THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, ... Respondents,

v.

Horry County, ... Appellant.

RESPONDENTS' RETURN AND MEMORANDUM IN OPPOSITION TO APPELLANT'S PETITION FOR SUPERSEDEAS

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The City of Myrtle Beach ("City"), on behalf of itself and all other similarly situated plaintiffs ("Respondents"), pursuant to Rule 240(e), SCACR, hereby submits this return and memorandum in opposition to the Petition for a Writ of Supersedeas ("Petition") of Appellant Horry County ("County"). At bottom, a grant of the relief sought by the County would permit it to continue imposing within the municipalities of Horry County a uniform service charge for unspecified services without the consent of these municipalities—an unlawful charge that the County asserts it may impose in perpetuity. For the reasons discussed herein, the circuit court correctly enjoined the County and the Petition should therefore be denied.

INTRODUCTION

The County introduces the Petition by asserting that it comes to this Court "under exigent circumstances." Petition at 1. Yet no explication of what these circumstances might be is provided and, in fact, the County's assertion in this regard is contradicted by its submission of a motion for supersedeas to the circuit court. *Cf.* Rule 241(d)(3)(C), SCACR (authorizing an appellant to eschew an application for supersedeas to the lower court where "extraordinary circumstances" make such an application "impracticable"). The County then asserts that "[t]he stakes here are high," Petition at 1, but again never explains what that sentence means. These mysteriously unsupported assertions are then followed by a misstatement regarding the scope of the injunction issued in the circuit court, which does not "enjoin[] the County from collecting ... a fee that it has collected for more than twenty-two years." *Id.* Rather, the injunction below only precludes the County from continuing[1] to impose a new uniform service charge within the

[1] The County's assertions regarding a change in more than twenty-two years of practice is misleading, at best. While it is true that the Hospitality Fee was first implemented on January 1, 1997, the City does not dispute that it, along with each of the other municipalities in Horry County, provided their consent for the County's collection of the Hospitality Fee for a period of twenty years. Rather, the City's claim for declaratory and injunctive relief is that, because the

corporate limits of all municipalities in Horry County, which injunction was issued in view of the fact that (a) the 1996 County ordinance which imposed a 1.5% uniform service charge within these municipalities was (i) by its own terms effective for a period of only twenty years, (ii) for a limited specific improvement, (iii) consented to by the municipalities, and (iv) terminated by its own terms on January 1, 2017; (b) the new uniform service charge which the County now claims may be imposed "forever"[2] has not been consented to by these municipalities as required by law; and (c) the County has taken official actions recognizing that it intends to use the revenue for no specific improvement within the ambit of the 1996 ordinance.

Given the foregoing, it is quite bold for the County to begin its argument by predicting that substantive and procedural errors committed by the circuit court in issuing the injunction will lead to a reversal on the merits of the County's appeal. *See* Petition at 8 ("[s]ometimes, a circuit court's decision to grant a preliminary injunction gets reversed. Given the substantive and procedural flaws with the injunction here, **this is likely going to be one of those times**") (emphasis supplied, citation omitted). Notwithstanding this presumptuous statement, the Petition primarily focuses on procedural arguments and gives short shrift to the substantive issue before the Court. That substantive issue is whether the circuit court correctly found that the City established all five of the required elements for the issuance of a preliminary injunction against the County's continued enforcement of the ordinance imposing a new uniform service charge within the corporate limits of all municipalities in Horry County without the consent of such municipalities as required by law.

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consent provided by the municipalities was expressly limited to twenty years, the County was unable to lawfully collect the Hospitality Fee in every municipality within Horry County beyond their consent, beginning January 1, 2017; thus, this claim was brought just two years and almost three months following the termination date of this uniform service charge as all of these municipalities originally agreed.

[2] *See* App'x at 301, ll. 4-7.

The County's description of the circumstances giving rise to this injunction is replete with mischaracterizations of and omissions from the matters presented to the circuit court and actually reinforces the irreparable harm that will befall the City and the proposed plaintiff class without the protection of the injunction the County seeks to have superseded. Further, the County's predicted reversal of the injunction is wholly undercut by the County's own (misguided) argument regarding protection of the interests of the Respondents under Rule 241(c)(3), SCACR, which is borne out of an apparent lack of understanding by the County as to the nature of the claims made against it in this case.

PROCEDURAL BACKGROUND

The City commenced this action on March 20, 2019, by filing and serving a summons and complaint against the County seeking declaratory, injunctive, and other equitable relief with respect to the validity and enforceability of amendments to the County's Ordinance 105-96 imposing a 1.5% uniform service charge on the sale of accommodations, prepared food and beverage, and admissions within the corporate limits of municipalities situated within Horry County ("Hospitality Fee") on and after January 1, 2017. App'x at 27-228. On April 19, 2019, the County filed and served its answer denying the allegations of the City's complaint and therein also asserted two counterclaims against the City—one for attorneys' fees and costs against the City and its counsel because the complaint was not "well-grounded in fact nor warranted by existing law" and the other for promissory estoppel arising out of the City's "promises ... to support ... the [County's] ... implement[ation] [of] the RIDE Report[3] and collect[ion] [of] a Hospitality Fee." App'x at 255-257.

[3] "RIDE" is an acronym for "Road Improvement Development Effort." A description and discussion of the RIDE committee and the referenced report are set out at p. 9, *infra*.

On May 3, 2019, the City filed a motion for preliminary injunction with supporting affidavits and a memorandum of law,[4] seeking to "enjoin[] ... [the County] from continuing to collect its 1.5% fee on the sale of accommodations, prepared food and beverages, and amusements within the corporate limits of the City and any other Horry County municipality ... during the pendency of [the] litigation." App'x at 325. On May 14, 2019, the County filed a Motion for Preliminary Injunction seeking to enjoin the City from "collecting or enforcing any tax or fee imposed in the City's newly enacted Ordinances 2019-22 and 2019-23,"[5] App'x at 516, along with supporting exhibits and a memorandum of law in support of the County's motion and in opposition to the City's motion for preliminary injunctive relief, App'x at 519-756.[6]

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[4] This case is subject to the requirements of Supreme Court Order 2015-09-10-01 creating the Civil Motions Pilot Program. Accordingly, the various motions which have been submitted to the circuit court have all been required to be supported by memoranda of law and affidavits or other materials in support, opposition, or reply filed well in advance of the hearings. This explains in large part the voluminous appendix submitted by the County (in excess of 1,275 pages), which the City is contemporaneously herewith supplementing as permitted by Rule 240(c)(3), SCACR, to include pertinent matter omitted by the County. In addition to the motions specifically addressed herein, the City moved for assignment to the Business Court Program of the South Carolina Circuit Court, *see* Supplemental Appendix ("Supp. App'x") at 3-12 (which motion the County opposed but was granted by the Honorable Roger M. Young and resulted in the assignment of the case to the Honorable William H. Seals, Jr., *see* Supp. App'x at 1-2) and to dismiss the County's counterclaims. The County has moved for partial judgment on the pleadings with respect to the City's class action claims, and the Horry County Treasurer has moved to intervene in this action. Aside from the motion for assignment, those motions remain outstanding.

[5] These ordinances, adopted by the City pursuant to S.C. Code Ann. §§ 6-1-520 and 6-1-720 and imposing a 3% accommodation and 2% hospitality tax within the corporate limits of the City, respectively, are hereinafter referred to as the "Local Tax Ordinances."

[6] Because the County had not stated a cause of action for injunctive relief, the City argued that the County was not entitled to move for preliminary injunctive relief. App'x at 921-922. The County thereafter sought leave to amend its Answer and Counterclaims to include claims for declaratory and injunctive relief, App'x at 856-889, which the City opposed on the ground that they constitute compulsory counterclaims that have been waived, App'x at 890-902. The circuit court did not rule on the City's argument that preliminary injunctive relief is not proper, *see* App'x at 13-14, and the County's motion for leave remains pending.

