

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

SC Court of Appeals

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

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

INITIAL BRIEF OF APPELLANT

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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.). Pursuant to Rule 12, RPALC, TERC timely 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.).

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.). 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.). The ALC ultimately determined that it would not consider COMB’s declaratory judgment filing in that Court. (R.). 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). The circuit court denied TERC’s requested declaration and issued its order denying TERC’s Rule 59(e), SCRPC 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.). Thus, the amount at issue before the ALC and this Court on appeal is \$302,545.

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.). 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.).

TERC timely filed a motion for reconsideration of the ALC’s Order pursuant to Rule 29(D), RPALC, on April 28, 2011. (R.). 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.).

⁴ TERC’s quarterly newsletter, “The A-Tax Update”, for the first and third quarters of 2006 (R.); COMB’s original filing and exhibits in this action, titled a “Petition for Declaratory Judgment”, as well as the record on appeal of Case No. 2005-CP-40-06505, involving the same parties, which is currently on appeal with this Court (R.); and South Carolina Department of Revenue Ruling #98-22, (R.).

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.). 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.).

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.). 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.)**. 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 general fund and subsequently

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.)**.

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.). TERC therefore requested further information from the COMB regarding its procedures. See Stipulation No. 7, (R.). 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.). 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. 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.). 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.). Stipulation No. 19, (R.). The COMB therefore refused to provide the information requested by TERC. (R.).

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.). 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.). 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.). 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.); Stipulated

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. (R.).

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.). 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. (R.). See Stipulations 17-24; Stipulation Exhibits 1-4.

Exhibits 1-4, (R.). 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.). 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.). 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 doing indirectly that which it cannot do directly. Furthermore, the ALC's Order violates a basic

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." (R.). See Stipulated Exhibits 1-2, 4.

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.). 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.)**; see

also TERC Trial Brief, (R.).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 South Carolina 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).

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.)), 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.)), 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 & Envtl. 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. Simply

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*.

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. 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 Mut. Ins.

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.

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). 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.” 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.” 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 designated names – i.e. the “Promotion Fund” and “Tourism-related Fund” – for each of the

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

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. 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. 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, 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. 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

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).

authority to review disbursements of state tax revenues. Cf. Hospitality Ass'n of S. Carolina, 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.)**, 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). 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.

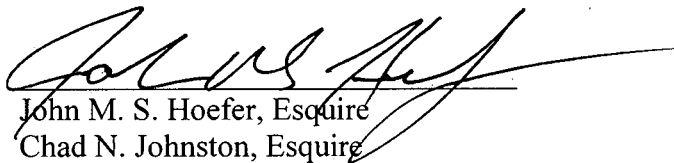
CONCLUSION

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,

A handwritten signature in black ink, appearing to read "John M. S. Hoefer", is written over a horizontal line.

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Review Committee

Columbia, South Carolina
This 7th day of September, 2011.

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,

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The City of Myrtle Beach (City) initiated the present matter with the Administrative Law Court (ALC) by appealing a Tourism Expenditure Review Committee's (TERC) decision that certain grants to outside entities of the City's general funds did not comply with the requirements of the Accommodations Tax Act (A-Tax act) because they were not reviewed by City's local advisory committee for use of the A-Tax special fund. As a result of its decision, TERC notified the State Treasurer, pursuant to S.C. Code Ann. § 6-4-35(B)(1)(a) (2004), that the grants were non-compliant and ultimately that \$302,545 worth of future distributions of A-Tax revenues should be withheld from the City. Thereafter, the State Treasurer complied by withholding that amount from the City's next A-Tax revenue allocation.

The City's appeal was heard by the Honorable Carolyn C. Mathews, Administrative Law Judge, as a contested case. On April 18, 2011, Judge Mathews issued a final order finding that the City's A-Tax special fund was not used to fund the four grants disallowed by TERC. The City's use of its general funds for the grants in question was proper. Judge Mathews further found TERC's statutory oversight authority was limited to the City's A-Tax special fund and TERC's authority under the A-Tax statutes did not extend to the City's general funds. TERC made a motion before Judge Mathews to reconsider and then duly filed the present appeal.

STATEMENT OF FACTS

The City is a duly incorporated municipality of the State of South Carolina. It has a high concentration of tourism activity as contemplated under section 6-4-10(4) of the

South Carolina Code (2004). [Stipulations of Fact #'s 1 & 2] At all times pertinent to this matter, and as required by section 6-4-25(A) of the South Carolina Code (2004), the City has had a seven member local advisory committee to consider and make recommendations to the Myrtle Beach City Council, based on applications for the expenditure of A-Tax special fund provided for under sections 12-36-920(A) and 12-36-2630(3) of the South Carolina Code (Supp. 2009) and created under the authority of section 6-4-10(4) for tourism related expenditures. [Stipulations of Fact # 3] All applications for grants from the A-Tax special fund are reviewed by a local advisory committee established pursuant the A-Tax act. [Stipulation of fact # 12] Applications for grants from general funds that don't involve the A-Tax special fund are not reviewed by the local advisory committee. [Tr. p 56]

The City Council of Myrtle Beach is vested with the ultimate decision making authority as to the final disbursement of the A-Tax special fund. [Stipulations of Fact # 4] During fiscal year 2008-2009, all grant applications to the A-Tax special fund were submitted to the local advisory committee for review. [Tr. p 63] The local advisory committee's recommendations to City Council, and City Council's final actions, with respect to those grant applications were reported to the Tourism Expenditure Review Committee (TERC) on September 30, 2009, as required by S.C. Code Ann. §6-4-25.

The City's 2008-2009 fiscal year report to TERC showed that: (a) there was \$4,681,464 available from the A-Tax special fund for fiscal year 2008-2009; (b) the staff of the City of Myrtle Beach requested that \$3,977,794, which was 84.97% of the available funds to be expended on "support of operating expenses for services provided above and beyond permanent population throughout the year, to include additional

Police, Fire and Parks personnel” according to Section 6-4-10 (4) (b); (c) the local advisory committee recommended that \$3,065,294, or 65.48% of the money available in the A-Tax special fund be granted to the City of Myrtle Beach to “support of operating expenses for services provided above and beyond permanent population throughout the year to include additional Police, Fire and Parks personnel. ” [Stipulations of Fact #'s 5 & 6]

The local advisory committee recommended that outside grant applicants receive \$636,500, or 13.60% of the available A-Tax special fund, to be used on “Tourism-Related Events” or “Tourism-Related Facilities”. City Council voted to use \$4,664,951, which was 99.65%, of the available A-Tax special fund 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. [Stipulations of Fact #'s 5 & 6]

In the same year the City made grants from its general funds to several outside recipients for events that were arguably tourism related. [Stipulations of Fact #'s 17-26] Since the 1980's the City has used the same uniform grant application process it used to make the general funds grants to outside recipients. [Tr p.57] Prior to the 2008-2009 fiscal year, TERC had not disallowed a grant from the general fund of the City of Myrtle Beach for tourism-related purposes. [Appellant's Initial Brief p. 4]

TERC was displeased that the City used its entire A-Tax special fund for tourism public safety when it later granted general funds for tourism related events to outside

recipients. [Letter May 6, 2010- Siegling to Shelton] TERC suspected the City's motive in making those grants was to evade TERC's scrutiny of the City's use of the A-Tax special fund. [Tr. p 122] TERC selected five grants of general funds totaling \$312,545 to outside recipients and notified the City that those outside grants had not been reviewed by the local advisory committee. TERC claimed the City violated the A-Tax act by making those five grants. [Letter May 6, 2010- Siegling to Shelton] By the same letter, TERC notified the State Treasurer's office that those grants violated the A-Tax act and that the State Treasurer should withhold \$312,545 from the City's next distribution of accommodations tax revenue. The State Treasurer complied by withholding \$312,545 from the City's 2009-2010 allocation of A-Tax funds. [Stipulation of Fact # 15] Later, the State Treasurer reduced the withholding to \$302,545 at the request of TERC. [Stipulation of Fact # 22]

The City appealed TERC's action. After a contested case hearing, Judge Mathews overruled TERC's disallowance. TERC duly filed the present appeal to the S.C. Court of Appeals.

STANDARD OF REVIEW

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
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. See S.C. Code Ann. § 1-23-610(B)

ARGUMENT

- I. The ALC correctly ruled that the City's general funds used for the grants in question were not A-Tax funds and the City did not violate the A-Tax act.**
 - a. The ALC's ruling comes from a correct understanding of the City's accounting and budget procedures.**

TERC's first argument illustrates the main difference between the parties' positions in the present appeal. TERC assumes that because the City's A-Tax special fund was placed in the same bank account as the City's other 20 or so funds, the A-Tax fund and the City's other funds became one and the same. If TERC's assumption was accurate the City violated S.C. Code Ann. §6-4-10 (4)(a) which requires that the A-Tax revenues in question be allocated to a special fund. TERC's assumption is contrary to testimony of the City's Budget Director, Mike Shelton. [Tr. p. 59]

Municipalities are required to maintain their financial records in a manner that allows for independent annual audits by certified public accountants. S.C. Code Ann. §5-7-240. The City contends State law requires the City to maintain its funds in accordance

with generally accepted accounting principles (GAAP). The City maintains its financial records according to State law. [Tr. p. 105]

TERC has confused a City bank account, the city's General Disbursements account, with ledger accounts used for the purpose of segregating and accounting for resources that have associated legislative or contractual mandates or earmarks. The City's General Disbursements account is the bank account in which the aggregate of cash from all the City's various Funds, other than Trust or Agency Funds, are invested and from which disbursements are made. A Special Revenue Fund, of which the Accommodations Tax Fund is one, is specifically defined according to GAAP as one that is designed to "account for the proceeds of specific revenue sources (other than capital projects) that are legally restricted to expenditure for specified purposes" (GASB Statement No. 54).

The GAAP term "General Fund," means the primary operating fund accounting for "all financial resources except those to be accounted for in another fund" (GASB Statement No. 54). Each Fund, including the General Fund, Enterprise Funds and the various Special Revenue Funds, owns its equitable share of the General Disbursements account. When it takes in revenue, its equity in the General Disbursements account rises. When it records expenses, its equity in the General Disbursements account declines. Interest is allocated monthly based upon each Fund's equitable share of earnings in the General Disbursements account. However, the Funds are kept separated on the accounting ledgers in accordance with the guides of the Governmental Accounting Standards Board (GASB) and Generally Accepted Accounting Principles (GAAP) in order to comply with legislative and contractual mandates. S.C. Code Ann. §5-7-240.

The City acknowledges that the term “general fund” has been used loosely by the attorneys and the parties’ employees in the present case. Its meaning is sometimes ambiguous, though it is true that “general funds” are normally accounted for in the “General Fund.” However, its meaning is not ambiguous in the A-Tax act. The meaning found there is consistent with the GAAP definitions stated above. Further, the City’s expenditures and budgetary accounting procedures for keeping the funds separate are explained fully in the testimony of the City’s Budget Director, Mike Shelton. [Tr. p 55 – 110] The A-Tax special fund is kept separate from the City’s other funds. [Tr. p 59] The authority and the requirement for the separation of funds are contained in the A-Tax act. S.C. Code Ann. §6-4-10 (4)(a)

TERC’s failure to give credence to the City’s accounting procedures caused it to claim the City’s expenditure of general funds for the four general grants to outside recipients was the expenditure of the City’s A-Tax special fund because TERC claims the A-Tax special fund and the general funds are one and the same. As stated before, TERC’s claim was expressly rejected by the ALC who found as a matter of fact: “The questioned four general fund grants to outside recipients were disbursed from the City’s general funds and not from the City’s allocation of A-Tax revenues.” [Additional Factual Finding # 5].

