

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Circuit Court's Orders are not based on the plain language of section 6-4-10(4)(b).

a. The plain language of section 6-4-10(4)(b) supports the position advanced by the Tourism Expenditure Review Committee.

TERC contends that the circuit court erred as a matter of law in holding the plain language of § 6-4-10(4)(b) supports the proposition advanced by the COMB, that a municipality may expend A-Tax revenues for services normally provided by the municipality. TERC App. Br. at 13-20. As has been demonstrated to this Court, although the circuit court Orders purport to be based on the plain meaning of the statute, they nevertheless rely solely on extrinsic evidence to substantiate the rulings contained therein. Id.

The COMB begins its brief with the proposition that TERC's contention that the Orders permit a municipality to expend A-Tax revenues for services normally provided by the municipality incorrectly interprets the findings of the circuit court. See COMB Resp. Br. at 9. The COMB then cites the first conclusion of law of the Initial Order for that proposition, which provides:

Because the City is an area with a high concentration of tourism activity, it may allocate its entire A-Tax discretionary fund to 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 under the authority of S.C. Code Ann. § 6-4-10(4)(b).

(R.p.), Initial Order at 8. However, this conclusion of law by the circuit court only supports TERC's argument that the circuit court held (incorrectly) that A-Tax revenues may be expended on services normally provided by the municipality. The error of the circuit court's conclusion in this regard is illuminated by its substitution of the phrase "additional costs" for the words that are used in the statute by the legislature: additional services. In other words, the Order adds words

to the statute that justify expending A-Tax revenues on the “additional costs” attributable to tourists for existing services normally provided by the City. The problem with this line of reasoning is that it creates a distinction that does not appear in § 6-4-10(4)(b) and, in fact, is contrary to the statute’s plain language.

In pertinent part, § 6-4-10(4)(b) provides:

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.

(Emphasis added). The phrase “additional costs”—erroneously employed by the circuit court and advanced by the COMB—does not appear in § 6-4-10(4)(b). Instead, the statute speaks only to additional services not normally provided by the municipality. The circuit court’s use of the phrase “additional costs” in its conclusion regarding the meaning of § 6-4-10(4)(b), demonstrates conclusively that the circuit court’s ruling is not based on the plain language of the statute.

By contrast, TERC’s position in this case is founded solely on the plain meaning of § 6-4-10(4)(b), i.e., that the statutory language is not ambiguous, and the circuit court erred in looking beyond the four corners of the statute to deny the declaratory judgment sought by TERC (and to grant the declaratory judgment sought by COMB). TERC asserts that a municipality with a high concentration of tourism activity¹ may only use A-Tax funds for those municipal services which are in addition to the services normally provided by the municipality, a position

¹ It is undisputed that the COMB is a municipality with a high concentration of tourism. See App. Br. at 14, n.7.

that is supported by words appearing in the statute. By contrast, the circuit court's construction, which follows the COMB's suggested reading of § 6-4-10(4)(b), would permit a county or municipality to use A-Tax Funds as an additional source of annual, general fund revenue to pay for services already provided by the City. TERC submits that, in order to give clear effect to the expressed intent of the legislature, the terms "additional" and "normal", which appear in the statute, can only mean that the COMB may use A-Tax revenues in certain circumstances to supplement the City's revenues that the City itself ordinarily expends on municipal services.

As previously noted, TERC's position is supported by the General Assembly's use of the specific article "the" rather than a more general article like "a" in the statute. See § 6-4-10(4)(b) ("The funds must not be used as an additional source of revenue to provide services normally provided by **the** county or municipality") (emphasis added); see App. Br. at 16. In order to overcome this fact, the COMB is forced to suggest, based on a 1944 Oregon Supreme Court case, that this Court should disregard the plain language of the statute and substitute the more indefinite article "a" for the definite article "the" appearing in the statute.² See COMB Resp. Br. at 12. However, a court's interpretation of a statute either is based on the plain language of the statute, or it is not, and the COMB's suggestion here that this Court should both affirm the circuit court's ruling based on the plain language of the statute and then construe into the statute substituted words for words appearing in the statute is a legal impossibility that cannot stand casual scrutiny. The General Assembly is presumed to know and intend the consequences of the legislation that it passes and courts are not at liberty to hold that the General Assembly has

² The Court should note that the case cited by the COMB for this proposition does not even hold that deletion of one article and substitution of another article is proper or appropriate. Vinton v. Hoskins, 147 P.2d 892 (Or. 1944). While the Vinton court discussed the appropriateness of substituting an indefinite article in the place of a definite article, that court ultimately determined that the statute is ambiguous and impermissibly vague. Id. at 895-96.

included futile and superfluous language. See State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) (stating that in seeking intention of legislature, a court must presume General Assembly intended by its action to accomplish something and not to do a futile thing). Consequently, the General Assembly's inclusion of the introspective, definite article "the" supports TERC's position that a municipality is required to consider its own personnel service expenditure levels to determine which uses of A-Tax revenues for municipal services are appropriate and does not allow for a comparison of service level expenditures among differing municipalities.

Additionally, the circuit court's construction of § 6-4-10(4)(b) would not only allow a municipality to disregard the specific language in the statute, but would effectively read additional provisions into the statute, including language that authorizes municipalities with high concentrations of tourism to compare their expenditures with other municipalities in order to determine the appropriateness of utilizing A-Tax revenues. Contra Independence Ins. Co. v. Indep. Life & Acc. Ins. Co., 218 S.C. 22, 34, 61 S.E.2d 399, 405 (1950) ("The purpose of construction is to ascertain the legislative intent from the words used; and, if these are susceptible to any sensible meaning, **the court cannot add to them other words which would give them a different meaning without making, instead of construing, the statute.**") (emphasis added) (quoting Banks v. Columbia Ry., G. & E. Co., 113 S.C. 99, 101 S.E. 285 (1919)). First, it is worth noting that § 6-4-10(4)(b) does not provide for any comparisons of the municipal service level expenditures made by a municipality. However, TERC suggests that common sense would dictate that if comparisons were permitted under the statute, a comparison of the level of services a municipality would be providing if it had the same permanent population as another county or municipality **not** situated in an area with a high concentration of

tourism activity—as suggested by the COMB—is entirely inapt, since it assumes that the two municipalities are similar.

Section 6-4-10(4)(b) clearly differentiates between municipalities having a high concentrations of tourism activity and those not having a high concentration of tourism activity. See § 6-4-10(4)(b) (limiting subsection (b)’s application to those counties or municipalities with high concentrations of tourism). Although the COMB has a high concentration of tourism activity, the construction of § 6-4-10(4)(b) by the circuit court allows the COMB to utilize a municipality that does **not** have a high concentration of tourism as a comparison point for its level of expenditures. This manner of comparison is convenient for the COMB, because it would hereafter allow it to put its service level expenditures side by side with a municipality that shares no similarities with the COMB beyond population size and both being located in the South Carolina.³ This “apples and oranges” comparison will permit the COMB to continue to supplant a portion of its municipal tax revenues for services that it normally provides, year in and year out, with A-Tax revenues. Consequently, the holding of the Orders is unsupported by the plain language of § 6-4-10(4)(b) and this Court should reverse accordingly.

b. The Circuit Court erred as a matter of law in admitting and relying upon on extrinsic evidence to support its ruling where it did not find the statute to be ambiguous.

TERC’s position in this case has been clear throughout its pleadings and briefs to this Court: this declaratory judgment action should be based on the plain language of § 6-4-10(4)(b) alone, and the COMB’s offer of extrinsic materials in support and in explanation of its position proves that the COMB’s position—and suggested manner of comparing expenditures—does not find support in the plain language of the statute and should therefore be disallowed. TERC also suggests that the circuit court’s admission and ultimate reliance upon extrinsic evidence to

³ The COMB has previously suggested Greenwood, South Carolina is be an suitable comparison.

interpret, explain and substantiate its holdings contradicts its “plain language” holding.⁴ In response, the COMB suggests that the circuit court’s admission of the extrinsic materials at trial, and ultimate inclusion and reliance on those materials in the Orders, was merely done to show the application of the plain language to the facts at hand.⁵ COMB Resp. Br. at 15-16. However, circuit court does not offer the extrinsic materials as context, but instead presents them under the headings of “prior court precedent” and “longstanding prior interpretations of the Act”, which clearly indicate the circuit court’s belief that those materials serve as the continuing foundation of its decision. **(R.p.)**, Initial Order at 11-12.

The COMB’s invocation of the Supreme Court’s opinion in Travelscape, LLC v. South Carolina Department of Revenue, to support its position and attempt to explain away the circuit court’s clear reliance on extrinsic materials, is inapposite. 391 S.C. 89, 705 S.E.2d 28 (2011); see COMB Resp. Br. at 15-16. In Travelscape, the court undertook an extensive analysis of the language of the tax statute in question. In doing so, the Supreme Court defined and applied, within the confines of the statute, the terms appearing in the statute, discussing the interplay between competing clauses and similar words. However, the Supreme Court’s analysis is entirely confined within the statute itself. Once it reached an interpretation of the provisions in the statute, the Supreme Court then applied that interpretation to the facts existing in the case. A

⁴ Again, although the circuit court’s initial Order states that its ruling is based on the plain meaning of § 6-4-10(4)(b), tellingly, the court’s discussion contains no actual analysis of the words contained in the statute, but instead advances only conclusory statements purporting to have arrived at legislative intent. **(R.p.)**, Initial Order at 9-10.

⁵ The COMB’s contention that the Orders are supported by the plain language of § 6-4-10(4)(b) is belied by the clear holdings of the Initial Order. See e.g. **(R.p.)**, Initial Order at 2 (In discussing the admittance of the extrinsic materials over TERC’s objection, “The Court rules that [the extrinsic] evidence was admissible and that such evidence could be properly weighed by the Court to determine its value in deciding the issues.”).

suggestion that the Orders in this case conduct a similar analysis to that performed in Travelscape is simply without basis in fact.

Under the “plain language” discussion, the circuit court’s analysis manifestly does not extend beyond the initial sentence of § 6-4-10(4)(b): “[w]hen construing the statute in question, the opening statement of the subsection expresses the intent of the legislature in plain language” See (R.p.), Initial Order at 9. However, in interpreting the plain language of § 6-4-10(4)(b), the circuit court avoided, altogether, any analysis of the clear legislative caveat placed on the use of A-Tax revenues by a municipality for additional governmental services, which appears in the very next sentence of the statute. While the Initial Order holds that “[t]he legislature did not limit the amount of the funds that could be used for the additional governmental services”, see (R.p.), Initial Order at 10, this holding is clearly contradicted by the plain language of the next sentence of the statute, which the circuit court did not discuss at all. As recited above, § 6-4-10(4)(b) expressly provides that A-Tax “funds must not be used as an additional source of revenue to provide services normally provided by the county or municipality....” § 6-4-10(4)(b). An order declaring the meaning of § 6-4-10(4)(b) is inadequate as a matter of law in the absence of a discussion regarding the import of the clear legislative limitation appearing in the statute in question, as well as a discussion of the interplay between those two portions of the same section, which is exactly the kind of thoughtful discussion undertaken by the Supreme Court in Travelscape. That conflict, as evidenced by the two distinct interpretations of § 6-4-10(4)(b) presented by the parties in this action, is at the heart of this declaratory judgment action; yet, this important and controlling provision of the statute is not even mentioned in the Orders; the COMB’s brief—like the Orders—avoids the provision by simply failing to address it.

Notwithstanding the pronouncement that its holdings are based entirely on the statute, and in support of its “plain meaning” ruling, the circuit court Orders rely exclusively on extrinsic materials presented by the COMB to substantiate their conclusions. In relying on these materials, the circuit court Orders contradict the ruling that the decision is based solely on the plain meaning of the statute. Moreover, absent a finding of an ambiguity, the circuit court’s analysis of and reliance on extrinsic materials was in error. See City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) (“Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.”).

Further, as discussed in the Appellant’s Brief, this Court has recently held, in an *en banc* decision, that a court must first make an express finding of an ambiguity in order to look beyond the plain meaning of a document. 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). Where there is no ambiguity, the court is bound to rely solely on the terms of the statute and give them their plain, ordinary and popular meaning. Id. Accordingly, the circuit court erred in admitting and relying on extrinsic materials for its holding, and absent an express finding of an ambiguity, the Orders should be reversed.

II. The Circuit Court erred in its interpretation and application of law to the extrinsic evidence that it erroneously admitted.

Despite its insistence that the Orders are based on the plain language of the statute, the COMB nevertheless also maintains that the circuit court’s continual reference to and reliance on extrinsic materials was merely done to provide context. See COMB Resp. Br. at 16. TERC disagrees and submits that rather than supplying context, the extrinsic evidence was erroneously

relied upon by the circuit court to arrive at the meaning of the statutory language. TERC also submits that the circuit court compounded its error in this regard in its analysis of the extraneous evidence upon which it relied.

- a. **The preamble of the enacting language to the statutory predecessor of sections 6-4-5 *et seq.*, sections 12-35-710 *et seq.* (1984), supports the position of the Tourism Expenditure Review Committee.**

TERC argued to the circuit court, and has maintained in the instant appeal, that if the circuit court found the statute to be ambiguous and endeavored to look beyond its plain language, the preamble of the enabling legislation to the statutory predecessor of § 6-4-10(4)(b) is clear evidence of the General Assembly's intent and should have been considered before, or in addition, to the extrinsic materials presented by the COMB. (**R.p.**); TERC App. Br. at 26-28. In response, the COMB does not dispute TERC's assertion, based on clear case law cited in the Appellant's Brief, see COMB App. Br. at 26-27, that if the statute is ambiguous, the circuit court could, and in fact should, have considered the preamble. Instead, the COMB goes to great lengths to attribute to TERC, and then dispute, a conclusion not advanced by TERC: that the COMB's City Council's decision to disburse all of the available A-Tax revenues to its general fund in fiscal year 2008-2009 somehow divests it of its discretion from doing anything different going forward. See COMB Resp. Br. at 16-17. TERC has not advanced this position and therefore will not undertake its discussion.

However, TERC continues to maintain that the language contained in the preamble to the enabling legislation is telling: the inclusion of the phrase "from time to time" reflects the General Assembly's intent that municipalities with high concentrations of tourism not be allowed to simply rely on A-Tax revenues for additional, yearly revenue supplanting normal municipal revenue. Instead, it demonstrates the intent of the General Assembly to only allow qualifying municipalities to use A-Tax revenues for the provision of those services in unique circumstances

warranting their need to help promote tourism and enlarge the economic benefits of the area, which conforms to the plain language of the statute and TERC's suggested reading. Again, while TERC submits that its position is fully supported by the plain language of § 6-4-10(4)(b), should this Court conclude that the statute is ambiguous (which the circuit court failed to do), TERC submits that the enabling language of the statutory predecessor to § 6-4-10(4)(b) supports TERC's position and that the circuit court's findings to the contrary should be reversed.

b. The Circuit Court misinterpreted South Carolina Department of Revenue Ruling #98-22.

The circuit court, in relying on an isolated portion of RR #98, failed to give full weight to the analysis of this ruling, and therefore misapplied the import of the 13 year old, non-binding administrative opinion. As discussed in the Appellant's Brief, and contrary to the position attributed to it in the initial Order, TERC does not dispute the fact that § 6-4-10(4)(b) permits a municipality with a high concentration of tourism activity to expend A-Tax revenues on municipal services in certain circumstances to the extent that the expenditures are for services in addition to those services that the particular municipality itself normally provides. See TERC App. Br. at 28-29. However, TERC maintains and reiterates its position that RR #98-22 does not support the COMB's proposition, *to wit*: that it is appropriate for a municipality with a high concentration of tourism activity to look to other municipalities with similar permanent populations (but without a high concentration of tourism activity) in order to determine the municipal costs attributable to tourists. See RR #98-22, (R.pp.), Questions and Answers 5, 6, 14, 19, and 31.

Additionally, contrary to the curious suggestion by the COMB that the General Assembly's segregation of municipalities into two distinct groups—i.e., those with high concentrations of tourism and those without—serves as the impetus and support for the

comparison among those differing groups, see COMB Resp. Br. at 18, TERC would suggest to this Court that common sense suggests the exact opposite: recognizing that municipalities with high concentrations of tourism have differing needs and obligations than municipalities without high concentrations of tourism, the General Assembly segregated those high tourism areas and allow them to use A-Tax revenues in support of services not normally provided by the municipality. Therefore, it is precisely because those municipalities typically have high concentrations of tourism that makes a comparison of its expenditures with a municipality that does not have a high concentration of tourism inappropriate.

In its Respondent's brief, the COMB advances a different section of RR #98-22 than that upon which the COMB and the circuit court previously relied. See COMB Resp. Br. at 19-20.

The COMB now cites an example contained in the answer to Question 14 of RR #98-22:

For example, assume that the City of North Myrtle Beach wishes to use some of their Tourism-related Funds on their police department. Tourism-related Funds could not be used to fund the police chief's salary, since this is a county expense that would be need to be funded whether North Myrtle Beach had any tourists or not. However, the money could be used to hire additional police because of the high concentration of tourism in North Myrtle Beach. The amount that can be spent on additional police must be based on the estimated percentage of costs attributable to tourists.

(R.p.), RR #98-22 at 10. TERC agrees with the COMB that the above-quoted example demonstrates a proper use of A-Tax revenues, which is not in question in this appeal and does not reflect the position advanced below by the COMB. Again, the issue in this declaratory judgment action is **not** whether the A-Tax revenues may be spent by municipalities with high concentrations of tourism on additional municipal services, but rather the limitations on when municipalities may do so. Under the statute, COMB is obligated to demonstrate that, *inter alia*, the additional municipal services are not those of the type normally provided by COMB. The method asserted by the COMB to demonstrate that the additional services are not normally

provided by COMB is that the additional services are attributable to the presence of tourists. TERC contends the method advocated by the COMB, which allows it to compare the level of services it would be providing if it had the same permanent population as another county or municipality not situated in an area with a high concentration of tourism activity, simply is not supported by the plain language of § 6-4-10(4)(b). Therefore, the COMB's new-found justification for its procedure in RR #98-22, quoted above, is no justification at all.⁶

The circuit court cited RR #98-22 in support of the conclusion that the COMB may compare the personnel costs of providing certain municipal services to the costs of other municipalities with similar permanent populations. (**R.p.**), Initial Order at 14. However, the comparison methodology adopted by the circuit court does not appear in RR #98-22 and there exists no support for this comparison in either the plain language of §§ 6-4-5 *et seq.* Consequently, RR #98-22, when read in its entirety, supports the positions advanced by TERC and not the result reached by the circuit court, and the circuit court's reliance on RR #98-22 constitutes reversible error.

c. The Circuit Court misinterpreted the holding of this Court in Thompson v. Horry County, 294 S.C. 81, 362 S.E.2d 646 (Ct. App. 1987).