After the substantial briefing by the parties, the circuit court heard the City's and County's motions for preliminary injunction at the Horry County Judicial Center on June 14, 2019. App'x at 265-96. Following this hearing, the circuit court instructed counsel for the City to prepare a proposed order granting the City's motion for preliminary injunction and denying the County's motion for preliminary injunction, which it submitted on June 19, 2019. Supp. App'x at 12-31. Minutes after the City submitted the requested proposed order, counsel for the County sent an electronic mail message to the circuit court with an unsolicited proposed order denying both the City's and County's motions for preliminary injunction. Supp. App'x at 32 - 34. On June 21, 2019, the circuit court entered an order enjoining the County from collecting the Hospitality Fee and denying the County's request that the City be enjoined from enforcing the Local Tax Ordinances ("Injunction Order"). App'x at 1-17.

In so doing, the circuit court thoroughly analyzed and expressly found that the City had established each of the five elements necessary for entitlement to injunctive relief against the County. App'x at 5-13. The circuit court further found that the County had failed to demonstrate a likelihood of success on the merits with respect to the claimed invalidity of the Local Tax Ordinances and concluded that it was therefore unnecessary to address any of the City's arguments regarding the other four elements required to be shown by the County in order for it to be entitled to injunctive relief. App'x at 13-15.

On June 25, 2019, the County filed a motion pursuant to Rules 52(b), 54(b), and 59(e), SCRCP, seeking reconsideration of the Injunction Order on, *inter alia*, the ground that the circuit court had erred in not requiring the City to post security (even though it is a political subdivision of the State and therefore exempt from this requirement under Rule 65(c), SCRCP), App'x at 1024-25, notwithstanding the County's own assertion that it considers the "segregat[ion of]

revenue from the 1.5 percent paid by the City within its borders pending the outcome of this litigation" to be acceptable and sufficient security for the County's own proposed injunction. App'x at 1027. On June 26, 2019, the City filed a motion for the issuance of a rule to show cause as to why the County should not be held in contempt of the Injunction Order on the ground that the County had publicly stated its intent to continue collecting the Hospitality Fee in every municipality in Horry County other than the City, App'x at 1034-59, which motion the City supplemented on July 1, 2019. App'x at 1060-83.[7]

On July 10, 2019, the circuit court heard the County's motion for reconsideration and the City's motion for a rule to show cause at the Marion County Courthouse.[8] App'x at 297-324. On the same date, the circuit court issued an order in which it denied both motions ("Reconsideration Order"). App'x. at 18-19.

On July 11, 2019, the County filed in this Court its Notice of Appeal from the circuit court's Injunction Order and Reconsideration Order, App'x at 1230, and separately filed with the Supreme Court a "motion to transfer" this appeal seeking certification of same pursuant to Rule 204(b), SCACR. The next day, the County filed a motion for supersedeas or stay of these orders with the circuit court. App'x at 1252-67, Supp. App'x at 36. Counsel for the City promptly

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[7] On July 2, 2019, the County filed a response in opposition to the City's motion for a rule to show cause, App'x at 1084-90, and a motion for judgment on the pleadings, App'x at 1091-94. On July 3, 2019, the City filed its memorandum in opposition to the County's motion for reconsideration of the Injunction Order. App'x at 1140-86. Also on July 3, the treasurer of Horry County filed a motion to intervene and a proposed motion to deny certification of the class action. The City has not responded to this motion and will not be doing so during the pendency of this appeal as a result of the circuit court's July 18 order. Nonetheless, the City notes its position that the treasurer has no standing which would permit her intervention in view of the plain language of Rule 65(d), SCRCP, which makes the Injunction Order binding upon her. Thereafter, on July 8, 2019, the County filed a reply memorandum in support of its motion for reconsideration of the Injunction Order, App'x at 1187-96, and the City filed a reply memorandum in support of its motion for the issuance of a rule to show cause, App'x at 1208-29.

[8] This transcript mistakenly indicates the hearing was held on July 11.

inquired of the circuit court as to whether it desired a response to the County's motion for supersedeas or stay and, in response to the County's assertions regarding the posting of security under Rule 65(c), SCRCP, reiterated its willingness to have the injunction modified, as permitted by Rule 62(c), SCRCP, to direct that the City hold the revenues derived from the Local Tax Ordinances in escrow, consistent with the type of security the County had argued would be appropriate in support of its own motion for preliminary injunction. Supp. App'x at 35-36. On July 15, 2019, the County filed a separate motion to stay the underlying litigation before the circuit court pending appeal. App'x at 1268-70. Also on July 15, 2019, the circuit court directed the City to prepare an order denying the County's motion for supersedeas or stay of the injunction, modifying the injunction pursuant to Rule 62(c) to require an escrow of the additional revenues derived by the City from the Local Tax Ordinances, and requiring that the parties mediate the case within twenty days.[9] Supp. App'x at 35. On July 16, 2019, the circuit court informed the parties of its inclination to grant the County's motion to stay further proceedings in the circuit court while the matter was pending on appeal with the exception of the contemplated mediation.

[9] Thereafter, the County sent unsolicited electronic mail messages to the Court demanding that it reverse course on its announced decision on the supersedeas and the directive to the parties to engage in a mediation of the case. Supp. App'x at 37-38. The County also filed a "Memorandum in Response to Email from County of City Dated July 12, 2019 & Email from Court Dated July 15, 2019." App'x at 1271-78. In form and substance, but without any authority to do so in the rules, the County sought reconsideration of the circuit court's decisions before any order was even issued. Counting these messages, the County argued its position to the circuit court on five separate occasions (in initial briefing on the motion for preliminary injunction, on reconsideration, in support of its motion for supersedeas, in opposition to the rule to show cause for contempt, and in reconsideration of the court's announced decision denying the supersedeas and requiring that the parties engage in mediation); thus any suggestion by the County that the circuit court did not adequately consider the issues before it, or that the County did not have a sufficient opportunity to present its arguments below and is before this Court under "exigent circumstances," is patently false.

On July 17, 2019, the circuit court issued its order denying the County's motion for a stay or supersedeas of the Injunction and Reconsideration Orders, modifying the injunction to require that the City escrow the additional revenues collected under the Local Tax Ordinances pursuant to Rule 62(c), directing that the parties mediate the case beginning no later than August 1, 2019, and appointing Karl Folkens, Esquire, to serve as the mediator ("Supersedeas Order"). App'x at 20-23. On July 18, 2019, the circuit court issued its order granting the County's motion to stay further proceedings below during the pendency of the instant appeal with the exception of the August 1 mediation before Mr. Folkens. App'x at 24-26.

On July 19, 2019, the City filed its return and memorandum to the County's motion to certify the instant appeal. The City also requested an extension of time to file the within return and opposition, which this Court granted over the County's objection. On July 19, 2019, the County amended its Notice of Appeal to include the Supersedeas Order.

FACTUAL BACKGROUND

The Hospitality Fee came into existence by way of Horry County Ordinance 105-96, which was adopted on October 15, 1996, to implement recommendations made by the RIDE Committee, created by the South Carolina Department of Transportation at the direction of Governor Beasley, to address certain transportation infrastructure needs and improvements within Horry County and the methods by which to fund them. App'x at 1-2. The impetus for the adoption of the ordinance was the County's unsuccessful attempt to obtain an affirmative referendum vote to allow a countywide local option sales tax (presumably pursuant to S.C. Code Ann. § 4-10-20) to fund road improvement projects throughout the County – including projects within the City. App'x at 329, 356. The ordinance, in pertinent part, established the Hospitality Fee and mandated that its revenues "shall be deposited in a Road Fund which will be used to

implement a comprehensive road plan adopted by the County in concert with the municipalities of the County." App'x at 2, 351. It further provided that the Hospitality Fee would take effect on January 1, 1997, and terminate twenty years after its effective date, *i.e.*, January 1, 2017. App'x at 2, 352.