The ALC’s factual finding that the four general grants to outside recipients did not come from A-Tax revenues is fully supported by evidence in the record. [See Stipulation Exhibits; Tr. p 57, line 6 – p 58 line 22; p 81, line 2 – p 82, line 15] As the testimony of Mike Shelton demonstrated, the City went to great lengths to keep the

application process and the accounting process for its funds separate. [Tr. p 57, 10- p 58 - 19] Mr. Shelton testified that the City handles about 20 or so funds as part of the City's budget process. [Tr. 57, 10-13]

Mr. Shelton has a master's degree in business from Webster University. He has completed the course work for a Ph.D. in public policy with a concentration in public finance at the University of Kentucky. He has thirty years of experience with public finances, administration and budgets. [Tr p 56] He testified that the City used parallel processes for handling general funds, accommodation tax funds and the other funds. [Tr. 58-60]. He knows what is required to keep separate funds and follow GAAP and GASB in keeping the A-Tax special fund separate from the City's other funds. Furthermore TERC has not offered any credible evidence to refute Mr. Shelton's testimony.

Instead of refuting the testimony of Mike Shelton, TERC focused on a single line lifted out of context from an e-mail by a City employee from Mr. Shelton's office. The line upon which TERC's hangs its claim is: "Council decided to sweep accommodations tax funds to the General Fund to cover tourism related public services." [Exhibit 7, Order]. TERC's interpretation of "General Fund" as used by the employee in the e-mail is mistaken. Sweeping accommodations tax funds into the General Fund does not mean that the A-Tax special fund lost its identity in the City's accounting procedures. As stated, those funds were properly used and accounted for to cover tourism related public services as indicated by the e-mail. [Exhibit 8, Order] That use of the A-Tax fund is expressly permitted by statute. S.C. Code Ann. § 6-4-10(4)(b).

TERC does not actually contest the propriety of the City's use of the A-Tax special fund in the present matter. That issue is the subject of another declaratory

judgment action in a Circuit Court. For the purposes of the present matter, the ALC assumed that the use of the City's A-Tax special fund was proper. TERC's dispute is over the City's use of general funds, not the A-Tax special fund. [Tr. p 30, Order p 1]

One source of TERC's confusion on the City's general funds can be found in the section of the A-tax act for areas with high concentrations of tourism. S.C. Code Ann. §6-4-10(b). That section of the act expressly gives local governments like the City with high concentrations of tourism the authority to use accommodations tax revenues for law enforcement, traffic control, public facilities, and highway and street maintenance expenditures provided the expenditures are related to the additional costs associated with providing for tourism activity. S.C. Code Ann. § 6-4-10(4)(b). Funding for those City services also comes from funds associated with the City's other revenues. For example, S.C. Code Ann. §6-1-530(b)(1) allows a local government to use different local accommodation taxes to fund tourism related public safety. Funding can also come from general funds.

The City has been funding outside agencies with general funds since 1981. [Tr p. 58] The City contends TERC did not object to the City's practice until the City decided to use substantially all of its A-Tax special fund for the City's own internal tourist related services as permitted by S.C. Code Ann. § 6-4-10(4)(b). Even though state statute expressly permitted the City to use substantially all of its accommodations tax revenues for funding internal tourist related services, TERC viewed such use as a threat to its existence as an oversight authority. TERC's only witness referred to the City's use of

substantially all of the City's A-Tax special fund for tourist related municipal services as being the appearance of the "camel's nose under the tent." [Tr. p 122].

b. The letter and the spirit of the accommodations tax act permit the City to use general funds to fund grants to outside agencies.

TERC's primary claim is that all tourism related grants to outside recipients should be passed before the local advisory committee notwithstanding the source of the grant. TERC would like to give the local advisory committee authority to make recommendations on the City's grants not using the A-Tax special fund. The A-Tax act does not give the local advisory committee such authority. The local advisory committee is only authorized to make recommendations on the expenditure of revenue generated from the accommodations tax. See S.C. Code Ann. § 6-4-25 (a) (advisory committee to make recommendations on the expenditure of revenue generated from the accommodations tax). TERC has no power to vest the local advisory committee with additional authority or duties in connection with applications for grants from the City's general funds. S.C. Code Ann. § 6-4-35. Only the City is authorized to budget for and disburse its general funds. S.C. Code Ann. § 5-13-30; S.C. Const. art. VIII, § 17.

TERC's primary argument in **Section b** of its brief begins with the same lack of understanding of the City's budget and accounting procedures mentioned above. TERC claims the City used the A-Tax special fund to fund the four grants to outside recipients through a deceptive "re-granting" process. TERC claims the City's process involves granting the A-Tax special fund to an umbrella organization that then redistributes those same funds to other organizations without going before the local advisory committee. According to TERC's witness, the purpose of such a process would be to avoid the

“review and sunlight and the pesky questions that come with it – because I know we (TERC) can be a bother at times.” (parenthetical added) [Tr. p 111] However, TERC did not present any evidence that the City was in fact funneling the A-Tax special fund to outside recipients through a regranting process. As stated above, the ALC rejected TERC’s argument when she found that the funds to the outside recipients came from the City’s general funds and not the A-Tax special fund. [Additional Fact Finding #5]

Very good reasons exist for the City’s general funds granting process. [Tr. p 91]. The City is required by statute to adopt its budget of each year. S.C. Code Ann. §6-1-80, The budget is based upon an estimate of anticipated revenues. 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 tourist related events. The A-Tax special fund granting process is a separate process that has different deadlines and different requirements for grants from the A-Tax special fund. [Tr. p 63] If the Court were to require outside grants from general funds to be reviewed by the local advisory committee, it would interfere with a local government’s discretion and flexibility on the use of its general funds. The Court would change the A-Tax act, create *ultra vires* work for the local advisory committee, and force the local advisory committee to meet throughout the year. S.C. Code Ann. §6-4-25. That result was not intended by the letter or spirit of the A-tax act. S.C. Code Ann. § 6-4-10 et. seq. The City is not doing anything indirectly with the A-Tax special fund.

The City used its allocation of accommodation tax revenues to fund tourist related public safety. [Stipulation of Fact # 6].

The wisdom behind the ALC's recognition of the City's need for flexibility in its budgeting process is supported by this Court. See *Thompson v. Horry County* 294 S.C. 81, 362 S.E.2d 646 (S.C.App. 1987). In *Thompson* this Court stated the A-tax act reflected the Legislature's practical recognition of the benefits of tourism and it made sense to give local governments some flexibility as to how and where they spend accommodations tax revenues. *Id.*

c. S.C. Department of Revenue, Revenue Ruling # 98-22, supports the ALC's finding that TERC does not have authority over the City's non accommodations tax funds.

The City agrees that under TERC's concept of "general fund," Revenue Ruling #98-22 does not support the proposition that the City's general fund is exempt from the requirements of the A-Tax act. Using TERC's concept of "general fund" all funds from the A-Tax allocation are an indistinguishable part of the City's general funds. However, Mike Shelton testified that the City followed the A-Tax acts requirements in connection with the use of the City's A-tax allocation. [Tr. p 57] Following the A-Tax acts requirements means that the City's A-Tax fund is kept separate. S.C. Code Ann. §6-4-10.

The difference between TERC and the City is that the City contends the A-Tax special fund is differentiated from the general fund in the A-Tax act. Revenue Ruling #98-22 states how general funds are to be considered by the City. General funds are not subject to any requirements of the A-Tax act. S.C. Code Ann. § 6-4-10(1), Revenue Ruling #98-22. The City contends that through proper governmental accounting

procedures the integrity of the A-Tax special fund was preserved and the requirements of the A-Tax act were observed. As found by the ALC, the A-tax special fund was not the source of funds for the grants in question. [Additional Stipulation of Fact # 5]

II. The ALC's ruling was consistent with the constitutional tenets of Home Rule.

Since the inception of the A-Tax act the City has been observing the same procedures for following its requirements. The City has reported its handling of the A-Tax allocation to TERC annually as required by TERC since TERC's inception. As far back as 1981, the City has been using general funds to fund grants to outside recipients for tourist related activities. [Tr p 58]

TERC now claims the general fund grants procedure used by the City since 1981 violates a constitutional tenet of Home Rule. TERC claims the City's general grant process upsets the structure and the administration of TERC's governmental function of oversight. *S.C. Const. art. VIII, § 14*. Once again, the City does not dispute that TERC has oversight authority over the A-Tax special fund. However, neither TERC nor the local advisory committee have oversight authority over general funds which are not part of the A-Tax special fund. *S.C. Code Ann. § 6-4-25 & § 6-4-35*. The ALC properly recognized the City has the authority over budgeting and expenditures of general funds. *S.C. Code Ann. § 5-13-30(3); S.C. Const. art. VIII, § 17*.

III. The South Carolina State Treasurer should restore to the City moneys wrongfully withheld at the request of TERC.

An appeal from TERC's action lies with the Administrative Law Judge Division (ALC). *S.C. Code § 6-4-35(b)(1)(a)*. The State Treasurer was not made a party because

the State Treasurer's role in the present case is ministerial like the Clerk of Court on the Circuit Court level. The ALC has the power to reverse a wrongful action taken by TERC just as this Court has the authority to instruct the ALC, trial judges or clerks of court without making those entities parties. If the ALC has the authority to reverse TERC's wrongful action, the ALC should be able to state what should be done to correct TERC's wrongful action. Such authority is implied in the State's judicial system.

When TERC determined it was mistaken on local advisory review of another City grant to an outside recipient, TERC simply "advised the State Treasurer to restore that amount of funding to the City in the next cycle of distributions of A-Tax funds." [See Stipulation # 16]. The funding was restored without any further action from TERC or the City.

Obviously, the present action is not a mandamus proceeding requiring the State Treasurer to act. The City acknowledges that if TERC or the State Treasurer failed to correct TERC's wrongful act after it was finally determined to be a wrongful act, the City would have to seek a mandamus action in the court and name both TERC and the State Treasurer as parties. The City sincerely hopes that it will not be necessary to embroil the State Treasurer in litigation every time TERC gets appealed by a local government.

CONCLUSION

Based upon the foregoing, the City of Myrtle Beach respectfully requests the Court to affirm the final order of the Hon. Carolyn C. Mathews, Administrative Law Judge, which is the subject of the present appeal.

[SIGNATURE PAGE TO FOLLOW]



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September 23, 2011

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.

