THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

Case No. 2019-CP-26-01732

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

v.

Horry County, ... Appellant.

FINAL BRIEF OF APPELLANT

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I. Whether the City is likely to succeed on the merits, when two sections of the South Carolina Code of Laws expressly permit the County to collect the Hospitality Fee and neither section says anything about a municipality having to consent to such a fee.

II. Whether the injunction violates the Supreme Court's holding that a preliminary injunction may be issued "only" to preserve the *status quo ante*, when the injunction here stopped the County from collecting a fee that had been in place for more than two decades.

III. Whether the City has provided adequate security for the injunction under Rule 65(c) when millions of dollars in lost annual revenue are unsecured by the circuit court's order.

IV. Whether the City has shown it will suffer irreparable harm without the injunction, when it waited more than two years to bring this lawsuit from the date it claimed the Hospitality Fee expired.

INTRODUCTION

Time and again, the Supreme Court has reminded lower courts three things about a preliminary injunction. *First*, an injunction is a "drastic remedy." *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018). *Second*, an injunction may be issued "*only* if necessary to preserve the status quo ante." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010) (emphasis added). *Third*, an injunction must be accompanied by

sufficient security to protect the enjoined party, if the injunction was wrongly entered. *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007).

When the circuit court granted the City's motion for a preliminary injunction to stop the County from collecting the Hospitality Fee within the County's municipalities, the circuit court violated these basic tenets. The County began collecting the Hospitality Fee on January 1, 1997, and it continued collecting it for more than twenty-two consecutive years, until the circuit court enjoined it from doing so in 2019. The revenue from the Hospitality Fee allowed the County to undertake needed road projects, which helped spur the County's (and the City's) growth and the tourism industry over the past two decades. As of last year, the Hospitality Fee generated over $51 million in revenue, including over $28 million from within the municipalities. In addition to upsetting the *status quo ante* by stopping the collection of a fee that had been in place for more than twenty-two years, the circuit court did not require adequate security for the injunction, as it leaves millions of dollars in annual revenue unsecured that the County would have collected but for the injunction.

Beyond issuing an injunction that upsets the *status quo ante* and requires too little security from the City, the circuit court missed the mark in its analysis of the central issue in this case, which is whether the County needed the City's consent to extend the Hospitality Fee beyond its original sunset date or to change the use of the revenue from the Hospitality Fee. Under the established two-step framework for analyzing the validity of a county ordinance, the first question is whether a county has

the *power* to adopt an ordinance, and the second is whether that ordinance *conflicts* with any State law.

Here, the County has the power to collect the Hospitality Fee, including to change the sunset provision and to change the use of the revenue from the fee, pursuant to various statutes (most notably S.C. Code § 6-1-330(A)). None of these statutes requires municipal consent.

That power does not conflict with any provision of State law. In enjoining the County, the circuit court relied on other statutes, none of which expressly require municipal consent. The circuit court's attempt to read a consent requirement into those statutes is flawed and disregards provisions like § 6-1-330(A) that apply directly to the Hospitality Fee.

The City therefore has no right to an injunction—an injunction it did not even seek for more than two years after it claimed the Hospitality Fee expired.

STATEMENT OF THE CASE

The County adopted the Hospitality Fee.

In March 1996, voters in Horry County rejected a referendum to adopt a local option sales tax to finance a proposed comprehensive road plan. (R. p. 60). Shortly after this vote, Governor David Beasley directed the chairman of the Department of Transportation to form a committee to propose a plan for the County's short-term and long-term transportation needs. (R. p. 60). That committee issued its report, known as the RIDE Report, in September 1996. (R. pp. 56–99).

To implement the recommendations in the RIDE Report, the County adopted a uniform service charge, called the Hospitality Fee, on October 15, 1996 by enacting Ordinance 105-96. (R. pp. 101–05). The Hospitality Fee imposed a 1.5 percent fee on lodging, admissions to places of amusement, and prepared food and beverage throughout the County, in both incorporated and unincorporated areas beginning on January 1, 1997.[1] (R. pp. 101–02).

In addition to adopting the Hospitality Fee, Ordinance 105-96 provided that the funds from this 1.5 percent fee would "be used to implement a comprehensive road plan adopted by the County in concert with the municipalities of the County." (R. p. 103). This ordinance also stated that the Hospitality Fee would expire after twenty years, on January 1, 2017. (R. p. 104).