To the best of TERC's knowledge, there is only one reported case that has interpreted our State's A-Tax statute: this Court's decision in Thompson v. Horry County, 294 S.C. 81, 362 S.E.2d 646 (Ct. App. 1987). In this and other litigation between the parties, including the other appeal pending before the Court between these two parties,⁷ the COMB has consistently misstated the clear holding of this Court's opinion in Thompson to suggest that municipalities

⁶ TERC would further note that a Department of Revenue Ruling is, at most, an advisory opinion, and courts are not required to follow their decisions. See TERC App. Br. at 29.

⁷ See Court of Appeals Case Tracking #2011194346, Brief of Respondent COMB.

should have unfettered flexibility to spend A-Tax revenues. COMB Resp. Br. at 17-18. However, the position advanced by the COMB and relied upon by the circuit court are contrary to this Court's clear holding in Thompson. Notwithstanding, the COMB once more suggests that Thompson allows it "discretion and flexibility to allocate their A-Tax revenues in their jurisdictions...." See COMB Resp. Br. at 18.

As extensively argued by TERC in the Appellant's Brief, this Court limited the scope and applicability of Thompson to the only issue before it: the geographical area in which a county or municipality could spend A-Tax revenues. 294 S.C. at 84, 362 S.E.2d at 648 ("In this case, the second requirement [—that expenditures must be made primarily in the geographical areas of the county in which the proceeds of the tax are collected where it is practical—] is in issue."); see also TERC App. Br. at 32-36. Furthermore, the General Assembly has since amended the statute to remove the "substantial compliance" standard associated with the geographic "flexibility" discussed by this Court in Thompson. Nevertheless, the COMB has continued to cite Thompson for a proposition that does not appear therein. See (R.pp.), Transcript at 17, lines 2-5, COMB Trial Br. at 12-13, COMB Resp. Br. at 17-18. A plain reading of this Court's opinion does not support the argument advanced by the COMB; consequently, the import of Thompson is limited to the scope of the issue before this Court in that case and the circuit court's reliance upon Thompson as substantiation for its decision in this declaratory judgment action is in error. TERC requests that this Court recognize the limited scope of the Thompson opinion, based on its express holding, as well as the fact that the language interpreted by the Court in Thompson no longer even appears in the A-Tax statute.

III. The Circuit Court erred in sanctioning the City of Myrtle Beach's fiscal year 2008-2009 disbursement of accommodation tax revenues.

In response to TERC's contention that the circuit court improperly decided an issue that was not, and could not be, before it, the COMB admits that it did not make the issue a part of its pleadings and requests the Court to liberally construe the arguments of counsel in a manner that sanctions its attempt to bring an issue before the circuit court on which it did not have the jurisdiction to pass. See COMB Resp. Br. at 20-22. In the Initial Order's conclusion, the circuit court held that "[t]he Court finds and declares that the City properly allocated substantially all of its 2008-2009 A-Tax special funds to additional services for tourists under the facts in the present case." **(R.p.)**, Order at 14. As thoroughly discussed in TERC's Appellant's Brief, the issue of the COMB's 2008-2009 disbursement of A-Tax Funds was not an issue before the Court in this declaratory judgment action, and this Court should reverse the circuit court's extra-jurisdictional ruling in that regard. See TERC App. Br. at 33-36.

The COMB did not move to amend its pleadings under Rule 15, SCRPC, either prior to, during, or after the trial, and the issue of the COMB's 2008-2009 expenditures was not tried by express consent.⁸ Additionally, the COMB now concedes that the matter was not included in its pleadings. See COMB Resp. Br. at 21 ("Although not expressly named in the City's counterclaim, the matter of the 2008-2009 A-Tax revenue expenditures was before the court"). Instead, the COMB attempted to inject the issue at trial, **(R.p.)**, Transcript at 17 ("And we have brought a counterclaim basically saying that the 2008-2009 expenditure was proper."), without support and without TERC's clear understanding of the COMB's efforts or consent thereto. See e.g. **(R.p.)**, Transcript at 6, lines 15-23, p. 12, lines 4-14, p. 19, lines 20-25; see also

⁸ In its Answer and Counterclaim, the COMB did not request this Court to declare its 2008-2009 disbursement proper. **(R.p.)**, COMB Answer and Counterclaim.

Dunbar v. Carlson, 341 S.C. 261, 268, 533 S.E.2d 913, 917 (Ct. App. 2000) (holding that implied consent will not be found if the parties did not recognize it as an issue at trial).

Furthermore, the record demonstrates that the circuit court did not recognize either an amendment to or the addition of a counterclaim in this matter, as evidenced by its failure to state in the record the reason or reasons for allowing the amendment or evidence, as required by Rule 15, SCRPC. Compare Rule 15(b), SCRPC (“Upon allowing any such amendment or evidence the Court **shall state in the record** the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor.”) (emphasis added).

In its Respondent’s Brief, the COMB appears to argue that the issue was simply tried by implication and cites the case of this Court in Harrington v. Blackston, 311 S.C. 459, 429 S.E.2d 826 (Ct. App. 1993), without any accompanying explanation. The issue of a matter having been argued to the lower court was an issue in Harrington; however, the case is of no import to the situation before the Court, which is the likely reason the COMB did not endeavor to discuss the case’s implications. In Harrington, the lower court had ruled that an issue was **not** properly before the court. 311 S.C. at 463, 429 S.E.2d at 829. On appeal, this Court, using the pleadings and statements of both the Appellant *and* Respondents, held that the parties had adequately placed the issue, by consent, before the circuit court and reversed its contrary holding. Id.

Furthermore, the issue erroneously inserted in the Orders by the circuit court—i.e., the propriety of the COMB’s 2008-2009 allocation of A-Tax revenues—is beyond the jurisdiction of the circuit court, as the ALC has **sole** subject matter jurisdiction to pass on issues related to a

county or municipality's disbursement of A-Tax revenues under §§ 6-4-5 *et seq.*⁹ This declaratory judgment action came about, and was deemed by both parties to be the proper vehicle for a determination of the meaning of § 6-4-10(4)(b), because of TERC's reasonableness in not certifying the COMB's entire fiscal year 2008-2009 disbursement as non-compliant, as is TERC's prerogative under § 6-4-35(B)(1)(a).¹⁰

Accordingly, TERC submits to the Court that, where the issue of the COMB's fiscal year 2008-2009 disbursements was not properly pled, where the COMB did not present the issue at trial, and where the circuit court is without jurisdiction¹¹ to pass on the issue, this Court should reverse the erroneous holding of the circuit court with respect to the propriety of COMB's fiscal year 2008-2009 A-Tax disbursement and limit the appeal to a determination of the single issue in this case over which the circuit court does possess jurisdiction: the meaning of § 6-4-10(4)(b).

CONCLUSION¹²

For the reasons set forth above, and in TERC's Appellant's Brief, the Orders of the circuit court should be reversed.

[SIGNATURE PAGE FOLLOWS]

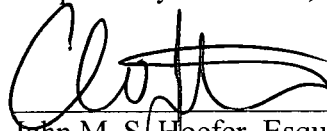
⁹ See S.C. Const. art. I, § 22; the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-10 *et seq.* (2005 & Supp. 2010); § 6-4-35(B)(1)(a); and Rules 2(e) and 11, of the Rules of Procedure for the Administrative Law Court; see also TERC App. Br. at 35-36.

¹⁰ In fact, TERC would also remind the Court that this very scenario played out with respect to some of the COMB's 2008-2009 disbursements. See COA Case Tracking #2011194346.

¹¹ Contrary to the COMB's assertion, actions beyond the scope of a court's jurisdiction do "matter" and do "make a difference." See Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993) (reversing the court for a want of jurisdiction to entertain the action before it).

¹² TERC rests on its Appellant's Brief with respect to the merits of the issues not directly discussed herein.

Respectfully submitted,

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

John M. S. Hoefer, Esquire

Chad N. Johnston, Esquire

WILLOUGHBY & HOEFER, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

(803) 252-3300

Attorneys for Appellant

Columbia, South Carolina

This 7th day of March, 2012.

The Supreme Court of South Carolina

Tourism Expenditure Review Committee, Appellant,

v.

City of Myrtle Beach, Respondent.

Appellate Case No. 2011-200407

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.



FOR THE COURT

J.

Chief Justice Jean H. Toal, not participating

COURT OF COMMON PLEAS
Columbia, South Carolina

July 24, 2012

cc:

Chad Nicholas Johnston

Michael Warner Battle

John Marion S. Hoefer

The Honorable Jenny Kitchings

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
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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

*ALSO ADMITTED IN TX

April 24, 2011

RECEIVED

APR 24 2012

SC Court of Appeals

VIA HAND DELIVERY

Honorable Jenny A. Kitchings
Clerk of Court

South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case No. 2010-CP-40-3001; Court of Appeals Case Tracking #: 2011200407

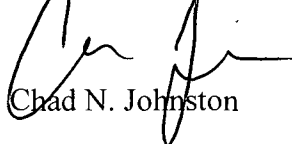
Dear Ms. Kitchings:

Pursuant to Rules 210, 211, and 267, SCACR, please find for filing fifteen (15) copies, including 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

BATTLE & VAUGHT P.A.
ATTORNEYS AND COUNSELORS AT LAW
1200 MAIN STREET
POST OFFICE BOX 530
CONWAY, SOUTH CAROLINA 29528
TELEPHONE (843) 248-4321
FACSIMILE (843) 248-4512
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

April 18, 2012

Honorable Tanya A. Gee
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED

APR 19 2012

SC Court of Appeals

RE: Tourism Expenditure Review Committee vs. City of Myrtle Beach
C/A No.: 2010-CP-40-3001/Tracking #2011200407

Dear Ms. Gee:

I have enclosed for filing the original and fifteen copies of the Respondent's Final Brief on Behalf of The City of Myrtle Beach ("City"), as well as our Proof of Service.

By copy of this letter to all counsel involved in this Appeal, I am serving them with a copy of this Brief and enclose a Proof of Service to that effect.

Please return a "clocked" copy of the Proof of Service. I have enclosed and extra copy of Proof of Service, as well as a self-addressed, stamped envelope for your convenience.

I appreciate your assistance in this matter.

Sincerely,



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

C Tom Ellenburg
John M.S. Hoefer
Chad Johnston

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

*ALSO ADMITTED IN TX

April 9, 2012

VIA HAND DELIVERY

Honorable Jenny A. Kitchings
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. 2010-CP-40-3001
Court of Appeals Case Tracking #: 2011200407

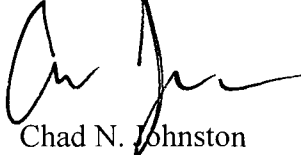
Dear Ms. Kitchings:

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 need additional information, please contact me at your convenience. With best regards, I am

Respectfully,

WILLOUGHBY & HOEFER, P.A.



Chad N. Johnston

CNJ/bim
Enclosures

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

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APR 09 2012

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

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TELEPHONE 252-3300
TELECOPIER 256-8062

*ALSO ADMITTED IN TX

March 22, 2012

VIA U.S. MAIL

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

MAR 23 2012

SC Court of Appeals

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

Dear Mr. Shearouse:

We represent the Tourism Expenditure Review Committee, appellant in the above-referenced appeal. As you are aware, by order dated March 20, 2012, the Court has certified the above-captioned appeal from the Court of Appeals. The purpose of this letter is to make the Court aware of another appeal which is currently pending before the Court of Appeals between these parties.

Specifically, an appeal has been brought by our client, Appellant Tourism Expenditure Review Committee (TERC), in a case captioned Tourism Expenditure Review Committee v. City of Myrtle Beach, Case No. 2010-CP-40-3001, Court of Appeals Case Tracking Number of: 2011200407. The initial briefs in this appeal have been filed with the Court of Appeals, and under Rule 210, SCACR, the Record on Appeal is due by TERC on Friday, April 6, 2012. This appeal arises out of a declaratory judgment action filed by TERC involving the same parties, time period and some of the same facts as the above-captioned appeal.

Although the issues in these two appeals are related, they are different. The possibility of consolidating the two appeals was referenced in TERC's Final Brief of Appellant, p.2, n.1, of the appeal that is now certified by the Court. I bring this matter to your attention so that the Court

will be aware of the potential for certifying the appeal that remains pending in the Court of Appeals.

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

Sincerely,

WILLOUGHBY & HOEFER, P.A.

A handwritten signature in black ink, appearing to read "Chad Johnston", with a stylized flourish at the end.

Chad N. Johnston

CNJ/bim
Enclosures

cc: The Honorable Jenny A. Kitchings, Clerk of Court, South Carolina Court of Appeals
Michael W. Battle, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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

March 27, 2012

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

Michael Warner Battle, Esquire
Battle & Vaught, PA
P.O. Box 530
Conway, SC 29528-0530

Re: Tourism Exp. v. City of Myrtle Beach
Case #2011200407

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

JAK/jt

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

Tourism Expenditure Review Committee, ...Appellant,

v.

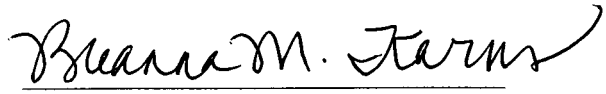
City of Myrtle Beach, ...Respondent.

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 of Appellant** 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, Esquire
Battle Vaught & Howe, P.A.
Post Office Box 530
Conway, South Carolina 29528

RECEIVED
MAR 07 2012
SC Court of Appeals


Breanna M. Karns

This 7th day of March, 2012

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

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TELECOPIER 256-8062

*ALSO ADMITTED IN TX

March 7, 2012

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MAR 07 2012

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: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case No. 2010-CP-40-3001
Court of Appeals Case Tracking #: 2011200407

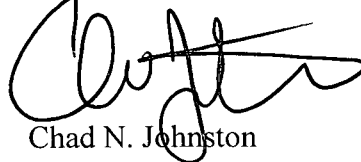
Dear Ms. Gee:

Pursuant to Rule 208, SCACR and this Court's February 16, 2012 Order granting an extension of time to file, enclosed for filing please find the original and one (1) copy of the **Initial Reply Brief 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/bik

Enclosures

cc: Michael W. Battle, Esquire

The South Carolina Court of Appeals

Tourism Expenditure Review
Committee,

Appellant,

v.

City of Myrtle Beach,

Respondent.

The Honorable William H. Seals, Jr.
Richland County
Trial Court Case No. 2010-CP-40-03001

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 March 7, 2012.

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. Johnson, Esquire
Michael Warner Battle, Esquire

FILED

2/16/12

SD

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

RECEIVED

JAN 30 2012

SC Court of Appeals

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

MOTION FOR EXTENSION OF TIME

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

1. TERC's Initial Reply Brief is currently due to be filed Monday, February 6, 2012.
2. Counsel for Appellant TERC requests an extension of time of 30 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 it will have until March 7, 2012 in which to file the Initial Reply Brief.

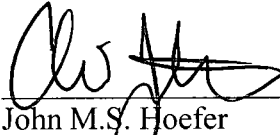
2/2/12
3/7/12
(5)

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

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 its Motion and extend the time for filing the Initial Reply Brief until March 7, 2012.

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
January 30, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

RECEIVED

JAN 30 2012

SC Court of Appeals

Tourism Expenditure Review Committee, ...Appellant,

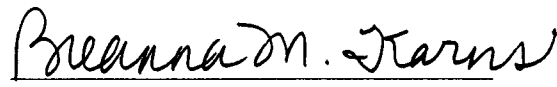
v.

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 **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, Esquire
Battle Vaught & Howe, P.A.
Post Office Box 530
Conway, South Carolina 29528


Breanna M. Karns

This 30th day of January, 2012

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

*ALSO ADMITTED IN TX

January 30, 2012

VIA HAND DELIVERY

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

RECEIVED

JAN 30 2012

SC Court of Appeals

Re: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case No. 2010-CP-40-3001
Court of Appeals Case Tracking #: 2011194346

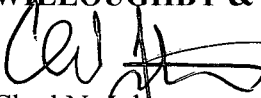
Dear Ms. Gee:

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 Reply Brief in the above-captioned matter. 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 to me via our 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 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
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February 10, 2012

Michael Warner Battle, Esquire
Battle & Vaught, PA
P.O. Box 530
Conway, SC 29528-0530

Re: Tourism Exp. v. City of Myrtle Beach
2011200407

Dear Mr. Battle:

We have received your Respondent's Initial Brief and Designation of Matter in the above entitled case on appeal. However, the caption on your brief is not correct.

According to the information on the Order being challenged on appeal, the caption should read as follows:

Tourism Expenditure Review Committee,

Appellant,

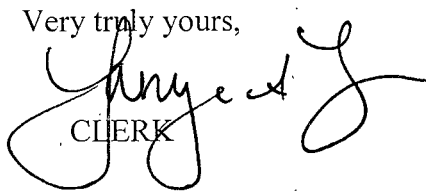
v.

City of Myrtle Beach,

Respondent.

The Court expects that all future filings by either party to this appeal will feature the correct caption as shown above.

Very truly yours,


CLERK

TAG/ma

cc: John M.S. Hoefer, Esquire
Chad N. Johnson, Esquire

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

City of Myrtle Beach.....Respondent

vs.

Tourism Expenditure Review Committee.....Appellant.

RESPONDENT'S DESIGNATION OF MATTER ON APPEAL

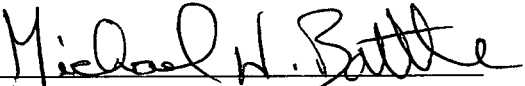
Respondent proposes that the following matters be included in the Record on Appeal:

1. Appellant's Complaint
2. Respondent's Answer and Counterclaim
3. Appellant's Trial Brief
4. Respondent's Trial Brief
5. Transcript of trial:
 - a. pp. 4-68

6. Trial Exhibits:

- a. P-1
- b. D 1-5

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


MICHAEL W. BATTLE (SCB # 584)
BATTLE & VAUGHT, P.A.
P.O. Box 530
Conway, SC 29528
(843)248-4321
mbattle@battlevaught.com

Conway, SC
January 23, 2012

Attorney for Respondent City of
Myrtle Beach

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

City of Myrtle Beach.....Respondent

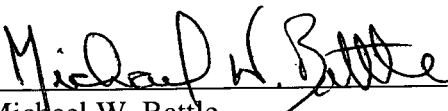
vs.

Tourism Expenditure Review Committee.....Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Respondent's Initial Brief complies with Order of The Supreme Court of South Carolina dated August 13, 2007, RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

January 23, 2012


Michael W. Battle
Battle & Vaught, PA
Po Box 530
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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

City of Myrtle Beach.....Respondent

vs.

Tourism Expenditure Review Committee.....Appellant.

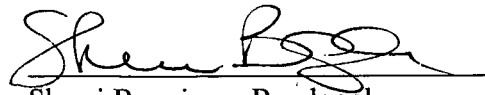
PROOF OF SERVICE

Sherri Benninga certifies that she is an employee with the law firm of Battle & Vaught, P.A., attorneys for Respondent City of Myrtle Beach, and that she has mailed the Initial Brief and Designation of Matter of Respondent City of Myrtle Beach to the addressees shown this 23rd day of January, 2012, with proper postage attached thereto.

