South Carolina Environmental Law Project

Lawyers for the Wild Side of South Carolina

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a 501c3
non-profit organization

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RE: SC Coastal Conservation League and SC Wildlife Federation v. SCDHEC and Horry County Public Works
Appellate Case No. 2016-001758

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy each of the Appellants' Response to Horry County's Motion to Vacate, along with my certificate of service.

Please return a clocked-in copy in the enclosed, postage-paid envelop. Thank you for your assistance.

Yours very truly,

Amelia A. Thompson

cc: Stan Barnett, Esq.
Michael Traynam, Esq.
Nathan Haber, Esq.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2016-001758

South Carolina Coastal Conservation League
and South Carolina Wildlife Federation ..... Appellants,

vs.

South Carolina Department of Health and Environmental Control
and Horry County Public Works ..... Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served Respondents Horry County Public Works and SCDHEC with Appellants' Response to Horry County's Motion to Vacate Stay by placing copies of same in the U.S. Mail addressed to:

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January 18, 2016

STATE OF SOUTH CAROLINA
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APPEAL FROM THE ADMINISTRATIVE LAW COURT
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South Carolina Department of Health and Environmental Control
and Horry County Public Works. . . . . Respondents,

vs.

South Carolina Coastal Conservation League and South Carolina
Wildlife Federation. . . . . Appellants.

RESPONSE TO HORRY COUNTY'S MOTION TO VACATE STAY

The Appellants submit this Response to Respondent Horry County's Motion to Vacate the Stay recently entered and reaffirmed by this Court. The stay prohibits Horry County from undertaking any additional construction activities, and specifically improving and paving International Drive, until such time as the legality of the authorizations for that paving, as issued by Respondent SCDHEC, can be determined in this appeal.

Based on the Motion to Vacate's inconsistency with the County's own prior representations; its dubious, post hoc timing; its bombastic, patently self-serving content; its facially incredible scientific propositions; its concealing of the County's own role in creating this purported dilemma; and its complete lack of relation to any change in circumstances or to the applicable legal standard; Appellants can draw no other conclusion but that the County's Motion is an attempt to bring undue public pressure and scrutiny upon this Court. Appellants do not

state such conclusion lightly. Rather, as will be explained herein, the County's Motion, which is filed on the heels of this Court having to *twice* order the County to stop work and of the Court rejecting the County's attempt to have this appeal dismissed as moot, is the ultimate confirmation that the County will say or do whatever it has to in order to brazenly push forward on this project, as it has done up until this Court's Order.

As an initial matter, Horry County's Motion to Vacate must also be viewed in light of the fact that its most inflammatory representations are far-removed from the legal inquiry before this Court. Indeed, even the most relevant portions of the County's Motion are at best tangential to the basis upon which this Court granted the stay in this case, which is that such "order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." (See Court's Order of December 15, 2016, granting supersedeas). Appellants submit that the credibility and intention of the County's Motion are apparent in that disconnect. With the proper legal framework in mind, Appellants' opposition to the County's Motion follows.

The Timing of the County's Motion is Dubious and Unjustified:

As this Court is keenly aware, the stay in this case is not the product of happenstance or of some automatic procedural trigger.[1] Rather, the stay (and its subsequent reaffirmation) is the culmination of a fully contested process during which the Court very recently considered and

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[1]In a typical case, matters under appeal to this Court are automatically stayed, so as to preserve the effectuality of this Court's Order. See SCACR Rule 225 ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree."). However, such automatic stay does not apply to appeals from contested cases decided by state agencies. SCACR Rule 241(b)(11). Thus, the automatic stay provision in the Appellate Court Rules did not apply to this matter. Rather, administrative appeals such as this are stayed upon motion "for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal." See SCACR Rule 241(c)(1).

reconsidered the propriety of staying construction for the purpose of preserving its jurisdiction, with Horry County having multiple opportunities to fully state the basis of its opposition to a stay. Horry County has provided no justification for this Court to consider the stay for the third time in a month.