Around the time the County was considering Ordinance 105-96, multiple municipalities—including the City—adopted resolutions supporting the Hospitality Fee. These ordinances "urge[d]" the County to adopt the Hospitality Fee. (R. pp. 107–08, 111–14, 116–19).

The municipalities were not the only public bodies that adopted ordinances urging the County to adopt the Hospitality Fee. Other governmental entities adopted similar resolutions. Both the Horry County Board of Education and the South Carolina Department of Transportation also expressed support for the County's plan to implement the RIDE Report. (R. pp. 110, 115).

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[1] Later amendments increased the fee in the unincorporated areas of the County and added a countywide 2.5 percent fee on rental cars. (R. p. 742–43).

Changes to Ordinance 105-96.

Over the next two decades, the County amended Ordinance 105-96 on multiple occasions, three of which are particularly relevant here.

As initially enacted, Ordinance 105-96 contained a sunset provision, providing that the Hospitality Fee would expire on January 1, 2017. (R. p. 104). All three relevant amendments to Ordinance 105-96 extended the sunset provision beyond January 1, 2017. *First*, in April 2004, the County enacted Ordinance 11-04, which "extended [the Hospitality Fee] for an additional period not to exceed five (5) years," until January 1, 2022. (R. p. 733). *Second*, in 2016, the County enacted Ordinance 93-16, which reaffirmed the five-year extension of the Hospitality Fee from Ordinance 11-04. (R. p. 184). *Third*, in 2017, the County removed the sunset provision from the Hospitality Fee altogether. (R. p. 193).

The City never voiced an objection to any of the three amendments extending the sunset provision when they were adopted. The City said nothing when the County extended the sunset provision for the first time in 2004. The City said nothing when the County reaffirmed that extension in 2016. And the City said nothing when the County eliminated the sunset provision completely in 2017. Ultimately, on March 20, 2019, with the filing of this lawsuit, the City alleged the County did not have the authority to extend the sunset provision without its consent, even though the County had done so on three occasions, years earlier.[2]

[2] The lawsuit was filed only about a month after the County paid off the State Infrastructure Bank loans referenced in the 2004 amendment. (*See* R. pp. 732–33). The County used the Hospitality Fee revenue from 2017 through early 2019 to pay

Not long after the last of the three amendments to the Hospitality Fee, the County adopted two resolutions declaring its intention for how part of the 1.5 percent piece of the Hospitality Fee would be used: construction of I-73. The County pledged up to $18 million annually (and then even more money, depending on the growth of that revenue) to building this new interstate. (R. p. 500, 502). Other revenue from the Hospitality Fee would be used as permitted by S.C. Code § 6-1-530, for the operation and maintenance of police, fire protection, emergency medical services, and emergency preparedness operations directly related to tourism-related infrastructure, facilities, and programs.

The City adopted local accommodations and hospitality taxes.

In March 2019, shortly before filing this lawsuit, the City adopted two new taxes. The City adopted a 3 percent local accommodations tax, the maximum amount a county and a municipality may cumulatively collect under § 6-1-540. (R. pp. 504–06). The City also adopted a 2 percent hospitality tax, again the maximum a county and a municipality may cumulatively collect under § 6-1-740. (R. pp. 508–10).

Less than two weeks later, the City sued the County, claiming the County could not extend the sunset provision of the Hospitality Fee or change the use of revenue from the Hospitality Fee without its consent. (R. pp. 37–238). As the backbone for its position, the City alleged its consent (as well as the consent of other

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these loans (until the loans were defeased on February 15, 2019)—money that the City now asserts the County should not have been collecting, despite the fact that the City claims it consented to the road projects paid for by those loans.

municipalities in the County) was necessary for the County to collect the Hospitality Fee. The City takes this position, even though it cites to no legal proposition using the word "consent" in this context or that otherwise indicates that consent was necessary. The City claims it provided its consent to the County's enactment of the Hospitality Fee when the City adopted its resolution "urg[ing]" the County to adopt the Hospitality Fee. The City argues that its consent to the Hospitality Fee expired with the initial sunset of the Hospitality Fee on January 1, 2017 (even though an additional twenty-five-and-a-half months were necessary to pay off the State Infrastructure Bank loans used to finance the very road projects that the City claims it consented to being performed through the use of the Hospitality Fee).

The circuit court enjoined the County's Hospitality Fee.