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ARGUMENT

I. The City of Myrtle Beach misstates the holdings of the Administrative Law Court and confuses the issues on appeal.

If there is confusion as to the issues presented by this appeal and the holdings of the Administrative Law Court (“ALC”), it lies solely with the City of Myrtle Beach (“COMB”). See COMB Resp. Br. at 9 (“TERC has confused a City bank account”), 12 (“One source of TERC’s confusion on the City’s general funds can be found”). As a result, the COMB misstates the arguments made by the Tourism Expenditure Review Committee (“TERC”) in this appeal in an attempt to cloud the actions it undertook to avoid the statutorily-mandated oversight of the state accommodations tax (“A-Tax”) revenues. To be clear, TERC does not assert, and the record shows that it has not asserted, that the COMB did not comply with any requirement of section 6-4-10 (1)-(4) of the South Carolina Code (2004) that A-Tax revenues be segregated as they are received.¹ In its Respondent’s brief, the COMB appears to argue, for the first time, that TERC is contending that the COMB did not comply with the requirement that the remaining A-Tax revenues, the 65% Fund, be placed in a separate, special fund according to subsection (4). See COMB Resp. Br. at 8-13. Again, this is not, and never has been, TERC’s contention. TERC would, for the purposes of this appeal, grant that the COMB complied with its initial segregation requirements under the statute, because A-Tax segregation was in no way relevant to the issues before the ALC or this Court on appeal and is the normal course for each and every county or municipality receiving A-Tax revenues in the State. It is what the COMB did *after* depositing

¹ As thoroughly explained in its initial brief, the first twenty-five thousand dollars (\$25,000) of A-Tax revenues allocated to a county or municipality is taken off the top and distributed to the general fund of the receiver. See § 6-4-10(1). Thereafter, an additional five percent (5%) of the A-Tax revenue is also allocated to the general fund of the receiver. 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 revenues (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).

the remaining A-Tax revenues into the 65% Fund that is the subject of this litigation. Both parties were clear on this issue below, and the ALC's Order demonstrates that it similarly understood the issues before it.

As TERC detailed in its brief, the COMB's fiscal year 2008-2009 annual report to TERC reflected the fact that the Myrtle Beach City Council ("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. Init. Br. of App. at 7; Stipulation Exhibit 8, (R.). Importantly, when considering the COMB's confusion and newfound justification on appeal, it should be noted that the City Council's grant was made *out of*, and constituted the entirety of, the 65% Fund properly established by the COMB to segregate the aggregate remaining A-Tax revenues for fiscal year 2008-2009, and *into* the general operating fund of the COMB. This is not conjecture on TERC's part, but comes directly from the COMB's annual report. See Stipulation Exhibit 8 at 4 (wherein the City Council made only one (1) grant of A-Tax funds for fiscal year 2008-2009 to the "City of Myrtle Beach – General Fund"). 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 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.

Once the A-Tax revenues in the 65% Fund were granted by the City Council into the COMB's general fund, the COMB subsequently re-granted² \$312,545³ out of its general fund to five outside entities for tourism-related expenditures, after those entities had previously applied for grants from the COMB but their applications were not reviewed by the Local Advisory Committee. TERC does not dispute that, under normal circumstances, it has no authority to question expenditures made out of a municipality's general fund.⁴ However, the COMB's admitted actions demonstrate why this was not simply a case of a municipality granting its general fund revenues to an outside entity. Following TERC's Freedom of Information Act (FOIA) request of the COMB seeking any and all documentation of "tourism-related" grants out of the COMB's general fund, the COMB produced letters and emails indicating that the City Council consciously and specifically decided to "sweep" available A-Tax revenues into its general fund by way of the single grant discussed above, and then utilize those funds, in part, to fund outside agency requests for tourism-related expenditures. See Stipulation Exhibits No. 1-10, **(R.)**. A February 25, 2008 electronic mail message within the COMB Office of Budget &

² "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. **(R.)**.

³ TERC subsequently 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.)**. 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. **(R.)**. See Stipulations 17-24; Stipulation Exhibits 1-4.

⁴ A blanket restriction of authority by TERC over a municipality's general fund does not apply for the reasons explained in TERC's Appellant's brief: if a 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 over the municipality's general fund to the extent that it would investigate and find such an allocation to be non-compliant with the statute.

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.).

Therefore, the City Council's actions are not mere random grants of general funds, but rather these letters and emails clearly show that the City Council chose to circumvent the Local Advisory Committee procedures and recommendations by executing a single grant for the entirety of the available A-Tax revenues, and then *in the same meeting* and *in the next breath* re-granted those funds to outside entities. While the COMB would have this Court believe, and was successful in convincing the ALC below, that the momentary lapse of time wherein the 65% Fund revenues were transferred to the COMB's general fund wholly and completely washed those funds of their discreteness and identity as 65% Fund revenues, TERC would contend that the totality of the circumstances clearly demonstrated that the COMB did indirectly, that which it could not do directly: grant A-Tax revenues to entities for tourism-related expenditures without first having those entities' requests evaluated by the Local Advisory Committee.

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. The ALC found this fact to be dispositive; however, as will be discussed more thoroughly below, such a finding was in the alternative to the ALC's plain meaning holding. TERC's argument is simply this: the evidence in the record clearly demonstrates that the COMB consciously and deliberately chose to circumvent the statutory procedures governing the distribution of A-Tax revenues for tourism

related purposes by first placing those funds in the COMB's general fund before disbursing them to outside agencies for tourism-related expenditures.

II. The City of Myrtle Beach presents evidence in the form of testimony and attached documents that were not presented to the Administrative Law Court below and are therefore improperly before this Court on appeal.

In an attempt to give substance to the confusion discussed above (again, where none has heretofore existed), the COMB presents evidence in the form of testimony and other documents attached to its Respondent's brief that were not presented to the ALC. See Resp. Br. at 9 (two full paragraphs). Consequently, this testimony and evidence are not properly before this Court and should either be stricken or disregarded. See State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 28-29 (Ct. App. 2006) (stating the general rule that an issue or evidence will not be considered for the first time on appeal). 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. However, in its Respondent's brief, and in response to its own invention of a controversy where none exists, the COMB presents testimony regarding its internal accounting procedures. Therein, the COMB opines and goes into great detail about its procedures and whether or not they are in compliance with the Generally Accepted Accounting Principles ("GAAP"). While the substance of these assertions may well be true, the COMB's artifice here is nothing more than a distraction and is not relevant to the issues at hand. The COMB obviously understood that these assertions as to its accounting procedures were not relevant to the issues in the case, as it did not attempt to present this testimony to the ALC below. Consequently, it should not be considered by this Court on appeal.

Moreover, although it does not reference the documents in its Respondent's brief, attached to the copy of the brief served on TERC by the COMB's counsel were three (3)

documents showing the release of the \$10,000, of the \$312,545 originally withheld, by the State Treasurer to the COMB following TERC's advisement to the State Treasurer to do so. Not only are these documents irrelevant to the issues in this case, but these documents were not presented to the ALC below and are not properly a part of the record on appeal. Accordingly, these documents should either be stricken or disregarded by the Court.

III. The City of Myrtle Beach does not address or refute the Tourism Expenditure Review Committee's assignment of error to several holdings of the Administrative Law Court; therefore, this Court should deem the City's failure to respond a concession that Tourism Expenditure Review Committee's position is correct.

The first argument of TERC in its Appellant's brief is that the ALC erred in finding a plain reading of section 6-4-10 exempts all A-Tax funds placed in a municipality's general fund from TERC's oversight authority. See Init. Br. of App. at 13-17. Specifically, TERC's argument to that end is in response to the ALC Order's Conclusions of Law #4, #5, and #7, wherein the ALC found that A-Tax funds deposited in a municipality's general fund are exempt from the requirements of section 6-4-10. TERC contends that the ALC erred in applying a limited exemption discussed in, and applicable only to, section 6-4-10(1) and (2) to the entire statute. See Init. Br. of App. at 13-17. In its Respondent's brief, the COMB does not address or refute TERC's argument that the ALC misapplied a limited exception. Additionally, the COMB does not address, absent a single conclusory statement, TERC's second argument that the COMB is doing indirectly, that which it cannot do directly. See Init. Br. of App. at 17-20; Resp. Br. at 14 ("The City is not doing anything indirectly with the A-Tax special fund"). Consequently, the COMB's failure to respond to TERC's arguments can and should be deemed an admission that TERC's positions are correct. See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 232 (2d ed. 2002) (citing First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 469 S.E.2d 631 (Ct. App. 1996), reversed on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997)

(providing that if a respondent fails to respond to an issue raised in the appellant's brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct)).⁵

IV. The City of Myrtle Beach admits to knowingly violating the clear and express language of section 6-4-10(b).

In the first full paragraph on page fourteen (14) of the Respondent's brief, the COMB states that:

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. The above statement by the COMB is an express admission and acknowledgment that the COMB is violating the clear and plain language of section 6-4-10(4)(b). Section 6-4-10(4)(b) clearly provides that A-Tax Funds may only be used to provide *additional* services not *normally* provided by *the* municipality:

The funds received by a county or municipality which has a high concentration of tourism activity may be used to provide *additional* county and municipal services including, but not limited to, law enforcement, traffic control, public facilities, and highway and street maintenance, as well as the continual promotion of tourism. *The funds must not be used as an additional source of revenue to provide services normally provided by the county or municipality* but to promote tourism and enlarge its economic benefits through advertising, promotion, and providing those facilities and services which enhance the ability of the county or municipality to attract and provide for tourists.

⁵ TERC refers the Court to its Initial Appellant's brief with respect to its arguments on the merits of the ALC's exemption holding and TERC's contention that the COMB is doing indirectly, that which it cannot do directly. See Init. Br. of App. at 13-20.

(Emphasis added). By contrast, the COMB clearly admits that if revenues that the municipality generates in a given year are not sufficient to cover its operating expenses, it views the State A-Tax Fund to be its own “rainy day” fund that can be used to make up for the City’s revenue shortfall. The plain language of section 6-4-10(4)(b) could not be clearer in its intent that A-Tax Funds not be used to supplement the operating budget of a municipality. Moreover, the COMB goes further to state it will only fund tourism-related expenditures upon “discover[y] during the year that more revenue has been collected than anticipated....” Resp. Brief at 14. The COMB’s clear disdain for, and desire to circumvent, the General Assembly’s intent and TERC’s statutory authority are on full display for the Court. See generally Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 227 (9th Cir. 1988) (holding that statements of fact contained in a brief may be considered admissions of the party in the discretion of the court); Matter of Estate of Tallman, 62 N.W.2d 893, 896 (S.D. 1997) (holding that parties are bound by their judicial admissions made in appellate briefs). TERC respectfully submits that the Court should not permit the COMB to frustrate the purpose of sections 6-4-5 *et seq.*, and undercut the authority and purpose given the Local Advisory Committee and TERC by the General Assembly and should therefore reverse the ALC for this reason alone, if no other.

V. The City of Myrtle Beach does not address or refute the Tourism Expenditure Review Committee’s argument that the Administrative Law Court failed to find an ambiguity in section 6-4-10 which would justify its consideration of materials outside of the statute; therefore, this Court should deem the City’s failure to respond a concession that Tourism Expenditure Review Committee’s position is correct.

Irrefutably, the ALC did not make a finding that section 6-4-10 is ambiguous. In its Respondent’s brief, the COMB does not address or refute TERC’s contention that, absent a finding of an ambiguity in section 6-4-10, the ALC is not permitted to look outside of the plain meaning of the statute. See 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 v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) ("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.")). 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).