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January 23, 2012

The Honorable Tanya A. Gee
Clerk of Court
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SC Court of Appeals
JAN 23 2012
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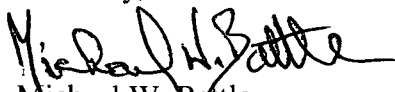
RE: Tourism Expenditure Review Committee v. City of Myrtle Beach
Case No. 10-CP-40-3001

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, Chad N. Johnston, Tom Ellenburg

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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM RICHLAND COUNTY
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City of Myrtle
Beach.....Respondent

vs.

Tourism Expenditure Review Committee.....Appellant.

**RESPONDENT CITY OF MYRTLE BEACH'S
INITIAL BRIEF**

RECEIVED

JAN 25 2012

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court properly ruled that the plain language of S.C. Code Ann. § 6-4-10 (4)(b) permits the City of Myrtle Beach to disburse substantially all of its accommodations tax revenues (A-Tax revenues) in a given year for tourism related expenditures in connection with police, fire and parks expenditures.**
- II. The Circuit Court properly admitted extrinsic evidence to support its ruling on the plain language of S.C. Code Ann. § 6-4-10(4)(b).**
- III. The Circuit Court properly interpreted and applied the law to the evidence in the record.**
- IV. The Circuit Court properly ruled that the City of Myrtle Beach's method of disbursement of A-tax revenues in the fiscal year 2008-2009 was proper.**

STATEMENT OF CASE

The present case is the Tourism Expenditure Review Committee's (TERC) appeal from the Final Order of the Hon. William B. Seals, Circuit Court Judge, in connection with a declaratory judgment action filed by TERC. To TERC and its attorneys credit the declaratory judgment action was filed in lieu of TERC's finding approximately four million dollars of the City's A-TAX expenditures non-compliant. Such a finding would have had a devastating effect on the City's public safety budget as well as the public safety budget of many other areas with high concentrations of tourism. Also, TERC's finding of noncompliance would have reversed approximately 20 years of prior compliance decisions made by TERC and its predecessor, South Carolina Department of Revenue.

The present appeal represents the third attempt of TERC to get an appellate court to reject adverse lower court rulings and adopt one of its interpretations of the Accommodations Tax Act. S.C. Code Ann. § 6-4-10. The first attempt was a joint appeal by TERC and the City. That appeal was dismissed for being moot. *Tourism Expenditure Review Committee, Appellant-Respondent, v City of Myrtle Beach, Respondent-Appellant*, Unpublished Opinion No. 2011-UP-464. The second appeal from the administrative law court is now pending before the S.C. Court of Appeals and deals with the City's authority over its own general funds. The second attempt is captioned: *City of Myrtle Beach, Respondent, v Tourism Expenditure Review Committee, Appellant*, Case No. 10-ALJ-30-0421-CC.

The present case was tried non-jury. The City offered the testimony of its Budget Director Michael Shelton together with documents. TERC did not offer any witnesses and relied

solely on documents and the argument of its attorneys. The trial court made factual findings and conclusions of law and issued a final order in favor of the City of Myrtle Beach. The Court found: 1) the City properly allocated substantially all of its 2008-2009 A-Tax special funds to additional services for tourists under the facts in the present case; and 2) the City's method of comparing its expenditures for law enforcement, traffic control, public facilities, and highway and street maintenance expenditures with similar expenditures for other SC municipalities with similar permanent population sizes to determine the amount of A-Tax discretionary funds that the City may allocate to such expenditures was proper and in compliance with S.C. Code Ann. § 6-4-10(b).

TERC moved to have the Court reconsider and amend its final order. After the trial court refused to amend its final order, TERC filed the present appeal.

STATEMENT OF FACTS

The Tourism Expenditure Review Committee (TERC) is an oversight committee created by S.C. Code Ann. § 6-4-35. TERC serves as the oversight authority on all questionable tourism-related expenditures and to that end, all reports filed pursuant to S.C. Code Ann. § 6-4-25(D)(3) must be forwarded to TERC for review to determine if they are in compliance with this chapter. [R__]

The City of Myrtle Beach (City) is a duly incorporated municipality located in Horry County, South Carolina. The City has a high concentration of tourism activity as contemplated under S.C. Code Ann. § 6-4-10(4). [R__]

At all times pertinent to this matter, and as required by S.C. Code Ann. § 6-4-25(A) of the South Carolina Code (2004), the City had a seven member local advisory committee to

consider and make recommendations to the Myrtle Beach City Council ("City Council") on applications for the expenditure of revenue generated from the state accommodations tax provided for under S.C. Code Ann. § 12-36-920(A) and § 12-36-2630(3) and allocated to the accommodation tax ("A-Tax") fund created under S.C. Code Ann. § 6-4-10(4). In fiscal year 2008-2009, all applications for A-Tax funds were presented to the local advisory committee.

[R__]

Although the local advisory committee makes recommendations on applications for the expenditure of the A-Tax fund and such recommendations must be considered by the City under S.C. Code Ann. § 6-4-25, the ultimate decision as to the final disbursement of A-Tax revenues is vested with City Council. [R__]

During fiscal year 2008-2009, applications for expenditures from the fund created under S.C. Code Ann. § 6-4-10(4) were submitted to the City's local advisory committee for their recommendations. A report of the local advisory committee's recommendations and City Council's final actions regarding these applications was made to TERC on September 30, 2009, as required by § 6-4-25. [R__]

The report showed that: (a) the staff for the City of Myrtle Beach requested that \$3,977,794, which was 84.97% of the \$4,681,464 in available A-Tax funds for fiscal year 2008-2009, 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"; (b) the local advisory committee recommended that \$3,065,294, which was 65.48% of the available A Tax funds, be expended to "support of operating expenses for services provided above and beyond permanent population throughout the year to include additional Police, Fire and Parks personnel"; and (c) City 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.” [R__]

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 S.C. Code Ann. § 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 S.C. Code Ann. § 12-36-2630(3), which was contrary to the requirements of S.C. Code Ann. § 6-4-25(A-C). [R__]

By letter dated January 7, 2010, Michael W. Shelton, Budget Director for the City, responded to TERC’s January 4, 2010, letter as follows: “For FY2008-09, total expenditures for the departments in question were:

Police Department	\$20,008,175
Fire Department	11,138,096
Cultural & Leisure Services	<u>10,998,109</u>
Total	\$42,144,380

Thus in the Police Department, at 76.7% of total, tourist-related expenditures amount to more than \$15 million—far greater than the \$4.6 million of accommodations tax money spent for such services. I would also point out that we have been reviewing our reports to TERC and to the Accommodations Tax Oversight Committee, which existed prior to TERC’s formation. Thus far, we have located records going as far back as the 1998-99 fiscal year. In each case,

the reports show that the City spent substantial amounts of these funds for these identical purposes. The expenditures were not questioned until the 2006-07 fiscal year, at which time we provided additional information regarding our rationale for the expenditures and TERC found them to be compliant." [R__]

In addition, the number of visitors to the City was estimated by the Myrtle Beach Chamber to be 13.7 million visitors annually. The City spends approximately \$14 million more for its police department than the average municipality of a similar population size. According to the U.S. Census Bureau Report for 2010 the City of Myrtle Beach has a permanent population of 27,109 residents. According to 2007 a report released by the U.S. Department of Justice, the average amount spent for law enforcement for cities with a population of 27,109 was approximately \$6,099,525. For FY2008-09, the City's total expenditures for its police department were \$20,008,175. [R__]

Presently the City has a total of 206 officers, not including 2 sworn personnel operating as Police Chief and Captain, 52 detention/communications officers, 2 animal control officers or 13 civilian employees for a total of 275 Police Department employees. 206 sworn officers are engaged in the direct delivery or direct command and supervision of law enforcement services. [R__] The average number of sworn officers is 62.33 for municipalities with similar populations. [R__]

Based upon an estimate of the number of annual visitors to the Myrtle Beach area conducted by D.K. Shiflett & Associates, Ltd. for the Myrtle Beach Area Chamber of Commerce, approximately 15.2 million people visited the area in 2007. The average length of stay for leisure travelers was 5 days (3 days for business travelers) according to data presented in the Chamber's 19th Annual Statistical Abstract, available on that organization's web site. That

total may amount to the equivalent of an *average* daily population of 208,000 people in addition to the area's permanent residents. In terms of orders of magnitude and taking into considerations increases in the number of tourists, this average is fairly consistent with information prepared by a consultant to a local developer and provided to the City in 2004 in which the City of Myrtle Beach was estimated to have had an *average* daily population of about 105,000, approximately 4.3 times the size of its permanent population. Except for the large influx of tourists, the record does not indicate any significant differences between the City and other similar sized municipalities. [R__]

In 2009, the City received \$4.6 million in accommodation tax funds that were allocated to special fund under S.C. Code Ann. § 6-4-10(4). The City allocated substantially all of the \$4.6 million to public safety services. [R__]

The City compared its government service expenditures for law enforcement, with similar government service expenditures of other municipalities in South Carolina having similar sized permanent populations to determine the amount of money the City could spend for such tourism related expenditures. [R__]

STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable. The standard of review depends on the nature of the underlying issues. *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct.App.2003). When the purpose of the underlying dispute is to construe the rights of parties under a statute, the action is one at law. See *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 497, 544 S.E.2d 637, 639-640 (Ct.App.2001). In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. *Townes Assocs.*,

Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, “ ‘[w]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.’ ” *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct.App.2003).

I. The Circuit Court properly ruled that the plain language of section 6-4-10(4)(b) permits the City of Myrtle Beach to disburse substantially all of its accommodations tax revenues (A-Tax revenues) in a given year for tourism related expenditures in connection with police, fire and parks expenditures.

A. The plain language interpretation of S.C. Code Ann. § 6-4-10(b).

The pertinent language of S.C. Code Ann. § 6-4-10(b) that was construed by the trial court is:

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.

“Tourism-related expenditures” include:

1. advertising and promotion of tourism so as to develop and increase tourist attendance through the generation of publicity;
2. promotion of the arts and cultural events;
3. construction, maintenance, and operation of facilities for civic and cultural activities including construction and maintenance of access and other nearby roads and utilities for the facilities;
4. the criminal justice system, law enforcement, fire protection, solid waste collection, and health facilities when required to serve tourists and tourist facilities. This is based on the estimated percentage of costs directly attributed to tourists;

5. public facilities such as restrooms, dressing rooms, parks, and parking lots;
6. tourist shuttle transportation;
7. control and repair of waterfront erosion;
8. operating visitor information centers.

S.C. Code Ann. § 6-4-10(4)(b).

From the outset, TERC has misconstrued the trial court's interpretation of *S.C. Code Ann. § 6-4-10(b)*. In its brief, TERC claims the trial court erred as a matter of law in finding that a municipality may expend A-Tax revenues for services "normally provided by the municipality." [Initial Appellant Brief p.] TERC's claim is an incorrect statement of the trial court's finding. The trial court found: "Because the City is an area with a high concentration of tourism activity, it may allocate its entire A-Tax discretionary fund to 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 the tourism activity under the authority of S.C. Code Ann. § 6-4-10(4)(b)***." (emphasis added). [R]

The City does not contend that A-Tax revenues may be used as an additional source of revenues to fund normal municipal services simply because the City is an area with a high concentration of tourism. The City contends it may use A-Tax funds to pay for a portion of its tourism-related expenditures associated with the additional law enforcement, traffic control, public facilities, and highway and street maintenance services needed to provide for the large number of tourists visiting the area on a year round basis.

TERC does not dispute the City incurs additional costs for law enforcement, traffic control, public facilities, and highway and street maintenance services because of the large influx

of tourists. Instead TERC claims that because the City is an area with a high concentration of tourism, the City's additional tourism related costs for public safety are normal for an area with high concentrations of tourism. [AB] TERC claims A-Tax funds may only be used to provide additional public safety services not normally provided by the City with a high concentration of tourism. [AB]

What is a normal provision of public safety services? Normal is defined as conforming to a standard; usual, typical, or expected. Oxford Dictionaries, Oxford University 2011. The dispute between TERC and the City is over how to determine the standard for normal municipal public safety services versus additional tourism related public safety services. Should the City consider only its own budget or should the City be allowed to look to other areas with similar permanent populations but without high concentrations of tourism?

In the definition of "tourism related expenditures" the General Assembly directs TERC and the City to make a determination for qualifying tourist related expenditures public safety services based on the estimated percentage of costs directly attributed to tourists. S.C. Code Ann. § 6-4-10(4)(b)(4). SCDOR interpreted the General Assembly's direction as follows:

Under Code Section 6-4-10(4)(b)(4), monies in the Tourism-related Fund can be used for the criminal justice system, law enforcement, fire protection, solid waste collection, and health facilities when required to serve tourists and tourist facilities. The amount that may be expended on this category must be based on the estimated percentage of costs directly attributable to tourists. Tourism-related funds cannot be used for these purposes by counties or municipalities that do not have high concentration of tourism activity. Examples of qualifying expenditures under this category would include salaries for extra police during the peak tourist season, monies spent to hire extra garbage service around tourist facilities during the tourist season or to provide other services that are required because of the high concentration of tourism.

When considering the percentage of costs that are attributable to tourism, the Department of Revenue will consider the number of permanent residents for the county or municipality as compared to the number of tourists

S.C. REVENUE RULING #98-22.

Unlike some areas which have a strong tourist season followed by a season when no tourists visit, the City of Myrtle Beach's tourist season lasts all year long. [R] The City has an estimated average daily population of 208,000 people. The permanent resident population of the City is between 27,109 and 30,000. Presently the City has a total of 206 officers, not including 2 sworn personnel operating as Police Chief and Captain, 52 detention/ communications officers, 2 animal control officers or 13 civilian employees for a total of 275 Police Department employees. 206 sworn officers are engaged in the direct delivery or direct command and supervision of law enforcement services. The national average number of sworn officers is 62.33 for municipalities with similar populations to the City of Myrtle Beach. [R __]

Using SCDOR's example, approximately 30% of the City's law enforcement budget is for normal municipal public safety services while 70% of its budget can be attributed to the estimated costs associated with tourists. When considering the City had an estimated \$20 million law enforcement budget for 2008-2009, the estimated costs associated with tourists would be \$14 million. The City's allocation of approximately \$4 million in A-Tax revenues towards payment of \$14 million estimated additional public safety costs associated with tourists is a reasonable and practical interpretation of S.C. Code Ann. § 6-4-10(4)(b)(4).

Prior to filing the declaratory judgment, SCDOR and later TERC permitted the City to look at other areas with similar permanent populations but without high concentrations of tourism. *S.C. Revenue Ruling #98-22*. However, TERC now claims the additional tourism related public safety costs are the new norm for the City of Myrtle Beach and the City can only look at its own budget for its standard of normality. TERC has written out of the statute the

language on the estimated public safety costs associated with tourists. See S.C. Code Ann. § 6-4-10(b)(4) ("Tourism related expenditures")

TERC reaches its conclusion that the norm should be restricted to only what is contained in the City's budget by focusing on the General Assembly's use of the definite article "the" instead of the indefinite article "a" when referring to the entity that provides the public safety services. According to TERC in the present case, "the" municipality can only mean the City of Myrtle Beach. TERC's focus is misplaced in construing S.C. Code Ann. § 6-4-10(b)(4). When construing a statute, the indefinite article "a" may be substituted for the definite article "the" in a proper case. *Vinton v. Hoskins*, 174 Or. 106, 147 P.2d 892 (1944); See AMJUR STATUTES § 159. The S.C. Supreme Court has held recently a statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Travelscape, LLC v. South Carolina Dept. of Revenue* 391 S.C. 89, 705 S.E.2d 28 (S.C., 2011) The City contends the present case is a proper case for such a substitution. *Id.*

The City's practice of comparing the City's public safety expenditures with other municipalities with similar permanent populations is a practice that has occurred for more than 20 years. The practice was recognized by SCDOR in S.C. Revenue Ruling #98-22. When TERC was formed it recognized and approved the City's practice. The language in the statute has not changed since 1984.

The only difference between the 2008-2009 expenditure and prior expenditures is that the City allocated 99.6% of its A-Tax revenues to public safety. In prior years the percentage of the allocation for public safety services was substantial but the allocation was less than 99.6%. If the City follows the procedures contained in the Accommodations Tax Act, the City may

allocate 100% of its a-Tax revenues to a single category of expenditures such as law enforcement or public safety. S.C. Revenue Ruling #98-22.

The procedure used by the City in its 2008-2009 allocation of A-Tax revenues followed the requirements of the Accommodations Tax Act. [R__] City staff members presented a request for A-Tax revenues to the local A-Tax advisory committee for municipal services which it related to tourism and which it estimated would be attributable to tourists. [R__] City staff based its request on the amount it anticipated spending for law enforcement services as compared to the amounts other cities with similar permanent populations had spent for law enforcement services. [R__] The local A-Tax advisory committee reviewed City staff's request and made its own recommendation for a lower amount. [R__] The matter was then taken up by City Council who considered the recommendations of City staff and the local A-Tax advisory committee and rejected both the City staff's request and the local A-Tax advisory committee's recommendations. [R__] City Council used its own discretion and decided to allocate substantially all of its A-Tax revenues for law enforcement services. [R__] Thereafter the City duly reported its allocation to TERC on the report forms provided by TERC. [R__]

TERC also claims the City's comparison of its public safety expenditures to other areas is improper because no two areas in South Carolina are alike. TERC's claim is not supported by the record. TERC did not offer any evidence to show that South Carolina municipalities with similar permanent populations are not comparable. The trial court found as a matter of fact: "Except for the large influx of tourists, the Court was not made aware of any significant differences between it and other similar sized municipalities." [Final Order p. 8].

The City contends TERC cannot provide a reasonable or practical alternative for determining whether an expenditure for public safety services qualifies for an expenditure of A-Tax revenues. In a footnote 8 of its brief, TERC claims that the City should distinguish between qualified tourism related expenditures and unqualified tourism related expenditures by determining whether the expenditures are reoccurring yearly expenditures. TERC provided the following example in its brief:

As an example, should the COMB decide to host a non-recurring event, like a parade in honor of one or more of its citizens, that is expected to draw tourists to the area, then the COMB would be justified under the statute in using A-Tax revenues to help off-set the additional municipal services costs for such nonrecurring, eligible events, which would both promote tourism and enlarge the economic benefits of the area. [Appellant's Brief, footnote 8, p. 20]

TERC's suggestion on the reoccurrence of the expenditure is not practical. As mentioned above, the City's concentration of tourism is year round. Using TERC's example of a parade, how much in A-Tax revenues should TERC allow the City to allocate to tourism related expenditures used in the construction and maintenance of public facilities or to highway and street maintenance services? How should the City account for and report those A-Tax expenditures to TERC? Do TERC's same restrictions apply to the City's reoccurring tourist promotions and reoccurring out of market tourism advertising expenditures?