After it filed its proposed class complaint, the City moved for a preliminary injunction, (R. pp. 335–37), as did the County, (R. pp. 539–41). The parties filed multiple briefs and dozens of exhibits. (R. pp. 338–525, 542–779, 799–878, 982–1100). At the circuit court's direction, they also each submitted a confidential memorandum to the court ahead of the hearing on the preliminary injunction motions.

The circuit court heard the motions on June 14, 2019. Later that day, the court informed the parties via email that it would grant the City's motion and deny the County's. The circuit court entered its order on June 21. (R. pp. 6–22). The County moved to reconsider four days later. (R. pp. 1108–19).

While the motion to reconsider was pending, the City moved to hold the County in contempt. The City claimed the County was violating the injunction by continuing to collect the Hospitality Fee in municipalities other than the City. (R. pp. 1120–69).

The circuit court denied both the motion to reconsider and the motion to hold the County in contempt on July 10, 2019, after holding a hearing earlier that day.[3] In denying both motions, the circuit court clarified that the injunction applied not only to the City, but also to the other municipalities in the County—Atlantic Beach, Aynor, Conway, Loris, North Myrtle Beach, and Surfside Beach.[4] (R. pp. 23–24). The order is not set to take effect in these other municipalities until August 10, 2019. (R. pp. 23–24).

The County appealed and sought supersedeas relief.

The County appealed the injunction order pursuant to S.C. Code § 14-3-330(4) on July 11, 2019. (R. pp. 1316–37). The day after filing its notice of appeal, the County moved the circuit court for supersedeas relief (*i.e.*, to stay the injunction),

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[3] Other motions remain pending, but none of those is essential to deciding the legal issues on this appeal. These motions include the County's motion for leave to amend its counterclaims, (R. pp. 879–912), the City's motion to dismiss the counterclaims, (R. pp. 780–98), the County's motion for judgment on the pleadings regarding the class action allegations, (R. pp. 1177–80), and the County Treasurer's motion to intervene, (R. pp. 1181–225).

[4] In its motion to reconsider, the County invoked Rule 65(d), which requires that an injunction "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Rule 65(d), SCRCP. The circuit court said it was "being extremely lenient" in not holding the County in contempt, while citing both the complaint and the transcript of the June 14 hearing. (R. p. 23). This defense of the June 21 order proves that the order violated Rule 65(d).

pursuant to Rule 241(d)(1), SCACR. (R. pp. 1338–53). The circuit court denied that motion, although it did order the City to escrow "the new tax revenues collected" pursuant to its new ordinances. (R. pp. 25–28). The County filed an amended notice of appeal, adding the circuit court's order denying the County's motion for supersedeas relief to those orders currently on appeal. (R. pp. 1365–91).

The County also asked the circuit court to stay the entire case, given that this Court's decision might effectively resolve the litigation. (R. pp. 1354–56). The circuit court granted that motion. (R. pp. 29–31).

After the circuit court denied the supersedeas relief, the County petitioned the Court of Appeals for a writ of supersedeas, based on (1) the lack of adequate security for the injunction as required by Rule 65(c); (2) the injunction changing the *status quo ante* in violation of Supreme Court precedent; and (3) the law, specifically S.C. Code § 6-1-330(A), allowing the County to collect the Hospitality Fee without municipal consent. (R. pp. 1392–420). The City filed a return, and after the County filed its reply, the City then filed a supplemental return. (R. pp. 1421–64, 1529–61, 1562–59). Two days after briefing was completed, Chief Judge Lockemy, for the Court of Appeals, denied the petition in a one-sentence order. (R. p. 32).

STANDARD OF REVIEW

To obtain a preliminary injunction, a party must establish three elements: "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603

S.E.2d 905, 908 (2004). An injunction against a county, as a government entity, requires a plaintiff also show the county's actions were arbitrary, capricious, or oppressive.[5] *Richland Cty.*, 422 S.C. at 310, 811 S.E.2d at 767.

The decision to grant an injunction is in a circuit court's discretion. *Scratch Golf Co.*, 361 S.C. at 121, 603 S.E.2d at 907. A circuit court abuses its discretion whenever it lacks evidentiary support for its decision or makes an error of law. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). On questions of law, this Court reviews them *de novo*. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018).

ARGUMENT

I. The County does not need the City's consent to the Hospitality Fee.

A. The County has the power to adopt the Hospitality Fee, and no provision of State law requires municipal consent to do that.

