decide an issue of law without deference to the ALC. Cf. S.C. Department of Corrections v. Mitchell, 377 S.C. 256, 659 S.E.2d 233 (Ct. App. 2008). This also is a case involving stipulated facts, which are binding upon both parties through this appeal and which “the court [may] not go beyond ... to determine the facts upon which the case is to be decided.” Griffith v. Griffith, 332 S.C. 630, 644, 506 S.E.2d 526, 534 (Ct. App. 1998) (internal quotation marks omitted). Therefore, as to the stipulated facts, review by this Court is limited to determining whether the ALC properly applied the law to them. Antley v. Nobel Insur. Co., 350 S.C. 621, 625, 567 S.E.2d 872, 874 (Ct. App. 2002). Moreover, the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). However, in addressing an issue of statutory interpretation, this Court may review the law *de novo*. See Town of Summerville v. City of North Charleston, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008); Cowden Enters., Inc. v. East Coast Millwork Distribs., 363 S.C. 540, 543, 611 S.E.2d 259, 261 (Ct. App. 2005).

ARGUMENT

- I. **The administrative law court erred in holding that all accommodation tax revenues allocated to a county or municipality's general fund are exempt from the requirements of section 6-4-10(4)(b).**
 - a. **A plain reading of section 6-4-10 does not support the ALC's exemption holding.**

The ALC erred as a matter of law in holding that a plain reading of section 6-4-10 exempts all A-Tax revenues disbursed to a municipality's general fund from the guidelines and oversight established by the General Assembly. To the contrary, TERC's position that the plain and unambiguous language of the statute supports its position that A-Tax funds are not exempted simply by the sole expedient that they are placed in a municipality's general fund, is supported by both the statutory language and the substantial evidence in the record.

There is no question but that section 6-4-10(1) provides for the first twenty-five thousand dollars (\$25,000) of available A-Tax revenues to be deposited into the recipient municipality's general fund and "is exempt from the from all other requirements of this chapter." § 6-4-10(1). Similarly, section 6-4-10(2)¹⁰ provides that the next five percent (5%) of the balance of A-Tax revenues must be allocated to the municipality's general fund and "is exempt from the from all other requirements of this chapter." § 6-4-10(2). This language is clear and unambiguous. Moreover, the COMB acknowledges that the \$25,000 and next five percent (5%) in A-Tax revenues disbursed to its general fund are separate and apart from the balance of the available A-Tax revenues, including the funds disbursed to the COMB's general fund from the 65% Fund, as

¹⁰ The COMB did not cite or rely upon section 6-4-10(2), in either its written or oral submissions to the ALC below, as substantiation for its position that A-Tax revenues disbursed to its general fund are exempt from the guidelines of the A-Tax statute. Correspondingly, the ALC did not rely on section 6-4-10(2) as substantiation for its exemption holding. Therefore, although TERC intends on discussing section 6-4-10(2) as proof of the exemption argument's inapplicability to the 65% Fund, it would respectfully submit to the Court that section 6-4-10(2), as substantiation for the ALC's decision, is not before this Court, based on the COMB's failure to either raise or obtain a ruling thereon below. See *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422 S.E.2d 716, 724 (2000) (stating an appellate court may affirm for any reason *appearing in the record*).

evidenced by the COMB's separation of these amounts in the report that it submitted to TERC pursuant to section 6-4-25(D)(3). Stipulation Exhibit 8, (R.pp. 84-94, 476-486, 505-515). However, this does not mean that TERC is without any authority to find an action of a county or municipality to be inappropriate with respect to these statutory provisions. For example, if a county or municipality decided to allocate more than \$25,000 or 5% of A-Tax revenues to its general fund in its initial allocation under sections 6-4-10(1) or (2), TERC would clearly have authority to find such an allocation to be non-compliant. Thus, it is only an allocation made in accordance with sections 6-4-10(1) and (2) that TERC may not question.