Appellants first moved for supersedeas on November 7, 2016, and Horry County responded with a memorandum forcefully opposing the legal and factual basis for a stay. This Court rejected the County's arguments and granted supersedeas on December 15, 2016. Appellants reasonably assumed that the Court's issuance of supersedeas put the issue of ongoing construction to bed, but Horry County continued right on with construction, relying on an untested legal theory that it was not bound by this Court's Order. (See Appellants' Motion to Compel Compliance). Appellants were then forced to file a Motion to Compel Compliance with this Court's Order, wherein Appellants once again asked this Court to make clear that the County was to desist from all road construction activities. (See Id.). And the Court did reaffirm the stay, this time by Order of December 20, 2016. **Horry County did not ask for reconsideration or rehearing either time this Court ordered it to stop roadway construction**. However, upon losing its motion to dismiss, Horry County is back before this Court with a new set of arguments and figures in opposition to the stay, only 21 days after the Court reaffirmed the validity of such measure.[2]

Absolutely nothing has changed that would lead Horry County to have new arguments in

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[2]Appellants do not believe that Horry County's Motion is even authorized by the Appellate Court Rules, given the limitations on stay and supersedeas in Rule 241 and the fact that the time to move for reconsideration of this Court's previous order has passed. Horry County does not state the rule under which its Motion is filed, nor the standard of review applicable to such Motion.

opposition to the stay. Once again: the arguments/figures in Horry County's Motion to Vacate are not the product of some change in circumstances that has occurred since this Court issued and reaffirmed the stay only weeks ago. Rather, the arguments/figures in the County's Motion to Vacate could and should have been presented during the two other times this Court recently ruled on the stay. Having lost on supersedeas, on its effort to ignore the supersedeas, and on its motion to dismiss, Horry County is simply taking another bite at the apple with a new set of arguments, this time backed by provocative, improbable and bare-boned affidavits.

In addition to being dilatory, inefficient and repetitive, the timing of the County's filings raises significant doubts as to the credibility of the figures and conclusions it has now drummed up. That is especially true in light of the fact that the County's motion to dismiss this appeal was denied just five days before its Motion to Vacate was filed. Horry County has repeatedly relied on its position that the state authorizations at issue in this appeal are ineffectual at this juncture, and that this Court's jurisdiction therefore is as well.[3] That proposition was fully and finally rejected in the Court's denial of the County's motion to dismiss, and the County then faced the realization that it could not push its way out of this appeal. Five days later, the circumstances that have remained unchanged since before this Court ordered supersedeas suddenly pose significant potential consequences for Horry County. Appellants submit that, when viewed in the context of the procedural history before this Court, the County's Motion to Vacate reveals its true nature as the final thrashing of a party that has repeatedly maintained that it is not limited or bound by the jurisdiction of this Court, and that is reeling from having such position rejected.

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[3]The County advanced this same argument in opposing supersedeas, in continuing to construct after issuance of supersedeas, and in moving for dismissal.

Even if Real, the County's Purported Dilemma is of its Own Conscious Creation:

The basis of Horry County's Motion to Vacate is essentially that the consequences of making the County stop at this point in construction are not justified. As explained in detail below, the various purported consequences advanced by Horry County are unsupported, exaggerated, or completely fabricated. First, though, it is significant to note in relation to such consequences that Horry County has contemplated and accepted the risk of proceeding with road construction in the face of pending legal challenges and has acted with knowledge that it could be required by court order to stop work in progress. Indeed, the County has shown a unique propensity for such risk during the pendency of this dispute, proceeding with construction at a breakneck pace any time it has been allowed a window, including while motions to enjoin construction have been pending and, in Appellants' view, even after such motions have been granted (see above discussion of this Court's second stay Order). In moving to vacate the stay, the County seeks to avoid the natural consequences of the risk that it cultivated and indeed flaunted.