As a starting point, the circuit court did not frame the issue correctly. The proper question is whether the County has the *power* to collect the Hospitality Fee, which is a uniform service charge, without the City's consent. The power to impose a uniform service charge[6] or to tax is solely vested in the General Assembly. *See Crow*

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[5] The circuit court included a fifth element: that the injunction was "reasonably necessary," based on *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50–51, 674 S.E.2d 505, 508 (Ct. App. 2009). (R. p. 10). The Supreme Court has framed that consideration as part of the standard three-part test for an injunction, not as a distinct element. *See Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). The Supreme Court's formulation makes sense, as an injunction will presumably always be necessary if a party lacks an adequate remedy at law.

[6] The Supreme Court distinguished uniform service charges from ordinary taxes in *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992). At the same

v. McAlpine, 277 S.C. 240, 243, 285 S.E.2d 355, 357 (1981) ("The people of this State, in their sovereign capacity have, by the Constitution, entrusted the taxing power to the General Assembly . . . ."). The General Assembly *may* delegate that power to counties and municipalities. S.C. Const. art. X, § 6. The specific question here is whether the General Assembly has empowered the County to collect the Hospitality Fee, and if the General Assembly did, whether the General Assembly required the consent of the municipalities within the County for the County to collect the Hospitality Fee.

Determining whether the General Assembly did that is a two-step process. First, the General Assembly must have given the County the power to adopt the Hospitality Fee. *See S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006). Second, if the County did have that authority, the Hospitality Fee must not conflict with the Constitution or State law. *See id.* Applying this test makes clear that the Hospitality Fee the County adopted is valid and does not require municipal consent.

1. The County was authorized to adopt the Hospitality Fee.

On the first step, the County has the *power* to adopt the Hospitality Fee. The general power to impose a uniform service charge is granted to the County by the General Assembly. *See* S.C. Code § 4-9-30(5)(a) (giving counties the power "to assess

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time, the Supreme Court has also recognized that, in a more general sense, any revenue-raising measure enacted by the government is a tax. *See Columbia Gaslight Co. v. Mobley*, 139 S.C. 107, 137 S.E. 211, 212 (1927); *see also Hosp. Ass'n of S.C., Inc. v. Cty. of Charleston*, 320 S.C. 219, 231, 464 S.E.2d 113, 121 (1995) (Finney, J., dissenting).

. . . uniform service charges . . . and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works").

Specifically, the County is also authorized to collect the Hospitality Fee pursuant to S.C. Code § 6-1-330(A). The statute provides:

> A local governing body, by ordinance approved by a positive majority, *is authorized to charge and collect a service or user fee.* . . . A fee adopted or imposed by a local governing body *prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.*

Id. § 6-1-330(A) (emphasis added).

Section 6-1-330(A) "authorize[s]" local governing bodies to collect a service or user fee. Additionally, this statute provides that those fees adopted prior to December 31, 1996 remain "in force and effect until repealed by the enacting local governing body." *Id.*

The General Assembly's use of this particular date in § 6-1-330(A) cannot be ignored. Only two governing bodies had imposed such a fee prior to December 31, 1996: the County and the City of Charleston. (*See* R. pp. 101–05); City of Charleston Ord. No. 1993-450, § 1. Therefore, the General Assembly necessarily could have had only these two fees in mind when it enacted § 6-1-330(A).

Because the County adopted the Hospitality Fee in Ordinance 105-96 on October 15, 1996, then, pursuant to § 6-1-330(A), the County had the authority to adopt and collect the Hospitality Fee. Moreover, pursuant to that same section, the

County can continue collecting the Hospitality Fee until it is repealed by County Council.

Also speaking directly to the Hospitality Fee is § 6-1-760(B). That section provides that "any ordinance enacted by county or municipality prior to March 15, 1997, imposing an accommodations fee . . . remains authorized and effective after the effective date of this section," as long as the ordinance meets certain requirements. S.C. Code § 6-1-760(B).

The Hospitality Fee (which was again passed on October 15, 1996, before the March 15, 1997 date in § 6-1-760(B)) meets all of these requirements. It is only 1.5 percent in the municipalities, so it is less than the 3 percent maximum of § 6-1-540. (R. pp. 101–02). It applies to the "gross proceeds derived from the rental or charges" for any type of hotel, motel, or campground, so it complies with § 6-1-510(1). (R. p. 101). And its uses are limited to the purposes outlined in § 6-1-530, all of which are related to tourism. (R. pp. 103–04; *see also* R. p. 205).