The City contends its method of determining compliant A-Tax revenue expenditures is proper and it uses a reasonable and practical method for determining tourism related expenditures that comply with the Accommodations Tax Act. *Travelscape, LLC v. South Carolina Dept. of Revenue* 391 S.C. 89, 705 S.E.2d 28 (S.C.,2011). The fact that TERC may not consider public safety the best use of the City's A-Tax revenues does not amend the plain language of the statute. If TERC wants to further limit the City's discretion over the expenditure

of A-Tax revenues, TERC should take that matter to the General Assembly and amend the statute.

II. The Circuit Court properly admitted extrinsic evidence to support its ruling on the plain language of S.C. Code Ann. § 6-4-10(4)(b).

TERC claims the court may not admit or rely on extrinsic evidence to support its ruling on the plain language of a statute unless the court first declares the statute to be ambiguous. The City disagrees. The City contends a court may not admit or rely on extrinsic evidence or the rules of statutory interpretation to *change* the meaning of the plain language of an unambiguous statute. *Travelscape, LLC v. South Carolina Dept. of Revenue* 391 S.C. 89, 705 S.E.2d 28 (S.C.,2011). However, a court may admit and rely on extrinsic evidence and the rules of statutory interpretation to demonstrate that the court's interpretation of a statute as a whole is consistent with the plain language used and it effectuates the intent of the legislature. *Id.*

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hardee v. McDowell*, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009) (internal quotation omitted). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Travelscape, LLC v. South Carolina Dept. of Revenue* 391 S.C. 89, 705 S.E.2d 28 (S.C.,2011).

In the trial court's discussion of the plain language of the statute, the trial court does not defer to extrinsic evidence or to the rules of statutory interpretation to change the meaning of the plain language of S.C. Code Ann. § 6-4-10(4). [Final Order pp. 9-11] The trial court uses

common sense and reasoning to discuss the plain language of that statute. The trial court also uses common sense and reasoning to refute TERC's claims on the meaning of S.C. Code Ann. § 6-4-10(4). [Final Order p. 9-11]. The trial court's approach is similar to the approach used by most courts when discussing statutory interpretations.

One recent example is the case of *Travelscape, LLC v. South Carolina Dept. of Revenue* 391 S.C. 89, 705 S.E.2d 28 (S.C., 2011). In *Travelscape*, the court construed the plain language of the statute and referred to the facts throughout the opinion to show the application of the court's interpretation of how the statutes involved applied to the parties and facts in that case. The trial court in the present case used a similar approach.

III. The Circuit Court properly interpreted and applied the law to the evidence in the record.

TERC claims the trial court erred in analyzing the evidence in the record. TERC claims the trial court failed to properly consider the preamble to the enabling language of the statutory predecessor to S.C. Code Ann. § 6-4-10(b)(4). In addition, TERC claims the trial court misinterpreted S.C. Revenue Ruling #98-22 and the holding of the court in *Thompson v. Horry County*, 294 S.C. 81, 362 SE 2d 646 (Ct. App. 1987). The City disagrees with each one of TERC's claims.

a. Preamble – "from time to time."

TERC claims the inclusion of the phrase "from time to time" in the preamble to the statutory predecessor to S.C. Code Ann. § 6-4-10(b)(4) demonstrates conclusively the General Assembly's intent that municipalities with high concentrations of tourism not be allowed to rely on A-Tax revenue supplanting normal revenue disbursements. TERC's claim reveals a lack of understanding of the actions and decisions of the City.

TERC's claim suggests that the City has determined that all future allocations of A-Tax revenues will be used automatically to provide public safety services without regard to the annual procedures required by the Accommodations Tax Act. There is nothing in the record to support TERC's claim. When making its 2008-2009 A-Tax Revenue allocation, City staff submitted a request to the local A-Tax advisory committee; the advisory committee made its recommendation to City Council; and City Council exercised its discretion to make the A-Tax revenue allocation. The City duly reported that allocation to TERC. City Council did not enact an ordinance or resolution in which they declared that all future A-Tax Revenues would be used for public safety. Every fiscal year, the City is permitted under the act to use its discretion on how to use its A-Tax revenues.

TERC has jumped the gun in making the assumption that because the City allocated substantially all of the City's A-Tax revenues to public safety in the 2008-2009 fiscal year, every subsequent A-Tax revenue allocation will be made automatically to public safety. TERC's assumption is akin to claiming that because the City allocated \$10,000 in A-Tax Revenues to a fall motorcycle rally event in 2003, that \$10,000 would be allocated automatically to every similar motorcycle rally event occurring thereafter. Obviously, the City did not divest itself of its discretionary authority under the act in making the 2008-2009 allocation. The City's contention is that it has the discretion to allocate its A-Tax Revenues on an annual basis in such manner as its City Council believes is in the best interest of its citizens.

b. The significance of Thompson v Horry County.

The significance of the case of the Court of Appeals case of *Thompson v. Horry County*, 294 S.C. 81, 362 SE 2d 646 (Ct. App. 1987) is that it recognized the wisdom of allowing local

governments to have the discretion and flexibility to allocate their A-Tax revenues in their own jurisdictions in accordance with the Accommodations Tax Act. The trial court's Final Order simply acknowledges that its ruling is consistent with that part of the opinion of the S.C. Court of Appeals. *Id.*

c. S.C. Revenue Ruling #98-22.

TERC claims the trial court misinterpreted S.C. Revenue Ruling #98-22 on the same grounds as it claimed the trial court misinterpreted S.C. Code Ann. § 6-4-10(b). TERC concedes that #98-22 supports the trial court's interpretation that tourism related expenditures can be determined by comparing expenditures for permanent residents with additional expenditures needed for tourists. However, TERC repeats its claim that comparisons of government services between different municipalities are not allowed by S.C. Revenue Ruling #98-22. TERC claims that the use of the definite article "the" in designating the particular A-Tax revenue expenditure area demonstrates SCDOR's intent to rule out comparisons with other municipalities as a means of determining tourism related expenditures. The City disagrees. (*That argument has been addressed in the Part I A. of Respondent's brief.*)

TERC also claims the trial court's comparison of government services between municipalities with high concentrations of tourism and municipalities without high concentrations of tourism is not valid because municipalities in South Carolina are not comparable. If TERC's claim was correct, the General Assembly's separation of municipalities/counties into only two classes based on the concentrations of tourism would be arbitrary and unreasonable. See *Foster v. South Carolina Dept. of Highways and Public Transp.* 306 S.C. 519, 413 S.E.2d 31 (S.C.,1992)(A broad legislative classification must be judged by

reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples.)

TERC did not engage in any comparative analysis or offer any evidence to support its claim that localities in South Carolina are incomparable. TERC did not offer any rationale for the General Assembly or SCDOR's classification of municipalities/counties into only two classes. TERC just made the bare assertion that governmental services in municipalities are not comparable. The trial court noted TERC's lack of comparative analysis or evidence when it stated, "Except for the large influx of tourists, the Court was not made aware of any significant differences between it and other similar sized municipalities." [Final order p. 8]

The City contends the Accommodations Tax Act and S.C. Revenue Ruling #98-22 properly classified municipalities/counties into two classes. The only distinguishing features in the two subclasses were those areas that had a high concentration of tourism and those that did not. The reoccurrence of events, differences of size of permanent populations, geographical areas, origins of tourists, average amounts spent by tourists, or the amount of services required by the tourists were not mentioned in the act or SCDOR's ruling. Based on the fact the General Assembly chose to distinguish municipalities/counties on only the concentration of tourism, the City contends the trial court was correct when it compared normal governmental services based on the remaining similarities of municipalities/counties in South Carolina.

The City contends S.C. Revenue Ruling #98-22 expressly supports the trial court's interpretation of the act in question. Question 14 of the ruling gives the following example:

For example, assume that the City of North Myrtle Beach wishes to use some of their Tourism-related Funds on their police department. Tourism-related Funds could not be used to fund the police chief's salary, since this is a county (sic) expense that would be need to be funded whether North Myrtle Beach had any tourists or not. However, the

money could be used to hire additional police because of the high concentration of tourism in North Myrtle Beach. The amount that can be spent on additional police must be based on the estimated percentage of costs attributable to tourists.

The above example demonstrates a proper use of A-Tax Revenues. The evidence in the record supports the trial court's finding that the use recommended by S.C. Revenue Ruling #98-22 was the same use made of A-Tax Revenues by the City in the 2008-2009 fiscal year. [R__]

IV. The Circuit Court properly ruled that the City of Myrtle Beach's disbursement of A-Tax revenues in the fiscal year 2008-2009 was proper.

In this part of its argument TERC claims that trial court's ruling on the disbursement of A-Tax revenues should be reversed because the City did not expressly name the 2008-2009 disbursement of A-Tax Revenues in its counterclaim. The City disagrees. The City contends the pleadings, trial brief of the City and the statements made by the parties to the court in outlining their positions adequately placed the matter before the trial court. See *Harrington v. Blackston* 311 S.C. 459, 429 S.E.2d 826 (S.C.App.,1993).

Rule 8(f) of the South Carolina Rules of Civil Procedure states that "[a]ll pleadings shall be so construed as to do substantial justice to all parties." Moreover, our Supreme Court has held that declaratory judgment actions must be liberally construed to settle legal rights and remove insecurity from legal relationships without awaiting a violation of the relationships. *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970); *Park v. Safeco Insurance Co. of America*, 251 S.C. 410, 414, 162 S.E.2d 709, 711 (1968).

TERC alleged in its complaint: TERC has chosen not to act upon its interpretation of § 6-4-10(4)(b) by finding the City's 2008-2009 expenditures non-compliant under S.C. Code Ann. § 6-4-35(B)(i)(a) because it has previously permitted similar expenditures, albeit in lesser amounts, and does not believe that it would be reasonable to certify as non-compliant the City's

2008-2009 A-Tax expenditures on police, fire and parks personnel. [Complaint p] The City alleged in its counterclaim: The City has compared its expenditures for law enforcement, traffic control, public facilities, and highway and street maintenance services with other municipalities with similar demographic features. The City has used that comparison among others to determine the amount of its expenditures that are based on the estimated percentage of costs attributable to tourists. The City is informed and believes that its method of comparing its costs to the costs of other municipalities with similar demographics is a reasonable method for determining the City's costs that are attributable to tourists. The City requested a declaration from the Court that the City's method of determining its costs attributable to tourists is acceptable under the terms of the Accommodations Tax Act.

In the conclusion to the City's trial brief which was provided to TERC prior to trial, the City requested a ruling on the 2008-2009 A-Tax revenues. The conclusion contains the following request: "The City of Myrtle Beach asks this Court to find and declare that the City properly allocated substantially all of its 2008-2009 A-Tax special funds to additional services for tourists under the facts in the present case. " [City's Trial Brief p. 18] The City's request for a ruling on the 2008-2009 disbursement was noted during opening statements of the attorneys for the parties. [R 17]

Extensive evidence was introduced on the subject of the 2008-2009- expenditure of A-Tax revenues. [R__] TERC cross examined the City's witness on the subject and introduced evidence to support its position on the subject. Although not expressly named in the City's counterclaim, the matter of the 2008-2009 A-Tax revenue expenditures was before the court and the trial court was proper in making its ruling. *Harrington v. Blackston* 311 S.C. 459, 429 S.E.2d 826 (S.C.App.,1993).

The City contends TERC is attempting to elevate form over substance with its argument about the 2008-2009 disbursement of A-Tax revenues. The City contends TERC's attempts to distinguish between the City's request for a declaration on the methods used by the City in disbursing the 2008-2009 A-Tax revenues and a declaration on the named disbursement of A-Tax revenues in its counterclaim falls in the category of a distinction without a difference. Since TERC has chosen not to contest the 2008-2009 A-Tax revenue disbursement, the trial court's ruling on that particular disbursement does not prejudice TERC in any way. TERC's appeal of trial court's ruling on the 2008-2009 disbursement of A-Tax revenues should be dismissed. See *Miles v. Miles*, 303 S.C. 33, 36, 397 S.E.2d 790, 792 (Ct.App.1990) (This Court has long recognized an overriding rule: "whatever doesn't make any difference, doesn't matter.") What is important is the trial court's ruling affirming the City's method of determining its disbursement of 2008-2009 A-Tax revenues and finding that the City's method met the requirements of S.C. Code Ann. § 6-4-10(b).

CONCLUSION

For the forgoing reasons, the City of Myrtle Beach respectfully requests that the Final Order of the Hon. William B. Seals, Jr. be affirmed and that Tourism Expenditure Review Committee's appeal be dismissed.



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January 23, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

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SC Court of Appeals

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

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

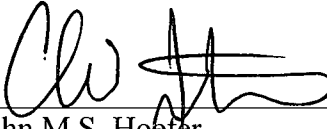
Appellant Tourism Expenditure Review Committee proposes that the following be included in the Record on Appeal:

1. Act No. 316, Acts and Joint Resolutions of the General Assembly of South Carolina, Regular Session, 1984, 63 Stat. at Large 1570 (1984).
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 22, 2009.

7. COMB Fiscal Year 2008-2009 Accommodations Tax Expenditure Reporting, dated September 30, 2009.
8. Tourism Expenditure Review Committee ("TERC") Return to Motion for Temporary Relief, Motion to Dismiss and Affidavit of Lanneau H. Siegling, filed October 26, 2009.
9. Letter to Michael D. Price from Lauren L. Sponseller, dated January 4, 2010.
10. Letter to Lauren Sponseller from Michael Shelton, dated January 7, 2010.
11. Letter to Michael Shelton from Lanneau H. Siegling, dated May 6, 2010.
12. TERC Summons and Complaint, filed May 6, 2010.
13. COMB Answer and Counterclaim, filed May 28, 2010.
14. TERC Reply to Counterclaim, filed July 21, 2010.
15. ALC Order Consolidating COMB Petition for Declaratory Judgment and Contested Case, filed August 17, 2010.
16. Town of Hilton Head Island ("Town") Motion to Intervene, Answer, and Counterclaim, filed October 19, 2010.
17. TERC's Return in Opposition to Town's Motion to Intervene, filed March 16, 2011.
18. Order Denying Town's Motion to Intervene, filed April 14, 2011.
19. COMB Trial Brief, filed July 11, 2011.
20. TERC Trial Brief, filed July 11, 2011.
21. Email to Michael W. Battle and John M.S. Hoefer from Judge William H. Seals, Jr.'s Law Clerk, dated July 11, 2011.
22. Letter to Judge William H. Seals, Jr. from John M.S. Hoefer, dated July 18, 2011.

23. Final Order, filed July 19, 2011.
24. TERC Motion to Alter or Amend, filed August 1, 2011.
25. Email to Michael W. Battle and Chad N. Johnston from Judge William H. Seals, Jr., dated August 4, 2011.
26. COMB Response to Motion to Alter or Amend, filed August 8, 2011.
27. TERC Reply in Support of Motion to Alter or Amend, filed August 25, 2011.
28. Order Denying TERC's Motion to Alter or Reconsider, filed September 15, 2011.
29. TERC Notice of Appeal, filed September 29, 2011.

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



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Columbia, South Carolina
This 3rd day of January, 2012.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

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:

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Battle Vaught & Howe, P.A.
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Conway, South Carolina 29528

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JAN 03 2012
SC Court of Appeals


Breanna M. Karns

This 3rd day of January, 2012

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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. 2010-CP-40-3001
Court of Appeals Case Tracking #: 2011194346

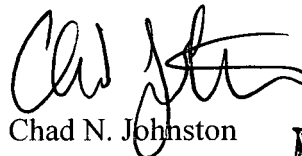
Dear Ms. Gee:

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.


Chad N. Johnston

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

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in ruling that the plain language of section 6-4-10(4)(b) permits the City of Myrtle Beach to disburse all accommodations tax revenue available to it in a given year to its general operating fund for police, fire and parks personnel expenditures because the City's municipal service expenditures were comparatively higher than South Carolina municipalities with similar permanent populations?
2. Did the Circuit Court err in relying on extrinsic evidence to support its ruling, despite stating that the basis for its opinion was the plain language of section 6-4-10(4)(b) and without first finding the statute to be ambiguous?
3. Assuming, *arguendo*, that reliance on extrinsic evidence in the absence of an ambiguity finding was proper, did the Circuit Court err in its interpretation and application of law to the extrinsic evidence admitted?
4. Did the Circuit Court err in ruling that the City of Myrtle Beach's fiscal year 2008-2009 disbursement of accommodation tax revenues was proper, an issue that was not, and jurisdictionally could not have been, before the Circuit Court?

STATEMENT OF THE CASE

Appellant Tourism Expenditure Review Committee (“TERC”) commenced its underlying action for declaratory judgment pursuant to S.C. Code Ann. § 15-53-20 (2005) and Rule 57 of the South Carolina Rules of Civil Procedure (“SCRCP”) against Respondent City of Myrtle Beach (“COMB” or “City”) by service of a May 6, 2010 summons and complaint. **(R.p.)**, Summons and Complaint. Thereby, TERC sought a declaratory judgment as to the meaning of S.C. Code Ann. §6-4-10(b)(4) (2004). Id. The COMB answered and made a counterclaim for declaratory judgment with respect to the meaning of §6-4-10 on May 28, 2010. **(R.p.)**, Answer and Counterclaim.

On October 19, 2010, the Town of Hilton Head Island (“Town”) moved to intervene in the action pursuant to Rule 24(b), SCRCP. **(R.p.)**, Town Motion to Intervene. TERC opposed the Town’s motion. **(R.p.)**, TERC Return to Town Motion to Intervene. After a hearing was held on the Town’s motion on March 16, 2011, the circuit court issued an order denying the Town’s motion. **(R.p.)**, Order Denying Town Motion to Intervene. No appeal was taken from this order.

A non-jury trial was held on July 11, 2011, at the Richland County Judicial Center before the Honorable William H. Seals, Jr. Both parties submitted trial briefs reflecting their respective positions to the Court in advance of the hearing. **(R.pp.)**, Trial Briefs. At trial, the COMB introduced testimony of a City employee and other evidence, including three (3) letters between the parties,¹ and a 2007 United States Department of Justice Study on local police department sizes, to all of which TERC timely objected. **(R.p.)**. In response, but subject to its earlier

¹ (1) TERC January 27, 2009 letter to the COMB, **(R.p.)**; TERC January 4, 2010 letter to the COMB, **(R.p.)**; and (3) COMB January 7, 2010 responsive letter, **(R.p.)**.

objections, TERC introduced the COMB's fiscal year 2008-2009 A-Tax compliance report, and the text of the preamble to 1984 S.C. Act No. 316, which is the enactment later codified as S.C. Code Ann. §§ 12-35-710 *et seq.* (1984), the statutory predecessor of S.C. Code Ann. §§ 6-4-5 *et seq.* (2004 and Supp. 2010). **(R.p.)**, 2008-2009 Compliance Report; Preamble to 1984 S.C. Act No. 316.