Horry County began construction of International Drive on August 22, 2016, shortly after issuance of the Administrative Law Court's final decision. See (myhorrynews.com article, attached hereto as Exhibit A). At the time construction began, Horry County Council Chairman Mark Lazarus acknowledged that this appeal was forthcoming, but indicated that Horry County had made the decision to begin work anyway, stating: "**There are always risks, but this is certainly an acceptable risk we are wiling to take**. ... We have the money in the bank and all the required permits for this project, and we are going to get this road built." (Id. (emphasis added)). According to Horry County's press release, the decision to proceed with construction in

the face of this appeal was made "[a]fter lengthy discussions with county staff and legal counsel." (Id.). It goes without saying, but the risk that Horry County now complains of is exactly the risk that it knowingly and willingly assumed: that the County would have to stop work before completion of the highway.

Appellants learned that the County had received a federal permit and began construction through its aforementioned press release issued on August 22, 2016. Appellants filed a notice of appeal in this Court the day after Horry County began construction, on August 23, 2016, and also filed a motion for stay in the ALC on that same day, seeking to halt filling of the wetlands during the pendency of this appeal. On September 1, 2016, Appellants filed their challenge to the federal permit for this project, and on September 14, 2016, Appellants moved for a preliminary injunction in federal court. Horry County pushed forward with construction through the notice of appeal, the ALC motion for stay, the federal complaint, and the federal motion for preliminary injunction.

As of September 23, 2016, one month after construction began, Horry County had filled portions of nearly all of the 24+ acres of wetlands on the project site, except for the wetlands on the Lewis Ocean Bay Heritage Preserve side of the road. See (Horry County's federal contempt response, excerpts attached hereto as Exhibit B). On that day, a temporary restraining order was entered in federal court preventing any destruction of the Heritage Preserve wetlands and vegetation, among other limitations. Appellants' Petition for Supersedeas was filed in this Court on November 7, 2016, while the temporary restraining order was still in effect. The TRO was then dissolved on November 18, and this Court entered supersedeas on December 15, leaving a 27-day window wherein Horry County could have performed construction activities. Horry

County says that it completed all pre-paving work on the highway during this window, despite the fact that the Petition for Supersedeas was pending in this Court. In other words, the supposedly problematic condition in which International Drive now exists is the product of Horry County's hurried work while Appellants' Petition for Supersedeas was under consideration by this Court.

In sum, with the exception of the very first day of construction, all of Horry County's construction activities have been undertaken while either a motion for injunctive relief was pending or while an injunction was actually in place.[4] While all of Horry County's construction activities may have been within their rights under the letter of the law, the County has certainly embraced the risk inherent in proceeding with construction that is under direct and immediate dispute. Most notably of all, the present state of International Drive, which the County says is unsustainable and problematic, is the direct result of work performed while the very stay at issue here was pending before this Court. Surely there can be no clearer example of proceeding at one's own risk.

The Alleged Financial Implications are Contradictory and Disingenuous:

To state it simply, the County's position on the difficulty of maintaining or remediating its construction site is highly dependent on the outcome the County is seeking at the time. As explained below, when it has served the County's interest in continuing construction, the County has readily touted its ability to halt and even undo construction if ordered. Now that the reverse

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[4]The Appellants have had to seek intervention from both this Court and the federal court after Horry County continued construction activities after entry of the supersedeas and temporary restraining order, respectively. In both instances, Horry County claimed to have understood a liberal interpretation of the orders that allowed continued work in onsite wetlands.

argument facilitates the County's objective of continuing construction, the County's new position on stabilization is not altogether surprising. In all, the exorbitant price quoted by Horry County for stabilizing and maintaining the current construction site fails from the standpoint that: it is inconsistent with the County's prior representations; it includes the cost of significant work that would take place regardless of the stay; and it is based on the barest of unsupported, self-serving declarations.