By contrast, the plain language of the statute does *not* provide that any other A-Tax revenues disbursed to a municipality's general fund are exempt. Consequently, the ALC's Order is not based on the plain language of the statute. Rather, the ALC erred in ending its analysis with the exemptions discussed in subsections (1) and (2) without giving full effect to the entire A-Tax statute. However, "[a] statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Therefore a court should not concentrate on isolated phrases within the statute. Id. Instead, a court must read the statute as a whole and in a manner consonant and in harmony with its purpose. State v. Sweat, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd*, 386 S.C. 339, 688 S.E.2d 569 (2010). To that end, courts must read the statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous," because "[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law" Id. 379 S.C. at 377-82, 665 S.E.2d at 651-654; see also State v. Gordon, 356 S.C. 143, 152, 588 S.E.2d 105, 110 (2003) ("[T]he court should not consider the particular clause being

construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law.”).

Using section 6-4-10(1) as an example, the exemption language contained in subsection (1) is located in a sentence that contains one subject, “the first twenty-five thousand dollars”, and two exclamatory predicate clauses, (a) “must be allocated to the general fund of the municipality or county”, and (b) “is exempt from all other requirements of this chapter.” Standard rules of sentence construction dictate that these two predicate clauses may only modify the subject of the sentence in which they are located. As a result, the predicate clause relied upon by the COMB and the ALC to substantiate its position that *all* funds allocated to the general fund are exempt from TERC oversight, may *only* modify the subject in the sentence in which it appears, which is “the first twenty-five thousand dollars.” Under the plain language of the statute, this clause may not be extrapolated, as argued below by the COMB, to support the contention that all A-Tax revenues placed in the general fund are exempt from the requirements of the Act – there is simply no support for this proposition in the Act. “If a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” Paschal v. State Election Comm’n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). “Furthermore, the legislature intends to accomplish something by its choice of words, and would not do a futile thing.” Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) (citing State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964)).

Moreover, contrary to the Order’s Conclusions of Law #4, #5, and #7, neither section 6-4-10, nor Revenue Ruling #98-22, discussed below, state that the COMB’s general fund is

exempt from the requirements of Title 6, Chapter 4. Instead, subsections (1) and (2) merely state that the first twenty-five thousand dollars (\$25,000) and the next five percent (5%) of available A-Tax revenues are allocated to the general fund and exempted from the further requirements of the chapter. Stated differently, it is the designation of those monies as coming out of the available A-Tax Funds *first* – i.e., off the top of all A-Tax revenues available to a municipality – and not the secondary fact that the statute directs those monies to a municipality’s general fund, that exempts those funds from the further requirements of the chapter. Consequently, the COMB should not be able to circumvent the requirements of sections 6-4-25 and 6-4-35, frustrate their purpose, and undercut the authority and sole function given to the local advisory committee and TERC by the General Assembly, simply by claiming an exemption that has no applicability to the 65% Fund and zero foundation in the statute.

Furthermore, even assuming that this result is not dictated by the plain language of sections 6-4-10(1), the canon of statutory construction “*expressio unius est exclusio alterius*” or “*inclusio unius est exclusio alterius*” requires a different result than that reached by the ALC in this regard. This canon means that “to express or include one thing implies the exclusion of another, or of the alternative.” Black’s Law Dictionary 602 (7th ed. 1999). As applicable here, only the funds specifically referenced in section 6-4-10(1)-(2) are expressly excluded from TERC oversight. Accordingly, the maxim of “*expressio unius est exclusio alterius*” suggests that the General Assembly intended, by only including an express exemption for the first \$25,000 under section 6-4-10(1), and the next five percent (5%) under section 6-4-10(2) of A-Tax revenues, that the remaining A-Tax Funds fall under the ambit of the local advisory committee’s review and TERC’s oversight. “The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded.

Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed.” Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992) (citations omitted); see also Hodges v. Rainey, 341 S.C. 79, 86-87, 533 S.E.2d 578, 582 (2000) (relying on and citing the above authority with approval); Evins v. Richland County Historic Pres. Comm’n, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) (restating the maxim that the expression of one thing is the exclusion of another).