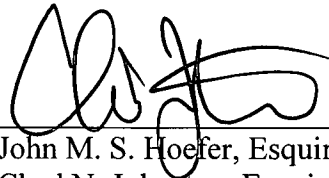
Moreover, where a Respondent does not address or respond to an issue raised by the Appellant, an appellate court may treat the failure to respond as a confession that the Appellant's position is correct. See Toal, et al. at 232 (citing First Union Nat. Bank, 321 S.C. 496, 469 S.E.2d 631), reversed on other grounds, 328 S.C. 290, 494 S.E.2d 429). Consequently, not only was it legal error for the ALC to construe section 6-4-10 and rely upon evidence outside of the statute absent an express finding of an ambiguity, but the COMB failed to address this issue in its Respondent's brief and thus concedes the merits of TERC's arguments. As a result, the ALC's reliance on South Carolina Department of Revenue Ruling #98-22 and the Home Rule Act, article VIII, section 14 of our State Constitution, for substantiation and support of its holdings is reversible error.⁶

⁶ TERC rests on its Initial Appellant's brief with respect to its arguments on the merits of the applicability of Revenue Ruling #98-22 and Home Rule. See Init. Br. of App. at 20-26.

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. Moreover, the COMB's interjects, by way of its Respondent's brief, evidence not properly a part of the record on appeal, does not address the substance of TERC's positions, admits to knowingly violating section 6-4-10(4)(b), and does not refute several of the arguments presented by TERC in its Appellant's brief. Consequently, the ALC's order should be reversed.

Respectfully submitted,



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Chad N. Johnston, Esquire

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Attorneys for Tourism Expenditure
Review Committee

Columbia, South Carolina
This 26th day of October, 2011.

The Supreme Court of South Carolina

City of Myrtle Beach,

Respondent,

v.

Tourism Expenditure Review
Committee,

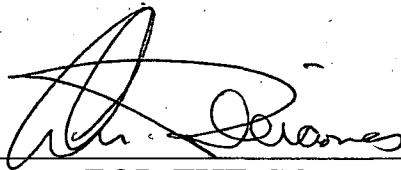
Appellant.

The Honorable Carolyn C. Matthews
Richland County
Trial Court Case No. 2010-AL-30-00421

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



A.C.J.

FOR THE COURT

Chief Justice Jean H. Toal, not participating

Columbia, South Carolina

March 20, 2012

cc: John M. S. Hoefer, Esquire
Chad N. Johnston, Esquire
Michael W. Battle, Esquire
The Honorable Tanya Gee

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December 1, 2011

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

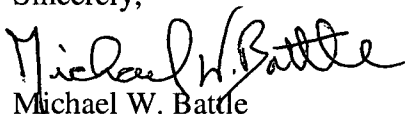
RE: Tourism Expenditure Review Committee v. City of Myrtle Beach
Case No. 10-ALJ-30-0421-CC
Case Tracking #2011194346

Dear Ms. Gee:

Enclosed are the unbound original and fifteen (15) copies of the Final Brief of the Respondent City of Myrtle Beach together with the Certificate of Counsel. Also enclosed is the Respondent's Proof of Service. Please return a "clocked" copy of the Proof of Service. I have enclosed an extra copy of the Proof of Service, as well as a self-addressed, stamped envelope for your convenience in returning the Proof to us.

By copy of this letter to all counsel involved in this Appeal, I am serving them with three copies of the Final Brief of the Respondent City of Myrtle Beach.

Sincerely,


Michael W. Battle
Battle & Vaught, P.A.

Enclosures: stated

C: John M.S. Hofer & Chad N. Johnston
Tom Ellenburg

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December 7, 2011

VIA HAND DELIVERY

Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: City of Myrtle Beach v. Tourism Expenditure Review Committee;
Case No. 10-ALJ-30-0421-CC

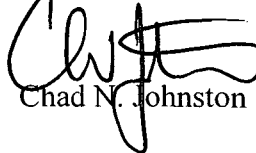
Dear Ms. Gee:

Pursuant to Rules 210, 211, and 267, SCACR, please find for filing fifteen (15) bound copies, and one (1) unbound copy, of both the Record on Appeal and the Tourism Expenditure Review Committee's (TERC) Final Briefs in the above-captioned matter. Also enclosed for filing, please find the original and one (1) copy of the Proof of Service of the Final Briefs on Respondent City of Myrtle Beach, as well as TERC's certificate compliance with Rule 211(b). I would appreciate your acknowledging receipt of both the Record on Appeal and Final Briefs, as well as the Proof of Service, by file stamping the extra copies and returning those to me via our courier.

If you have any questions or if you need any additional information, please do not hesitate to contact me. With best regards, I am

Sincerely,

WILLOUGHBY & HOEFER, P.A.


Chad N. Johnston

CNJ/bim
Enclosures
cc: Michael W. Battle, Esquire

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DEC 07 2011

SC Court of Appeals

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November 28, 2011

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SC Court of Appeals

VIA HAND DELIVERY

Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: City of Myrtle Beach v. Tourism Expenditure Review Committee;
Case No. 10-ALJ-30-0421-CC

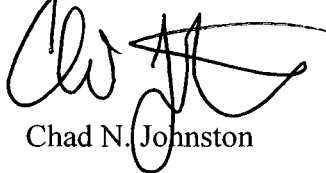
Dear Ms. Gee:

Pursuant to Rule 210, SCACR, please find for filing the enclosed original and one (1) copy of the Proof of Service of the Record on Appeal on Respondent City of Myrtle Beach. I would appreciate your acknowledging receipt of this document by file stamping the extra copy and returning it to me via the enclosed envelope.

If you have any questions or if you need any additional information, please do not hesitate to contact me. With best regards, I am

Sincerely,

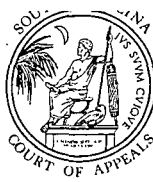
WILLOUGHBY & HOEFER, P.A.



Chad N. Johnston

CNJ/bim
Enclosures

cc: Michael W. Battle, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
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November 15, 2011

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Re: City of Myrtle Beach v. Tourism
Case Tracking #: 2011194346

Dear Counsel:

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S.C. 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

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

RECEIVED
OCT 26 2011
SC Court of Appeals

City of Myrtle Beach, ...Respondent,

v.

Tourism Expenditure Review Committee, ...Appellant.

**APPELLANT'S AMENDED DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

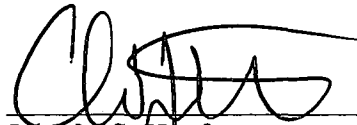
Appellant Tourism Expenditure Review Committee proposes that the following be
included in the Record on Appeal:

1. Complete Transcript of Contested Case Hearing before the Honorable Carolyn C. Matthews, Administrative Law Judge, held December 2, 2010.
2. SC Revenue Ruling #98-22, dated October 27, 1998.
3. Letter to Michael D. Price from Lanneau H. Siegling, dated January 27, 2009.
4. Letter to Lanneau H. Siegling from Michael W. Battle, dated February 9, 2009.
5. Letter to Michael W. Battle from John M.S. Hoefer, dated April 22, 2009.
6. City of Myrtle Beach ("COMB") Petition for Declaratory Judgment, Temporary, and Permanent Injunction and Motion for Preliminary Relief, filed September 9, 2009.

7. Accommodations Tax Expenditure Reporting Forms of COMB, dated September 30, 2009.
8. Notice of Assignment, filed October 7, 2009.
9. Tourism Expenditure Review Committee ("TERC") Return to Motion for Temporary Relief, Motion to Dismiss and Affidavit of Lanneau H. Siegling, filed October 26, 2009.
10. Letter to Michael D. Price from Lauren L. Sponseller, dated January 4, 2010.
11. Letter to Lauren Sponseller from Michael W. Shelton, dated January 7, 2010.
12. Letter to Michael W. Battle from John M.S. Hoefer, dated January 11, 2010.
13. Letter to John M.S. Hoefer from Michael W. Battle, dated February 10, 2010.
14. Letter to Michael W. Battle from John M.S. Hoefer, dated February 11, 2010.
15. Letter to Tom Leath from John M.S. Hoefer, dated February 24, 2010.
16. Letter to Michael Shelton from Lanneau H. Siegling, dated May 6, 2010.
17. Letter to Paul D. Jarvis, Jr. from Michael W. Battle, dated May 11, 2010.
18. COMB Notice of Appeal and Final Decision, dated May 12, 2010.
19. Notice of Assignment, filed June 1, 2010.
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21. Order for Consolidation, filed August 17, 2010.
22. Prehearing Statement of COMB, dated August 30, 2010.
23. Prehearing Statement of TERC, filed September 1, 2010.
24. Stipulations and Stipulated Exhibits of TERC and COMB, filed November 17, 2010.
25. COMB Opening Statement Memorandum, dated December 2, 2010.
26. TERC Trial Brief, dated December 2, 2010.

27. Final Order, filed April 18, 2011.
28. TERC Motion for Reconsideration, filed April 28, 2011.
29. COMB Response to Motion for Reconsideration, dated May 2, 2011.
30. TERC Reply In Support of Motion for Reconsideration, filed May 6, 2011.

I certify that this designation contains no matter which is irrelevant to this appeal.



John M.S. Hoefer

Chad N. Johnston

Willoughby & Hoefer, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

803-252-3300

Attorneys for Appellant

Columbia, South Carolina
This 26th day of October, 2011.

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

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

PROOF OF SERVICE

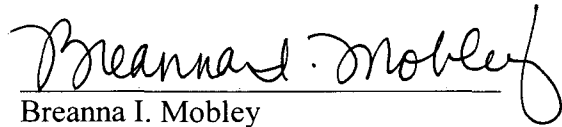
This is to certify that I, an employee of the law offices of Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Initial Reply Brief and Amended Designation of Matter To Be Included in the Record on Appeal of Appellant Tourism Expenditure Review Committee** by placing same 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

RECEIVED

OCT 26 2011

SC Court of Appeals


Breanna I. Mobley

This 26th day of October, 2011.

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL
TRACEY C. GREEN
BENJAMIN P. MUSTIAN
ELIZABETH ZECK*
ELIZABETHANN LOADHOLT FELDER
ANDREW J. MACLEOD
CHAD N. JOHNSTON
JOHN W. ROBERTS

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

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October 26, 2011 OCT 26 2011

SC Court of Appeals

VIA HAND DELIVERY

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: City of Myrtle Beach v. Tourism Expenditure Review Committee;
Case No. 10-ALJ-30-0421-CC

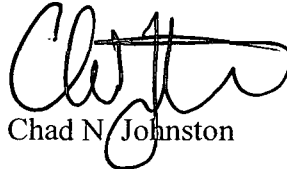
Dear Ms. Gee:

Enclosed for filing please find the original and one (1) copy of the **Initial Reply Brief and Amended Designation of Matter To Be Included in the Record on Appeal of Appellant Tourism Expenditure Review Committee ("TERC")** in the above-referenced matter. I would appreciate your acknowledging receipt of these documents by file stamping the extra copy and returning them to me via our courier.

By copy of this letter, I am serving counsel of record and enclose a Proof of Service to that effect. If you have any questions or if you need any additional information, please do not hesitate to contact me. With best regards, I am

Sincerely,

WILLOUGHBY & HOEFER, P.A.



Chad N. Johnston

CNJ/bim

Enclosures

cc: Michael W. Battle, Esquire

The South Carolina Court of Appeals

City of Myrtle Beach,

Respondent,

v.

Tourism Expenditure Review
Committee,

Appellant.

