

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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Appellate Case No. 2016-000460

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DomainsNewMedia.com, LLC.....Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce .....Appellant.

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MOTION TO STRIKE

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Andrew S. Radeker  
S.C. Bar No. 73743  
Taylor M. Smith IV  
S.C. Bar No. 101584  
Harrison & Radeker, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
(803) 779-2211  
Attorneys for Respondent

**RECEIVED**  
SEP 15 2016  
S.C. SUPREME COURT

Respondent, Domainsnewmedia.com, LLC, moves pursuant to Rules 208, 209, 210, and 240, SCACR, for an order that strikes the Appellant's designation of matter to be included on appeal and the Appellant's initial brief or, in the alternative, strikes improperly designated matter from the Appellant's designation of matter to be included in the record on appeal and strikes all references to that material from the Appellant's brief. The memorandum setting forth the grounds for this motion is as follows:

1. The purpose of an appeal is for the appellate court "to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court." Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984). Neither the Court of Appeals nor the Supreme Court in its appellate jurisdiction "sit as a trial court to receive evidence on disputed issues of fact[.]" Id. "[A]ppellate review should be limited to the record in the trial court." Id. at 461.
2. Rule 210(c), SCACR, prohibits the inclusion in the record on appeal of "matter which was not presented to the lower court or tribunal." Accord State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007); Sanders, 283 S.C. at 460; see Cobb v. Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997). Rule 209(b), SCACR, provides that a designation of matter for inclusion in the record on appeal "may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the record on appeal."

3. Item 14 of the Appellant's designation of matter describes "Letter from Taylor Smith to Stephen Riley, Town Manager, dated May 17, 2016." A copy of that letter is attached to this motion. This letter was mailed by Taylor Smith to Mr. Riley, the town manager of the Town of Hilton Head Island, on May 17, 2016.
4. The order subject of this appeal was signed and filed on February 22, 2016. This is a direct appeal, with no motion to reconsider having been made. Accordingly, the record for this appeal was set and complete on February 22, 2016. The letter did not even exist then.
5. The improperly designated letter is referenced in the Appellant's initial brief on page 25 at footnote 2, quoted below, where the Appellant itself notes the letter was not presented to the lower court:

Throughout this litigation, Respondent has argued that the Chamber is a public body subject to FOIA because it is not a contractor of the local governments and is not providing goods and services in exchange for funds received. Recently, however, Respondent sent a letter to the Town Manager for Hilton Head Island acknowledging the contractual relationship between the Chamber and the Town of Hilton Head Island acknowledging the contractual relationship between the Chamber and the Town of Hilton Head Island and arguing that the contract should be subject to the procurement code because it is an agreement for the provision of services by the Chamber. (Letter from Taylor Smith to Stephen Riley, Town Manager, May 17, 2016.) **Because this letter was sent after the circuit court issued its decision in this case, the circuit court was not able to consider it.**

(Emphasis added.)

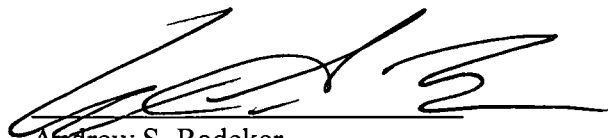
6. “The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged. Rule 208(b)(4), SCACR (bracket in original). The Rule’s language regarding what can be referenced in the brief mirrors the language in Rule 209, SCACR, limiting factual references to material that was properly designated for inclusion in the record on appeal.
7. The letter designated and referenced in the Appellant’s initial brief is not material that can be properly included in the Record on Appeal. The Appellant’s designation and brief are not in compliance with the Appellate Court Rules.
8. The Appellant has declined to amend its brief and designation by consent to remove the improperly designated matter and remove any reference to it from the Appellant’s brief.
9. By no means does the Respondent agree with the Appellant’s characterization of the letter or even that the letter in question has any significance to the issues in this case at all. If, however, the Appellant believes that the letter somehow entitles it to have the judgment be undone, the proper course to address that would be for the Appellant to move the trial court for relief from the judgment pursuant to Rule 60(b), SCRCF. The Appellant’s proper course is not to designate improper material for inclusion in the record on appeal and to argue to an appellate court, on the basis of that material, which was never

presented to the trial court, that the trial court was wrong to reach its decision. Such an argument is not really an argument that the trial court was wrong to rule as it did based on the record before it. It is not a proper argument for an appellate brief.