Thus, even if the statute were ambiguous, the Order fails to give effect to the applicable rule of statutory construction which compels a different result than that reached below. Thus, the ALC erred as a matter of law in holding that section 6-4-10 exempts all disbursements of A-Tax revenues to a county or municipality’s general fund from the guidelines and oversight of TERC. The ALC’s decision is clearly not intended by the plain language of the statute, and allowing a municipality to avoid the statutorily prescribed local advisory committee review process and TERC oversight authority frustrates the clear intent of the statute. Consequently, the ALC should be reversed.

b. A municipality such as the City of Myrtle Beach may not do indirectly that which it cannot do directly.

TERC’s primary argument to the ALC below was that COMB’s deliberate decision to disburse all of the A-Tax revenues it expended in fiscal year 2008-2009 from the 65% Fund under section 6-4-10(4)(b) to COMB’s general fund, then contemporaneously re-grant funds to four outside entities for tourism-related expenditures without first having the applications reviewed by the local advisory committee, wholly violates the spirit – if not the letter – of Title 6, Chapter 4 and clearly frustrates its purpose. See TERC Prehearing Statement at 2, **(R.pp. 218-**

224); see also TERC Trial Brief, (R.pp. 230-236).¹¹ It is a well-established rule of law in this state that a municipality may not do indirectly that which it cannot do directly. See City of Rock Hill v. Pub. Serv. Comm'n of S. Carolina, 308 S.C. 175, 178-179, 417 S.E.2d 562, 564 (1992) (preventing a city from providing electricity to a parcel of land that was within an area assigned to an electric co-op by the Public Service Commission, by annexing all of the property around it, without the City having first annexed the actual parcel as required by existing case law); see also Lurey v. City of Laurens, 265 S.C. 217, 225, 217 S.E.2d 226, 229 (1975) (Ness, J., dissenting) (stating that the city was attempting to do indirectly what it could not do directly in its approach to zoning administration, which was impermissible and amounted to spot zoning where the city attempted to relieve certain property from more restrictive zoning regulations through an amendment); Cook v. Douglas, 243 S.C. 201, 204, 133 S.E.2d 209, 210 (1963) (preventing a defendant the ability indirectly to depose the witness/plaintiff of a second identical cause of action, where the Court held in a prior appeal that he could not do the same directly); State v. Nelson, 192 S.C. 422, 7 S.E.2d 72 (1940) (disallowing the solicitor's attempt to get into the record indirectly testimony previously given by the solicitor's own witness which was contrary to that given by the witness at trial under the guise of surprise, where the solicitor knew the witness intended to contradict herself prior to trial, and the solicitor could not get the previous testimony in the record directly in any other way); Dial v. Gary, 14 S.C. 573, 574 (1881) (preventing an administrator of an estate to do indirectly, namely to administer the estate in

¹¹ Despite the fact that this ground constituted a primary argument by TERC below, the ALC did not mention or rule on this contention in its Order. TERC raised the argument once more in its motion for reconsideration, but as stated above, no subsequent order, either denying or granting reconsideration, was forthcoming from the ALC. As a result, TERC's argument that the COMB may not do indirectly, that which it cannot do directly, is preserved for this Court's review. See Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (holding that once an issue is properly raised by a motion for reconsideration, it is preserved for appellate review).

South Carolina in order to allow a party to bring an action against the estate, where the administrator could not bring the same action directly).