None of these three provisions—§ 4-9-30(5)(a), § 6-1-330(A), and § 6-1-760(B)—says anything about a municipality having to consent to the fee. Indeed, were the circuit court's conclusion about consent correct, both § 6-1-330(A) and § 6-1-760(B) would read very differently. They would contemplate municipal consent. The fact that these statutory provisions do not contemplate municipal consent demonstrates that the General Assembly (the power source for both the County and the City) does not require the County to obtain that consent before adopting and collecting the Hospitality Fee.

2. Adopting the Hospitality Fee did not conflict with the Constitution or any State statute.

The only inquiry left is whether adopting the Hospitality Fee in Ordinance 105-96 *conflicts* with the Constitution or State law. It does not.

The City does not actually challenge the Hospitality Fee's adoption because it claims that it consented to the Hospitality Fee's adoption. Putting aside the fact that the City did not actually consent, *see infra* Part I.D., State law does not require the City's consent for the County to adopt the fee.

According to the City, "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." (R. pp. 1441–42.) The City makes that assertion without any direct citation.

The circuit court adopted a similar view of the law, without identifying which specific provision the County supposedly violated when it extended the Hospitality Fee. (R. pp. 11–12). Rather than point to a particular provision and then explain how the County transgressed it, the circuit court simply quoted two statutes saying a county must comply with the Constitution and State law and then cited a string of constitutional and statutory provisions. (R. pp. 11–12). This approach is akin to the often-criticized "penumbra" rational of decisions like *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See, e.g.*, *State v. Forrester*, 343 S.C. 637, 644 n.2, 541 S.E.2d 837, 840 n.2 (2001) ("This [penumbra] analysis has engendered much controversy over the years among constitutional scholars and the Court itself."). As the Supreme Court

indicated in *Forrester*, South Carolina has not embraced such an amorphous style of interpreting the law, so the circuit court was wrong to take employ it here.

As another flaw, the circuit court disregarded what the constitutional and statutory provisions it cited expressly require or prohibit. For example, the general requirement to follow the law does not provide any insight on the specific question here (obviously, everyone has to follow the law). *See* S.C. Const. art. VIII, § 7; S.C. Code § 4-9-25. The circuit court never pointed to a single municipal road that the County built or any other service the County is providing within the City. *See* S.C. Code §§ 4-9-30(5)(a); 5-7-30. The circuit court never identified a particular joint function the City and County undertook, as any such function would presumably have required some clear agreement about the sharing of powers or duties (the adoption of the Hospitality Fee, of course, was a County decision, and the City having input on the road plan is not actually sharing a government function). *See* S.C. Const. art. VIII, § 13; S.C. Code § 4-9-41(A). The circuit court never invoked any contract between the City and County that the County was violating. *See* S.C. Code §§ 4-9-40; 5-7-60. The circuit court never cited any use of the 1.5 percent piece of the Hospitality Fee for something that is not permitted or what particular "service" was being provided that the County was not allowed to provide with the Hospitality Fee revenue. *See id.* § 6-1-530 (setting froth the permissible uses for revenue from the Hospitality Fee).

By divining a consent requirement from these statutes, the circuit court ignored an elementary rule of statutory construction. When, as here, "there is one

statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner," the specific statute controls. *Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). On the question of the County's authority to collect the Hospitality Fee, § 6-1-330(A) and § 6-1-760(B) are specific statutes dealing with the County's authority to collect the Hospitality Fee. Neither requires the County to obtain municipal consent to collect the Hospitality Fee. In fact, no statute or constitutional provision expressly requires municipal consent as a prerequisite to the County's adoption and collection of the Hospitality Fee. Other, more general statutes like the ones cited by the circuit court cannot trump these specific statutes.

Plus, the idea that municipal consent is required for a county to adopt every fee or tax within a municipality is inconsistent with Act 138 of 1997 (the act in which the General Assembly established the current framework for local accommodations and hospitality taxes). There, the General Assembly expressly permitted counties to collect up to a certain percent of local accommodations or hospitality taxes without getting municipal consent. *See* S.C. Code §§ 6-1-520(A); 6-1-720(A).