The County's estimate of $932,000 to stabilize the site in accordance with its stormwater permit is startling in light of the County's prior representations to this Court regarding the exact same work. After the Court ordered Horry County to stop construction for a second time on December 20, 2016, counsel for Horry County wrote this Court seeking permission for the County to complete "**small additional work**" to stabilize the site. (Letter of December 21, 2016, attached hereto as Exhibit C (emphasis added)). This included "work to comply with the N.P.D.E.S. stormwater general permit authorization (including some **minor** grading and grass seeding, which must be commenced within 14 days)." (Id. (emphasis added)). In other words, the "small additional work" Horry County was seeking to perform outside of the stay is the same work it has now quoted at $932,000.[5] The Court construed counsel's letter as a motion, and after Appellants opposed that motion, the County doubled down on its description of the stabilization work as "minor" and explicitly quoted the price of the work at $250,000:

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[5]As described in the County's Motion to Vacate: "The General Permit issued by SCDHEC and EPA for stormwater management of construction work such as International Drive requires that when construction is halted for a significant period, specific steps must be taken to stabilize bare earth areas so that sediment does not run off into nearby streams and/or wetlands. The cost of this work, should the County have to undertake it, will be in excess of $932,000.00" (p. 5).

> DHEC polices compliance with the storm water permit. If the county is in any way prevented from following the requirements of that NPDES permit there will be sediment runoff which will pollute nearby streams and wetlands. **The cost of this work is significant, some $250,000, and is a cost necessitated only by the Court's order to halt further construction**.

(Motion reply email of December 22, 2016, attached hereto as Exhibit D).

Horry County has not explained why its estimate for this work jumped almost $750,000 in less than a month, but what is clear is that the quotes in the County's Motion to Vacate and in its earlier reply are for exactly the same work. The difference, of course, is that it served the County's interests to provide a lower estimate in its earlier motion, whereas the opposite is true in the Motion at hand. For what it's worth, neither estimate shows any particular detail that would allow the Court to judge credibility or accuracy. In counsel's email of December 22, the cost figure is stated flatly, and the same is true in the County employee's affidavit attached to the Motion to Vacate.[6]

Perhaps the stark difference in these figures is attributable to the fact that the estimate accompanying the Motion to Vacate makes no effort to distinguish or exclude stabilization work that would be required under the NPDES stormwater permit, irrespective of the stay. According to his affidavit, Mr. Gilreath bases his cost estimate on stabilization of "all disturbed areas (entire

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[6]This is the most relevant instance, but not the only time that the County has adjusted its position on maintenance/restoration of the construction site depending on its needs at the time. When the issue of a preliminary injunction was before the federal court, the County advanced the argument that such injunction should not be issued because the work it had performed could be reversed, and the wetlands it had filled could be restored, should the court eventually order it. (Excerpts from the County's injunction response, attached as Exhibit E ("Restoration of wetlands is not difficult. ... Any harm to wetlands from construction of the road would, therefore, not be irreparable should this Court rule in favor of Plaintiffs and invalidate the Corps' permit.")). When it behooves the County, its position is that it is prepared to go so far as undoing work when ordered. When its incentives are reversed, however, the County's position is that the cost of even pausing the work is unbearable.

project area)." Of course, that would include not only the roadway/paving footprint, but also the shoulders, median, and other areas that would remain grass after the final paving. It follows from the stormwater permit requirements cited by the County that these areas would have to be stabilized after paving anyway and that such cost would be a part of the normal project budget. Nevertheless, Mr. Gilreath includes that entire cost in his estimate, without explanation. Further, a substantial portion of Mr. Gilreath's cost estimate is based on his inclusion of a silt fence replacement after two years. We are given no idea, though, whether the inclusion of that item is based on Mr. Gilreath's presumption that this appeal will last more than two years, or whether such replacement might be an expected outcome in a construction project of this magnitude and duration. Likewise, Gilreath includes a surprisingly large figure for weekly inspections over the next two years, with no explanation of what the inspection schedule would normally be for this project. Presumably, though, such inspections do not just arise as a result of the stay, and Mr. Gilreath is double-counting. With mindfulness to not belaboring the point, Appellants' purpose is to show that one could poke one hundred holes in Mr. Gilreath's inflated cost estimate, and his affidavit does not provide any of the detail necessary to determine the basis or credibility of his numbers.

The County's nearly million dollar purported price tag for just maintaining the construction site during this appeal is at the heart of what Appellants describe above as the County's effort to bring undue public pressure to bear on the Court. In light of the fact that this cost estimate is not relevant to the Court's legal inquiry, that it is contradicted by the County's prior representations in the most direct way possible, and that its inflammatory total is offered with little support or explanation, Appellants submit that their description of the County's actions

is not hyperbole.