Prior to Ordinance 105-96's effective date, and as required by law, each municipality in Horry County adopted a resolution consenting to the imposition of the Hospitality Fee within their respective corporate limits, specifically recognizing the "proposed implementation of a 1.5% hospitality fee for a period of up to 20 years" and "urg[ing] Horry County Council to enact expeditiously the necessary ordinances to implement the RIDE Committee report." App'x at 2, 400-10 (emphasis removed). Thereafter, the County began to collect the Hospitality Fee and used the revenues to fully pay off $547 Million in loans it obtained from the South Carolina State Transportation Infrastructure Bank ("STIB") to fund the projects provided for in the RIDE Report. App'x at 35, 193-195; Supp. App'x at 8. While the County attempted to unilaterally amend Ordinance 105-96 on three separate occasions to extend and ultimately repeal the sunset date, and has indicated its intent to change the scope of services to be funded by the Hospitality Fee, App'x at 3-4, neither the City nor any other municipality within Horry County consented to these amendments, the collection of the Hospitality Fee within their respective corporate limits after January 1, 2017, or the use of the revenues derived from the Hospitality Fee on other services not enumerated in the RIDE Report.[10] App'x at 3, 7. The City adopted the Local Tax Ordinances on March 7, 2019, to be effective July 1, 2019, increasing its existing local accommodations tax from 0.5% to 3%, the maximum allowed by S.C. Code Ann. § 6-1-540, and

[10] Furthermore, one such amendment, found in Ordinance 11-04, appeared only in an "Editor's Note" in the County's Code of Ordinances and was never codified. App'x at 3; *see also* App'x at 534 & n. 5 (the County acknowledging that Ordinance 11-04 was only "referenced" in the Code of Ordinances); *cf.* S.C. Code Ann. § 4-9-120.

imposing a 2% hospitality tax, the maximum rate S.C. Code Ann. § 6-1-740 permits. App'x at 4, 745-52.[11]

On March 20, 2019, the City filed the instant action for itself and on behalf of a class of similarly situated plaintiffs who have paid the Hospitality Fee since the termination of Ordinance 105-96 on January 1, 2017. Primarily, the City's complaint seeks declaratory and injunctive relief to stop the collection of the 1.5% uniform service charge within the municipalities without their consent, which currently generates approximately $28 Million per year in revenues. App'x at 38-41, 808. The City concomitantly filed the motion to preliminarily enjoin the County's continued collection of the Hospitality Fee during the pendency of this lawsuit which the circuit court granted. Secondary to declaratory and injunctive relief, the City seeks a pro rata refund for itself and all others similarly situated who have paid the County's 1.5% uniform service charge on purchases of accommodations, prepared food and beverage, and admissions within the corporate limits of municipalities after it terminated two and a half years ago. The potential class consists of all individuals and entities that have paid the Hospitality Fee since January 1, 2017, including the City and the Other Municipalities, on covered purchases within the corporate limits of municipalities. App'x at 28. In retaliation, the County moved to enjoin the City from enforcing its Local Tax Ordinances. The Petition does not seek supersedeas of the circuit court's

[11] Three other municipalities in Horry County adopted similar ordinances of their own. *See* Supp. App'x at 8, 41, 43, 45-46. The City requests that this Court take notice of City of Conway Code of Ordinances §§ 1-5-40, et seq. and 1-5-57 adopting a 3% accommodation tax and 2% hospitality tax within that municipality on April 15, 2019, same to be effective July 1, 2019, and the related minutes of the Conway City Council on April 1, 2019, and April 15, 2019, copies of which are set forth in the City's supplemental appendix at pp. 48-59 *See Masters v. Rogers Development Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984); *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) ("[A]n appellate court can take judicial notice of something that was not before the trial court if it is indisputable.").

orders to the extent they denied the County's motion, although those orders are appealed by the County.

As a result of the Injunction, Reconsideration, and Supersedeas Orders, respectively, the County is now enjoined from collecting the Hospitality Fee within the City, and, based on the timeline set forth in the Reconsideration Order, will be enjoined from collecting the Hospitality Fee within the other municipalities in Horry County on August 10, 2019, but the City and the other municipalities can—and are—enforcing their respective Local Tax Ordinances. Although its July 14 order denied the City's motion for a rule to show cause as to why the County should not be held in contempt for continuing to impose its uniform service charge within the other municipalities after the Injunction Order had been issued, the circuit court found that it was being "extremely lenient" because the Injunction Order expressly characterized the relief being sought as applying within all municipalities in Horry County, in addition to the fact that the City's complaint, the oral arguments on the motions, and the case caption all made it clear that all municipalities in Horry County were within the ambit of the preliminary injunction that was issued.

STANDARD

The County asserts that the "legal standard" governing the issuance of a writ of supersedeas is whether the absence of a supersedeas will work an irreparable harm upon the applicant or result in a miscarriage of justice. *See* Petition at 8. The case relied upon by the County, *Kuhn v. Electric Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791 (1912), does not support this proposition, as it is not a decision of the Supreme Court and does not make the holding asserted by the County. To the contrary, *Kuhn* is an order of an individual justice refusing to supersede a lower court injunction because "the petitioners have not clearly shown that, pending

appeal, it will result in irreparable injury or the miscarriage of justice" as is required for an individual justice to supersede a lower court order under the Supreme Court's opinion in *Andrews v. Sumter Commercial Real Estate Co.,* 87 S.C. 301, 69 S.E. 604 (1910)—a case cited in *Kuhn* but not mentioned by the County in its petition. Accordingly, because the County is not seeking supersedeas from an individual justice or judge in this matter, *Kuhn* does not apply and all of the County's arguments based upon the contrary assertion should be ignored by this Court.

The applicable standard of review to determine whether a writ of supersedeas should be issued by this Court is whether the circuit court "unjustifiably denied" the County's motion for supersedeas below (*see* Rule 241(d)(4)(C), SCACR) and whether a writ is needed "to preserve jurisdiction of the County's appeal or to prevent a contested issue from becoming moot." *See* Rule 241(c)(2), SCACR; *also see* Toal, J.H., Walker, A.W., Baker, M.E., *Appellate Practice in South Carolina*, 346 (3d ed., 2016). Moreover, the grant of the writ may be conditioned by this Court upon such terms as it deems appropriate, including the filing of a bond or other undertaking by the County—*see id.* at 347; Rule 241(c)(3), SCACR—a point which the County conveniently ignores.

For the reasons discussed below, the County is not entitled to the writ under the applicable standard—or even under the incorrect standard argued by the County.

SUMMARY OF ARGUMENT

As the County belatedly recognizes, *see* Petition at 15-16, the underlying issue in this case is whether the County may impose a uniform service charge within the corporate limits of municipalities situated within Horry County without the municipalities' consent to same. In this case, the County unilaterally extended the duration and seeks to change the scope of the Hospitality Fee which had been consented to by the municipalities of Horry County. As will be

discussed below, the actions of the County are expressly forbidden under the constitutional provision providing for Home Rule and statutes implementing and giving effect to same. Moreover, because the Hospitality Fee terminated on its own based on the express language of the Sunset Provision which codified the municipalities' consent for twenty years, the County's actions, if anything, constitute an attempt to impose a new uniform service charge. The circuit court found that the City had shown a likelihood of success on the merits because it had raised a reasonable question as to its right to relief from the County's imposition of the Hospitality Fee on and after January 1, 2017, within the corporate limits of these municipalities but without their consent based upon the express provisions of S.C. Const. art. VIII § 13(A), S.C. Code Ann. § 4-9-25; *id.* § 4-9-30(a)(5); *id.* § 4-9-40; *id.* § 4-9-41(A); and *id.* § 5-7-60. *See* App'x at 5-7. The County has failed to meet its burden for the issuance of the instant writ as it has not shown that the circuit court was unjustified in denying the motion for supersedeas below, or that the writ is needed to prevent a loss of appellate jurisdiction or to prevent its appeal from becoming moot. And, to the extent it is pertinent to a determination on the Petition, the County has not demonstrated that irreparable harm to the County or a miscarriage of justice will result from a denial of supersedeas.

ARGUMENT

I. Because it Does Not Address the Applicable Standard, the County's Petition Should Be Denied

The County does not mention, much less address the substance of, Rules 241(d)(1)(C) and Rule 241(c)(2), SCACR, which provide the applicable standard of review in this matter. Having failed to do so, this Court should deny the Petition without further inquiry. *Cf.* Rule 208(b)(D), SCACR; *State v. Lindsay*, 394 S.C. 354, 364, 714 S.E.2d 554, 599 (Ct. App. 2011) (holding that an issue not addressed in a brief is deemed abandoned).