Because the County has the *power* to collect the Hospitality Fee without municipal consent and because collecting that fee by the County without municipal consent does not *conflict* with the law, the circuit court erred in the legal analysis underlying the injunction.

One final, more philosophical (yet still practical) point on this subject: Requiring consent in this situation would be illogical and antidemocratic. Mandating

municipal consent here would effectively give people who live in a city or town the option to refuse to pay any county fee, thereby unfairly casting the burden of financing county projects solely on those people who live outside a city or town. The obvious—and democratic—solution if residents in the City (or any other municipality) do not want the County to continue to collect the Hospitality Fee is go to the ballot box and elect public officials who will vote to repeal the Hospitality Fee, not to run to the courthouse and argue a novel and flawed theory that municipal consent is necessary for the County to do what it has been empowered to do by the State: adopt and collect the Hospitality Fee.

B. The County did not need municipal consent to extend or remove the sunset provision or to change how funds from the Hospitality Fee would be used.

Just as adopting the Hospitality Fee did not require municipal consent, neither did extending or removing the sunset provision or changing how the revenue from the Hospitality Fee would be used. The same two-step framework should be employed in this analysis.

1. The County has the power to change the sunset provision, and that power does not conflict with State law.

When initially adopted, the Hospitality Fee contained a sunset provision, stating that the County would stop collecting the Hospitality Fee on January 1, 2017. (R. p. 104). The County amended that sunset provision three times, first for up to five years, then reaffirming that the extension was for the full five years, and finally removing the sunset provision entirely. (R. pp. 733, 184, 193).

Counties have broad discretion in passing and amending ordinances. *See, e.g.*, *Sloan v. Greenville Cty.*, 356 S.C. 531, 555–65, 590 S.E.2d 338, 351 (Ct. App. 2003). That is because legislative bodies are the people's representatives, and courts are "loath" to interfere with the democratic process. *Id.* at 555, 590 S.E.2d at 351. Amending an ordinance is all the County did by changing the sunset provision, which is a power the County certainly has.

Exercising this power here did not conflict with any State law. The General Assembly empowered the County to collect the Hospitality Fee by enacting § 6-1-330(A). And the General Assembly allowed the Hospitality Fee to remain "in force and effect until repealed." S.C. Code § 6-1-330(A). County Council has not repealed the Hospitality Fee.

Although the initial ordinance creating the Hospitality Fee contained a sunset provision, that provision was a limitation imposed on the County by the County, not by the General Assembly. The General Assembly expressly empowered the County to continue collecting the Hospitality Fee until it is repealed. Because the sunset provision was a self-imposed limitation, the County was free to amend it (and even, as it did, to remove it).[7]

[7] Notably, when the County changed the Hospitality Fee in 2001 to add a countywide 2.5 percent fee on rental cars (R. pp. 742–43), the City raised no objection. Like the 1.5 percent fee that is the focus of this litigation, that fee on rental cars applied in the municipalities. Yet for some reason, the City has not expressly challenged that part of the Hospitality Fee. Perhaps that reason is because no statute allows the municipalities to tax rental cars.

2. The County has the power to change the use of the Hospitality Fee revenue, and that power does not conflict with State law.

The County originally planned to use the revenue from the Hospitality Fee to finance the road-construction projects outlined in the RIDE Report. Now, after those projects have been completed, the County has found new, yet similar uses for that revenue. Most recently, on July 24, 2018, the County adopted Resolution 84-18, which provided that the revenue from the Hospitality Fee would be used to fund construction of I-73 and for the operation and maintenance of police, fire protection, emergency medical services, and emergency preparedness operations directly related to tourism-related infrastructure, facilities, and programs. (R. p. 205).

Once again, counties have broad discretion to amend ordinances. *Sloan*, 356 S.C. at 555–65, 590 S.E.2d at 351. And once again, that is all the County will do under its announced plan to change how the revenue from the 1.5 percent piece of the Hospitality Fee would be used.

Nothing about this change conflicts with State law. The General Assembly has specifically placed limitations on how funds from the Hospitality Fee may be used. *See* S.C. Code § 6-1-530. Of particular note, the General Assembly has stated that the funds can be used for "highways, roads, streets, and bridges providing access to tourist destinations," as well as for "police, fire protection, emergency medical services, and emergency-preparedness operations directly attendant to those facilities" when a county collects as much revenue as the County does. *Id.* § 6-1-530(A)(4), (B)(1).