The Honorable Carolyn C. Matthews
SC Administrative Law Court
Case No. 2010-AL-30-00421

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Reply Brief in the above entitled matter is hereby extended until October 26, 2011.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

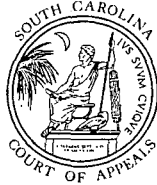
BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: John M. S. Hoefer, Esquire
Chad N. Johnston, Esquire
Michael W. Battle, Esquire
The Honorable Jana E. Shealy

FILED

Sept 9/30/11



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

September 29, 2011

John M. S. Hoefer, Esquire
Chad N. Johnston, Esquire
Willoughby & Hoefer, PA
P O Box 8416
Columbia, SC 29202

Michael W. Battle, Esquire
Battle, Vaught & Howe, PA
P O Box 530
Conway, SC 29526

Re: City of Myrtle Beach v. Tourism
Case Tracking #: 2011194346

Dear Counsel:

We have received Mr. Johnston's motion for an extension to serve and file the Appellant's Initial Reply Brief in the above matter. Unfortunately, we have not received the Respondent's Initial Brief and Designation of Matter in this case.

All parties are advised that the correct case caption for this appeal is:

City of Myrtle Beach,

Respondent,

v.

Tourism Expenditure Review Committee,

Appellant.

The Court's staff cannot guarantee that your filings will be properly filed if the case caption is not correct.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: The Honorable Jana E. Shealy

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

RECEIVED
SEP 27 2011
SC Court of Appeals

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

MOTION FOR EXTENSION OF TIME

Appellant Tourism Expenditure Review Committee ("TERC") respectfully moves this Court for an extension of time in which to file its Initial Reply Brief of Appellant pursuant to Rules 208, 240 and 263(b), SCACR. In support of this Motion, Appellant states as follows:

1. TERC's Initial Reply Brief of Appellant is due to be filed October 6, 2011.
2. Counsel for Appellant TERC requests an extension of time of twenty (20) days to file the Initial Reply Brief due to continuing work schedule conflicts coinciding with the current due date.
3. If the Court grants this request, Counsel for Appellant TERC calculates that TERC will have until October 26, 2011 in which to file the Initial Reply Brief.

20 days
(15)

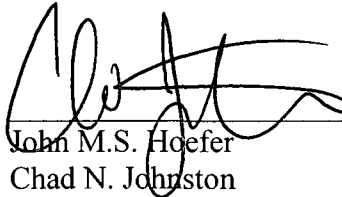
10-26-11

4. This is the second request for an extension by Counsel for Appellant TERC in this appeal. TERC requested, and was granted by Order of the Court filed August 12, 2011, a thirty (30) day extension to file its Initial Appellant's Brief and Designation of Matter.

5. Counsel for Appellant TERC has consulted with Michael W. Battle, Counsel for Respondent City of Myrtle Beach, and I am authorized to state that he has consented to the granting of this request.

Counsel for Appellant TERC therefore respectfully requests that this Court grant this Motion and extend the time for filing the Initial Reply Brief until October 26, 2011.

Respectfully submitted,



John M.S. Hoefer
Chad N. Johnston

WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
(803) 252-3300
Counsel for Appellant/Respondent Tourism
Expenditure Review Committee

Columbia, South Carolina
September 27, 2011

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

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

PROOF OF SERVICE

This is to certify that I, an employee of the law offices of Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Motion for Extension of Time** 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

RECEIVED
SEP 27 2011
SC Court of Appeals

Breanna I. Mobley
Breanna I. Mobley

This 27th day of September, 2011.

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL
TRACEY C. GREEN
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ELIZABETH ZECK*
ELIZABETHANN LOADHOLT FELDER
MICHAEL R. BURCHSTEAD
ANDREW J. MACLEOD
CHAD N. JOHNSTON
JOHN W. ROBERTS

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

RECEIVED

SEP 27 2011

SC Court of Appeals

September 27, 2011

*ALSO ADMITTED IN TX

VIA HAND DELIVERY

Honorable Tanya A. Gee

Clerk of Court

South Carolina Court of Appeals

Post Office Box 11629

Columbia, South Carolina 29211

Re: City of Myrtle Beach v. Tourism Expenditure Review Committee;
Case Tracking #: 2011194346

Dear Ms. Gee:

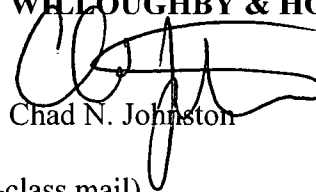
On behalf of the Appellant Tourism Expenditure Review Committee ("TERC") and pursuant to Rules 240 and 263(b), SCACR, enclosed for filing please find an original and six copies of a **Motion for Extension of Time** seeking an additional twenty (20) days within which TERC may file its Initial Reply Brief of Appellant. Also enclosed is a check in the amount of \$25.00 in payment of the motions filing fee. Please acknowledge receipt of this motion by file-stamping the additional copy of the motion and returning it via the courier.

By copy of this letter, I am serving counsel of record, Michael W. Battle, and enclose a Proof of Service to that effect.

If you have any questions or need additional information, please contact me at your convenience. With best regards, I am

Respectfully,

WILLOUGHBY & HOEFER, P.A.



Chad N. Johnston

cc: Michael W. Battle, Esquire (via first-class mail)

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,

RESPONDENT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Respondent City of Myrtle Beach proposes the following matters be included in
the Record on Appeal:

1. All matters designated by Appellant Tourism Expenditure Review Committee in
its designation dated September 7, 2011 in the above captioned appeal.
2. Final Order and all exhibits introduced in the administrative hearing held
December 2, 2010, and/or attached to the Final Order of Hon. Carolyn C.
Matthews, Administrative Law Judge.
3. Page 30 of transcript of administrative hearing held December 2, 2010.
4. Pages 55-135 of transcript of administrative hearing held December 2, 2010.

RECEIVED

SEP 26 2011

SC Court of Appeals

I certify that this designation contains no matter which is irrelevant to this appeal.



Michael W. Battle
Battle & Vaught, P.A.
P.O. Box 530
Conway, South Carolina 29528
(843)248-4321
mbattle@battlevaught.com
Attorneys for Respondent
City of Myrtle Beach

September 23, 2011

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,

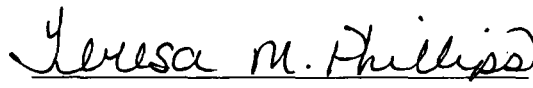
v.

Tourism Expenditure Review Committee,.....Appellant,

PROOF OF SERVICE

This is to certify that I, an employee of the law offices of Battle & Vaught, P.A., have caused to be served this day one (1) copy of the Initial Brief and Designation of Matter to be Included in the Record on Appeal of Respondent City of Myrtle Beach by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

John M.S. Hoefer
Chad Johnston
Willoughby & Hoefer, P.A.
930 Richard Street
PO Box 8416
Columbia, SC 29202-8416


Teresa M. Phillips

This 23rd day of September, 2011.

BATTLE & VAUGHT P.A.
ATTORNEYS AND COUNSELORS AT LAW
1200 MAIN STREET
POST OFFICE BOX 530
CONWAY, SOUTH CAROLINA 29528
TELEPHONE (843) 248-4321
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www.battlevaught.com

MICHAEL W. BATTLE
E-Mail Address: mbattle@battlevaught.com
VICTORIA T. VAUGHT
E-Mail Address: vvaught@battlevaught.com

JAMES R. BATTLE, II
E-Mail Address: jbattle@battlevaught.com
M. KIRK BATTLE
E-Mail Address: kbattle@battlevaught.com

September 23, 2011

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

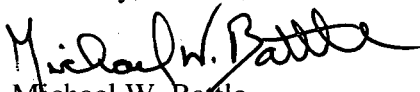
RE: Tourism Expenditure Review Committee v. City of Myrtle Beach
Case No. 10-ALJ-30-0421-CC

Dear Ms. Gee:

Enclosed for filing please find the original and one (1) copy of the Initial Brief and Designation of Matter To Be Included in the Record on Appeal of Respondent City of Myrtle Beach in the above-referenced matter. I would appreciate your acknowledging receipt of these documents by file stamping the extra copy and returning them to me in the enclosed envelope.

By copy of this letter, I am serving counsel of record and enclose a Proof of Service to that effect. If you have any questions or if you need any additional information, please do not hesitate to contact me. With best regards, I am

Sincerely,


Michael W. Battle
Battle & Vaught, P.A.

Enclosures: stated
C: John M.S. Hoefer (w/enclosures)
Chad Johnston (w/enclosures)

RECEIVED

SEP 26 2011

SC Court of Appeals

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL
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CHAD N. JOHNSTON
JOHN W. ROBERTS

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

September 14, 2011

*ALSO ADMITTED IN TX

VIA HAND DELIVERY

Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
SEP 14 2011
SC Court of Appeals

Re: City of Myrtle Beach v. Tourism Expenditure Review Committee;
Case No. 10-ALJ-30-0421-CC

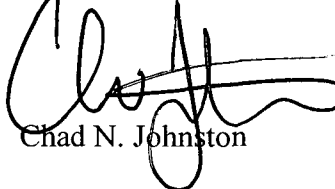
Dear Ms. Gee:

Pursuant to Appellant Tourism Expenditure Review Committee's (TERC) conversation with your clerk's office yesterday, please find the enclosed original and one (1) copy of the revised cover pages of TERC's **Initial Brief and Designation of Matter To Be Included in the Record** in the above-referenced matter. These revised cover pages reflect the Court's desired caption order. I would appreciate your acknowledging receipt of these documents by file stamping the extra copy and returning them to me via our courier.

By copy of this letter, I am also noticing counsel of Respondent City of Myrtle Beach of this change. We apologize for any confusion that this might have caused. If you have any questions or if you need any additional information, please do not hesitate to contact me. With best regards, I am

Sincerely,

WILLOUGHBY & HOEFER, P.A.



Chad N. Johnston

CNJ/bim
Enclosures

cc: Michael W. Battle, Esquire

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

RECEIVED
SEP 14 2011
SC Court of Appeals

City of Myrtle Beach, ...Respondent,

v.

Tourism Expenditure Review Committee, ...Appellant.

**APPELLANT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Appellant Tourism Expenditure Review Committee proposes that the following be included in the Record on Appeal:

1. SC Revenue Ruling #98-22, dated October 27, 1998.
2. Letter to Michael D. Price from Lanneau H. Siegling, dated January 27, 2009.
3. Letter to Lanneau H. Siegling from Michael W. Battle, dated February 9, 2009.
4. Letter to Michael W. Battle from John M.S. Hoefer, dated April 22, 2009.
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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

RECEIVED
SEP 14 2011
SC Court of Appeals

City of Myrtle Beach, ...Respondent,

v.

Tourism Expenditure Review Committee, ...Appellant.

INITIAL BRIEF OF APPELLANT

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

Attorneys for Appellant

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

Tourism Expenditure Review Committee, ... Appellant,

v.

City of Myrtle Beach, ... Respondent.

**APPELLANT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

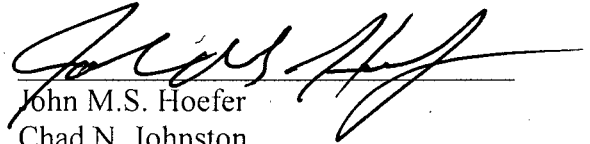
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29. TERC Reply In Support of Motion for Reconsideration, filed May 6, 2011.

I certify that this designation contains no matter which is irrelevant to this appeal.