The County's Scientific and Technical Propositions are Illogical:

The self-serving nature of the County's cost estimate pales in comparison to that of the proposition the County advances in relation to the environmental impact of paving. The headline for the County's environmental argument, which is enough to make any unbiased water quality scientist or engineer blush, might be phrased as follows: "Paving of Five Lane Highway Greatly Reduces Water Pollution." Rarely has a less scientific, more self-interested proposition been advanced than Horry County's argument that a five-lane asphalt highway must be paved through a state-designated heritage preserve in order to "greatly reduce" the water pollution that would result from leaving the area as grass and dirt.

One of the most striking parts of Horry County's environmental argument is its flagrant contradiction. In the opinion of Horry County employee Steve Gosnell, the best management practices for stabilizing a construction site, which consist primarily of planting grass and installing silt fences, apparently cannot be trusted to stop sediment runoff from the roadway footprint. (County's Motion, Exhibit B). Paving is necessary, he says, to stop this sediment transport. (Id.). One might ask, then, how the County intends to stabilize the shoulders, median, and other grassy areas that will not be paved. The answer, of course, is seeding and silt fences. The County apparently feels comfortable with its ability to stabilize and prevent sediment transport on every part of the construction zone except the part that would be paved.

The reality, though, is that Mr. Gosnell's comfort with stabilizing the non-paved portions of this project is the only part that he gets right. The other part of his opinion is what facilitates a statement in Horry County's Motion that is as facially absurd as one might encounter in the field

of environmental law: that "removing bare ground and replacing it with the completed project will greatly reduce the risk of water pollution." (Motion, p. 6). Appellants believe that even the average non-scientist would understand that the idea of filling in wetlands and then covering the grass and dirt with impermeable asphalt in order to generate an environmental benefit is laughable. Imminently qualified water quality scientist Dan Tufford, Ph.D., also reaches that conclusion in regard to the circumstances here:

> [P]aving the road does not remove the risk of water pollution, but actually exacerbates water pollution. ... There is no scientific basis upon which one could conclude that paving a 5 lane road, including filling and eliminating 24 acres of wetlands, would improve water quality. Water quality in the vicinity of the project has been harmed by the fill of those wetlands and will deteriorate further if the road is paved.

(Tufford Declaration, attached hereto as Exhibit F).

Dr. Tufford bases his opinion on his observations that "[s]tabilization measures, when appropriately implemented for the specific site and when properly maintained, will largely eliminate water pollution for long periods of time." (Id. at ¶ 14). Dr. Tufford does not share Mr. Gosnell's situational skepticism of these best management practices. Further, Dr. Tufford's opinion is informed by his pre-construction observations of the wetlands adjacent to International Drive, which he observed to have "minimal, if any, degradation," resulting from sediment transport from the dirt road. (Id. at 13). Consistent with common sense, Dr. Tufford's opinion is that any sediment transport from a stabilized construction site poses a far less serious threat to adjacent water quality than does the paving of a five-lane road. See (Id.).

Of equal significance, Dr. Tufford explains that the paving of International Drive would significantly reduce the chances that the onsite wetlands could ever be restored. See (Id. at 9-12).

Specifically, [p]aving over wetlands would make it more difficult to restore the wetlands than if the wetlands remain filled with dirt," because paving "would further compact [the wetlands], causing a complete loss of their functions and values." (Id. at 10). Translated into the terms of the legal inquiry before this Court, allowing Horry County move forward with paving could very well render this case moot by eliminating this Court's ability to award an effective remedy.

Horry County's proposition that completion of the road project will not result in any further harm fails on the bases that highways are not environmentally superior to grass and dirt and that paving will place the nail in the coffin of the wetlands at issue in this appeal. The County's environmental arguments, which may be its only arguments with any relation to the legal question before the court, provide no basis for this Court to vacate the stay.