A city or county may only grant A-Tax funds to outside entities for tourism-related purposes if those entities apply for funding, the local advisory committee reviews those applications, and make its recommendation thereon. Only when this required statutory process is observed are the application amounts, local advisory committee recommendations and county or municipal governing body actions reported to TERC. See § 6-4-25(A-C). Therefore, if a municipality like the COMB may simply “sweep” all of the available A-Tax funds into its general fund (see Stipulation Exhibits No. 5-7, **(R.pp. 79-83, 471-475)**), and then subsequently entertain and fund grant applications for tourism-related purposes from its general fund into which the A-Tax Funds were swept, (see Stipulation Exhibits No. 8-10, **(R.pp. 84-103, 476-495)**), then it frustrates the purpose of the statute, and undercuts the authority and purpose given to the local advisory committee and TERC by the General Assembly. There can be no doubt that the substantial evidence before this Court conclusively establishes that the COMB has done indirectly that which it cannot do directly, i.e. utilized A-Tax revenues from the 65% Fund created by section 6-4-10(4) for tourism-related expenditures by outside entities which have not been reviewed by the Committee and reported to TERC. Two facts in this record make this conclusion abundantly clear: first, the contemporaneous decisions of COMB’s governing body to “sweep” available A-Tax Funds into its general fund and make distributions for tourism-related expenditures by way of its internal grants award program; and second, the decision of COMB’s governing body to grant to COMB \$687,157 *more* for police, fire and parks personnel expenses than the COMB itself requested in fiscal year 2008-2009. TERC asserts that these facts demonstrated intent on the part of the COMB’s governing body to take steps to avoid the

procedure for disbursements of A-Tax revenues for tourism-related purposes.¹² This evidence was not refuted below by the COMB; therefore, the ALC's Order is not supported by reliable, probative, and substantial evidence on the whole record.

A county or municipality may only grant A-Tax Funds for tourism-related purposes if the entities apply for funding and their applications are reviewed and forwarded by the Committee, with its recommendation thereon, to the governing body. See § 6-4-25(A-C). By re-granting funds to outside entities for tourism-related expenditures from the general fund, after initially sweeping substantially the entire amount of available A-Tax Funds into the general fund, the COMB was doing indirectly, that which it could not do directly: granting A-Tax Funds for tourism-related expenditures without the review by the Committee or the annual reporting requirements to TERC. The COMB's actions circumvent the requirements of section 6-4-25 and, ultimately, section 6-4-35. The COMB's circumvention of these requirements is a primary argument advanced by TERC at every stage of this contested case hearing, yet the ALC's Order failed to address TERC's contention, which has been found by this Court to limit its ability to review a case on appeal. See Sierra Club v. S.C. Dept. of Health & Env'tl. Control, 387 S.C. 424, 439, 693 S.E.2d 13, 20 (Ct. App. 2010). TERC asserts that substantial evidence supports its contention that the COMB is doing indirectly, that which it cannot do directly.

c. South Carolina Department of Revenue Ruling #98-22 does not support the administrative law court's statutory exemption holding.

Not only is the ALC's Order not based on the plain meaning of the statute, as evidenced by its use of Revenue Ruling #98-22 as justification for its holding, but the ALC also erred in its interpretation of the ruling by reading a portion of Revenue Ruling #98-22 in isolation. **(R.pp.**

¹² TERC's contention in this regard is bolstered by COMB's refusal to provide TERC with the information requested in 2009 and 2010 regarding the re-granting of A-Tax revenues and TERC's subsequent need to rely upon a request under the Freedom of Information Act to ascertain the nature and amount of the tourism-related expenditures arising out of this re-granting of A-Tax revenues. See discussion at 11, 13, *supra*.

541-555). Simply put, substantial evidence does not support the ALC's holding that Revenue Ruling #98-22 stands for the proposition that the COMB's general fund is exempt from all requirements of the A-Tax statute. Initially, it is worth noting that Revenue Ruling #98-22 is a thirteen (13) year old, non-binding ruling of the South Carolina Department of Revenue.¹³ It is an advisory opinion that this Court is not required to follow. See Revenue Ruling #98-22, Scope, p.1 ("A Revenue Ruling is the Department of Revenue's official *advisory opinion* . . .) (emphasis added); see also Revenue Ruling #05-2, p. 2 ("A Revenue Ruling does not have the force or effect of law. It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion."). The ALC's misinterpretation of Revenue Ruling #98-22 is clearly erroneous when the ruling is read in its entirety, and the ALC erred in giving it the substantial weight that it did.