John M.S. Hoefer

Chad N. Johnston

Willoughby & Hoefer, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

803-252-3300

Attorneys for Appellant

Columbia, South Carolina
This 7th day of September, 2011.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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SEP 07 2011

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

SC Court of Appeals

Tourism Expenditure Review Committee, ...Appellant,

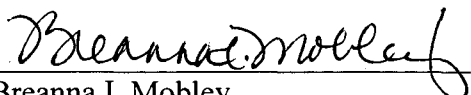
v.

City of Myrtle Beach, ...Respondent.

PROOF OF SERVICE

This is to certify that I, an employee of the law offices of Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Initial Brief and Designation of Matter to Be Included in the Record on Appeal of Appellant Tourism Expenditure Review Committee** 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 I. Mobley

This 7th day of September, 2011.

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
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AREA CODE 803
TELEPHONE 252-3300
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September 7, 2011

RECEIVED

SEP 07 2011

SC Court of Appeals

*ALSO ADMITTED IN TX

VIA HAND DELIVERY

Honorable Tanya A. Gee

Clerk of Court

South Carolina Court of Appeals

Post Office Box 11629

Columbia, South Carolina 29211

Re: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case No. 10-ALJ-30-0421-CC

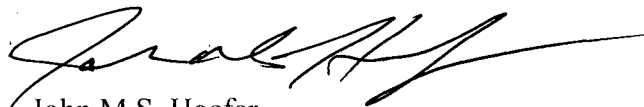
Dear Ms. Gee:

Enclosed for filing please find the original and one (1) copy of the **Initial Brief and Designation of Matter To Be Included in the Record on Appeal of Appellant Tourism Expenditure Review Committee ("TERC")** in the above-referenced matter. I would appreciate your acknowledging receipt of these documents by file stamping the extra copy and returning them to me via our courier.

By copy of this letter, I am serving counsel of record and enclose a Proof of Service to that effect. If you have any questions or if you need any additional information, please do not hesitate to contact me. With best regards, I am

Sincerely,

WILLOUGHBY & HOEFER, P.A.



John M.S. Hoefer

JMSH/bim

Enclosures

cc: Michael W. Battle, Esquire

The South Carolina Court of Appeals

City of Myrtle Beach,

Respondent,

v.

Tourism Expenditure Review
Committee,

Appellant.

The Honorable Carolyn C. Matthews
Richland County
Trial Court Case No. 2010-AL-30-00421

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until September 7, 2011.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: John M. S. Hoefer, Esquire
Chad N. Johnston, Esquire
Michael W. Battle, Esquire

8/12/11 **FILED**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED

JUL 28 2011

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

SC Court of Appeals

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

MOTION FOR EXTENSION OF TIME

Appellant Tourism Expenditure Review Committee ("TERC") respectfully moves this Court for an extension of time in which to file its Initial Brief of Appellant and Designation of Matter pursuant to Rules 240 and 263(b), SCACR. In support of this Motion, Appellant states as follows:

1. TERC's Initial Brief of Appellant and Designation of Matter currently are due to be filed August 8, 2011.

2. Counsel for Appellant TERC requests an extension of time of 30 days to file the Initial Brief of Appellant and Designation of Matter due to continuing work schedule conflicts coinciding with the current due date.

3. If the Court grants this request, Counsel for Appellant TERC calculates that TERC will have until September 7, 2011 in which to file the Initial Brief of Appellant and Designation of Matter.

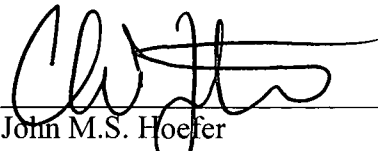
8-8-11
9-7-11
18

4. This is the first request for an extension by Counsel for Appellant TERC.

5. Counsel for Appellant TERC has consulted with Michael W. Battle, Counsel for Respondent City of Myrtle Beach, and I am authorized to state that he has consented to the granting of this request.

Counsel for Appellant TERC therefore respectfully requests that this Court grant this Motion and extend the time for filing the Initial Brief of Appellant and Designation of Matter until September 7, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M.S. Hoefler", written over a horizontal line.

John M.S. Hoefler

Chad N. Johnston

WILLOUGHBY & HOEFER, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

(803) 252-3300

Counsel for Appellant/Respondent Tourism
Expenditure Review Committee

Columbia, South Carolina
July 28, 2011

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

RECEIVED

JUL 28 2011

SC Court of Appeals

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

PROOF OF SERVICE

I certify that I have served the **Motion for Extension of Time** on City of Myrtle Beach by depositing a copy of it in the United States Mail, postage prepaid, on July 28, 2011, addressed to their attorney of record, as indicated below:

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

July 28, 2011



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

Attorneys for Appellant
Tourism Expenditure Review Committee

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL
TRACEY C. GREEN
BENJAMIN P. MUSTIAN
ELIZABETH ZECK*
MICHAEL R. BURCHSTEAD
ANDREW J. MACLEOD
CHAD N. JOHNSTON

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

*ALSO ADMITTED IN TX

July 28, 2011

VIA HAND DELIVERY

Honorable Tanya A. Gee

Clerk of Court

South Carolina Court of Appeals

Post Office Box 11629

Columbia, South Carolina 29211

RECEIVED

JUL 28 2011

SC Court of Appeals

Re: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case Tracking #: 2011194346

Dear Ms. Gee:

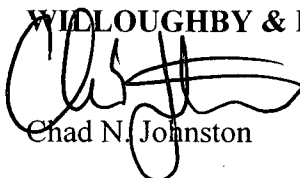
On behalf of the Appellant Tourism Expenditure Review Committee ("TERC") and pursuant to Rules 240 and 263(b), SCACR, enclosed for filing please find an original and six copies of a **Motion for Extension of Time** seeking an additional 30 days within which TERC may file its Initial Brief of Appellant and Designation of Record. Also enclosed is a check in the amount of \$25.00 in payment of the motions filing fee. Please acknowledge receipt of this motion by file-stamping the additional copy of the motion and returning it via the courier.

By copy of this letter, I am serving counsel of record, Michael W. Battle, and enclose a Proof of Service to that effect.

If you have any questions or need additional information, please contact me at your convenience. With best regards, I am

Respectfully,

WILLOUGHBY & HOEFER, P.A.



Chad N. Johnston

cc: Michael W. Battle, Esquire (via first-class mail)

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

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COLUMBIA, SOUTH CAROLINA 29202-8416

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TELECOPIER 256-8062

*ALSO ADMITTED IN TX

July 12, 2011

VIA HAND DELIVERY

Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case Tracking #: 2011194346

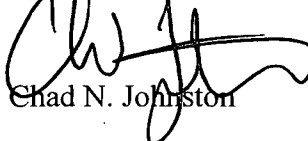
Dear Ms. Gee:

This letter is to inform you that this office received the transcript ordered in connection with the above-captioned case on Friday, July 8, 2011. Pursuant to your letter of July 7, 2011 and the South Carolina Appellate Court Rules, we understand that initial briefs and designation of matter to be included in the record on appeal are due thirty (30) days from the receipt of the transcript. By copy of this letter to its counsel, Michael W. Battle, Esquire, I am noticing Respondent City of Myrtle Beach of the receipt of the transcript.

I would appreciate your acknowledging receipt of this notice by file stamping the extra copy of the notice and returning it to me via our courier. If you have any questions, or require additional information, please do not hesitate to contact me. With best regards, I am,

Respectfully,

WILLOUGHBY & HOEFER, P.A.


Chad N. Johnston

cc: Michael W. Battle, Esquire (via first-class mail)

RECEIVED
JUL 12 2011
SC Court of Appeals

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

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AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

*ALSO ADMITTED IN TX

July 12, 2011

RECEIVED
JUL 14 2011
SC Court of Appeals

VIA FIRST CLASS MAIL

Creel Court Reporting, Inc.
1230 Richland Street
Columbia, South Carolina 29201

RE: Transcript for Tourism Expenditure Review Committee v. City of Myrtle Beach; Case No. 10-ALJ-30-0421-CC
Court of Appeals Case Tracking #: 2011194346

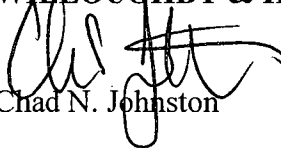
To whom it may concern:

Enclosed please find the invoice and requested payment regarding the transcript request made on June 24, 2011 for the above-referenced case before the Honorable Carolyn C. Matthews on December 2, 2010. We agree to pay the per page charge for this transcript as provided in Rule 207(b), SCACR and Rule 32, RPALC. By copy of this letter, pursuant to Rule 207(b), I am copying the Clerks of Court for the South Carolina Court of Appeals and the South Carolina Administrative Law Court, as well as opposing counsel for the City of Myrtle Beach.

Thank you for your assistance. If you have any questions, or need additional information, please do not hesitate to contact me.

Sincerely,

WILLOUGHBY & HOEFER, P.A.


Chad N. Johnston

CNJ/bim
Enclosure

cc: Honorable Tanya A. Gee, Clerk of Court, Court of Appeals (via first-class mail, w/out enclosures)
Honorable Jana E. Shealy, Clerk of Court, Administrative Law Court (via first-class mail, w/out enclosures)
Michael W. Battle, Esquire (via first-class mail, w/out enclosures)



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 7, 2011

John M. S. Hoefer, Esquire
Chad N. Johnston, Esquire
Willoughby & Hoefer, PA
P O Box 8416
Columbia, SC 29202

Re: City of Myrtle Beach v. Tourism
Case Tracking #: 2011194346

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the

notification requirements c le 207(a)(5), SCACR, also, please ac the Court in writing
upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,
Tanya A. Gee
CLERK

VAG
TAG/ec

cc: Michael W. Battle, Esquire
The Honorable Jana E. Shealy



The South Carolina Court of Appeals

TANYA A. GEE
CLERK
V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
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July 7, 2011

John M. S. Hoefer, Esquire
Chad N. Johnston, Esquire
Willoughby & Hoefer, PA
P O Box 8416
Columbia, SC 29202

Re: City of Myrtle Beach v. Tourism
Case Tracking #: 2011194346

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Michael W. Battle, Esquire
The Honorable Jana E. Shealy

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL
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MICHAEL R. BURCHSTEAD
ANDREW J. MACLEOD
CHAD N. JOHNSTON

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

June 24, 2011

*ALSO ADMITTED IN TX

VIA FIRST CLASS MAIL

Creel Court Reporting, Inc.
1230 Richland Street
Columbia, South Carolina 29201

Re: Transcript for Tourism Expenditure Review Committee v. City of Myrtle Beach; Case No. 10-ALJ-30-0421-CC

To whom it may concern:

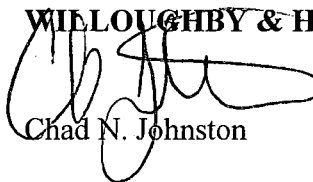
Enclosed please find our enclosed request for a transcript of the entire record of the contested case hearing in the above-referenced case before the Honorable Carolyn C. Matthews on December 2, 2010. We agree to pay the per page charge for this transcript as provided in Rule 207(b), SCACR and Rule 32, RPALC.

By copy of this letter, pursuant to Rule 207(b), I am copying the Clerks of Court for the South Carolina Court of Appeals and the South Carolina Administrative Law Court, as well as opposing counsel for the City of Myrtle Beach, the request for which was made within ten (10) days of the filing of our Notice of Appeal.

Thank you for your assistance. If you have any questions, or need additional information, please do not hesitate to contact me.

Sincerely,

WILLOUGHBY & HOEFER, P.A.