II. Because the County Cannot Meet the Applicable Standard, the County's Petition Should be Denied

Even assuming that the County's asserted standard of review applies—which it does not—or that the elements of that standard are in some manner pertinent to the considerations required by this Court under the standard of review which does apply, the County has failed to meet its burden to justify issuance of the writ. Although the County professes to be coming before this Court under "exigent circumstances" that cause "an irreparable injury or the miscarriage of justice," tellingly, the County spends very little of its brief discussing the underlying legal arguments that convinced the circuit court that the County was acting in contravention to the constitution and applicable implementing statutes, thus warranting the enjoinment of the continued collection of the Hospitality Fee. Instead, the County's brief begins with and focuses almost exclusively on alleged procedural defects going to the terms of the Injunction, Reconsideration and Supersedeas Orders which are inherently within the circuit court's discretion, rather than addressing the merits of the County's actions which led to the enjoinment in the first instance. The City submits that the County's approach in that regard is strategic, as the County has yet to advance a legally viable defense to the clear and overwhelming constitutional, statutory, case law, and secondary source citations put forward by the City and on which the circuit court relied in granting the injunction.

Moreover, as to the County's procedural argument that the amount of the security under Rule 65(c), SCRCP, is not discretionary with the circuit court, that it was instead required to impose upon the City a dollar-for-dollar security bond under the injunction – which obligation would amount to the posting of $28 million dollars in security in this case – and that its failure to do so is a miscarriage of justice exposing the County to irreparable injury, Petition at 8-13, it is wholly without merit for the many reasons discussed below.

a. It is the County's, and Not the Circuit Court's, Analysis of the Law on the Underlying Issue that is Wrong.

Perhaps in recognition of the frailty of its only substantive argument, the County leaves to the very end of its Petition (and even then, only implicitly) any discussion addressing one of the five elements that the City was required to establish in order to obtain the injunction issued by the circuit court—*i.e.*, likelihood of success on the merits. *See* Petition at 17-20. With no supporting authority, the County asserts that the circuit court's "flawed legal analysis" constitutes a "miscarriage of justice" warranting issuance of the writ. Petition at 17. Once again, the County's penchant for misstating the arguments of the City and either failing to address or misstating the applicable legal authority is on full display.

i. The Constitutional Provision and Statutes Relied upon by the Circuit Court Justified the Issuance of the Injunction and the Denial of the Motion for Supersedeas.

The circuit court concluded that the City had demonstrated a likelihood of success on the merits because it had raised a fair question with respect to its right to relief from the County's imposition of a uniform service charge within the corporate limits of municipalities in Horry County, where neither the City nor any other municipality had consented to same for any period after January 1, 2017, or for any purpose other than implementation of the transportation infrastructure project in the RIDE Report. App'x. at 5-7. South Carolina law prohibits the

imposition of a uniform service charge by county ordinance within municipal limits unless the municipality has agreed and consents, or the General Assembly expressly provides otherwise. The circuit court's conclusion in this regard was proper in view of the clear requirements of the following law relied upon in its orders:

(1) **S.C. Const. art VIII, § 7 Organization, powers, and duties of counties; special laws prohibited**: states in pertinent part that "[t]he General Assembly shall provide by general law for the ... powers ... and the responsibilities of counties." The Legislature has done this, *inter alia*, in S.C. Code Ann. § 4-9-25, *see infra*, which specifically provides that a county's ordinances may not be "inconsistent with the Constitution and general law of this State" and § 4-9-30 which specifically provides that a county's powers (including the power to impose a uniform service charge under § 4-9-30(5)) are constrained "by the Constitution and subject to the general law of this State."

(2) **S.C. Const. art. VIII, § 13(A) Joint administration of functions and exercise of powers**: states in pertinent part that "[a]ny county, incorporated municipality, or other political subdivision ... may agree with ... any other political subdivision for the joint ... exercise of powers." Accordingly, the joint administration of functions and powers, is permitted, but only where it is agreed to by both the county and the municipality. Here, a joint exercise of powers was undertaken in 1996 when City and the other municipalities consented and agreed that the County could impose a uniform service charge within the corporate limits of the municipalities for the specific purpose of road improvements pursuant to the "road plan" which County admits was developed "in conjunction with the City." The City and County each possessed then, and still do today, the statutory authority to make road improvements within their respective jurisdictions under S.C. Code Ann. §§ 5-7-30 and 4-9-30. However, under this constitutional provision, County has no authority to impose a uniform service charge within the municipalities for road improvements located outside the municipalities' corporate limits (*e.g.*, the long discussed but never constructed I-73) unless the municipalities consent or agree "to a joint exercise of these powers and the sharing of its costs" – which they have not.

(3) **S.C. Code Ann. § 4-9-25** empowers the County to "enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State." The County is thus statutorily constrained to ensure that its ordinances are consistent with the Constitution and any applicable statute.

(4) **S.C. Code Ann. § 4-9-30(a)(5)** empowers the County to "assess ... uniform service charges ... for functions and operations of the county, including, but not limited to ... roads," but only if the exercise of that power is "within the authority granted [to the County] by the Constitution." Further, any exercise of this power is expressly "subject to the general law of this State." *Cf.* § 4-9-25. Subsection (17) further provides that "[t]he governing body of any county shall not create a special tax district ... any portion of which falls within the corporate boundaries of a municipality, except upon the

concurrence of the governing body of the municipality." The County overlooks the language of § 4-9-30(a), as the County's authority to provide services within municipalities is restricted by S.C. Const. art. VIII, § 13(A) and it is not empowered to act contrary to the general law provisions set out S.C. Code Ann. § 4-9-40 and § 4-9-41 as discussed, *infra*.

(5) **S.C. Code Ann. § 4-9-40** empowers the County to "perform any of its functions ... [and] furnish any of its services within the corporate limits of any municipality ... by contract with [a] municipal governing body **subject always** to the general law and Constitution of this State regarding such matters." (Emphasis supplied.) Moreover, "where such service is being provided by the municipality or has been budgeted or funds have been applied for that **such service may not be rendered without the permission of the municipal governing body**." (Emphasis supplied). In addressing the applicability of this statute, County has made the incredible assertion that "it is not providing any service that the City could possibly be providing, but rather the County is collecting a fee." App'x at 530. Quite clearly, the City could be (and does) provide services to its residents and visitors with respect to road design, construction, maintenance and operation as authorized by § 5-7-30. App'x at 811.[12]

The County also clearly misapprehends the correlation between the provision of services and the enactment of a uniform *service* charge. Under the clear precedent of the Supreme Court in *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992) and *C.R. Campbell Const. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), a uniform service charge may only be imposed if it is tied to a specific service and "if (1) the revenue generated is used to the benefit of the payers, even if the general public also benefits (2) the revenue generated is used only for the specific improvement contemplated (3) the revenue generated by the fee does not exceed the cost of the improvement and (4) the fee is uniformly imposed on all the payers," *C.R. Campbell*, 325 S.C. at 236, 481 S.E.2d at 438 (interpreting *Brown* and specifying the above four-part test for determining whether a uniform service charge is legally valid). Under the precedent of *Brown* and *C.R. Campbell*, in order for a uniform service charge to be valid, it must be tied to a specific service provided by the imposing political body and for the specific improvements enumerated in the ordinance.

Thus, the Hospitality Fee was a valid uniform service charge since its inception only if it was collected for the specific road improvement services specified in Ordinance 105-96 which, by its plain language, was limited to the road projects specifically enumerated in the RIDE report (which did not contemplate the I-73 project identified by the County for receipt of the Hospitality Fee revenues on a going forward basis, much less the provision of general police protection services identified by the County for the remainder in its various ordinances and resolutions adopted without municipal consent). Further, because

[12] The County has thrice adopted resolutions indicating that it intends to use revenues from the Hospitality Fee for a variety of other functions and services, including public safety, which City is also statutorily authorized to provide and does provide. App'x at 193-95; Supp. App'x at 8-9.

the municipalities only consented to the imposition of the Hospitality Fee within their corporate limits for a period of twenty years, the County's unilateral extension of the duration of the fee indefinitely violates the further specific restriction of § 4-9-40 that "such service may not be rendered without the permission of the municipal governing body."

(6) **S.C. Code Ann. § 4-9-41(A)** authorizes the County and municipalities to "provide for the joint administration of any [of their] function[s] and exercise any of [their] powers" and only subject to the express limitation of § 4-9-41(B) that same does not diminish or alter the City's "political integrity" in engaging in such functions or exercising such powers. As City has asserted, the County's unilateral actions in imposing a uniform service charge within municipal limits without bespeaking the City's consent do not "provide for" a joint administration of any function or exercise of any power and have destroyed the rights of municipal voters, thus contravening § 4-9-41(B).