Thereafter, the circuit court ruled in favor of the COMB on its counterclaim and thereby rejected TERC's interpretation of the statute.² **(R.p.)**, Circuit Court Order. TERC timely filed a motion for reconsideration of the circuit court's Order pursuant to Rule 59(e), SCRCP, on August 1, 2011. **(R.p.)**, TERC Motion for Reconsideration. Thereafter, the circuit court again contacted the parties by electronic mail, inquiring as to the issues raised in TERC's motion for reconsideration and directing the parties to submit further written briefs and proposed orders. **(R.p.)**. In accordance with the circuit court's direction, the COMB filed a return to TERC's motion, **(R.p.)** TERC submitted a reply, **(R.p.)**, and both parties submitted proposed orders. Subsequently, the circuit court issued an order dated August 31, 2011, denying TERC's motion for reconsideration. **(R.p.)**, Order Denying Rule 59(e). TERC filed and served its notice of appeal on September 9, 2011, pursuant to Rule 73, SCRCP, and Rule 203 of the South Carolina Appellate Court Rules ("SCACR"). **(R.p.)**, Notice of Appeal.

² Via an electronic mail message on July 11, 2011, the same day of the trial, the circuit court notified the parties that it had found in favor of the COMB and requested a proposed order to that effect. **(R.p.)**. TERC disputed some of the matters contained in the resulting COMB proposed order, by way of a July 18, 2011 letter to the circuit court. **(R.p.)**. However, unbeknownst to TERC, the circuit court had already signed the COMB's proposed order, a file stamped copy of which TERC received several days after July 18, 2011. **(R.p.)**.

STATEMENT OF THE FACTS

I. Statutory Framework

Under S.C. Code Ann. § 12-36-920(A) (Supp. 2010), a sales tax of seven percent (7%) is imposed by the state on accommodations provided to transients in South Carolina. One component of that tax is a two percent (2%) “local” accommodations tax (i.e., the A-Tax) which, pursuant to S.C. Code Ann. § 12-36-2630(3) (1977 & Supp. 2010), must be credited to cities and counties in accordance with §§ 6-4-5, *et seq.* TERC is the legislatively created committee that is designated, under S.C. Code Ann. § 6-4-35 (Supp. 2010), to oversee tourism-related expenditures of A-Tax revenues to ensure compliance with §§ 6-4-5 *et seq.*

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”).³ See S.C. Code Ann. § 6-4-25 (2004). 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 § 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

³ Qualifying municipalities and counties are also required to file an annual report with TERC, no later than October 1 of each year, detailing the Committee’s recommendations and how the A-Tax revenues segregated under § 6-4-10(3)-(4) were disbursed. See § 6-4-25(D).

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 §§ 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 recipient. See § 6-4-10(1). Thereafter, an additional five percent (5%) of the A-Tax Fund allocation is also placed in the recipient's general fund. See § 6-4-10(2). Thirty percent (30%) of the remaining balance is then allocated to a "special fund" under § 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).

The annual reports submitted by municipalities and counties to TERC 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 reviews these reports to determine if the disbursements comply with the statute as contemplated by § 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 its determination of whether a questioned expenditure complies with the requirements of the statute. Id. After considering any such additional information, TERC 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. The dispute at the heart of this appeal arises from the parties' opposing interpretations of § 6-4-10(4)(b), as it relates to the disbursement of the remaining A-Tax revenues in the 65% Fund.

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 filing of this declaratory judgment action began during the COMB's fiscal year 2007-2008; therefore, in order to provide a clearer picture as to the parties' opposing viewpoints, TERC provides the following additional factual background.

PAST FISCAL YEAR EXPENDITURES OF THE COMB

After reviewing the report submitted by the COMB pursuant to § 6-4-25(D)(3), which detailed the expenditure of A-Tax revenues for fiscal year 2007-2008, TERC notified the COMB, by letter dated January 27, 2009, that it questioned the expenditure of substantially all of the A-Tax revenues available to the COMB on operating expenses for police, fire and parks personnel in light of § 6-4-10(4)(b)'s proscription on utilizing A-Tax revenues for municipal services "normally" provided by the City. **(R.p.)**, TERC January 27, 2009 Letter. TERC also put the COMB on notice that it did not agree with the City's comparison of its level of municipal service expenditures with the expenditures of other municipalities solely on the basis of permanent populations. Id. The COMB responded, by February 9, 2009 letter, wherein it relied principally on RR#98-22, **(R.pp.)**, asserting that the COMB should be able to use the available A-Tax revenues for qualifying municipal operating expenses and that TERC lacked jurisdictional oversight of "tourism-related" expenditures from its general fund. **(R.p.)**, COMB February 9,

2009 Letter. The COMB also asserted that TERC's approval of expenditures for police, fire and parks personnel in a prior fiscal years supported COMB's position. Id.

TERC responded to the COMB by letter dated April 22, 2009, in which it questioned whether COMB's grant of 100% of the A-Tax revenues expended to the COMB's general fund was appropriate given the statutory limitation included in § 6-4-10(4)(b), that permitted the 65% Fund's use only on "additional" municipal services not "normally provided by the county or municipality." (**R.p.**), TERC April 22, 2009 Letter. Recognizing the "hardship" a decision to certify the COMB's entire A-Tax disbursement might impose on the City, TERC noted that it had found the COMB's fiscal year 2006-2007 expenditures compliant with the A-Tax statute under similar circumstances and therefore would not certify the entire amount to the State Treasurer as non-compliant on that ground. Id. However, TERC put the COMB on notice of its interpretation of § 6-4-10(4)(b) and that it would review the COMB's fiscal year 2008-2009 expenditures under the new interpretation. Id.

2008-2009 EXPENDITURES

Prior to submitting its fiscal year 2008-2009 A-Tax report to TERC, and thus prior to TERC's review of the report on COMB's state A-Tax disbursements for that year, the COMB filed an action with the Administrative Law Court ("ALC"), Docket No. 09-ALJ-30-0435-IJ, seeking a "petition for a declaratory judgment" as to the meaning of § 6-4-10(4)(b), as well as a temporary and permanent injunction preventing TERC from reviewing the COMB's fiscal year 2008-2009 expenditures. The purpose of the City's filing was to preclude TERC from reviewing, and potentially certifying to the State Treasurer as non-complaint, the COMB's fiscal

year 2008-2009 A-Tax disbursement. **(R.p.)**. TERC opposed⁴ the COMB's filing in the ALC, arguing, *inter alia*, that the ALC did not have jurisdiction to issue a declaratory judgment. **(R.p.)**, TERC Return in Opposition. The ALC ultimately determined that it would not consider COMB's declaratory judgment filing.⁵ **(R.p.)**.

The COMB submitted its annual report to TERC on September 30, 2009, pursuant to § 6-4-25(D)(3), detailing its expenditures of A-Tax revenues in fiscal year 2008-2009. **(R.p.)**, COMB FY 2008-2009 Report. The report showed that the Myrtle Beach City Council had granted all of the A-Tax revenues made available for disbursement in 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 for tourism-related activities. Id. Notably, as further detailed in this report, the City Council's grant was approximately \$700,000 more than the COMB had 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

⁴ 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, hence TERC's later filing of the current action in the circuit court, the court with jurisdiction to consider a declaratory judgment action. **(R.p.)**.

⁵ Through a subsequent Freedom of Information Act ("FOIA") request, TERC learned that the COMB had, in fiscal year 2008-2009, disbursed revenues out of its general operating fund to four outside (i.e., non-municipal department) entities, totaling \$302,545, requested for tourism-related activities; however, these outside entities had not submitted funding requests that were reviewed by the Committee as provided for in § 6-4-25. TERC therefore determined that the COMB's disbursements to these outside entities had not complied with the statutory mandates of §§ 6-4-5 *et seq.* and certified to the State Treasurer to withhold the funds from the COMB's next A-Tax revenue disbursement. Thereafter, the COMB filed a contested case request with the ALC based on TERC's non-compliance certification, 10-ALJ-30-0421-CC, and the two pending matters before the ALC were consolidated in one contested case, although the issues raised in the COMB's original "petition for a declaratory judgment" were excluded. **(R.p.)**, ALC Order of Consolidation. The contested case hearing was held before the Honorable Carolyn C. Matthews on December 2, 2010, and an appeal from the final order in that case is currently before this Court, City of Myrtle Beach v. Tourism Expenditure Review Committee, Case Tracking No. 2011194346.

84.97% of the \$4,681,464 in available A-Tax revenues. Id. After its review, the Committee had 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. Notwithstanding the COMB's funding request and the Committee's recommendations, 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 § 6-4-10(4)(b), because the COMB appeared to be using the A-Tax revenues as an additional source of funds to provide services normally provided by the City. **(R.p.)**, January 4, 2010 Letter. TERC also requested further information from the COMB regarding its procedures. Id. 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. **(R.)**, COMB January 7, 2010 Letter. In support of its position, the COMB relied upon RR#98-22. Id.

Following further correspondence between the parties not pertinent to this appeal, TERC replied to the COMB by letter dated May 6, 2010. **(R.p.)**, TERC May 6, 2010 Letter. Therein, TERC informed the COMB of its view that the COMB's disbursement of substantially all of the available A-Tax revenues to the City's general fund for police, fire and parks personnel expenses was not consistent with the legislative intent of §§ 6-4-5 *et seq.* Id. However, TERC once more informed the COMB that, because it had previously allowed the COMB to use a substantial portion of available A-Tax revenues for the COMB's general fund expenses for police, fire and

parks personnel expenses, certification to the State Treasurer's Office that the entire expenditure of \$4.6 Million of A-Tax revenues by the COMB was non-compliant (and that this amount should therefore be withheld from future disbursements to the COMB) would not be reasonable. Instead, TERC informed the COMB a declaratory judgment action was the proper, and most reasonable, vehicle to ascertain the meaning of the statute, and that TERC had filed the declaratory judgment action underlying the instant appeal on that same day. Id.

SUMMARY OF ARGUMENT

The parties present opposing interpretations of § 6-4-10(4)(b). In filing the action underlying the instant appeal, TERC sought a declaration that: (1) the 65% Fund may only be used by the COMB as a source of revenue to fund additional police, fire, and parks personnel expenses, over and above what the COMB itself normally spends on police, fire, and parks personnel and (2) the fact that the COMB has a high concentration of tourism activity does not in and of itself permit the City to expend the entire 65% Fund proceeds on municipal services such as police, fire, and parks personnel. By contrast, the COMB counterclaim sought a declaration that: (1) § 6-4-10(4)(b) permits a municipality to use all of its tourism-related funds on a single category of eligible expenditures; (2) TERC's oversight authority is limited to determining whether the county or municipality has complied with § 6-4-10(4)(b) as written; (3) the COMB's method of comparing the amount of its municipal services expenditures to other counties or municipalities with similar permanent populations in order to determine the amount attributable to tourists is appropriate; and (4) TERC may not expand its oversight authority through policy interpretations.

The result reached in the circuit court's orders ("Orders") is contrary to the plain language of § 6-4-10(4)(b) and violates the General Assembly's clear legislative intent. Further, despite ruling that its decision was based upon the plain meaning of § 6-4-10(4)(b), the circuit court erroneously looked beyond the statute for substantiation of its rulings, relying on testimony and other extrinsic evidence without first finding an ambiguity. Moreover, the circuit court erred in its interpretation and application of law to the extrinsic evidence admitted. Finally, the circuit court erred as a matter of law in sanctioning the COMB's fiscal year 2008-2009 disbursement of A-Tax funds, an issue that was not, and jurisdictionally could not be, before the circuit court.

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The result reached in the circuit court's orders ("Orders") is contrary to the plain language of § 6-4-10(4)(b) and violates the General Assembly's clear legislative intent. Further, despite ruling that its decision was based upon the plain meaning of § 6-4-10(4)(b), the circuit court erroneously looked beyond the statute for substantiation of its rulings, relying on testimony and other extrinsic evidence without first finding an ambiguity. Moreover, the circuit court erred in its interpretation and application of law to the extrinsic evidence admitted. Finally, the circuit court erred as a matter of law in sanctioning the COMB's fiscal year 2008-2009 disbursement of A-Tax funds, an issue that was not, and jurisdictionally could not be, before the circuit court.

ARGUMENT

I. The Circuit Court erred as a matter of law in ruling that the plain language of section 6-4-10(4)(b) permits a municipality to expend accommodation tax revenues on services normally provided by the municipality.⁶

a. The plain language of section 6-4-10(4)(b) supports the position advanced by the Tourism Expenditure Review Committee.

The circuit court erred as a matter of law in finding that the plain language of § 6-4-10(4)(b) supports the proposition advanced by the COMB that a municipality may expend A-Tax revenues for services normally provided by the municipality. As will be demonstrated to this Court, although the circuit court Orders purport to be based on the plain meaning of the statute, they nevertheless rely solely on extrinsic evidence to substantiate the rulings contained therein.

By contrast, TERC's position in this case is founded solely on the plain meaning of § 6-4-10(4)(b), i.e., that the statutory language is not ambiguous, and the circuit court erred in looking beyond the four corners of the statute to deny the declaratory judgment sought by TERC (and grant the declaratory judgment sought by COMB). TERC asserts that a municipality with a high concentration of tourism activity may only use A-Tax funds for those municipal services which are in addition to the services normally provided by the municipality. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. See Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) (citation omitted). "The legislature's intent should be

⁶ The arguments contained under this heading address Issues on Appeal Nos. One and Two.

ascertained primarily from the plain language of the statute.” Bass v. Isochem, 365 S.C. 454, 470, 617 S.E.2d 369, 377 (Ct. App. 2005).

Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). 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. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm’n, 317 S.C. 434, 454 S.E.2d 890 (1995)). “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.” Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992). The language must also be read in a sense which “harmonizes with its subject matter and accords with its general purpose.” Mun. Ass’n of S. Carolina v. AT & T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (quoting Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

In pertinent part, § 6-4-10(4)(b) provides:

The funds received by a county or municipality which has a high concentration of tourism activity⁷ may be used to provide

⁷ The term “high concentration of tourism activity” is not explicitly defined within Title 4 Chapter 6. TERC, consistent with the view of the Department of Revenue – which, pursuant to the now-repealed S.C. Code Ann. § 6-4-30 (2004), previously exercised some of the authority devolved upon TERC by 2001 Act No. 74, § 3.A of the General Assembly – has interpreted the term as applying to any “county area” defined under section 6-4-5(1) as collecting over \$900,000 in A-Tax revenues. See South Carolina Department of Revenue Ruling No. 98-22 (“RR#98-22”); cf. S.C. Code Ann. § 6-1-730(B) (Supp. 2010) (wherein legislature adopted the same \$900,000 threshold for certain local hospitality tax disbursements). It is undisputed that the COMB has a high concentration of tourism activity, as contemplated under section 6-4-10(4).

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.

(Emphasis added).

Although the terms “additional” and “normal” are not defined within the context of county or municipality service level expenditures, it is appropriate for this Court to interpret the terms based on their usual meaning. “When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning.” Strother v. Lexington County Recreation Comm’n, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) (citation omitted); see also Santee Cooper Resort v. South Carolina Pub. Serv. Comm’n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) (“Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation.”). S.C. Code Ann. § 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. By contrast, the circuit court’s construction, which follows the COMB’s suggested reading of § 6-4-10(4)(b), would permit a county or municipality to use A-Tax Funds as an additional source of annual, general fund

revenue. However, in order to harmonize and give effect to the expressed intent of the legislature, these terms can only mean that the COMB may use A-Tax revenues to supplement the City's revenues that it ordinarily expends on municipal services.

This point is further confirmed by the General Assembly's use of the specific article "the" rather than a more general article like "a" in the statute. See § 6-4-10(4)(b) ("The funds must not be used as an additional source of revenue to provide services normally provided by **the** county or municipality") (emphasis added). The plain meaning of the language used by the General Assembly indicates that a municipality should look at its own service level expenditures, rather than look to the cost of services provided by **other** municipalities with similar permanent populations, in order to determine the amount of its municipal services expenditures which are attributable to tourists, as is asserted by the COMB. The General Assembly is presumed to know and intend the consequences of the legislation that it passes and courts are not at liberty to hold that the General Assembly has included futile and superfluous language. See State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) (stating that in seeking intention of legislature, a court must presume General Assembly intended by its action to accomplish something and not to do a futile thing). Consequently, the General Assembly's inclusion of the introspective, specific article "the" supports TERC's position that a municipality is required to consider its own personnel service expenditure levels to determine which uses of A-Tax revenues for municipal services are appropriate and does not allow for a comparison of service level expenditures among differing municipalities.

Moreover, under the circuit court's erroneous interpretation, the limitations on the use of A-Tax revenues in § 6-4-10 are rendered a nullity for the COMB and any other municipality (or county) with a high concentration of tourism activity, as they would be enabled to simply

transfer all of the A-Tax revenues in a given year to their general funds for normal operating purposes and no incentive is left to provide funding for “tourism-related expenditures” by way of the statutorily prescribed method. See § 6-4-10 (providing specific guidelines for the use of A-Tax Funds received by a county or municipality collecting more than fifty thousand dollars from local accommodations tax). 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 by this Court. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (citing Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994)). As is evidenced by the COMB’s own actions, any municipality (or county) with a high concentration of tourism could simply bypass § 6-4-10’s restrictions, § 6-4-25’s procedures, and § 6-4-35’s oversight by disbursing all available A-Tax Funds to its general fund. See Kiriakides, 312 S.C. at 275, 440 S.E.2d at 366 (declining to give effect to a party’s interpretation of a statute that would lead to an absurd result); see also In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous....”) (citation omitted). The General Assembly saw fit to create and give the Committee and TERC this statutory authority; the circuit court Orders, which adopted the COMB’s proposed construction of the statute, sanction the COMB’s bypass of the General Assembly’s grant of authority.

Additionally, the General Assembly understands the distinction and limitation placed on use of tax funds to supplement and support the municipal services expenditures “normally” provided by a municipality with a high concentration of tourism. In S.C. Code Ann. §§ 6-1-700 *et seq.* (2004 & Supp. 2010), which establishes the rights and procedures related to a local

government's ability to impose, collect and use an additional local hospitality tax, the General Assembly expressly permits a local government to do with local hospitality tax revenues exactly what the COMB is trying to do with the State A-Tax revenues. Specifically, S.C. Code Ann. § 6-1-730 provides that a county with a high concentration of tourism activity, i.e., one meeting the same \$900,000 in state A-Tax revenues criteria discussed in n.7, supra, is permitted to use all of the revenues collected under the local hospitality tax to supplement the municipality's normal expenditures on police, fire protection, emergency medical services, and emergency-preparedness operations. § 6-1-730(B)(1). By contrast, those counties without high concentrations of tourism activity are only permitted to use up to fifty percent (50%) of the collected local hospitality tax revenues for those services normally provided. § 6-1-730(B)(2). Therefore, the General Assembly knows how to relax, and has expressly relaxed, a limitation on the use of tax funds in areas of high concentrations of tourism activity. However, with respect to the State's A-Tax revenues, the General Assembly saw fit to include language that limited a municipality's use of A-Tax funds on municipal services to those in addition to the services normally provided by the municipality. The canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*" suggests that the General Assembly's differing treatments of State A-Tax revenues and local government's hospitality tax revenues in areas with high concentrations of tourism activity was intentional. 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, the General Assembly's failure to expressly allow a municipality with a high concentration of tourism activity to use all of the State A-Tax revenues on municipal services expenditures, contrasted against the permitted uses of local hospitality revenues provided for in § 6-1-730(B)(1) and (2), was deliberate and should be

enforced by this Court. See 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).