The County has never used the funds from the Hospitality Fee for an improper purpose. Initially, the County used the funds for the roads contemplated by the RIDE Report. Most recently, the County proposed to use the funds for I-73 and approved police, fire protection, and emergency medical services. The General Assembly allows the County to use the funds from the Hospitality Fee for these purposes. *See id.*

Like the sunset provision, when the County initially adopted the Hospitality Fee, it limited its use of funds from the Hospitality Fee to the road projects contemplated by the RIDE Report. Yet this too was a self-imposed limitation by the County, not one imposed by the General Assembly. The County was free to remove this limitation it placed on itself for use of the funds, as long as it used those funds only as allowed by the General Assembly. Nothing is improper about these new uses for the revenue from the Hospitality Fee. They are exactly those uses permitted by state law for hospitality and local accommodations taxes. *See id.*; *see also id.* § 6-1-730. As long as the revenue from an accommodations fee established at the time the Hospitality Fee was adopted is used only for the purposes in those statutes, that fee remains in effect. *See id.* § 6-1-760(B).

That the County would adopt new uses makes sense. Eventually the projects in the RIDE Report were completed, but that does not mean tourism-related needs disappeared. As the County grows, new needs emerge. Those needs, however, are similar to the needs identified in the RIDE Report. For instance, just as the RIDE Report was concerned about promoting tourism in Horry County, (R. pp. 57, 80), the

current uses of the revenue are also tourism-related and involve roads, including I-73, (R. p. 205).

C. Changes to Ordinance 105-96 did not create a new Hospitality Fee.

The plain language of § 6-1-330(A) and § 6-1-760(B) controls this case. The circuit court (in a footnote, no less) tried to get around that plain language by characterizing the extension of the Hospitality Fee as the adoption of a new fee that is not subject to the "grandfathered" protections of § 6-1-330(A) and § 6-1-760(B).[8] (R. pp. 12–13). As a new fee, the circuit court reasoned that municipal consent was required.

But that conclusion is incorrect. Beyond ignoring the plain language of § 6-1-330(A) and § 6-1-760(B) and the date upon which the Hospitality Fee was adopted (which makes it subject to these grandfathered protections), the circuit court's conclusion disregards the irrefutable fact that the Hospitality Fee collected by the County has never changed. There is no new fee. The Hospitality Fee has always been the same, from adoption in 1996 until injunction in 2019. In other words, the same countywide 1.5 percent part of the Hospitality Fee that was adopted on October 15, 1996 is the same 1.5 percent part of the Hospitality Fee that the County was collecting when the circuit court entered the injunction. Changing the sunset provision did not adopt a new fee. It simply extended the time that the Hospitality

[8] Sections 6-1-330(A) and 6-1-760(B) apply if a fee were adopted prior to a cut-off date—December 31, 1996 and March 15, 1997, respectively. The Hospitality Fee was adopted before both of these dates. (*See* R. pp. 101–05).

Fee was already in place. Similarly, changing how the revenue from the Hospitality Fee is used did not create a new fee. It just changed how revenue from the fee would be used. But the fee itself has always remained the same.

Moreover, the circuit court's "new fee" conclusion ignores the statutory directive from the General Assembly regarding how long the County can continue collecting the Hospitality Fee. In § 6-1-330(A), the General Assembly expressly stated that the County's Hospitality Fee "remains in force and effect until repealed." The County has not repealed the Hospitality Fee. If the General Assembly intended for the County to lose its statutory right to collect the fee if the sunset provision were changed or the use changed, it could have said so. But it did not. The General Assembly intended for the County to collect the Hospitality Fee until repealed, and the circuit court ignored this plain statutory language when it entered the injunction.

The County's position is further bolstered by examining sunset provisions in other statutes. Take for example the Voting Rights Act of 1965, one of the most significant pieces of legislation in the past century. *See* Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437. That act had certain provisions in § 4(a) and § 5 that were that were set to expire in 1970. Congress extended those provisions before they initially expired, and it extended them again in 1975, 1982, and 2006, each time before those provisions expired. *See Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 538–39 (2013) (reviewing the history of these extensions). The Supreme Court never interpreted Congress's actions as adopting a "new" Voting Rights Act; instead, the Supreme Court viewed Congress as having merely extended the law it had originally

enacted in 1965 (with whatever substantive amendments Congress might have made).