(7) **S.C. Code Ann. § 5-7-30** empowers the City to enact regulations, resolutions and ordinances with respect to a variety of matters, including roads, streets and public safety. Although this section may not specifically give the City "the right or authority to approve of a fee imposed by a county" as County contends, this section clearly gives the City the power to control its own roads and law enforcement. Moreover, nothing in this section authorizes a County to impose a uniform service charge for roads and law enforcement within the municipalities' limits. But even if it did, it would be in conflict with S.C. Const. art. VIII, §§ 7 and 13(A) and § 4-9-30, § 4-9-40, and § 4-9-41.

(8) **S.C. Code Ann. § 5-7-60** empowers the City to perform any of its functions and provide any of its services in areas outside its corporate limits, which would include the unincorporated areas of Horry County, by contract and, where a county is already providing such service, to do so only with the permission of such county. The limitations in § 5-7-60 are nearly identical to those imposed on the County by § 4-9-30 and § 4-9-40. Under the County's rubric, City would have the ability to discharge its functions and exercise its powers, and impose a uniform service charge relating to same, outside its corporate limits without the County's agreement and consent. The Court of Appeals has recognized that the "permission" required for a municipality to provide its services in the territory of another local governmental entity involves that entity's consent. *See Comm'rs of Public Works of the City of Laurens v. City of Fountain Inn*, 423 S.C. 461, 465, 815 S.E.2d 21, 23 (Ct. App. 2018) (describing a declaratory judgment action brought by a municipality against a municipal commission of public works based upon the "permission" requirement of § 5-7-60 as a challenge to a municipality's extension of "natural gas service in a particular area without the **consent** of the" commission of public works). The circuit court order imposing the injunction against the County recognizes that the permission required to be obtained by a municipality under § 5-7-60 and the permission required to be obtained by a county under § 4-9-40 operate in the same way to require "consent."

See App'x at 787-89.

In addition, the circuit court looked to the plain language of Ordinance 105-96, which it found to be self-limiting and to require the consent of the respective municipalities. App'x at 6. Ordinance 105-96 allowed only for the collection of a uniform service charge "which will be used to implement a comprehensive road plan adopted by the County in concert with the municipalities of the County." App'x at 6, 351; *cf.* S.C. Code Ann. § 4-9-40. This language has not been changed or repealed. The County therefore could collect the Hospitality Fee only to the extent the municipalities still consented to this "comprehensive road plan." App'x at 6. As limited by the RIDE Report, the STIB Application, and the municipalities' consent, Ordinance 105-96's Sunset Provision expressly limited its duration to twenty years from the effective date of the ordinance. App'x at 6. There is no evidence any municipality consented to an ordinance which had the effect of altering this original agreement. App'x at 7. The lack of consent precludes the County from imposing the Hospitality Fee within the corporate limits of any Horry County municipality and invalidates the Hospitality Fee by its own terms. Any extension of the Hospitality Fee, whether in time or scope, without municipal consent is not "implement[ing] a comprehensive road plan adopted by the County in concert with the municipalities of the County," and is violative of S.C. Const. art. VIII, § 13(A) and S.C. Code Ann. § 4-9-40 and § 4-9-41.[13]

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[13] Moreover, the circuit court cited to and relied upon a number of South Carolina Attorney General opinions recognizing municipal independence from unilateral county interference. App'x at 7 n.4 (stating that "for over thirty years, the Attorney General similarly has recognized the independence of municipalities from county interference absent consent or express statutory authority") (citing S.C. Att'y Gen. Op., 2016 WL 7031993 (Nov. 15, 2016) (finding that a county has no power with respect to roads located within a municipality and, in so doing, observing that "[t]he Legislature did not grant county councils the ability to exercise any power within the territory of a municipality **without the permission of the municipal council.**") (emphasis supplied); S.C. Att'y Gen. Op., 2011 WL 3918176 (Aug. 10, 2011) (concluding that a county may not enforce its non-smoking ordinance within the corporate limits of municipalities because it infringes upon the autonomy of municipalities under Home Rule unless a municipality

Notwithstanding the circuit court's citation to and reliance upon the foregoing provisions of law, cases, and secondary sources, the County makes a variety of assertions which it contends demonstrate inadequacies in the circuit court's orders, *e.g.*, "the circuit court's conclusion finds no support in the ... Constitution ... Code ... or ... Home Rule doctrine (which is about the relationship between the State and local governments)),"[14] Petition at 17, "[t]he circuit court accepted the City's arguments seemingly at face value," *id.*, the "order granting the preliminary injunction (which was initially drafted by the City) ... quotes generic language about counties having to follow the law and then provides a string cite to various provisions," and "nowhere in that order does the circuit court cite a single legal authority that expressly requires a municipality's consent for the County to adopt or extend the Hospitality Fee," *id.* In addition to being factually incorrect and disrespectful to the circuit court, these assertions rehash the County's arguments below but do not overcome that which compelled the circuit court to conclude that the City had demonstrated a likelihood of success on the merits: under South

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chooses to allow it by agreement); S.C. Att'y Gen. Gen. Op., 1988 WL 383501 (Feb. 25, 1988) (recognizing that the Home Rule amendments to the Constitution and associated legislative enactments do not permit a County to regulate bingo within municipal corporate limits and stating that "[o]ur beliefs are in accordance with the general law on this issue. Counties and cities are viewed co-equal political subdivisions which are independent of each other politically, geographically, and governmentally"); S.C. Att'y Gen. Gen. Op., 1984 WL 249691 (Oct. 2, 1984) (recognizing the autonomy of a municipality within its borders to the exclusion of a county with respect to a referendum for the sale of mini-bottles by non-profit entities). These Attorney General opinions cite many, if not all, of the constitutional provisions and statutes relied upon by City in this action. The County recognizes Attorney General opinions can be persuasive. Petition at 19.

[14] This is a clear misstatement of the law as the Home Rule provisions of the Constitution and related statutes quite clearly involve the governance of relationships between local governments. *See*, e.g., *Comm'rs of Public Works of the City of Laurens*, *supra*, 423 S.C. at 471, 815 S.E.2d at 25 (Ct. App. 2018) ("'[t]he Home Rule Act of 1975 completely rewrote the powers of municipalities in this [s]tate. [Section] 5-7-60 [of the South Carolina Code] contains provisions both granting and delimiting the exercise of corporate functions of municipalities outside their corporate limits.'") (citing *City of Newberry v. Public Serv. Comm'n*, 287 S.C. 404, 406, 339 S.E.2d 124, 126 (1986)).

Carolina law, a county has no authority to impose a uniform service charge for services provided within the corporate limits of a municipality unless the municipality has consented to it. The County cites to no authority—case law, statutory, or otherwise—which provides to the contrary. Accordingly, the circuit court justifiably denied the motion for supersedeas.

ii. The County's Semantics Do Not Rescue It from the Injunction or the Denial of the Motion for Supersedeas.

In order to paint its inaccurate picture of the circuit court's orders, the County engages in a variety of word-games which this Court should reject—if not condemn. For example, while it would be accurate to say that the circuit court's orders do not cite to any caselaw comprising "legal authority" for the proposition that the City's consent is required "for the County to adopt or extend the Hospitality Fee," Petition at 17, that means nothing as there has never been (at least to the City's knowledge) any determination regarding the County and its Hospitality Fee by an appellate court in South Carolina. However, this Court has recognized that the requirement that one local government obtain the "permission" of another local government in order to provide its services in the latter's territorial limits under § 5-7-50 involves "consent." *See Comm'rs of Public Works of the City of Laurens*, *supra*, 423 S.C. at 465, 815 S.E.2d at 23. That no appellate decision has specifically addressed whether a county may provide its services within incorporated areas and impose a uniform service charge without the consent of the affected municipality is unsurprising given the sheer cheek that is required for a county to contend that it may do so. The City argued as much below without any effective rejoinder by the County. App'x at 272, ll. 18-24.