As stated above, the exemption described in sections 6-4-10(1) and (2) can only be reasonably interpreted to apply to the first twenty-five thousand dollars (\$25,000) and next five percent (5%) specifically addressed in those subsections. Similarly, the ALC relies on the first "Question and Answer" addressed in Revenue Ruling #98-22 and construes it in isolation, without giving benefit or weight to the explanations and designations preceding the question and answer segment in the ruling. **(R.p. 544)**. The context provided by the surrounding portions of the ruling clearly show that substantial evidence does not support the ALC's finding that all A-Tax revenues deposited in the COMB's general fund are exempt from the General Assembly's clear intent. Similar to statutes or regulations, this Court should read the first question and answer of Revenue Ruling #98-22 in the complete context in which it is provided. C.f. Liberty

¹³ Administration of state A-Tax Funds was formerly under the oversight of the South Carolina Department of Revenue; however, all oversight duties and accompanying interpretation of the governing statute was transferred to TERC by 2001 Act No. 74, § 3.A of the General Assembly.

Mut. Ins. Co. v. S. Carolina Second Injury Fund, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005) (“Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.”) (citing Whitner v. State, 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997)); see also Gordon, 356 S.C. at 152, 588 S.E.2d at 110 (“[T]he court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law.”).

Revenue Ruling #98-22, when read in its entirety, clearly supports the positions advanced by TERC. As explained in the “Law: Allocation of Accommodation Tax Funds” section, the first twenty-five thousand dollars (\$25,000) of A-Tax revenues is taken off the top and allocated to the county or municipality’s general fund. § 6-4-10(1). (R.p. 541-542). After an additional five percent (5%) of the remaining balance of A-Tax revenues is also allocated to the general fund, § 6-4-10(2), thirty percent (30%) of the remaining balance is allocated to a special fund, § 6-4-10(3), which Revenue Ruling #98-22 designates as the “Promotion Fund.” Id. Any remaining A-Tax revenues are then allocated to a special fund that must be used for tourism-related expenditures, § 6-4-10(4), which Revenue Ruling #98-22 designates as the “Tourism-related Fund.” Id. Revenue Ruling #98-22 does not in any way reflect or contemplate the situation before this Court, wherein the COMB decides to “sweep”¹⁴ the entirety of the “Tourism-related Fund” into its general account, and then re-grant those funds to outside entities for tourism-related expenditures.

Furthermore, based on a plain reading of Revenue Ruling #98-22, it was clearly only contemplated that A-Tax revenues would be allocated to the general fund under subsections (1) and (2), and therefore only exempted those specific allocations. In fact, because #98-22 has

¹⁴ This terminology originates from the COMB, as stipulated to prior to the hearing. See Stipulated Exhibit 7.

designated names – i.e. the “Promotion Fund” and “Tourism-related Fund” – for each of the allocations of A-Tax revenues except those made under subsection (1) and (2) to the general fund, the reference to the general fund in Question and Answer #1 can only be in reference to the amounts allocated under those limited sections. To hold otherwise, as the ALC did, leads to an absurd result and renders the express review authority of the Committee and oversight by TERC a nullity at the whim of a municipality (or county). A statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention should be rejected. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (“[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted)).

Accordingly, Revenue Ruling #98-22 does not support the outcome reached by the ALC, which erred in reading the ruling in isolation, thus ignoring the reliable, probative, and substantial evidence appearing in the entirety of Revenue Ruling #98-22.

II. The ALC erred in violating a constitutional tenet of Home Rule.

The ALC’s Order is contrary to the Home Rule provisions of the Constitution and therefore should be reversed. Not only does the Order contravene the constitutional limitations upon Home Rule, it also erroneously cites the Home Rule provisions of the Constitution as substantiation for its holdings. See Order, Home Rule discussion, (R.p. 11). Therein, the ALC stated: “The [A-Tax Fund] Act falls with Title 6 of the SC Code, which deals with local government provisions. Article VIII of the South Carolina Constitution mandates home rule for local governments and requires all laws concerning local government to be liberally construed in their favor.” Order at 9, #2, (R.p. 11). As discussed above, the provisions of section 6-4-5 *et seq.* are not ambiguous and require no construction. Thus, this constitutional provision lacks

application.¹⁵ Nevertheless, although the ALC states that its holding is based on the plain language of the statute, see Order at 12, (R.p. 14), it relies on extrinsic evidence beyond the statutory language as substantiation and therefore cannot be based on its plain meaning.