Moreover, the circuit court erred as a matter of law because, in interpreting the plain language of § 6-4-10(4)(b), its Orders are devoid of analysis of an important portion of the statutory provision in question. Notably, although the initial Order recites the statute in its introduction, the circuit court does not discuss the plain language of the second sentence of the section, which expressly provides that A-Tax “funds must not be used as an additional source of revenue to provide services normally provided by the county or municipality....” § 6-4-10(4)(b). TERC submits that an order declaring the meaning of § 6-4-10(4)(b) is inadequate as a matter of law in the absence of a discussion regarding the import of the clear legislative limitation contained in its second sentence, and the interplay between those two portions of the same section. That conflict, as evidenced by the two distinct interpretations of § 6-4-10(4)(b) presented by the parties in this action, is at the heart of this declaratory judgment action. Additionally, this language was specifically raised by TERC in its pleadings, Trial Brief, and at the hearing, and served as the basis for the declaratory judgment sought by TERC in this action.⁸

⁸ In this regard, the circuit court’s analysis may be a function of a misperception of the claim made by TERC. Specifically, the initial Order misapprehends TERC’s position in this case when it states that “[t]he Court does not agree with TERC’s claims that areas with high concentrations of tourism should not be allowed to use A-Tax funds for law enforcement, traffic control, public facilities, and highway and street maintenance expenditures.” Neither TERC’s pleadings nor its argument during the trial of this case, including its submitted Trial Brief, asserted such a position. To the contrary, TERC’s position in this matter has consistently conformed to the plain reading of section 6-4-10(4)(b): A-Tax revenues may be used by municipalities with high concentrations of tourism for municipal services, but only to the extent that they are in addition to those services that the particular municipality itself normally provides. Similarly, the circuit court’s initial Order also erroneously suggests that “[u]nder TERC’s reasoning areas with a high concentration of tourism could never use their A-Tax discretionary funds for tourism related government services because they normally have a high concentration of tourism activity and all

Instead of addressing this statutory provision, the circuit court focused only upon the language of the first sentence of § 6-4-10(4)(b), and supports its ruling by reference to extrinsic evidence⁹ in order to reach its conclusion that the General Assembly intended to allow municipalities to use State A-Tax revenues to offset the costs of municipal services they normally provide. The circuit court failed to reach the heart of the dispute before it, and misinterpreted the part of the provision it did analyze; therefore, the decision of the circuit court must be reversed.

b. The Circuit Court erred as a matter of law in admitting and relying upon on extrinsic evidence to support its ruling where it did not find the statute to be ambiguous.

The circuit court's initial Order states that its ruling is based on the plain meaning of § 6-4-10(4)(b). **(R.p.)**. Notwithstanding this pronouncement, and in support of its "plain meaning" ruling, the circuit court relies exclusively on extrinsic materials presented by the COMB to substantiate its position. Similarly, although the COMB contended throughout this litigation that its position is also supported by the plain language of the statute and presented extraneous

expenditures would be part of the services normally provided by the City," **(R.p.)**. However, this, too, is incorrect as TERC's interpretation is perfectly in line with the General Assembly's intent, evidenced by the preamble to the enabling legislation. See discussion infra, Section II.a. TERC concedes that areas of high concentration of tourism activity may use A-Tax revenues for municipal services; however, such uses should be non-recurring exceptions, rather than the rule, see Title 12, Chapter 35 (Preamble Section 1) ("from time to time"), and not recurring yearly expenditures, funding for which the county or municipality is looking to supplant with non-qualifying State A-Tax revenues, see Preamble Section 1 ("[t]he purpose of this act is not to provide an additional source of revenue for . . . services normally provided by the county or municipality"). **(R.p.)**, Preamble to 1984 S.C. Act No. 316. As an example, should the COMB decide to host a non-recurring event, like a parade in honor of one or more of its citizens, that is expected to draw tourists to the area, then the COMB would be justified under the statute in using A-Tax revenues to help off-set the additional municipal services costs for such non-recurring, eligible events, which would both promote tourism and enlarge the economic benefits of the area. Thus, TERC asserts that its position is not accurately portrayed in the above-quoted statements included in the initial Order by the circuit court and should therefore be vacated.

⁹ Kennedy v. S. Carolina Ret. Sys., 345 S.C. 339, 346-47, 549 S.E.2d 243, 246-47 (2001) (holding that, in order to consult materials beyond the borders of the act itself, a court must first find that the statute is ambiguous).

testimony and other extrinsic evidence to the court in the event that it found the statute ambiguous, the circuit court, without first finding an ambiguity in the statute, nevertheless relied upon the extraneous material to support its rulings.¹⁰ **(R.p.)**. TERC contends that this is a legal contradiction that cannot stand: either a decision is based on the plain language, and substantiation for that decision is rooted solely in the words of the statute; or, a Court makes a finding that the statute is unclear and ambiguous, and it endeavors to fulfill the General Assembly's intent by looking to extrinsic evidence. See Kennedy, 345 S.C. at 346-47, 549 S.E.2d at 246-47 (holding that, in order to consult materials beyond the borders of the act itself, a court must first find that the statute is ambiguous). The circuit court erred in looking outside the statute when the plain language clearly dictates otherwise and without first having found an ambiguity within the language of the statute. State v. Hudson, 336 S.C. 237, 246-47, 519 S.E.2d 577, 582 (Ct. App. 1999) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning.") (citing Paschal, 317 S.C. at 436, 454 S.E.2d at 892); City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the **statute** is clear and explicit, the court cannot rewrite the **statute** and inject matters into it which are **not** in the legislature's language.") see also Contra

¹⁰ As noted above, TERC objected to this evidence on the basis of both relevancy and hearsay, the former objection being grounded in the fact that the extrinsic evidence and testimony is inappropriate in a declaration of the meaning of an unambiguous statute. **(R.p.)**. The circuit court reserved ruling on TERC's objections and the testimony and materials were allowed. **(R.p.)**. Thereafter, the circuit court's Order relied exclusively on the extrinsic materials presented by the COMB to support its plain meaning holding. **(R.p.)**. TERC raised the circuit court's legal error in this regard in its motion for reconsideration, **(R.p.)**; however, the circuit court's order denying TERC's Rule 59(e), SCRPC motion failed to address TERC's assignments of error. **(R.p.)**; 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 has been properly raised in a Rule 59(e) motion, it is preserved).

Independence Ins. Co. v. Indep. Life & Acc. Ins. Co., 218 S.C. 22, 34, 61 S.E.2d 399, 405 (1950) (“The purpose of construction is to ascertain the legislative intent from the words used; and, if these are susceptible to any sensible meaning, **the court cannot add to them other words which would give them a different meaning without making, instead of construing, the statute.**”) (emphasis added) (quoting Banks v. Columbia Ry., G. & E. Co., 113 S.C. 99, 101 S.E. 285 (1919)).

Furthermore, this Court has held, in an *en banc* decision, that, in order to look beyond the plain meaning, a court is first required to make a finding of ambiguity. 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). Where there is no ambiguity, the court is bound to rely solely on the terms of the statute and give them their plain, ordinary and popular meaning. Id. The circuit court made no finding of an ambiguity in § 6-4-10(4)(b). Moreover, at the hearing, the COMB admitted that the materials it introduced to the circuit court were meant for the court’s consideration in the event that it found an ambiguity. **(R.p.)**, Transcript at 17-18 (“And that’s the reason we’re not just going based on oral arguments on the statute. We do think that the statute is clear to us, but there is always room for ambiguity, and so you have a choice to decide how you want to have this thing interpreted. And you’ll have as much information as we think is appropriate for you to determine what’s the best way to decide what 20 [sic] – 6-4-10(b)(4) [sic] means.”). Therefore, the COMB expressed knowledge and intent that the materials it was presenting were to be used by the circuit court in the event it found an ambiguity. The circuit court Orders instead considers materials outside of the record

and construes the statute in favor of the COMB without a finding of ambiguity, which constitutes reversible error.

Additionally, the materials relied upon in the initial Order are not relevant to an interpretation of the statute and constitute inadmissible hearsay, properly objected to by TERC. In relying on these materials,¹¹ the circuit court Orders contradict their ruling that the decision is based solely on the plain meaning of the statute. At trial, TERC objected to the COMB's introduction of documents and studies on multiple grounds. **(R.p.)** First, because the action was filed and accepted in this Court's jurisdiction as a declaratory judgment action, construing the language of § 6-4-10(4)(b), TERC argued that the materials and testimony proposed by the COMB were not relevant to the Court's analysis. Secondly, because the studies and other documents referenced in the initial Order were out of court statements proffered for the truth of the matters asserted therein, TERC objected to them on the grounds of hearsay. Despite the fact that the materials do not fit within a hearsay exception, and despite their having been proffered by the COMB solely as reference, the facts and figures contained in the studies were included by the circuit court in the initial Order as findings of fact. Once more, if the Orders were based on the plain language of the statute, then these materials should have been excluded as impermissible extrinsic evidence; regardless, however, these materials are inadmissible hearsay and cannot serve as substantiation for the Orders.

The COMB has previously attempted to explain away the circuit court's patent contradiction by stating that the extrinsic materials offered by the COMB, and cited as substantiation in the initial Order, were merely "factual applications" of the initial Orders' plain

¹¹ In addition to the studies listed below, the circuit court also repeatedly relies on RR#98-22, which belies the circuit court's insistence that its decision is based on the plain meaning of the statute.

meaning ruling. (R.p.), COMB Response to TERC Motion for Reconsideration. However, the initial Order clearly provides the discussion of extrinsic materials as support for its “plain meaning” holding, not as an application of that holding to a set of facts. This discrepancy is unexplainable and legally dispositive. For this and other reasons argued herein, the circuit court’s Orders are erroneous as a matter of law and should be reversed.

- c. **The Circuit Court erred as a matter of law in ruling that the City of Myrtle Beach’s method of comparing its municipal service expenditures to the expenditures of other South Carolina municipalities with similar permanent populations is supported by the plain language of section 6-4-10(4)(b).**

Similarly, the circuit court erred in ruling that the plain language of § 6-4-10(4)(b) supports its conclusion that municipalities with high concentrations of tourism may compare their levels of municipal services to the expenditures of other South Carolina municipalities with similar permanent populations, regardless of whether or not they, too, had a high concentration of tourism activity. The circuit court’s construction of § 6-4-10(4)(b) not only improperly allows a municipality to disregard the specific language and implication of other, more general language in the statute, but it also reads additional provisions into the statute, namely, that municipalities with high concentrations of tourism are authorized to compare their expenditures with other municipalities in order to determine the appropriateness of utilizing A-Tax revenues. Contra Independence Ins. Co., 218 S.C. at 34, 61 S.E.2d at 405 (“The purpose of construction is to ascertain the legislative intent from the words used; and, if these are susceptible to any sensible meaning, **the court cannot add to them other words which would give them a different meaning without making, instead of construing, the statute.**”) (emphasis added) (quoting Banks, 113 S.C. 99, 101 S.E. 285). TERC submits that it is not appropriate to look outside the statute when the plain language clearly dictates otherwise, and the circuit court erred as a matter of law in so doing. Hudson, 336 S.C. at 246-47, 519 S.E.2d at 582 (“If a statute’s language is

plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning.”) (citing Paschal, 317 S.C. at 436, 454 S.E.2d at 892).

Furthermore, comparing the level of services a municipality would be providing if it had the same permanent population as another county or municipality not situated in an area with a high concentration of tourism activity is entirely inapt, since it assumes that the two municipalities are similar. The statute treats municipalities with high concentrations of tourism activity differently from those that do not have a high concentration of tourism activity, see § 6-4-10(4)(b) (limiting subsection (b)’s application to those counties or municipalities with high concentrations of tourism), a status which COMB holds and of which it is taking advantage, yet the construction of § 6-4-10(4)(b) by the circuit court allows the COMB to use a municipality that does **not** have a high concentration of tourism as its comparison point. This is an “apples and oranges” comparison that effectively permits a municipality to supplant a portion of the municipal tax revenues needed for services normally provided by a municipality with State A-Tax revenues. This leads to an absurd result prohibited by the rules of statutory construction. See Kiriakides, 312 S.C. at 275, 440 S.E.2d at 366 (declining to give effect to a party’s interpretation of a statute that would lead to an absurd result). Concomitantly, the circuit court erred as a matter of law in approving the COMB’s proposed method of avoiding the statutory oversight of TERC, and its holding should be reversed.

II. Assuming, *arguendo*, that reliance on extrinsic evidence was proper, the Circuit Court erred in its interpretation and application of law to the extrinsic evidence admitted.

Notwithstanding TERC’s contention that the circuit court Orders are not based on the plain language of § 6-4-10(4)(b), but instead relies on extrinsic materials for support which in

and of itself constitutes grounds for reversal of the circuit court, TERC also submits that the circuit court erred in its analysis of the extraneous evidence upon which it relied.

- a. **The preamble of the enacting language to the statutory predecessor of sections 6-4-5 *et seq.*, sections 12-35-710 *et seq.* (1984), supports the position of the Tourism Expenditure Review Committee.**

As an alternative to its plain meaning argument, and offered to the circuit court in the limited circumstance that it found § 6-4-10(4)(b) to be ambiguous, TERC submitted to the court the preamble of the enabling language of the statutory predecessor to § 6-4-10(4)(b).¹² TERC submits that, if the circuit court could properly look beyond the plain language of the statute (which was and remains disputed by TERC), the preamble is clear evidence of the General Assembly's intent in § 6-4-10(4)(b) which is controlling and should have also been considered. "If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 25, 579 S.E.2d 334, 337-38 (Ct. App. 2003) (citing State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002)); see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. See Hudson, 336 S.C. at 247, 519 S.E.2d at 579. In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002).

¹² The enabling language was argued to the circuit court, (**R.p.**), but was not included in the Order. TERC raised the circuit court's failure to rule on the enabling language, in light of its decision to look beyond the four corners of section 6-4-10(4)(b), in its motion for reconsideration; therefore, the enabling language is properly before this Court. (**R.p.**); see Coward Hund, 336 S.C. 1, 518 S.E.2d 56 (holding that once an issue has been properly raised in a Rule 59(e) motion, it is preserved).

Furthermore, the Supreme Court has held that the preamble to an act is often useful in explaining otherwise unclear legislative intent. See Brown v. Cont'l Ins. Co., 315 S.C. 393, 395, 434 S.E.2d 270, 272 (1993) (citing Treasurers of the State v. Lang, 18 S.C.L. (2 Bail.) 430 (1831)); see also State v. Thrift, 312 S.C. 282, 305-06, 440 S.E.2d 341, 354 (1994) (preamble of an act may be used as a guide in determining legislative intent); City of Spartanburg v. Leonard, 180 S.C. 491, 186 S.E. 395 (1936) (holding that the preamble, though not a part of the effective portion of a statute, may nevertheless supply the guide to the meaning of the act). The statutory predecessor to §§ 6-4-5 *et seq.*, §§ 12-35-710 *et seq.* (1984), discussed in Thompson v. Horry County, 294 S.C. 81, 82-85, 362 S.E.2d 646, 647-49 (Ct. App. 1987), included a preamble in its enacting language that provided:

The General Assembly finds that areas of the State which have a high concentration of tourism activity **may also be required from time to time** 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 purpose of this act is not to provide an additional source of revenue for counties and municipalities required 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.

Act No. 316, Acts and Joint Resolutions of the General Assembly of South Carolina, Regular Session, 1984, 63 Stat. at Large 1570 (1984) (emphasis supplied). As is evident, this language is

substantially similar to the language currently included in § 6-4-10(4)(b). However, the additional language contained in the preamble to the enabling legislation is telling: the inclusion of the phrase “from time to time” reflects the General Assembly’s intent that municipalities with high concentrations of tourism not be allowed to simply rely on A-Tax revenues for additional, yearly revenue supplanting normal municipal revenue disbursements. Instead, it contemplated only using A-Tax revenues for the provision of those services in unique circumstances warranting their need to help promote tourism and enlarge the economic benefits of the area, which conforms to the plain language of the statute and TERC’s suggested reading. *Cf. Brown*, 315 S.C. at 395, 434 S.E.2d at 272 (holding that where the preamble to the statute suggests a different meaning than the plain language of the statute, the preamble does not control). Again, while TERC submits that its position is fully supported by the plain language of § 6-4-10(4)(b), should this Court conclude that the statute is ambiguous (which the circuit court failed to do), TERC submits that the enabling language of the statutory predecessor to § 6-4-10(4)(b) supports TERC’s position and that the circuit court’s findings to the contrary should be reversed.

b. The Circuit Court misinterprets South Carolina Department of Revenue Ruling #98-22.

The circuit court, in relying on an isolated portion of RR#98, fails to give full weight to the analysis of this ruling, and therefore misapplies the import of the 13 year old, non-binding administrative opinion.¹³ As discussed above, and contrary to the position attributed to it in the initial circuit court Order, TERC does not dispute the fact that § 6-4-10(4)(b) permits a municipality with a high concentration of tourism activity to expend A-Tax revenues on municipal services to the extent that the expenditures are for services in addition to those

¹³ Administration of State A-Tax funds was formerly under the oversight of the South Carolina Department of Revenue. *See* n.7, *supra*.

services that the particular municipality itself normally provides. Moreover, TERC acknowledges that RR#98-22 suggests that a municipality with a high concentration of tourism activity may compare the number of its permanent residents with the number of tourists that visit the locality in order to determine the cost of providing municipal services that are directly attributable to tourists. TERC also acknowledges that it has, at times since its inception in 2001, relied upon RR#98-22 when evaluating questionable tourism-related expenditures under § 6-4-35. However, nowhere in RR#98-22 does it suggest that it is appropriate for a municipality with a high concentration of tourism activity to look to **other** municipalities with similar permanent populations (especially those without a high concentration of tourism activity) in order to determine the municipal costs attributable to tourists. See RR#98-22, (**R.pp.**), Questions and Answers 5, 6, 14, 19, and 31.

Furthermore, a Department of Revenue Ruling is, at most, an advisory opinion, and courts are not required to follow their decisions. See RR#98-22, Scope, p.1 (“A Revenue Ruling is the Department of Revenue’s official **advisory opinion**....”) (emphasis added); **see also** South Carolina Department of 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.”). Additionally, although the Department of Revenue and TERC have held differing views over the interpretation of §§ 6-4-5 *et seq.*,¹⁴ this Court is not required to enforce TERC’s previous position regarding the meaning of the statute where it is contrary to the plain language of the statute. *Cf. Media Gen.*

¹⁴ As noted by TERC during the trial, because its interpretation of section 6-4-10 has changed, TERC did not assert, as is its right according to case law, that its interpretation was entitled to deference by the Court. (**R.p.**). Cf. Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (“The fact that the agency has from time to time changed its interpretation of the term ‘source’ does not, as respondents argue, lead us to conclude that no deference should be accorded the agency’s interpretation of the statute.”).