Similarly sophistic is the County's complaint that none of the provisions of law cited in the circuit court's orders "expressly requires a municipality's consent" and that the County's Ordinance 105-96 "never even uses the word consent." Petition at 17-18. Only in the County's

mind do the statutory requirements that a county's exercise of its functions, the provision of its services, and the imposition of its uniform service charges within a municipality be done on a "joint" basis in which costs are "shared," or by "contract", or with the "agree[ment]" or the "permission" of the municipality, not require the "consent" of the municipality. Along the same lines, only by twisted logic can the County assert that the specific requirement of Ordinance 105-96 that the proceeds of the Hospitality Fee be used "to implement a comprehensive road plan adopted by the County in concert with the municipalities of the County" does not require the "consent" of the municipalities. Or that "strongly urg[ing]" the County to adopt the Hospitality Fee is not consenting to it. *See* App'x at 8.

iii. Not Only is There No Black Letter Law Justifying Issuance of the Writ, the County Argued the Exact Opposite Proposition Below.

Equally uncompelling is the County's contention that the circuit court "attempted to justify its conclusion that municipal consent was necessary to extend the Hospitality Fee" by ignoring "black letter law" in the form of S.C. Code Ann. § 6-1-330(A), which the County contends required the circuit court to recognize the continuing validity of Hospitality Fee. Petition at 19. The circuit court correctly disposed of this rationalization on the part of the County by concluding that the unilateral change in the duration of the ordinance and the use of the revenues from the Hospitality Fee for a purpose other than to "implement a comprehensive road plant adopted by the County in concert with the municipalities" rendered it a new uniform service charge which was not entitled to the grandfathered status arising under § 6-1-330(A). App'x at 7 n.6. Nothing the County argues in its Petition to this Court justifies a departure from the circuit court's ruling in this regard.

Moreover, the County's actions in the circuit court give lie to its current assertion that § 6-1-330(A) is a "plain directive from the General Assembly" requiring that the Hospitality Fee

remain[] in effect 'until repealed.'" Petition at 19. Following the hearing on the motions for preliminary injunction, but before the circuit court issued its June 21 order, the County wrote to the circuit court and asserted that "there are many legal issues for which there is no direct guidance from any legal decisions and the state statutes cited by the parties do not directly, nor indirectly, provide answers." Supp. App'x at 32. Also, attached to the County's June 19 correspondence to the circuit court was an unsolicited proposed order in which the County stated that "[w]ith no case law interpreting the statutory provisions the Parties invoke, neither Party has established that it is likely to prevail in this matter, so neither is entitled to a preliminary injunction." Supp. App'x at 33.

Now, when it is seeking relief which will allow it to continue imposing a uniform service charge under an ordinance which, by the consent of the City and the other municipalities, became effective on January 1, 1997, by its own terms terminated on January 1, 2017, and provided for the use of the revenue on a specific improvement that has been completed, the County contends that the circuit court ignored "black letter law" which contains a "plain directive" from the legislature in § 6-1-330(A) that allows it to impose that charge "forever." *See* App'x at 301, ll. 4-7. To say the least, the County's criticism of the circuit court in regard to its ruling that the Hospitality Fee provision of Ordinance 105-96 is not grandfathered under this statute is unfounded. Allowing the County to circle back, change the positions it took below, and criticize the circuit court for not giving § 6-1-330(A) a reading which essentially guts Home Rule would constitute a "miscarriage of justice" that should not inure to the benefit of the County.

b. <u>The County Is Not Exposed to Irreparable Harm and No Miscarriage of Justice Exists.</u>

Regarding the County's misguided argument that Rule 65(c) does not allow the trial court to set a non-nominal security for the issuance of an injunction, and that the trial court's exercise of that discretion amounts to a miscarriage of justice leaving the County exposed to irreparable injury, the facts do not support the County's hyperbole.

i. *The City is Exempt from the Security Requirement of Rule 65(c).*

The circuit court found in its order denying the County's motion for reconsideration that "a bond as required by Rule 65 is not necessary and/or required of these parties." App'x. at 19. Although it attempts to suggest otherwise,[15] this ruling can hardly have been a surprise to the County since it asserted to the circuit court that the County's ability to collect and hold the revenues it would derive from the Hospitality Fee on a going forward basis was sufficient to protect the City from irreparable harm if the circuit court granted the County's motion to enjoin the City from enforcing the Local Tax Ordinances. *E.g.*, App'x at 1027. In fact, even after its motion for reconsideration of the Injunction Order was denied, the County repeated this assertion in its motion to the circuit court for a stay or supersedeas, stating that "the County can be required to put the 1.5 percent collected within the municipalities in a segregated account. If the City prevails in this litigation, then that money may be transferred to those municipalities[16] that have enacted ordinances to collect local accommodations and hospitality [taxes]." App'x at 1264. Now, the County posits that Rule 65(c) "requires security from the party who obtains the

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[15] *See* Petition at 9, n.5 ("[t]he City is the only party whose motion for injunction was granted, so it is unclear why the circuit court referred to 'parties' in the plural"). The County overlooks the fact that it, too, sought injunctive relief – the denial of which it has appealed from but which is not raised in the Petition.

[16] The County's assertion in this regard indicates that it does not understand the underlying issue in this case and the relief sought. The City is not asserting that it is entitled to the funds unlawfully collected by the County under the Hospitality Fee. The City is asserting that the persons and entities paying the improper Hospitality Fee are entitled to these funds. See App'x at 2-5, 15-17.

injunction" (Petition at 8), argues that no exemption is available to the City thereunder (Petition at 9-11), and asserts that the City's escrow of the additional revenues it generates from the Local Tax Ordinances is insufficient to comply with the security requirements of Rule 65(c) (Petition at 11-13).[17]

As an initial matter, the circuit court correctly concluded that the City is entitled to the exemption from giving security under Rule 65(c) because it is not independent from, but rather is a political subdivision of, the State. App'x at 2 n.3.; *see also Hibernian Society v. Thomas*, 282 S.C. 465, 472, 319 S.E.2d 339, 343 (Ct. App. 1984). This Court must apply the same rules which govern the construction of statutes when interpreting the SCRCP. *See Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006). Accordingly, Rule 65(c) must be given a reasonable reading in light of its intended purpose, *Enos v. Doe*, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App. 2008), and must be interpreted in a manner which is consistent with the law at the time of its adoption in 1985, *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970). The City submits that the intended purpose behind this exemption in Rule 65(c) is to recognize that the State has the ability to respond to judgments by virtue of the fact that it has the power to raise revenue through taxation and therefore no security is needed to protect persons or entities subject to an injunction obtained by the State. *See* 11A Fed. Prac. & Proc. Civ. § 2954 (3d ed.) ("[a]lthough the government later may be liable for [damages arising from an improperly issued injunction], security is unnecessary because there is no substantial risk that the United States will be

[17] In support of these assertions, the County also makes the astonishing contention that it is actually protecting the residents of the City by seeking a writ of supersedeas of an injunction that prohibits the County from imposing a uniform service charge against these residents. Petition at 13. The obvious irony of this contention aside, the Petition is deafeningly silent with respect to whether the County should be required to file a bond or undertaking as provided for in Rule 241(c)(3), SCACR, should the writ be issued.

financially unable to indemnify the enjoined party for any of the costs it is legally obligated to pay").

In view of *Hibernian Society*, *supra*, which was existing law at the time the SCRCP were adopted, a reasonable reading of Rule 65(c) is that a political subdivision of the State is within the ambit of the exemption because it, too, has revenue raising capability. By virtue of its repeated assertions below that its ability to devote public funds it collects to secure against irreparable harm to the payers of its Hospitality Fee in the event the injunction it sought was granted but later reversed on appeal, the County has implicitly acknowledged the correctness of the circuit court's finding that "a bond as required by Rule 65 is not necessary and or required of these parties." Accordingly, the circuit court was justified in denying the County's motion for supersedeas and no miscarriage of justice can result from a denial of the Petition.

ii. The City Has Given Adequate Security.

Without citation to any authority supporting the proposition, the County asserts that the security required by the circuit court is not "adequate" and is "insufficient" because it will not "make the County whole, if the injunction is reversed." Petition at 1, 11-12. Even assuming that Rule 65(c) does not exempt the City from giving security for the injunction against the County's collection of the Hospitality Fee, issuance of the writ on this ground is not warranted for a number of reasons.