10. The purpose of an appeal is for the appellate court “to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court.” Sanders, 283 S.C. at 460. What the Appellant seeks is to transform this appeal into a new hearing on a new record. That is not allowed.

WHEREFORE Respondent prays for an order that strikes the Appellant’s designation of matter to be included in the record on appeal and strikes the Appellant’s initial brief, or, in the alternative, that strikes the matter designated as “Letter from Taylor Smith to Stephen Riley, Town Manager, dated May 17, 2016” from the Appellant’s designation of matter to be included in the record on appeal and strikes all language referring to that letter from the Appellant’s initial brief.

Respectfully submitted,



Andrew S. Radeker  
S.C. Bar No. 73743  
Taylor M. Smith IV  
S.C. Bar No. 101584  
Harrison & Radeker, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
(803) 779-2211  
Attorneys for Respondent

September 15, 2016

LAW OFFICES  
**HARRISON & RADEKER, P.A.**  
923 CALHOUN STREET  
COLUMBIA, SOUTH CAROLINA 29201

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James C. Harrison, Jr.\*  
Andrew S. Radeker  
Taylor M. Smith IV

P.O. Box 50143  
Columbia, SC 29250

(803) 779-2211  
(803) 779-6700 (FAX)

\* Mediator/Arbitrator

May 17, 2016

Via U.S. Mail, Email

Mr. Stephen G. Riley  
Town Manager  
Town of Hilton Head  
1 Town Center Court  
Hilton Head Island, SC 29928

RE: HHI Town Council - HHI Chamber of Commerce / VCB Agreement

Dear Mr. Riley,

My law firm represents Mr. Skip Hoagland who has appeared before the Town Council on several occasions. Mr. Hoagland previously asked me to provide an opinion on whether the Town of Hilton Head Island (hereinafter "Town") November 18, 2015 contract with the Hilton Head Island - Bluffton Chamber of Commerce (hereinafter "Chamber") was in compliance with the procurement laws of South Carolina and the Town. On April 15, 2016, I drafted, mailed and emailed a letter to your office. That letter explained our disagreement with Mr. Hulbert's memorandum position on this matter and craved reference to legal authority for understanding the Town's position. On April 27, 2016, I drafted, mailed and emailed another letter to your office that explained how our position had not changed. I further expressed hope that the Town would act at its next meeting, in the interests of transparency and public accountability, to subject the Chamber contract to the Town's procurement code, Section 11-1-111 et. seq.

On May 13, 2016, I received a letter from Gregg Alford who was asked to respond to my previous correspondence regarding this issue. In the letter, Mr. Alford articulates the position that the Chamber contract is indeed not subject to the Town's procurement code because 1) state law concerning the allocation of accommodation tax revenues mandates that a contract of this type go to an entity like the Chamber, 2) to the extent there is a conflict between a local ordinance and state law regarding what entity should be procured, much deference will be provided to the Town, and 3) if there is a conflict between two local ordinances then the more specific ordinance will control such a conflict. I appreciate Mr. Alford's response and the open dialogue this has created, but respectfully disagree with his position.

Please allow me to be absolutely clear concerning my client's current position in this controversy. Mr. Hoagland is deeply concerned last November's contract with the Chamber was entered without subjecting such a contract to the Town's procurement code. It is not that **this**

Chamber was chosen by the Town, but that any entity was chosen by the Town in this manner. Mr. Hoagland is very worried about the lack of transparency in this process.