Communications, Inc. v. South Carolina Dep't of Revenue, 388 S.C. 138, 149-50, 694 S.E.2d 525, 530-31 (2010) ("An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language.") (citing Etiwan Fertilizer Co. v. South Carolina Tax Comm'n, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950)); see also Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation.") (citation omitted). Similarly, TERC, having interpreted a statute to mean one thing in the past, is under no obligation to continue interpreting a statute the same way going forward, as long as its interpretation is not contrary to the plain language of the statute. See Chevron U.S.A., 467 U.S. at 863-64 (stating that an agency, in order to come to an informed decision, "must consider varying interpretations and the wisdom of its policy on a continuing basis.").

As noted above, the impetus for the filing of the declaratory judgment action underlying this appeal lies in the contrary interpretations of TERC and the COMB with respect to what municipal services are considered normal and how the use of A-Tax Funds as an additional source of revenue for those services already provided by the municipality are limited under § 6-4-10(4)(b). The circuit court cited RR#98-22 in support of the conclusion that the COMB may compare the personnel costs of providing certain municipal services to the costs of other municipalities with similar permanent populations. However, as stated above, the comparison

methodology adopted by the circuit court does not appear in RR#98-22. There exists no support for this comparison in either the plain language of §§ 6-4-5 *et seq.*, or RR#98-22.

The COMB has previously relied upon one sentence appearing in RR#98-22 to support its position:

When considering the percentage of costs that are attributable to tourism, the Department of Revenue will consider the number of permanent residents for the county or municipality as compared to the number of tourists that visit **the** locality, taking into consideration the average length of stay for such tourists.

(**R.p.**), RR#98-22 at 7 (emphasis added); (**R.p.**), COMB Trial Brief at 17. However, both the plain language of § 6-4-10(4)(b) and RR#98-22 use the specific article “the” rather than a more general article like “a” when referencing the number of tourists visiting, or municipal services provided by the municipality in question. See § 6-4-10(4)(b) (“The funds must not be used as an additional source of revenue to provide services normally provided by **the** county or municipality”) (emphasis added); RR#98-22.

By contrast, RR#98-22 **does** provide examples of determining the costs of municipal services attributable to tourism that actually support TERC’s interpretation of the plain meaning of the statute. RR#98-22 states that a municipality must show that the amount expended on costs for additional municipal services are based upon the estimated percentage of the municipality’s total costs incurred in providing the service in question **that are directly attributable to tourists**. One means suggested by RR#98-22 for making such a showing is to determine the

difference in costs incurred during the tourist season and the non-tourist season.¹⁵ **(R.p.)**, RR#98-22 at 7. Consistent with TERC's reading of the statute above, the comparison suggested to municipalities by RR#98-22 is entirely introspective, and does not suggest that a municipality may look to other areas lacking high concentrations of tourism activity to determine what is **normally** provided by **the** municipality. See § 6-4-10(4)(b). Comparing the number of tourists that visit a municipality, or the level of services a municipality would be providing if it had the same permanent population as another county or municipality not situated in an area with a high concentration of tourism activity, is inapt since it assumes that the two municipalities are similar when they clearly are not. Consequently, RR#98-22, when read in its entirety, supports the positions advanced by TERC and not the result reached by the circuit court and the circuit court's reliance on RR#98-22 constitutes reversible error.

c. The Circuit Court misinterprets the holding of this Court in Thompson v. Horry County, 294 S.C. 81, 362 S.E.2d 646 (Ct. App. 1987).

The initial Order erroneously cites this Court's decision in Thompson v. Horry County in support of its conclusion that a municipality should be allowed to compare the costs of providing its municipal services with those of another municipality with a similar permanent population. However, the reliance on Thompson in the circuit court's initial Order misconstrues its clear holding. In Thompson, this Court analyzed the predecessor version of §§ 6-4-5 *et seq.* to determine the reasonable geographic area in which a municipality could spend available A-Tax Funds. This Court stated, and thus limited the scope and applicability of the opinion, that the only issue before it related to the geographical area in which a county or municipality could

¹⁵ However, as noted by testimony presented by the COMB, the City has an average daily population of 104,000, as compared to the claimed permanent population of 27,109; therefore, the COMB has a consistent and constant tourist presence, as opposed to the peaks and valleys it may have historically experienced. **(R.pp.)**, Transcript at 39, 41-43.

spend A-Tax revenues. 294 S.C. at 84, 362 S.E.2d at 648 (“In this case, the second requirement [–that expenditures must be made primarily in the geographical areas of the county in which the proceeds of the tax are collected where it is practical–] is in issue.”).

Furthermore, under the former version of § 6-4-10(4)(b) discussed in Thompson, there existed a clause with respect to the “‘C’ Fund” – referred to as the “65% Fund” in this case – which provided that counties or municipalities were required only to be “substantially in compliance” with the requirements of the statutory section. See S.C. Code Ann. § 12-35-710 *et seq.* (1984) (amended 2001) (removing “substantial compliance” language). However, the General Assembly amended the statute to provide oversight authority over A-Tax revenues to TERC, and removed the “substantial compliance” standard associated with the geographic “flexibility” discussed by this Court in Thompson.

Consequently, the import of Thompson is limited to the scope of the issue before the Court of Appeals in that case and the circuit court’s reliance upon Thompson as substantiation for its decision in this declaratory judgment action is in error. TERC does not contend, contrary to ruling of the circuit court’s initial Order, that the COMB does not have flexibility as to how it spends A-Tax revenues. Rather, TERC contends that it is authorized to execute the oversight authority delegated to it by the General Assembly under § 6-4-35 in evaluating questionable tourism-related expenditures. Consequently, the circuit court’s reliance on Thompson for its “plain language” holding is misplaced and constitutes reversible error.

III. The Circuit Court erred in sanctioning the City of Myrtle Beach’s fiscal year 2008-2009 disbursement of accommodation tax revenues

In its conclusion, the circuit court held that “[t]he Court finds and declares that the City properly allocated substantially all of its 2008-2009 A-Tax special funds to additional services for tourists under the facts in the present case.” (R.p.), Order at 14. The issue of the COMB’s

2008-2009 disbursement of A-Tax Funds was not an issue before the Court in this declaratory judgment action.¹⁶ In response to TERC's Rule 59(e), SCRCP, motion on this point, the COMB generically stated that "[a]ll issues decided by the Court were raised either in TERC's complaint or the City's counterclaim." (R.p.), COMB Return to Motion for Reconsideration at 4. However, review of the COMB's Answer and Counterclaim reveals no mention of the issue. (R.p.), COMB Answer and Counterclaim. At the trial, counsel for the COMB asserted that the COMB "[has] brought a counterclaim basically saying that the 2008-2009 expenditure was proper", (R.p.), Transcript at 17, but this, too, is contradicted by the record on appeal. (R.p.), COMB Answer and Counterclaim.

The COMB did not move to amend its pleadings under Rule 15, SCRCP, either prior to, during, or after the trial. Further, the issue of the COMB's 2008-2009 expenditures was not tried by express consent. Instead, counsel for the COMB attempted to inject the issue at trial, (R.p.), Transcript at 17 ("And we have brought a counterclaim basically saying that the 2008-2009 expenditure was proper."), without support, and TERC clearly did not recognize the COMB's motivation in doing so and expressly refuted that the COMB's 2008-2009 allocation was at issue. (R.p.), Transcript at 6, lines 15-23, p. 12, lines 4-14, p. 19, lines 20-25. However, a party is not permitted to amend its pleadings by implied consent if the parties did not recognize it as an issue at trial, even if evidence in the record exists to support the amendment. See Dunbar v. Carlson, 341 S.C. 261, 268, 533 S.E.2d 913, 917 (Ct. App. 2000) (holding that implied consent will not be found if the parties did not recognize it as an issue at trial) (citing Williams v. Addison, 314 S.C. 35, 443 S.E.2d 582 (Ct. App. 1994)). Furthermore, if a court allows an

¹⁶ In its Answer and Counterclaim, the COMB did not request this Court to declare its 2008-2009 disbursement proper. Moreover, TERC timely objected to the COMB's counterclaim(s) and moved to dismiss in accordance with Rule 12(b)(6), SCRCP, which had been raised as a specific defense in TERC's reply.

amendment or the introduction of evidence under Rule 15(b), SCRCP, it is required to state in the record the reason or reasons for allowing the amendment or evidence; the circuit court Orders are devoid of such statements or analysis. See Rule 15(b), SCRCP (“Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor.”). Instead, the initial Order simply adds a holding into its conclusion that is unsupported by the record. **(R.p.)**, Order at 14.

Moreover, because the only reference to sanctioning the COMB’s 2008-2009 expenditure was made by counsel during trial, the counsel’s statement may not be viewed as evidence by the court and cannot orally add an unsupported counterclaim to an action during the trial. See South Carolina Dep’t of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (“Arguments made by counsel are not evidence.”) (citing McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (“This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.”)); see also Sessions v. Withers, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986).

Furthermore, the propriety of the COMB’s 2008-2009 allocation of A-Tax revenues is beyond the jurisdiction of the circuit court. The ALC has sole subject matter jurisdiction to pass on issues related to a county or municipality’s disbursement of A-Tax revenues under §§ 6-4-5 *et seq.* See S.C. Const. art. I, § 22; the South Carolina Administrative Procedures Act, S.C. Code

Ann. §§ 1-23-10 *et seq.* (2005 & Supp. 2010); § 6-4-35(B)(1)(a); and Rules 2(e) and 11, of the Rules of Procedure for the Administrative Law Court.¹⁷

Thus, while a decision by the circuit court with respect to the meaning of § 6-4-10(4)(b) was within the circuit court's jurisdiction for a declaratory judgment action filed pursuant to S.C. Code Ann. § 15-53-20 (2005), the propriety of the COMB's 2008-2009 disbursement was not cognizable before the circuit court, and, absent a finding of non-compliance by TERC, not even the ALC had jurisdiction to pass on the COMB's disbursement of A-Tax revenues. Consequently, the circuit court's holding in this regard should be reversed.

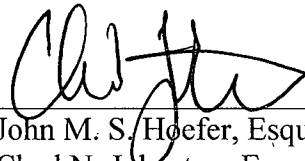
CONCLUSION

For the reasons set forth above, the Orders of the circuit court should be reversed. The circuit court erred as a matter of law in holding that the plain language of § 6-4-10(4)(b) permits a municipality to expend A-Tax revenues on services normally provided by the municipality, by comparing the municipality's service level expenditures to the expenditures of other South Carolina municipalities with similar permanent populations. Instead, the plain language of § 6-4-10(4)(b) supports the position advanced by TERC. Additionally, the circuit court erred as a matter of law in, notwithstanding its pronouncement that the holding was based on the plain language of the statute, admitting and relying upon on extrinsic evidence to support its holding without first finding an ambiguity in the statute. Furthermore and in the alternative, in relying on extrinsic materials, the circuit court erred in failing to consider the preamble of the enacting language of the statutory predecessor to the statute in question, in addition to misinterpreting and

¹⁷ Although the last cited statutory provision refers to an "appeal" from an action of the TERC, it has been held that the TERC lacks authority to conduct contested cases and, thus, that jurisdiction over matters arising out of a determination of the TERC is contested case jurisdiction before the ALC. *See, e.g.*, 2005 WL 3308567, Order of the Honorable Marvin F. Kittrell, May 5, 2005, Docket No. 04-ALJ-30-0382-CC.

misconstruing the extrinsic materials on which it relied. Finally, the circuit court erred in sanctioning the COMB's fiscal year 2008-2009 disbursement of A-Tax revenues, an issue that was not and could not be before it in the instant appeal.

Respectfully submitted,

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

John M. S. Hoefer, Esquire
Chad N. Johnston, Esquire

WILLOUGHBY & HOEFER, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

(803) 252-3300

Attorneys for Appellant

Columbia, South Carolina
This 3rd day of January, 2012.

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

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AREA CODE 803
TELEPHONE 252-3300
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*ALSO ADMITTED IN TX

December 2, 2011

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DEC 02 2011
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: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case No. 2010-CP-40-3001
Court of Appeals Case Tracking #: 2011194346

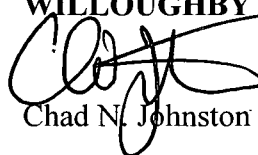
Dear Ms. Gee:

This letter is to inform you that this office received the transcript ordered in connection with the above-captioned case on Thursday, December 1, 2011. Pursuant to your letter of October 28, 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, which we calculate as January 3, 2012. 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)

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

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December 2, 2011

*ALSO ADMITTED IN TX

VIA FIRST CLASS MAIL

Elizabeth B. Harris
414 Autumn Circle
Columbia, SC 29206

RECEIVED
DEC 05 2011
SC Court of Appeals

RE: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case No. 2010-CP-40-3001
Court of Appeals Case Tracking #: 2011194346

Dear Ms. Harris:

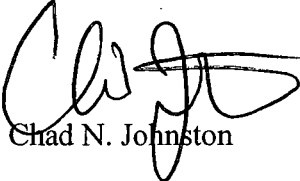
This office is in receipt of the transcript requested in the above-referenced case before the Honorable William H. Seals, Jr. on July 11, 2011. Enclosed please find the invoice and payment for the request made on September 27, 2011.

By copy of this letter, pursuant to Rule 207(a), SCACR, I am copying the Clerk of Court for the South Carolina Court of Appeals, South Carolina Court Administration, 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)
Rosalyn Frierson, Director, S.C. Court Administration (via first-class mail)
Michael W. Battle, Esquire (via first-class mail)



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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1015 SUMTER STREET
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October 28, 2011

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

Re: Tourism Exp. v. City of Myrtle Beach
Case #2011200407

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: 1205 Pendleton 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 of Rule 207(a)(5), SCACR, also, please advise 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,

V. Claire Allen, Deputy
Tanya A. Gee
CLERK

TAG/jt

cc: Michael Warner Battle, Esquire
The Honorable Jeanette W. McBride



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V: CLAIRE ALLEN
DEPUTY CLERK

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October 28, 2011

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

Re: Tourism Exp. v. City of Myrtle Beach
Case #2011200407

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/jt

cc: Michael Warner Battle, Esquire
The Honorable Jeanette W. McBride

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

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ANDREW J. MACLEOD
CHAD N. JOHNSTON
JOHN W. ROBERTS

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TELEPHONE 252-3300
TELECOPIER 256-8062

September 27, 2011

*ALSO ADMITTED IN TX

VIA FIRST CLASS MAIL

Elizabeth B. Harris
414 Autumn Circle
Columbia, SC 29206

RE: Tourism Expenditure Review Committee v. City of Myrtle Beach;
Case No. 2010-CP-40-3001

Dear Ms. Harris:

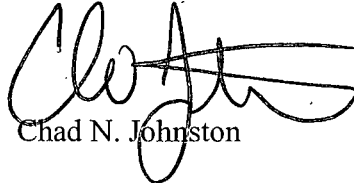
Enclosed, please find our request for a transcript of the entire record of the non-jury merits trial in the above-referenced case before the Honorable William H. Seals, Jr. on July 11, 2011. We agree to pay the per page charge for this transcript as provided in Rule 207(a), SCACR.

By copy of this letter, pursuant to Rule 207(a), SCACR, I am copying the Clerk of Court for the South Carolina Court of Appeals, South Carolina Court Administration, 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

RECEIVED

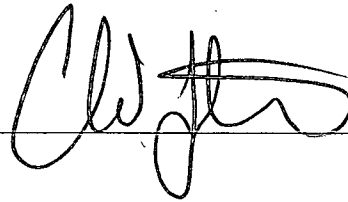
SEP 29 2011

SC Court of Appeals
CNJ/bim
Enclosure

cc: Honorable Tanya A. Gee, Clerk of Court, Court of Appeals (via first-class mail)
Rosalyn Frierson, Director, S.C. Court Administration (via first-class mail)
Michael W. Battle, Esquire (via first-class mail)

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; Case No. 2010-CP-40-3001. The hearing in this matter was held on July 11, 2011 before the Honorable William H. Seals, Jr. I understand that I am responsible for all costs associated with the preparation of this transcript pursuant to Rule 207(a), of the South Carolina Appellate Court Rules.

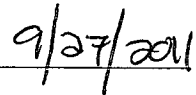


Signed

Willoughby & Hoefer, PA

Post Office Box 8416

Columbia, South Carolina 29202-8416



Dated

PM - 9/27/11
POS - 9/27/11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

NOTICE OF APPEAL

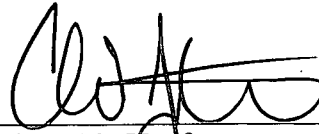
Pursuant to Rule 203 of the South Carolina Appellate Court Rules ("SCACR"), Appellant Tourism Expenditure Review Committee ("TERC") appeals the orders of the Honorable William H. Seals, Jr. in the above-referenced case. The Circuit Court's initial order was filed July 15, 2011. A copy of this order is attached hereto as Exhibit "A". TERC timely filed a Rule 59(e), of the South Carolina Rules of Civil Procedure ("SCRCP"), motion for reconsideration of the Court's order on August 1, 2011. Thereafter, a form order denying TERC's motion was filed by the Court on September 15, 2011, notice of which TERC received on September 19, 2011. A copy of this order is attached hereto as Exhibit "B". Pursuant to Rule 73, SCRCP, and Rule 203, SCACR, TERC files the within notice of appeal.

[SIGNATURE PAGE FOLLOWS]

RECEIVED

SEP 29 2011

SC Court of Appeals



John M.S. Hoefer

Chad N. Johnston

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Attorneys for Appellant

Tourism Expenditure Review Committee

Columbia, South Carolina

September 27, 2011

Other Counsel of Record:

Michael W. Battle

Battle, Vaught, PA

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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 RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

Tourism Expenditure Review Committee, ...Appellant,

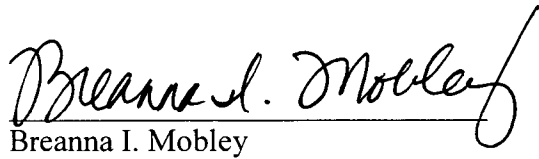
v.

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 **Notice of Appeal** 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, Esquire
Battle Vaught & Howe, P.A.
Post Office Box 530
Conway, South Carolina 29528


Breanna I. Mobley

This 27th day of September, 2011

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Tourism Expenditure Review Committee,

Plaintiff,

vs.

City of Myrtle Beach,

Defendant.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-40-3001

CERTIFICATE OF SERVICE

20 SEP 14 PM 12:27
FILED
JEANETTE W. McBRIDE
CLERK, C.P. & G.S.

I, Sherri Benninga, Paralegal for Battle & Vaught, P.A., hereby certify that I have this
September 12, 2011 have served a copy of the **Order Denying Plaintiff's Motion to Alter or
Reconsider** upon all counsel of record in this action, by depositing the same in the United
States mail, first-class postage pre-paid, to the following address(es):

Chad N. Johnston
John M.S. Hoefer
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, SC 29202



Sherri Benninga Paralegal
to Michael W. Battle
BATTLE & VAUGHT, P.A.
1200 Main Street
PO Box 530
Conway, SC 29528

September 12, 2011

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

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AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

*ALSO ADMITTED IN TX

September 27, 2011

RECEIVED
SEP 29 2011
SC Court of Appeals

VIA FIRST CLASS MAIL

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. 2010-CP-40-3001

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 enclosed order of the Honorable William H. Seals, Jr. 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.