Chad N. Johnston

CNJ/bim
Enclosure

cc: Honorable Tanya A. Gee, Clerk of Court, Court of Appeals (via first-class mail)
Honorable Jana E. Shealy, Clerk of Court, Administrative Law Court (via first-class mail)
Michael W. Battle, Esquire (via first-class mail)

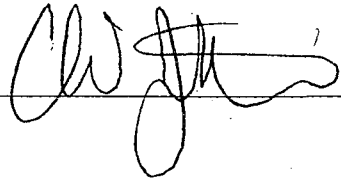
RECEIVED

JUN 27 2011

SC Court of Appeals

Request for Transcript of Record

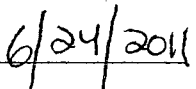
I, Chad N. Johnston, request the Transcript of the Record for the case Tourism Expenditure Review Committee v. City of Myrtle Beach, Docket No. 10-ALJ-30-0421-CC. The hearing in this matter was held on December 2, 2010 before the Honorable Carolyn C. Matthews. I understand that I am responsible for all costs associated with the preparation of this transcript pursuant to Rule 32 of the Rules of Procedure for the Administrative Law Court.


Signed

Willoughby & Hoefer, PA

Post Office Box 8416

Columbia, South Carolina 29202-8416


Dated

RECEIVED

JUN 27 2011

SC Court of Appeals

PM 6/20/11
POS 6/20/11

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

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JUN 22 2011

SC Court of Appeals

Tourism Expenditure Review Committee, ...Appellant,

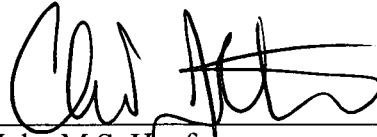
v.

City of Myrtle Beach, ...Respondent.

NOTICE OF APPEAL

Appellant, Tourism Expenditure Review Committee ("TERC"), appeals the order, dated April 18, 2011, of the Administrative Law Court in the above-referenced case. A copy of this order is attached hereto as Exhibit "A". Thereafter, TERC timely filed a motion for reconsideration of the Administrative Law Court's order on April 28, 2011. No order, either granting or denying TERC's motion for reconsideration, was issued by the Court, the requisite time for which would have been May 31, 2011. Consequently, TERC's motion is deemed denied, see Rule 29(D)(2) of the Rules of Procedure for the Administrative Law Court ("RPALC"), and TERC files the within notice pursuant to Rule 29(D)(4), RPALC, and Rule 203 of the South Carolina Appellate Court Rules.

[SIGNATURE PAGE FOLLOWS]



John M.S. Hoefler

Chad N. Johnston

Willoughby & Hoefler, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

803-252-3300

jhoefler@willoughbyhoefler.com

cjohnston@willoughbyhoefler.com

Attorneys for Appellant

Tourism Expenditure Review Committee

Columbia, South Carolina

June 20, 2011

Other Counsel of Record:

Michael W. Battle

Battle, Vaught, PA

Post Office Box 530

Conway, South Carolina 29528

843-248-4321

mbattle@sccoast.net

**Attorney for Respondent City of
Myrtle Beach**

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

Tourism Expenditure Review Committee, ...Appellant,

v.

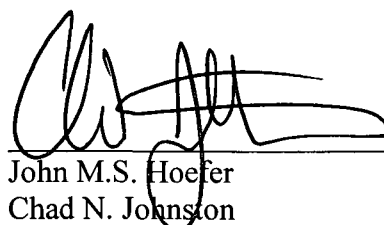
City of Myrtle Beach, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on City of Myrtle Beach by depositing a copy of it in the United States Mail, postage prepaid, on June 20, 2011, addressed to their attorney of record, as indicated below:

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

June 20, 2011



John M.S. Hoefler
Chad N. Johnston
Willoughby & Hoefler, P.A.
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Columbia, South Carolina 29202-8416
803-252-3300
jhoefler@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Appellant
Tourism Expenditure Review Committee

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

RECEIVED

JUN 22 2011

SC Court of Appeals

Tourism Expenditure Review Committee, ...Appellant,

v.

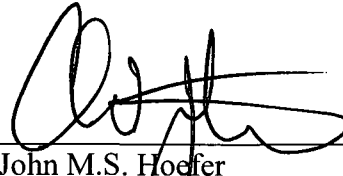
City of Myrtle Beach, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the South Carolina Administrative Law Court by depositing a copy of it in the United States Mail, postage prepaid, on June 20, 2011, addressed as indicated below:

The Honorable Jana E. Shealy
Clerk of Court
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

June 20, 2011



John M.S. Hoefler
Chad N. Johnston

Willoughby & Hoefler, P.A.

Post Office Box 8416
Columbia, South Carolina 29202-8416
803-252-3300
jhoefler@willoughbyhoefler.com
cjohnston@willoughbyhoefler.com

Attorneys for Appellant
Tourism Expenditure Review Committee

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

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COLUMBIA, SOUTH CAROLINA 29202-8416

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CHAD N. JOHNSTON

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

*ALSO ADMITTED IN TX

June 20, 2011

RECEIVED

JUN 22 2011

SC Court of Appeals

VIA FIRST CLASS MAIL

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case No. 10-ALJ-30-0421-CC

Dear Ms. Gee:

Enclosed for filing please find the original and one (1) copy of a Notice of Appeal on behalf of the Tourism Expenditure Review Committee ("TERC") from the order of the Honorable Carolyn C. Matthews in the above-referenced matter.

By copy of this letter to its counsel, Michael W. Battle, Esquire, I am serving the City of Myrtle Beach ("City") with a copy of this Notice and enclose a proof of service to that effect. By separate letter, I am serving and filing a copy of this Notice with the Clerk of Court for the Administrative Law Court, a proof of service to that effect is enclosed.

Because it is an instrumentality of the State of South Carolina, created by the legislature under S.C. Code Ann. §6-4-35 (2004, as amended), it is my understanding that TERC is exempt from the filing fee under Rule 203(d)(1)(B)(iii), SCACR. However, out of an abundance of caution, I am enclosing our check in the amount \$100 for the filing fee should it be required. If my interpretation of the rule is correct, I ask that you return our check via the enclosed return envelope.

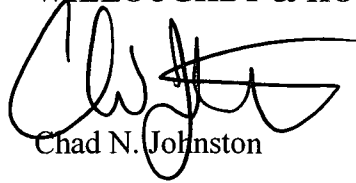
I would appreciate your acknowledging receipt of the within enclosures by file stamping the extra copy of the Notice and returning it to me via our courier.

Honorable Tanya A. Gee
June 20, 2011
Page 2

If you have any questions, or require additional information, please do not hesitate to contact me. With best regards, I am,

Respectfully,

WILLOUGHBY & HOEFER, P.A.

A handwritten signature in black ink, appearing to read "Chad N. Johnston", is written over the firm name.

Chad N. Johnston

CNJ/bim
Enclosure

cc: Michael W. Battle, Esquire (via first-class mail with enclosures)

EXHIBIT A

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

City of Myrtle Beach,

Petitioner,

v.

Tourism Expenditure Review Committee,

Respondent.

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

FINAL ORDER

APPEARANCES: FOR THE PETITIONER: MICHAEL W. BATTLE
 FOR THE RESPONDENT: JOHN M.S. HOEFER

STATEMENT OF THE CASE

On May 19, 2010, the City of Myrtle Beach (City or Petitioner) filed this matter with the Administrative Law Court (ALC or Court) requesting a hearing regarding the Tourism Expenditure Review Committee's (TERC or Respondent) determination that four separate disbursements of general funds in the amount of \$302,545 by the City in fiscal year 2008-2009 did not comply with the requirements of the Accommodations Tax Act (Act), specifically S.C. Code Ann. § 6-4-25. TERC thus certified to the State Treasurer, pursuant to S.C. Code Ann. § 6-4-35(B)(1)(a) (2004), that the disbursements were non-compliant and that \$302,545 worth of future distributions of accommodations tax revenues (A-TAX) should be withheld from the City. The State Treasurer thus withheld those funds from the City's A-TAX [Accommodations Tax] allocation.

The appeal before the Court involves the City's use of its general funds. It does not address the City's use of the A-TAX special fund. TERC has challenged the City's disbursement of its 2008-2009 A-TAX-fund in a separate declaratory judgment action filed in the Court of Common Pleas in Richland County. The Court will assume that the City's use of its A-TAX

FILED

APR 14 2011

allocation for the 2008-2009 fiscal year was proper, solely for the purpose of resolving the case before the Court.

The only issue is whether TERC has the authority to reduce the City's accommodation tax revenue allocations because TERC disapproves of the manner in which the City disbursed its general funds. TERC disapproved of the City's disbursement of its general funds for tourism related expenditures because the City did not submit those applications to a local advisory committee.

Pursuant to notice, a hearing on the merits was held before me in Columbia, South Carolina. For the reasons set forth below, I conclude that the City's four tourism related expenditures from its general fund to outside entities are exempt from the requirements of the Act and therefore TERC's notification to the State Treasurer to withhold \$302,545 should be reversed. The State Treasurer should include the withheld \$302,545 in the City's next A-TAX allocation.

STIPULATIONS OF FACT

The parties entered into the following written stipulation of facts, with exhibits attached, pursuant to ALC Rule 25(C):

1. The City is a duly incorporated municipality of the State of South Carolina.
2. The City has a high concentration of tourism activity as contemplated under section 6-4-10(4) of the South Carolina Code (2004).
3. At all times pertinent to this matter, as required by section 6-4-25(A) of the South Carolina Code (2004), the City of Myrtle Beach has had a seven member local advisory committee ("Committee") to review and make recommendations to the Myrtle Beach City Council ("Council"), based on applications for the expenditure of revenue generated from the state accommodations tax (A-Tax) provided for under sections 12-36-920(A) and 12-36-2630(3)

of the South Carolina Code (Supp. 2009) and allocated to the A-Tax fund created under section 6-4-10(4) for tourism related expenditures. At all times pertinent to this matter, the City has adopted and used the Uniform Grant Application Form as the application document for both A-Tax and non-A-Tax outside agency funding. The City uses different cover letters and application periods to distinguish between A-Tax and non-A-Tax applications. In fiscal year 2008-2009, the Council made grants from the general fund of the City of Myrtle Beach for tourism-related purposes in the total amount of \$960,045.

4. Pursuant to Section 6-4-25 (C), the Committee makes recommendations regarding tourism related expenditures from the A-Tax fund, and those recommendations are considered by the Council as required under Section 6-4-25 (C). The Council is vested with the ultimate decision as to the final disbursement of the A-Tax fund created under section 6-4-10(4).

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. The Committee's recommendations to Council, and Council's final actions with respect to these applications were reported to the Accommodations Tax Oversight Committee (TERC) on September 30, 2009, as required by section 6-4-25.

The report showed that: (a) there was \$4,681,464 available from the A-Tax special fund for fiscal year 2008-2009; (b) the City of Myrtle Beach requested that \$3,977,794, which was 84.97% of the available funds, be expended on "support of operating expenses for services provided above and beyond permanent population throughout the year, to include additional Police, Fire and Parks personnel" according to Section 6-4-10 (4) (b); (c) the Committee recommended that \$3,065,294, or 65.48% of the money available in the A-Tax special fund be granted to the City of Myrtle Beach to "support of operating expenses for services provided above and beyond permanent population throughout the year to include additional Police, Fire

and Parks personnel”, based on the City’s applications, and (d) the number of visitors to the City was estimated by the Myrtle Beach Chamber to be 13.7 million visitors annually. The Committee recommended that non-city A-Tax applicants receive \$636,500, or 13.60% of the available A-Tax fund, be used on “Tourism-Related Events” or “Tourism-Related Facilities”.