Article VIII, section 14 of our State Constitution provides in pertinent part: “In enacting provisions required or authorized by [the Home Rule Act], general law provisions applicable to the following matters shall not be set aside: . . . (6) the structure and the administration of any governmental . . . function, responsibility for which rests with the State government or which requires statewide uniformity.” The COMB’s own actions in this case have served to circumvent the purpose of a statewide, legislatively-created body charged with the oversight of expenditures of State A-Tax funds collected under section 12-36-2630 – the TERC. This amounts to a clear and documented contravention of Home Rule, and the ALC’s Order is therefore in violation of our State’s Constitution and should be reversed.

The Order also cites the Supreme Court’s decision in Quality Towing, Inc. v. City of Myrtle Beach, presumably for the proposition that local governments have a protected ability to address local problems with local ordinances. 340 S.C. 29, 530 S.E.2d 369 (2000); Order at 9, #2, (R.p. 11). However, at issue in Quality Towing was the efficacy of a local ordinance that was found not to be in conflict with a general state law. 320 S.C. at 37, 530 S.E.2d at 373. Here, the COMB’s actions simply ignore the general statutory provision that gives TERC statewide authority to review disbursements of state tax revenues. Cf. Hospitality Ass’n of S. Carolina,

¹⁵ In order to look outside of the statute, the Court must first find that the plain language of the statute is ambiguous. Stringer v. State Farm Mut. Auto. Ins. Co., 386 S.C. 188, 193, 687 S.E.2d 58, 60 (Ct. App. 2009), reh’g denied (Jan. 20, 2010), cert. denied (May 6, 2011) (discussing a trial court’s error, in the context of an insurance contract, in construing a contract without first finding an ambiguity existed). Furthermore, where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. In re Vincent J., 333 S.C. 233, 233, 509 S.E.2d 261, 262 (1998) (citing Paschal, 317 S.C. 434, 454 S.E.2d 890). Even in a situation where a Court is authorized to liberally construe a statute, it must reject a meaning that would lead to a result so plainly absurd that it could not have been intended by the General Assembly. See e.g. Sheppard v. City of Orangeburg, 314 S.C. 240, 244-45, 442 S.E.2d 601-04 (1994).

Inc. v. County of Charleston, 320 S.C. 219, 228-29, 464 S.E.2d 113, 119 (1995) (discussing the invalidity of local ordinances that change or circumvent any of the requirements of the State statutes); cf. Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1992) (holding an initiated ordinance defective under article VIII, section 14, because it attempted to limit the authority granted to the Department of Highways by State law). Additionally, where the General Assembly has seen fit to require statewide uniformity in an area, municipalities are bound to comply with that uniformity. Cf. Westvaco Corp. v. S.C. Dep't of Revenue, 321 S.C. 59, 62-63, 467 S.E.2d 739, 741 (1995) (distinguishing between the assessment and distribution of taxes where the Constitution articulated a standard of uniformity only for the assessment of taxes, which municipalities were bound to follow).

Clearly, the legislature has delegated to the TERC the function of reviewing statewide expenditures by local governments of the revenues generated by the state accommodations tax. See § 6-4-35(B)(1)(a) (“[TERC] shall serve as the oversight authority on all questionable tourism-related expenditures and to that end, all reports filed pursuant to Section 6-4-25(D)(3) must be forwarded to the committee for review to determine if they are in compliance with this chapter.”). The ALC’s construction of the Home Rule Act as permitting the COMB to avoid a statutorily mandated review – by the simple expedient of dedicating all A-Tax revenues to the COMB’s general fund for the putative purpose of defraying personnel expenses – only to turn around and make expenditures for tourism-related purposes using an extra-statutory grants program that does not include local committee and, thus, TERC review – cannot be accepted when considered in light of article VIII, section 14. The COMB’s actions set aside the function and responsibility of overseeing A-Tax Fund disbursements to tourism-related activities that was

clearly intended by the General Assembly to provide statewide uniformity to the use of these tax revenues. § 6-4-5 *et seq.*