State law provides specific guidance on how Accommodation's Tax (hereinafter "ATAX") revenues are to be spent. As Mr. Alford alluded to, S.C. Code Ann. Section 6-4-10 "dictates how, when, and to whom the thirty percent (30%) Special Fund is to be disbursed." Further, I agree with Mr. Alford that Town Code Section 4-12-20, does provide that the Chamber "shall be the designated non-profit organization to manage and direct the expenditures of the thirty percent (30%) Special Fund." Taken together this does not mean that a contract with the Chamber should not be subject to the Procurement Code. It may mean (although I am by no means conceding this point) that the Chamber is the proper entity to be selected once the procurement process is started, but here such a process was never started. Again, Mr. Hoagland's position at this time is not that that the Chamber should not be selected, it is that the manner in which it was selected last November was not proper.

In the *Glasscock* opinion cited by Mr. Alford, the Court of Appeals said that in controversies of this nature, a "reasonable degree of latitude" should be afforded local governments in devising their own procurement ordinances and procedures. *Glasscock Company, Inc., v. Sumter County*, 361 S.C. 483, 490 (S.C. App. 2004). The Court of Appeals went further,

**Whether a contract should be approved by ordinance and therefore exempt from the sealed bid requirement is a function of County Council's discretion, the exercise of which they are accountable for as publicly elected officials. In reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions 'should not be upset on appeal unless [they are] arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power.'**

*Id.* at 491; quoting *Sloan v. Greenville County*, 356 S.C. 531 (Ct. App 2003) (quoting *Smith v. Georgetown County Council*, 292 S. C. 235, 238-239 (Ct. App. 1987).

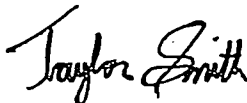
I believe that the Town would was afforded reasonable degree of latitude when it adopted its procurement code. The local procedure was codified as Section 11-1-111 et. seq. Section 11-1-113 ("Application") provides "[t]his chapter applies to contracts for the procurement of supplies, services, and construction, entered into by this town after the effective date of this chapter unless the parties agree to its application to contracts entered into prior to the effective date." By its title and nature, the Contract for Professional Services (upon information and belief, signed November 18, 2015), appears to be a contract for services. Because this was a contract for services between the Town and another entity entered into after the enactment of the Town's procurement code, it is my belief that the Town's procurement procedures should have been followed. Again this is not to say that within the procurement process, a well-reasoned decision by Town Council may result in the Chamber being selected. Furthermore, in adopting the Procurement Code the Town Council had the foresight to recommend that in certain select circumstances, the bidding process may be unnecessary. See "Sole Source Procurement." Before we even get to that debate though, the Chamber contract must be subject to the procurement code.

Despite a relationship that has apparently been in existence for more than two decades, the

Town decided its relationship with the Chamber should be codified in a written agreement. This decision was an important step in helping Town residents understand how ATAX revenues are spent to promote tourism locally. Unless the Chamber contract is subject to the Town's procurement code, any good will engendered by creating a written agreement, which every town resident can read, will likely be lost.

Thank you for your attention to this matter. If you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,  
HARRISON & RADEKER, PA



Taylor M. Smith IV, Esquire

TMS/

Cc (by email): The Honorable David Bennett  
The Honorable Lee Edwards  
The Honorable Marc Grant  
The Honorable John McCann  
The Honorable Tom Lennox  
The Honorable Bill Harkins  
The Honorable Kim Likins  
Mr. Gregg Allford, Esquire  
Mr. Brian Hulbert, Esquire

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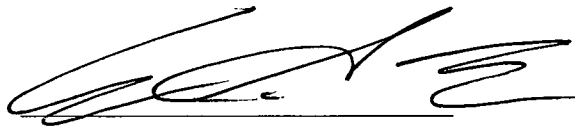
PROOF OF SERVICE

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I certify that I served the foregoing motion by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Robert E. Stepp, Esq.  
Tina M. Cundari, Esq.  
Bess J. DuRant, Esq.  
Sowell Gray Stepp & Laffitte, LLC  
P.O. Box 11449  
Columbia, SC 29211

September 15, 2016



Andrew S. Radeker