First, the circuit court ordered the City to give the County the exact same type of security which the County repeatedly asserted below was adequate to protect the City in the event that the County succeeded in having the Local Tax Ordinances enjoined. *E.g.*, App'x at 1027. Having conceded below that this is an adequate form of security, the County may not now contend

otherwise. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.").

Second, the amount of security required for the issuance of an injunction is a matter within the discretion of the circuit court. *See* Rule 65(c), SCRCP (providing that security is to be given "in such sum as the court deems proper"). An abuse of discretion arises only if the circuit court's determination is controlled by an error of law or fact. *Tri–County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). The County points to no error of law or fact committed by the circuit court in ordering the security it required to be given by the City.

Third, in cases not involving the State or its political subdivisions, our appellate courts have recognized only that it is improper for a circuit court to issue an injunction where either no security, or only nominal security, is required. *See AJG Holdings v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (2009) (holding that, where "there would be [a] need for a bond to protect" an enjoined party, "Rule 65(c), SCRCP requires the trial court to order [the party obtaining an injunction] to post a bond"); *see also Atwood Agency v. Black*, 374 S.C. 68, 78, 646 S.E.2d 882, 884 (2007) (holding that "a nominal security bond does not satisfy Rule 65(c)"). Here, by the County's own admission, the circuit court has required security from the City in the approximate amount of $12.77 million dollars. *See* App'x at 1276-1277, paras. 4.A and 8. This is clearly not a nominal amount.

Fourth, the County's assertion that the $12.77 million dollars of security required of the City is inadequate to address the County's estimated loss of revenues resulting from the application of the injunction in the other municipalities (Petition at 12) is not a proper consideration at this point since the injunction will not take effect in these other municipalities

until August 10, 2019. App'x at 18-19. As recognized in *AJG Holdings*, whether security is needed is an appropriate consideration for a trial court. 382 S.C. at 50, 674 S.E.2d at 508 (observing that, where enjoined party had ceased the improper commercial use of residential property, "it follows there would be no need for a bond to protect their future losses as a result of the injunction"). Here, no security is presently needed with respect to these other municipalities as the County continues to collect the Hospitality Fee within their jurisdictions.

Fifth, the County's criticism of the circuit court for "recognizing the potential prospective ability of a public entity to raise revenue through taxes as an exemption to the security requirements of Rule 65(c)" is unfounded given the specific discretion accorded trial courts to determine the appropriate amount of security under that rule. This discretion has been recognized by both appellate courts in the cases cited above, which resulted only in a remand to the lower court for a determination of an appropriate amount of security. *See AJG Holdings v. Dunn*; *Atwood Agency v. Black*, *supra*.

In conclusion on this point, the circuit court's refusal to grant the County's motion for supersedeas was justified for the foregoing reasons and does not present any potential for a loss of jurisdiction over or mootness of the County's appeal. And, to the extent relevant, that refusal does not expose the County to irreparable harm or constitute a miscarriage of justice. Indeed, the County's offer to escrow and thus not use any and all funds it collects under the Hospitality Fee pending this litigation proves the County will not be irreparably harmed if the injunction remains in effect.

iii. Security Beyond that Ordered by the Circuit Court is Now in Place.

Subsequent to the issuance of the circuit court's July 17 order (App'x at 20-23), the next three largest municipalities in Horry County (in terms of revenues collected by the County from

the Hospitality Fee in 2018, which are the City of North Myrtle Beach, the City of Conway, and the Town of Surfside Beach) that have enacted ordinances similar to the City's Local Tax Ordinances, have either adopted resolutions agreeing to escrow the additional revenues generated within their corporate limits by their 3% accommodation and 2% hospitality taxes or indicated their intent to do so. *See* Supp. App'x at 41-47.[18] These resolutions are (or will become) official actions of these municipalities, *see* S.C. Code Ann. § 5-7-260, and ensure the availability of funds to address "costs and damages" which may be incurred by the County as a result of the application of the injunction in their jurisdictions on and after August 10, 2019. Based upon the County's own estimates, this will result in an additional security of $5.82 million dollars generated in the City of North Myrtle Beach and $887,211 generated in the Town of Surfside Beach. App'x at 1275-1276. Further, the revenues which are generated by the City of Conway's 3% accommodation and 2% hospitality taxes that have been in place since July 1, 2019 (*see* n.11, *supra*), are estimated to generate an additional $815,000, no part of which is being expended and is also likely to soon be escrowed. *See* App'x at 1276-1277, Supp. App'x at 10, 45. The combination of the $12.77 million dollars being escrowed by the City and the escrows of these other three municipalities results in a total security of approximately $20.34 million dollars as against the County's claimed exposure of $28 million dollars resulting from the injunction. The City submits that this is more than adequate security – particularly in view of the City's undisputed ability to raise additional revenue through ad valorem taxation and otherwise.

iv. This Court May Require Additional Security Without Issuing the Writ.

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[18] This Court may take judicial notice of these resolutions pursuant to *Masters v. Rogers Development Group* and *Wise, supra*. Moreover, such resolutions, along with the affidavit of the City Administrator of the City of Conway, are also properly submitted to the Court under Rule 240(c)(3), SCACR.

Should this Court conclude that the City is not entitled to the "State" exemption under Rule 65(c), the security required by the circuit court is not sufficient, the escrow resolutions adopted and to be adopted by the other municipalities, and the City's ability to raise revenue is insufficient to satisfy the security requirements of the rule, the Court may modify the injunction to require the City to give security of $28 Million dollars or such lesser amount as this Court may find proper in view of the security already given. Just as the circuit court has authority to modify an injunction that is the subject of an appeal with respect to the amount of security does under Rule 62(c), SCRCP, this Court has the authority to modify an injunction on appeal. *See* Rule 220, SCACR. As noted above, a determination of inadequate security does not require that the injunction be reversed and a remand to the lower court to determine and require an appropriate amount of security is proper where security is absent. *See AJG Holdings*, *supra*. In this instance, should this Court determine that additional security is required, even a remand would be unnecessary given that the County has asserted that $28 Million dollars is the proper amount of security, App'x at 1025, and nothing remains to be determined by the circuit court in this regard.

c. An Injunction is Properly Issued to Prevent Unlawful Conduct and the City's Status Quo Argument Does Not Support the Issuance of the Writ

As it did before the circuit court without success, *see* App'x at 1025, 1191-92, 1261-64, the County asserts that the circuit court's injunction improperly fails to preserve the *status quo ante*. Petition at 14-16. The County's breathtakingly illogical contention in this regard—which is that the law commands that all parties *must* carry on as they were at the time of the lawsuit, even if the actions of the party sought to be enjoined are unlawful and illegal—is contrary to law and can provide no basis for the issuance of the writ.

Initially, the City submits that South Carolina law has long recognized that the *status quo ante* is not required to be maintained in the face of illegal conduct. *See, e.g., LeFurgy v. Long Cove Club Owners Ass'n, Inc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994) (holding that an injunction may issue "when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected") (citing *Carter v. Lake City Baseball Club*, 218 S.C. 255, 269, 62 S.E.2d 470, 476 (1950) (holding that "Courts of Equity have power, of course, to issue mandatory injunctions" in such instances)). And this principle has specifically been recognized in the context of unlawful local government actions involving public funds. *See, e.g., Kirk v. Clark*, 191 S.C. 205, ___, 4 S.E.2d 13, 15 (1939), which held that

> Perhaps the most frequent ground of application for relief by injunction against municipal corporations is for the prevention of an illegal or an unauthorized diversion of public funds. The foundation of the relief which is invoked in cases of this nature rests in the doctrine of trusts, and **while courts of equity are averse to any interference with the proceedings of** municipal officers while acting within the scope of their authority, and while they will not by injunction control the judgment or revise the action of **municipal bodies** in matters resting within their own well defined jurisdiction or discretion, **they will yet relieve in behalf of citizens and taxpayers against official acts on the part of such bodies, when they move without authority or warrant of law and in excess of the corporate powers**.