The County's Emergency Services Argument is Hollow Alarmism:

Nothing about the emergency services rhetoric in Horry County's motion suggests that the stay should be vacated. Any time a new road is constructed, that road will necessarily shorten the route for emergency services to reach some set of residents. Likewise, any time a new road is constructed, especially on the coast, one could imagine a scenario where that road is used by some set of residents to flee a natural disaster. However, advancing speculative scenarios based off these truisms is the most superficially provocative justification one could possibly advance for a highway project. Yet, such transparent alarmism is exactly what Horry County resorted to when this project came under serious scrutiny, and it is exactly what the County has recycled in an attempt to overturn this stay. It is necessarily true that International Drive could allow some potential patient to get to the hospital faster, or could allow some potential resident to escape some potential disaster, but to the extent the County maintains that this emergency services

justification is the basis for the project, or a primary benefit to be derived therefrom, that proposition is clearly contradicted by the history of this project.

In 2007, Horry County put into effect a one penny sales tax increase on all retail sales, accommodations, and prepared food and beverage. See <http://www.ridingonapenny.com/>. This tax increase, which lasted for a period of seven years, went into the County's "Riding on a Penny" program, which funded certain road projects within Horry County. Id. The County brought in approximately $425 Million through this program, and it prioritized fifteen specific road projects where this money would be spent. Id. The paving of International Drive, which Horry County would have us believe would remedy an emergency services dilemma that has existed since at least 1999 (See Declaration of Randal Webster), was ranked thirteenth of fifteen priorities and was slated for only two lanes of paving. Id. If the hazard posed by International Drive's present unpaved condition is as serious as Horry County's speculation on possible emergency scenarios would suggest, one could scarcely imagine the dire circumstances that must have existed in relation to the twelve projects with higher priority.

In reality though, the emergency services component of this project is something the County created in order to enhance its legal defense, and such justification was never mentioned during the planning and initial approval processes. For example, during the critical public notice and comment period for this project, when the justification for this project was front and center, emergency services was never mentioned as a purpose for this road. Horry County's application for the authorizations at issue in this appeal described the purpose of the road as "reliev[ing] current and anticipated congestion for ... commuters and to provide a secondary evacuation route." (Joint application, attached as Exhibit G). The County reiterated this purpose in two 27-

page responses to the public comments it received on the project, and it never once mentioned emergency services. (Response to comments, excerpts attached as Exhibit H). Over time, though, the headlining purpose of this road morphed to suit the County's need for a justification that is easy to get behind and tough to disprove. The strategy has worked so well for the County that it is still using this "hollow alarmism" before the Court at present.

The hollowness of the emergency services rhetoric is apparent, though, from the declaration on which it is based, that of Horry County employee Randall Webster. Mr. Webster throws around a great deal of alarming speculation, but decompressing his declaration reveals its dearth of substance. While acknowledging two existing highways that are available for residents in the area proximate to International Drive, Mr. Webster's declaration rests on the undeniable truism that "[t]he shorter the travel time for EMS services to reach communities, the better chance their services will minimize the risk of permanent injury or death." (Declaration, ¶ 6). Horry County does not and cannot point to any incident where increased harm has come to a citizen in the vicinity of International Drive as a result of delayed emergency services, though Mr. Webster's declaration does offer a lot of "what if." If Horry County is truly unable to provide effective emergency services to citizens in one of its major population zones without the paving of International Drive, that failure rests squarely on the County. However, such doomsday speculation rings hollow, given the infrastructure in place in this highly developed portion of one of South Carolina's most highly developed counties. Similarly unpersuasive is the idea that these doomsday scenarios can only be headed off by paving a five-mile stretch that runs parallel to two existing major highways.

The Appellants urge this Court to look beyond the County's attempt to skew the Court's

analysis through invocation of a tired narrative that is wielded all too easily and often in disputes like this to take away from the legal inquiry at issue.

Conclusion:

Horry County's Motion to Vacate represents the County's last ditch attempt to conjur whatever pressure, bias, or alarm may aid it in overturning a stay that this Court has already twice affirmed. For all of the reasons stated herein, Horry County's Motion should be denied.

Respectfully submitted,

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