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.

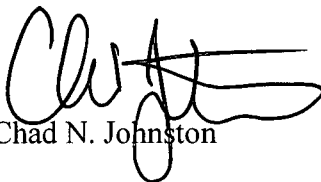
I would appreciate your acknowledging receipt of the within enclosures by file stamping the extra copy of the Notice and returning it to me via the enclosed return envelope.

Honorable Tanya A. Gee
September 27, 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.



Chad N. Johnston

CNJ/bim
Enclosures

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



WILLOUGHBY & HOEFER, P.A.

930 Richland Street
Post Office Box 8416
Columbia, SC 29202-8416

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

EXHIBIT A

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE 21 2011

COUNTY OF RICHLAND

CASE NO: 2010CP4003001

IN THE COURT OF COMMON PLEAS

Willoughby & Hoefer, P.A.

Tourism Expenditure Review Committee

vs.

City Of Myrtle Beach

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this ____ day of _____, 2011.

PRESIDING JUDGE

This judgment was entered on the ____ day of _____, 2011, and a copy mailed first class this 19 July 2011, to attorneys of record or to parties (when appearing pro se) as follows:

John Marion S. Hoefer

Michael Warner Battle
Curtis Lee Coltrane

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride

Clerk of Court

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Tourism Expenditure Review Committee,

Plaintiff,

vs.

City of Myrtle Beach,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE NO.: 2010-CP-40-3001

FINAL ORDER
(Non-jury Trial)

JEANETTE W. McBRIDE
CLERK
S.C.

2011 JUL 15 AM 10:29

RICHLAND COUNTY
FILED

The above captioned lawsuit came before the court for a non-jury trial for declaratory judgment on the proper interpretation of S.C. Code Ann. § 6-4-10(4)(b) and how that statute was being applied by Defendant City of Myrtle Beach (City). The trial was conducted on July 11, 2011 in the Richland County Courthouse. Present at the trial were John M.S. Hoefer, Esq. and Chad N. Johnston, Esq. of Willoughby & Hoefer, P.A. who represented the Plaintiff Tourism Expenditure Review Committee (TERC). Also present was Michael W. Battle, Esq. of Battle & Vaught, PA who represented the City. Michael W. Shelton, CFGO, Budget & Evaluation Director for the City of Myrtle Beach was the only witness who testified at the trial. During the trial exhibits were introduced by both TERC and the City.

At the outset of the trial TERC entered an objection to the introduction of any testimony or exhibits being offered in connection with the interpretation of S.C. Code Ann. § 6-4-10(4)(b). TERC's objection was based on its claim that the statute was not ambiguous and it should be construed based solely on the plain meaning of the language

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county or municipality to attract and provide for tourists. (parenthetical added) S.C. Code Ann. §6-4-10(4)(a)& (b).

After carefully considering the arguments presented, weighing the evidence introduced and judging the credibility of the witness's testimony, I find and conclude that the City's interpretation of S.C. Code Ann. § 6-4-10(4)(b) is proper. The City's 2008-2009 allocation of 99.65% of its A-Tax discretionary funds to municipal services such as law enforcement was proper because the A-Tax statute permits the City to allocate its A-Tax discretionary fund (a/k/a the 65% fund) to law enforcement, traffic control, public facilities, and highway and street maintenance expenditures which the City can attribute to tourism activities under that code section. I find and conclude that the City's method of comparing budgets of cities with similar permanent populations to determine the amount of services that should be attributed to tourism and the amount of A-Tax discretionary funds that can be allocated to pay for such government services is proper. I find and conclude that a city may allocate its entire A-Tax discretionary fund to single eligible category of expenditures under the Accommodations Tax Act.

Findings of Fact

1. The Tourism Expenditure Review Committee (TERC) is an oversight committee created by S.C. Code Ann. §6-4-35
2. TERC serves as the oversight authority on all questionable tourism-related expenditures and to that end, all reports filed pursuant to S.C. Code Ann. § 6-4-25(D)(3) must be forwarded to TERC for review to determine if they are in compliance with this chapter.

3. The City of Myrtle Beach (City) is a duly incorporated municipality located in Horry County, South Carolina.
4. The City has a high concentration of tourism activity as contemplated under SC Code Ann. § 6-4-10(4).
5. At all times pertinent to this matter, and as required by SC Code Ann. §6-4-25(A) of the South Carolina Code (2004), the City had a seven member local advisory committee to consider and make recommendations to the Myrtle Beach City Council ("City Council") on applications for the expenditure of revenue generated from the state accommodations tax provided for under SC Code Ann. §12-36-920(A) and §12-36-2630(3) and allocated to the accommodation tax ("A-Tax") fund created under SC Code Ann. §6-4-10(4). In fiscal year 2008-2009, all applications for A-Tax funds were presented to the local advisory committee.
6. Although the local advisory committee makes recommendations on applications for the expenditure of the A-Tax fund and such recommendations must be considered by the City under SC Code Ann. §6-4-25, the ultimate decision as to the final disbursement of the A-Tax fund is vested with City Council.
7. During fiscal year 2008-2009, applications for expenditures from the fund created under SC Code Ann. §6-4-10(4) were submitted to the City's local advisory committee for their recommendations. A report of the local advisory committee's recommendations and City Council's final actions regarding these applications was made to TERC on September 30, 2009, as required by

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§ 6-4-25. The report showed that: (a) staff for the City of Myrtle Beach requested that \$3,977,794, which was 84.97% of the \$4,681,464 in available A-Tax funds for fiscal year 2008-2009, 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"; (b) the local advisory committee recommended that \$3,065,294, which was 65.48% of the available A Tax funds, be expended to "support of operating expenses for services provided above and beyond permanent population throughout the year to include additional Police, Fire and Parks personnel"; and (c) City 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."

8. 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 SC Code Ann. §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

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SC Code Ann. §12-36-2630(3), which was contrary to the requirements of SC Code Ann. §6-4-25(A-C).

9. By letter dated January 7, 2010, Michael W. Shelton, Budget Director for the City, responded to TERC's January 4, 2010, letter as follows: "For FY2008-09, total expenditures for the departments in question were:

Police Department	\$20,008,175
Fire Department	11,138,096
Cultural & Leisure Services	<u>10,998,109</u>
Total	\$42,144,380

Thus in the Police Department, at 76.7% of total, tourist-related expenditures amount to more than \$15 million—far greater than the \$4.6 million of accommodations tax money spent for such services. I would also point out that we have been reviewing our reports to TERC and to the Accommodations Tax Oversight Committee, which existed prior to TERC's formation. Thus far, we have located records going as far back as the 1998-99 fiscal year. In each case, the reports show that the City spent substantial amounts of these funds for these identical purposes. The expenditures were not questioned until the 2006-07 fiscal year, at which time we provided additional information regarding our rationale for the expenditures and TERC found them to be compliant." TERC did not offer any evidence to contradict the statements made by Shelton.

10. The number of visitors to the City was estimated by the Myrtle Beach Chamber to be 13.7 million visitors annually; and (d) the permanent population of the City is estimated by the City to be approximately 30,000 residents.

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11. The City spends approximately \$14 million more for its police department than the average municipality of a similar population size. According to the U.S. Census Bureau Report for 2010 the City of Myrtle Beach has a permanent population of 27,109 residents. According to 2007 a report released by the U.S. Department of Justice, the average amount spent for law enforcement for cities with a population of 27,109 was approximately \$6,099,525. For FY2008-09, the City's total expenditures for its police department were \$20,008,175.
12. Presently the City has a total of 206 officers, not including 2 sworn personnel operating as Police Chief and Captain, 52 detention/communications officers, 2 animal control officers or 13 civilian employees for a total of 275 Police Department employees. 206 sworn officers are engaged in the direct delivery or direct command and supervision of law enforcement services. The average number of sworn officers is 62.33 for municipalities with similar populations.
13. Based upon an estimate of the number of annual visitors to the Myrtle Beach area conducted by D.K. Shiflett & Associates, Ltd. for the Myrtle Beach Area Chamber of Commerce, approximately 15.2 million people visited the area in 2007. The average length of stay for leisure travelers was 5 days (3 days for business travelers) according to data presented in the Chamber's 19th Annual Statistical Abstract, available on that organization's web site. That total may amount to the equivalent of an *average* daily population of 208,000 people in addition to the area's permanent residents. In terms of orders of magnitude and taking into considerations increases in the number of tourists, this average

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is fairly consistent with information prepared by a consultant to a local developer and provided to the City in 2004 in which the City of Myrtle Beach was estimated to have had an *average* daily population of about 105,000, approximately 4.3 times the size of its permanent population. Except for the large influx of tourists, the Court was not made aware of any significant differences between it and other similar sized municipalities.

14. In 2009, the City received \$4.6 million in accommodation tax funds that were allocated to special fund under S.C. Code Ann. § 6-4-10 (4). The City allocated substantially all of the \$4.6 million to law enforcement services.
15. The City compared its government service expenditures for law enforcement, with similar government service expenditures of other municipalities in South Carolina having similar sized permanent populations to determine the amount of money the City could spend for such tourism related expenditures.

Conclusions of Law

1. Because the City is an area with a high concentration of tourism activity, it may allocate its entire A-Tax discretionary fund to 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 the tourism activity under the authority of S.C. Code Ann. § 6-4-10(4)(b).
2. The City's permanent population comparative method for determining the amount of A-Tax funds that could be allocated for tourist related expenditures for law enforcement, traffic control, public facilities, and highway and street

maintenance for the fiscal year 2008 – 2009 was proper under S.C. Code Ann. § 6-4-10(b)(4).

Discussion

The plain language of the S.C. Code Ann. § 6-4-10 (4).

The declaratory judgment action between the City and TERC can be resolved by construing the plain language of the S.C. Accommodations Tax Act. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Charleston County Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). “The determination of legislative intent is a matter of law.” *Eagle Container Co. v. County of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008) (quoting *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)).

“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.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). 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.” *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03, at 94 (5th ed.1992)).

When construing the statute in question, the opening statement of the subsection expresses the intent of the legislature in plain language: “The funds received by a county or municipality... may be used to provide additional county and municipal services....”

S.C. Code Ann. §6-4-10(4) (b). The legislature did not limit the amount of the funds that could be used for the additional government services. The legislature intended to allow areas like the City with high concentrations of tourism activity to have the discretion to spend all of their A-Tax discretionary funds on law enforcement, traffic control, public facilities, and highway and street maintenance expenditures. Common sense dictates that an area's reputation for safety is important to its ability to attract and retain tourists. Tourists have to be provided the above listed services if they are to be attracted to this State and if they are to have a quality experience that makes them want to return on future occasions. The plain language also indicates that the legislature recognizes that such government services are provided at a cost to the City and that such costs should be shared by the tourists who use the services.

The Court does not agree with TERC's claims that areas with high concentrations of tourism should not be allowed to use A-Tax funds for law enforcement, traffic control, public facilities, and highway and street maintenance expenditures. The Court does not agree with TERC's interpretation of the phrase "services normally provided by the county or municipality." TERC's interpretation creates an illogical paradox. Under TERC's reasoning areas with a high concentration of tourism could never use their A-Tax discretionary funds for tourism related government services because they normally have a high concentration of tourism activity and all expenditures would be part of the services normally provided by the City. *S.C. Code Ann. §6-4-10(b).* Expenditures of A-Tax funds for services normally provided by the county or municipality are prohibited by the latter part of *S.C. Code Ann. §6-4-10(b).*

Under TERC's reasoning only unusual non-reoccurring expenditures could be funded with A-Tax discretionary funds. However, the statute allows highway and street maintenance expenditures to be funded with A-Tax discretionary funds. Street maintenance, like law enforcement, cannot be classified as an unusual or non-reoccurring expenditure. Both tourists and permanent residents use the streets. There's no practical way to separate tourists' use from permanent residents' use. The City's comparison of the costs it incurs and with the costs incurred by other cities with similar sized permanent populations is a proper way to determine the amount that may be attributed to tourism activity.

Prior court precedent.

Only one South Carolina appellate court opinion has been found construing the Accommodations Tax Act. See *Thompson v. Horry County* 294 S.C. 81, 362 S.E.2d 646 (S.C.App.,1987). In that case the Court stated the Act reflected the Legislature's practical recognition of the benefits of tourism and it made sense to "give counties some flexibility as to how and where they spend accommodations tax revenues." *Id.* TERC's interpretation of the Act is contrary to *Thompson v. Horry County*. TERC claims it does not make sense to give the City the necessary flexibility as to how and where it spends accommodations tax revenues. TERC claims that it makes sense to give TERC the flexibility to determine how and where local governments spend accommodations tax revenues. TERC claims its oversight authority gives it the overriding authority to limit the use of the City's special funds to TERC's views on the best use of those funds. The Court disagrees. TERC does not have the authority to make rules or create new policy.

TERC's sole authority is to determine whether an "expenditure is in noncompliance" with the act. See S.C. Code Ann. §6-4-35(B)(1)(a).

TERC wants this Court to declare that TERC now has the discretion to base its decisions on what it considers to be "the best use of accommodations tax funds." Such a declaration would be contrary to the Court of Appeals' holding in *Thompson v. Horry County*, 294 S.C. 81, 362 S.E.2d 646 (S.C.App., 1987).

TERC's longstanding prior interpretations of the Act.

In TERC's Complaint, TERC admits that it has previously permitted similar expenditures, albeit in lesser amounts, on police, fire and parks personnel. See TERC's Complaint ¶ 12. Since 1983, TERC's predecessor, SCDOR, and TERC have permitted local governments with high concentrations of tourism activity to spend the A-Tax discretionary funds on police, fire and parks personnel. See SCDOR Revenue Ruling # 98-22. SCDOR's revenue ruling adopted the position that the Act does not require that the A-Tax discretionary fund be divided in any particular way. If the expenditure meets the requirements of the law, a county or municipality can use all of its tourism-related funds on a single category of eligible expenditures. *Id.* Additional municipality and county services were expressly included in the discussion of categories of eligible expenditures under the Act. *Id.*

Good government policy favors the City's position.

As an oversight committee, TERC does not make policy, its primary job is to see that the statute enacted by the legislature is followed by the county or municipality. For example, if the City's expenditure meets the requirements of the law, the City should

have the discretion to use the special fund it receives from state accommodation taxes on a single category of eligible expenditure. See SCDOR Revenue Ruling # 98-22.

When the Accommodations Tax Act was passed in 1983, the State recognized the need for some local governments to be able to use "the funds received by a county or municipality" to offset the additional burden tourists place on the government services provided in areas with high concentrations of tourism. See S.C. Code Ann. §6-4-10(4)(b). Presently, the following counties (and municipalities within those counties) have a high concentration of tourism: Beaufort, Charleston, Georgetown, Greenville, Horry and Richland. See SCDOR Revenue Ruling #98-22. For approximately 27 years, TERC and its predecessors have recognized the right of those local governments including the City to use "the funds" for government services that provide for tourists including law enforcement. The Court was not presented with any reasons that justified reversing TERC and SCDOR's prior interpretations.

Oversight committees are external committees that oversee the operations and activities of specific local government committees such as finance, public works, health, education, etc. These committees perform an important but limited role of gathering information on the functioning of individual departments and ensuring, through their oversight and questioning of management officials, that corrupt practices do not take place.

The City's determination of expenditures attributable to tourists.

As shown above, the City determined the expenditures attributable to tourists by comparing its operating budget with those of cities with similar permanent populations in South Carolina. Mike Shelton testified the City's determination method was chosen

because of the guidelines chosen by TERC's predecessor, S.C. Department of Revenue, in SCDOR Revenue Ruling #98-22. In that revenue ruling SCDOR stated: "When considering the percentage of costs that are attributable to tourism, the Department of Revenue will consider the number of permanent residents for the county or municipality as compared to the number of tourists that visit the locality, taking into consideration the average length of stay for such tourists." *Id.*

TERC claims comparisons of the City's "permanent population" with those of other municipalities is not relevant in view of the statutory proscription against using these funds for services that are 'normally' provided." The Court disagrees. The plain meaning of the language used is that government services are to be divided into two categories: normal government services for permanent residents and government services made necessary by a high concentration of tourists. That interpretation is also consistent with Revenue Ruling # 98-22. The City's method of comparing its budgets to budgets of cities with similar sized permanent populations should be affirmed until such time as the legislature determines otherwise by amending the statute.

Conclusion

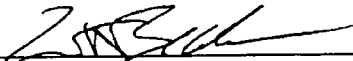
The Court finds and declares that the City properly allocated substantially all of its 2008-2009 A-Tax special funds to additional services for tourists under the facts in the present case. The Court to finds and declares that the City's method of comparing its expenditures for law enforcement, traffic control, public facilities, and highway and street maintenance expenditures with similar expenditures for other SC municipalities with similar permanent population sizes to determine the amount of A-Tax discretionary funds

that the City may allocate to such expenditures is proper and in compliance with S.C.

Code Ann. §6-4-10(b).

AND IT IS ORDERED.

July 14, 2011



Hon. William H. Seals, Jr.
Presiding Judge

EXHIBIT B

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND

CASE NO: 2010CP4003001

IN THE COURT OF COMMON PLEAS

Tourism Expenditure Review Committee

vs.

City Of Myrtle Beach

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2011.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 15 September 2011, to attorneys of record or to parties (when appearing pro se) as follows:

John Marion S. Hofer

ATTORNEY(S) FOR THE PLAINTIFF(S)Michael Warner Battle
Curtis Lee Coltrane_____
ATTORNEY(S) FOR THE DEFENDANT(S)_____
Clerk of Court

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Tourism Expenditure Review Committee,

Plaintiff,

vs.

City of Myrtle Beach,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-40-3001

**Order Denying Plaintiff's Motion
to Alter or Reconsider**

FILED
2011 SEP 14 PM 12:29
JEANETTE W. McBRIDE
C.C.P. & G.S.

The above captioned lawsuit originally came before the court for a non-judicial trial or declaratory judgment on the proper interpretation of S.C. Code Ann. § 6-4-10(4)(b) and how that statute was being applied by Defendant City of Myrtle Beach (City). The Court filed its final order dated July 14, 2011, and Plaintiff Tourism Expenditure Review Committee (TERC) duly filed a Motion to Alter or Amend. Both TERC and the City filed documents which fully briefed the arguments raised in the TERC's motion. After carefully considering the arguments presented by both parties, I find and conclude that the Court's Order dated July 14, 2011, was proper. The arguments raised by TERC in its motion were properly addressed in this Court's Order dated July 14, 2011.

**THEREFORE, TERC'S MOTION TO ALTER OR AMEND IS HEREBY
DENIED. AND IT IS ORDERED.**

August 31, 2011



Hon. William H. Seals, Jr.
Presiding Judge