(Emphasis added, citation omitted). Similarly, in *Shillito v. City of Spartanburg*, 214 S.C. 11, 21, 51 S.E.2d 95, 99 (1948), the court recognized the right of a taxpayer to seek injunctive relief against a municipal government with respect to the expenditure of public funds and, in so doing stated that

> **[a]s a rule, private citizens may not restrain official acts** when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. **An apparent exception** to **this rule exists when the Act sought to be enjoined** is] an unlawful **diversion of public funds**. [Citation omitted.] In such cases, **a taxpayer who may be compelled to pay the assessment, or who has contributed to the sum jeopardized, is considered to have sufficient interest to enjoin the illegal Act.**

(Emphasis added).

And South Carolina authority in this regard is not unique. Courts in other jurisdictions have recognized that the *status quo ante* cannot consist of, or prevail in the face of, illegal conduct. *See, e.g.*, *DeNoie v. Bd. of Regents of Univ. of Tex. Sys.*, 609 S.W.2d 601, 603 (Tex. Ct. Civ. App. 1980) (holding that the "[s]tatus quo can never be a course of conduct which is a prima facie violation of law"); *Viestenz v. Arthur Twp.*, 54 N.W.2d 572, 574 (N.D. 1952) ("[w]hile such injunctions are not favored by the courts 'it is now well settled that unless prohibited from so doing by some constitutional or statutory provision, a court of equity can, and in a proper case will, award mandatory as well as prohibitive injunctive relief. It may, by its mandate, compel the undoing of those acts that have been illegally done, as well as it may, by its prohibitive powers, restrain the doing of illegal acts'); *Seaboard Air Line R. Co. v. Atl. Coast Line R. Co.*, 74 S.E.2d 430, 434 (N.C. 1953) ("'a court of equity may, by its mandate, compel the undoing of those acts that have been illegally done, as well as it may, by its prohibitive powers, restrain the doing of illegal acts'") (citation omitted).

Further, the *status quo ante* is not the circumstances which existed at the time the lawsuit was filed as asserted by the County. Petition at 15. If this were the case, preliminary injunctions would never issue. The Fourth Circuit has held that that "[t]he status quo to be preserved by a preliminary injunction, however, is not the circumstances existing at the moment the lawsuit or injunction request was actually filed, but the 'last uncontested status between the parties which preceded the controversy.'" *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) (quoting *Stemple v. Bd. of Ed. of Prince George's Cnty.*, 623 F.2d 893, 898 (4th Cir. 1980)). Requiring a party who has "disturbed the status quo ante to reverse its actions" actually "restores, rather than upsets, the status quo ante." *Id.* (quoting *O Centro Espirita Beneficiente Uniao Do*

Vegetal v. Ashcroft, 389 F.3d 973, 1013 (10th Cir. 2004)). The "last uncontested status" between the City and the County is Ordinance 105-96 terminating on January 1, 2017, in accordance with its own terms and the consent provided by the respective municipalities in 1996. That is the status quo the City, on behalf of all similarly situated plaintiffs, seeks to protect. And that is the status quo the circuit court protected in its orders enjoining the County from continuing to collect its Hospitality Fee.

Finally, on the altar of preserving the *status quo ante*, the County contends that it should be allowed to continue collecting a uniform service charge the circuit court has seen fit to enjoin because the County is in a position to put certain municipalities "in the same position as if they had been collecting new taxes" Petition at 16. According to the County, this is a "sensible approach" in view of the lack of appellate authority on the specific issue raised by this case. *Id.* In addition to being no basis upon which to grant the writ under the applicable standard of review, this suggestion is an astounding revelation that the County has yet to comprehend what the City's action seeks to achieve.

The purpose of the City's lawsuit is not to preserve the right of any municipality to impose taxes. The purpose of the City's lawsuit is to protect persons and entities which are subject to the County's Hospitality Fee (which does include the City and, upon information and belief, includes other municipalities) from the imposition of an unlawful uniform service charge. The County's proposal that it be allowed to continue imposing the Hospitality Fee because it can later pay the proceeds of it over to four municipalities if the City prevails in the underlying action would do nothing to compensate the other persons and entities that have actually paid the unlawful charge. Although this might be a resolution of the issue before this Court which can be affected "without harm to the City," the County's proposal in this regard would visit upon the

persons and entities who are subject to the Hospitality Fee the "irreparable harm" and "miscarriage of justice" to which the County purports to be exposed by a denial of the writ.[19]

In conclusion on this point, the circuit court was justified in denying the County's motion for supersedeas as unlawful acts cannot constitute the *status quo ante* that is required to be preserved by an injunction. Nor does the injunction issued jeopardize the Court's jurisdiction over the County's appeal or render same moot. Accordingly, the County is not entitled to a writ of supersedeas under the applicable standard of review. *See* Rules 241(d)(4)(C) and 241(c)(2), SCACR. Moreover, the County has not shown that irreparable harm or a miscarriage of justice—even though neither is an element of the pertinent standard of review—will result from a denial of the writ. To the contrary, the County's proposed "sensible approach" that can be adopted "with no harm to the City" would expose the persons and entities who are being subjected to the County's unlawful uniform charge to the exact same irreparable harm that led the circuit court to issue the injunction against the County.

And, perhaps most importantly, at no point has the County presented evidence showing that *it* will be irreparably harmed by allowing the injunction to remain in force and effect.[20] Indeed, the County previously argued that the result it seeks here—that it can continue collecting the Hospitality Fee while the City can continue collecting under its Local Tax Ordinances during the pendency of this litigation—would cause irreparable harm and "mayhem." App'x at 538-39.

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[19] The Court should view the County's protestations that the City's residents are harmed by the putative lack of security required by the circuit court (Petition at 1, 13) through the prism of the County's proposal for "particularly careful consideration" of the issues in this case. Petition at 16.

[20] Nor can the County use its reply to advance such justification for the first time. *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (holding that a party may not use a reply brief as a vehicle to argue issues not argued in the initial brief or filing).

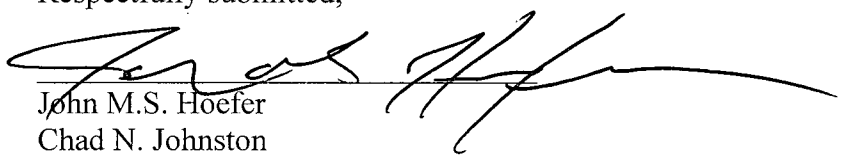
This is yet another example of the County advancing a position to this Court that is the exact opposite of what it argued below. *See, e.g.,* pp. 23-24, *supra.* The County's prior protestations of irreparable harm caused by these circumstances should bar it from now asking that this Court create that very situation.

CONCLUSION

The County has not demonstrated that the writ is needed to prevent a loss of jurisdiction of the instant appeal or to prevent it from becoming moot. Nor has the County demonstrated that the circuit court's denial of the motion for supersedeas was unjustified. It has therefore not met its burden under the applicable standard of review set out in Rule 241, SCACR. Even assuming that the standard is irreparable harm or a miscarriage of justice as the County contends, it has not demonstrated that either results from the injunction issued by the circuit court. At bottom, the City has demonstrated its entitlement to injunctive relief against the County by satisfying the five elements for same and the County's ham-handed effort to implicitly deride the circuit court's conclusion with respect to only one of these – the City's likelihood of success on the merits – via word-games should be rejected and the Petition for Writ of Supersedeas denied.

[signature page follows]

Respectfully submitted,



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July 29, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, Respondents,

v.

Horry County, ... Appellant.

CERTIFICATE OF SERVICE

This is to certify that I, a Legal Assistant with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of Respondent City of Myrtle Beach's **Return and Memorandum in Opposition to Appellant's Petition for Supersedeas** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows, or via hand delivery where indicated below:

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This 29th day of July, 2019.

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July 29, 2019

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RE: City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, Respondents, *v.* Horry County, Appellant; Appellate Case No. 2019-001134

Dear Ms. Kitchings:

On behalf of Respondents, enclosed for filing please find the original and six (6) copies of the Respondents' Return and Memorandum in Opposition to the Appellant's Petition For Supersedeas and Respondents' Supplemental Appendix in the above-referenced appeal.

I would appreciate very much your acknowledging receipt of the enclosed documents by file stamping the extra copy of same and returning it to me via my courier.

By copy of this letter, I am serving counsel for Appellant and enclose a certificate of service to that effect. If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

John M. S. Hoefer

cc: Henrietta U. Golding, Esquire
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