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.

7. By letter dated January 4, 2010, TERC notified the City that it had reviewed the City’s September 30, 2009, report and questioned: (a) whether the City’s expenditure of approximately \$4.6 Million on police, fire and parks personnel complied with the requirement of S.C. Code Ann. §6-4-10(4)(b) that monies in the fund created under section 6-4-10(4)(a) not be used as an additional source of revenue to provide services normally provided by the City; and (b) whether, by dedicating this amount to the City’s general fund and subsequently approving expenditures on various tourism related events and projects from the City’s general fund, the City was employing a procedure to authorize expenditures of local accommodations tax funds, generated under section 12-36-2630(3), which was contrary to the requirements of section 6-4-25(A-C).

8. By letter dated January 7, 2010, the City responded to TERC’s January 4, 2010, letter and, with respect to TERC’s question regarding the procedure used for expenditures on “various events and projects” from its general fund stated that “Council considered the local advisory committee’s recommendations regarding the funding of the agencies and projects for which applications were filed when [City Council] subsequently considered the allocation of grant money from its General Fund.”

9. By letter dated January 8, 2010, the City made a request for information from TERC under the South Carolina Freedom of Information Act consisting of, among other items, minutes of TERC meetings and reports filed with TERC from and between 2001 and 2009 by municipalities and counties with a high concentration of tourism as provided for in section 6-4-10(4)(b). TERC made the requested information available to City.
10. By letter dated February 11, 2010, TERC requested that the City provide additional information to TERC pertaining to “the amount of accommodations tax fund expenditures by the City during the pertinent period which were associated with ‘the funding of the agencies and projects for which applications were filed when [City Council] subsequently considered the allocation of grant money from its General Fund.’”
11. By letter dated February 10 *[sic]*, 2010, the City responded to TERC’s February 11, 2010, letter and asserted therein that the funding of the agencies and projects from its general fund, referenced in the City’s January 10, 2010, letter, and TERC’s February 11, 2010, letter, were “outside the scope of S.C. Code Ann. §6-4-35.”
12. For the 2008-2009 fiscal year, the local advisory committee considered all applications for grants from the special fund of A-Tax revenues. The local advisory committee recommended that some of the funds from the special fund of A-Tax revenues be disbursed to specific grant applicants and that the remainder of the funds from the special fund of A-Tax revenues be disbursed to the City to provide 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.
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.

14. On February 24, 2010, TERC made a Freedom of Information Act request to the City for documents relating to "the funding of the agencies and projects for which applications were filed when [City Council] subsequently considered the allocation of grant money from its General Fund" as described in the City's January 7, 2010, letter to TERC. The City complied with this request.

15. By letter dated May 6, 2010, TERC notified the City that five expenditures from its general fund totaling \$312,545 constituted expenditures of accommodations tax funds for tourism-related purposes which had not been reviewed by the local advisory committee and therefore did not comply with section 6-4-25(A-C). By the same letter, TERC certified to the State Treasurer's office that these expenditures were not compliant and that it should withhold \$312,545 from the City's next distribution of accommodations tax revenue in accordance with section 6-4-35(B)(1)(a) of the South Carolina Code (2004). The State Treasurer's office withheld \$312,545 from the City's 2009-2010 distribution of A-Tax funds.

16. TERC and the City have resolved their dispute with respect to \$10,000 of the \$312,545, which was withheld by the State Treasurer's Office arising out of the expenditure for the FPC Concerts, Inc./First Presbyterian Church. TERC has advised the State Treasurer to restore that amount of funding to the City in the next cycle of distributions of A-Tax funds.

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.

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.

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.

25. The Committee did not review the specific grants referenced in Stipulation numbers 17-24 above.

26. The total amount of the grants identified in Stipulation numbers 17-24 above is \$302,545.

27. 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.

28. The document attached hereto as Stipulation Exhibit "8" is a true and correct copy of City's report to the Respondent under section 6-4-25 for fiscal year 2008-2009.

29. The document attached hereto as Stipulation Exhibit "9" is a partial list of grants made by the City in fiscal year 2008-2009.

30. The document attached hereto as Stipulation Exhibit "10" is a true and correct copy of the minutes of the Council meeting held February 24, 2009.

ADDITIONAL FINDINGS OF FACT

I make the following Additional Findings of Fact by judicial notice or by a preponderance of the evidence:

1. On October 27, 1998, the South Carolina Department of Revenue issued Revenue Ruling # 98-22 which contained the following statement, among others:

QUESTION 1: Must the amounts allocated to the general fund of the county or municipality be used for tourism-related expenditures?

ANSWER: No. Code Section 6-4-10 specifically provides that Accommodations Tax Funds allocated to the general fund are specifically exempted from the requirements of Chapter 4 of Title 6, including any requirements as to how those funds must be spent.

2. Revenue Ruling # 98-22 has not been modified or rescinded.
3. TERC does not have any statutory authority to promulgate regulations or adopt guidelines governing the requirements for applications for funds¹
4. The City of Myrtle Beach adopts its own budget and disburses its general funds in accordance with S.C. Code Ann. §5-13-90.

¹ The local municipality or county and its advisory committees are required to adopt such guidelines. S.C. Code Ann. Section 6-4-25(B)

5. The questioned four general fund grants to outside recipients were disbursed from the City's general funds and not from the City's allocation of A-TAX revenues.

CONCLUSIONS OF LAW

Based on State statutes and case law, the parties' stipulations and the additional findings of fact, I conclude the following as a matter of law:

1. The appeal involves the statutory construction of the Accommodations Tax Act. Courts construe a statute with regard to its plain and ordinary meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. *Horry County School Dist. v. Horry County* 346 S.C. 621, 552 S.E.2d 737, 157 Ed. Law Rep. 951 (SC 2001). "A statute must receive such construction as will make all of its parts harmonize with each other and render them consistent with its general scope and object." *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996).
2. The Act falls within 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. S.C. Const. art. VIII, § 17; see also *Quality Towing Inc. v. City of Myrtle Beach*, 340 S.C. 29, 37, 530 S.E.2d 369, 373 (2000).
3. TERC lacks authority under the Act to prescribe requirements for disbursements after A-Tax funds have been allocated to the City's general funds.
4. Within the Act, there is language which indicates that the general fund of a municipality is exempt from all requirements of the Act. See S.C Code Ann. §6-4-10 (1) ("The first twenty-five thousand dollars must be allocated to the general fund of the municipality or county and is exempt from all other requirements of this chapter.") S.C Code Ann. §6-4-10 (4)(a) provides:

“This section does not prohibit a municipality or county from using accommodations tax general fund revenues for tourism-related expenditures.”

5. The local advisory committee is authorized to make recommendations only on the expenditure of revenue generated from the accommodations tax. See SC Code Ann. § 6-4-25 (a). TERC has no power to vest the local advisory committee with additional authority or duties in connection with the City’s general fund. SC Code Ann. § 6-4-35. Only the City is authorized to budget for and disburse its general fund. S.C. Code Ann. § 5-13-90; S.C. Const. art. VIII, § 17. Further, as stated above, the City’s general fund is exempt from the requirements of the Act. SC Code Ann. § 6-4-10; SC Department of Revenue, Revenue Ruling 98-22.

6. The City has met the Act’s requirements, because the local advisory committee reviewed the City’s grant application and the City was the only recipient of the City’s A-TAX allocation. SC Code Ann. § 6-4-25 (B) & (C).

7. The local advisory committee’s failure to review grant applications for disbursements from the general fund does not violate the Act because the Act provides that the general fund is exempt from the requirements of the Act. SC Code Ann. § 6-4-10(1).

Discussion

TERC found that the City’s use of general funds for tourism related expenditures did not comply with the Accommodations Tax Act because those expenditures were not first reviewed by the local advisory committee established by the Act. The starting point of this Court’s analysis is the authority or jurisdiction of the local advisory committee.

Local advisory committees were mandated by the Act for local governments receiving more than \$50,000 in accommodations taxes. S.C. Code Ann. §6-4-25. The purpose of local advisory committees is “to make recommendations on the expenditure of revenue generated from the accommodations tax.” *Id.* The Act requires that a recipient’s application for A-Tax funds

must be reviewed by an advisory committee before it receives funds from a county or municipality. S.C. Code Ann. §6-4-25(b). The Act does not vest the local advisory committee with authority or jurisdiction to review applications for a county or municipality's general funds. TERC was not given the authority to vest the local advisory committee with the authority to review applications for disbursements from a county or municipality's general funds. S.C. Code Ann. §6-4-25. However, TERC interpreted the Act to require the City to submit outside agencies' tourism- related applications for its general funds to an advisory committee which has no authority to review those applications. TERC's interpretation of the Act leads to an absurd result. Statutes are not to be interpreted in a way that leads to absurd results. See e.g. *Lancaster County Bar Assoc. v. S.C. Comm. on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008) (holding the Court should avoid construing a statute so as to lead to an absurd result, and it will reject an interpretation which leads to an absurd result that could not have been intended by the legislature).

The stated purpose of the Accommodations Tax Act is to provide for the allocation of accommodations tax revenues. Those revenues are allocated to a special A-TAX Fund over which TERC has oversight authority. The Act separates the A-TAX special fund from counties and municipalities' general funds. The Act permits a county or municipality to allocate a certain percentage of the special fund allocation to its general fund; the Act provides that the general fund is exempt from any further requirements of the Act. The obvious intent of the General Assembly is to limit the disbursement of accommodations tax revenues through the procedures established for review of outside agency applications by the local advisory committee and reporting expenditures of those accommodations tax revenues to TERC.

It is equally obvious that the General Assembly did not intend for the Act to limit the City's expenditure of its general funds. The Act expressly exempts general fund expenditures

from the requirements of the Act, notwithstanding the fact that some of the general funds may involve accommodations tax revenues. S.C. Code Ann. §6-4-10.

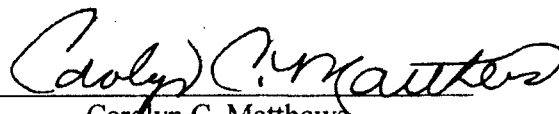
TERC's determination that the City did not comply with the Accommodations Tax Act is contrary to the plain meaning of the Act and should be reversed. See *Media General Communications, Inc. v. South Carolina Dept. of Revenue* 388 S.C. 138, 694 S.E.2d 525 S.C.,2010. ("Where the statute's language is plain 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. The best evidence of intent is in the statute itself: "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).)

Conclusion

The question of whether the City is permitted to allocate to itself all of its ATAX revenues for the 2008-2009 fiscal year is not before the Court. The sole question before the Court is whether 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 Act does not apply to the City's general fund. It only applies to the special fund created by ATAX revenues. SC Code Ann. § 6-4-10.

TERC's notification to the State Treasurer's Office to withhold funds from the City's ATAX revenue allocation because of general fund disbursement procedures should be set aside and the State Treasurer should release those funds to the City in the next ATAX allocation of special revenues.

April 14, 2011


Carolyn C. Matthews
Administrative Law Court Judge