The ALC's citation of the Home Rule Act as substantiation for its position is an error of law that mandates reversal. Furthermore, as argued to the ALC in TERC's motion for reconsideration, (**R.pp. 237-251**), substantial evidence supports that finding that the COMB's own actions violate the Home Rule Act, which is concomitantly a violation of a constitutional provision that warrants reversing the ALC under this Court's standard of review.

III. The administrative law court erroneously directed the South Carolina State Treasurer, who was neither a party to the contested case hearing below nor this current appeal, to return the withheld funds to the COMB in the next A-Tax disbursement?

In the Order's conclusion, the administrative law court directs the State Treasurer to release the withheld A-Tax Funds to the COMB. See Order at 12 ("TERC's notification to the State Treasurer's Office to withhold funds from the [COMB]'s [A-Tax] revenue allocation because of general fund disbursement procedures should be set aside and *the State Treasurer should release those funds to the [COMB] in the next [A-Tax] allocation of special revenues.*") (emphasis added), (**R.p. 14**). The State Treasurer is not a party to the instant appeal, nor was it ever part of the contested case hearing below; therefore, the State Treasurer was not subject to the ALC's jurisdiction and the inclusion of the above-directive in the Order was in error.

For the Court's edification, once TERC makes a determination with respect to an expenditure of A-Tax revenues and directs the State Treasurer to withhold an amount from a county or municipality, those funds are then disbursed, proportionately, to the other qualifying counties and municipalities. See § 6-4-35(B)(1)(c) ("Allocations withheld must be reallocated proportionately to all other recipients."). Consequently, contrary to the Order's supposition, there are no discrete (in this case \$302,545) A-Tax revenues in the State Treasurer's control

awaiting the outcome of this litigation. Instead, TERC, who as a party to this action is therefore bound by it, would be obligated to report to the State Treasurer an opinion by this Court regarding the compliance of the withheld funds, and the State Treasurer would then make the appropriate credits to COMB in its next A-Tax Fund disbursement.¹⁶ Accordingly, the Order's directive to the State Treasurer was error, the ALC did not have jurisdiction over such a directive to a non-party, and TERC asserts the ALC must therefore also be reversed with respect to this issue.

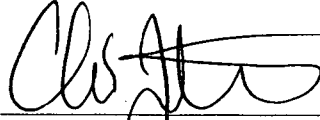
CONCLUSION

For the reasons set forth above, the administrative law court should be reversed. The ALC's decision is unsupported by the substantial evidence in the record and is wrought with errors of law and violations of constitutional and statutory provisions. The ALC's Order condones the COMB's actions in doing indirectly, that which it cannot do directly. Additionally, the Order erroneously misconstrues the statute in a way that defeats the legislative intent, and is in violation of Home Rule provisions of the Constitution. By contrast, TERC's position is based on the plain meaning of the statute and is supported by the reliable, probative, and substantial evidence on the whole record. Consequently, the ALC's order should be reversed.

[SIGNATURE PAGE TO FOLLOW]

¹⁶ As evidence that this constitutes the proper procedure, this scenario played out exactly in this case. Once TERC determined that one of the original five (5) questioned allocations, in the amount of \$10,000, had, in fact, been reviewed by the local advisory committee, it requested that the State Treasurer restore that amount to the COMB's next disbursement.

Respectfully submitted,



John M. S. Hoefer, Esquire

Chad N. Johnston, Esquire

WILLOUGHBY & HOEFER, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

(803) 252-3300

Attorneys for Tourism Expenditure
Review Committee

Columbia, South Carolina

This 7th day of December, 2011.