As a second example, consider the General Assembly's decision to remove sunset provisions from certain state boards. *See* 1994-1995 Appropriations Act, Part II, § 117. Shortly after the General Assembly's decision, the attorney general, in a letter analyzing the impact of this legislation on the Boards of Dentistry and Opticianry, raised no problem with the General Assembly removing those sunset provisions. *See* Letter to Mark R. Elam, 1994 WL 378027 (S.C.A.G. June 29, 1994). No one would claim that a "new" Board of Dentistry or Board of Opticianry was created simply because the sunset provision was changed.

D. The City never actually consented to the adoption of the Hospitality Fee.

As explained in Parts I.A. and I.B., the City did not have to consent to the Hospitality Fee's adoption in 1996 or to changes to the Hospitality Fee in subsequent years because the statutes giving the County the authority to adopt the Hospitality Fee do not require municipal consent. Thus, the analysis of whether the City actually consented to the Hospitality Fee is irrelevant, as no such consent was statutorily required.

Nevertheless, the circuit court sought to answer the question of whether the City consented to the Hospitality Fee and concluded that the City consented. Although irrelevant to the legal analysis, the circuit court's conclusion was incorrect.

Ordinance 105-96 was, of course, proposed and adopted by the County alone. The City had no role in that process. The City did not propose it. The City did not

vote on it. Moreover, Ordinance 105-96 nowhere says that any municipality's consent is necessary, nor is it conditioned on any other entity approving of—or consenting to—it.

In concluding otherwise, the circuit court relied on the City's October 8, 1996 resolution supporting the Hospitality Fee and on the language of Ordinance 105-96 itself. (R. p. 11). On both fronts, the circuit court's analysis is incorrect.

1. The City did not "consent" to the Hospitality Fee in its resolution.

Contrary to the circuit court's conclusion, the resolutions passed by the City and the other municipalities do not show that they consented to the Hospitality Fee. Actually, they prove that the City's consent was not required.

Starting with the City's resolution, it was adopted on October 8, 1996 and "urge[d]" the County to adopt the Hospitality Fee. (R. pp. 107–08). The City did not "consent" to the Hospitality Fee. In the resolution, the City did not cite any provision of state law that its consent was required. In fact, the word "consent" appears nowhere in either the City's resolution or the resolutions from the other municipalities.

All the City did in its resolution was "strongly and unanimously support" the RIDE Report and "urge[]" the County to adopt the Hospitality Fee. (R. pp. 107–08). Even if the City would have consented to the Hospitality Fee if it were requested to do so (it was not), the City did not provide its consent by adopting its October 8, 1996 resolution, and its urging of the County to adopt the Hospitality Fee cannot now be transmogrified into consent. The circuit court provided no explanation for

disregarding the plain language of the City's resolution, and in doing so, the circuit court disregarded the plain-meaning rule. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

The resolutions from other municipalities are of no more help to the City. Other municipalities in the County adopted virtually identical resolutions to the City's in support of the Hospitality Fee. Like the City, these municipalities "urge[d]" the County to adopt the Hospitality Fee, without pointing to any law requiring them to consent to the Hospitality Fee and without using the word "consent." (R. pp. 111–14, 116–19).

The timing of some of these other municipal resolutions further supports the conclusion that municipal consent was not required. Atlantic Beach, Aynor, Conway, Loris, and North Myrtle Beach all passed their resolutions *after* the County adopted Ordinance 105-96 on October 15, 1996. (*See* R. pp. 111, 112–13, 114, 116–17, 118). Granted, these resolutions were passed before the Hospitality Fee's January 1, 1997 effective date, but that is irrelevant. Nothing in Ordinance 105-96 conditioned the Hospitality Fee's effectiveness on any of the municipalities consenting to the Hospitality Fee. The only condition that would terminate the Hospitality Fee early (other than a decision of County Council) was if an agreement with the State was not reached to provide additional funding for the road plan. (R. p. 104). Thus, even if none of those five municipalities passed their resolutions urging the County to adopt

the Hospitality Fee, the Hospitality Fee would still have gone into effect on January 1, 1997. That means their consent could not have been required.

Also telling are the resolutions from the Horry County Board of Education and the South Carolina Department of Transportation. These two resolutions are similar to the municipal resolutions. (*Compare* R. pp. 110, 115, *with* R. pp. 107–08, 111, 112–13, 114, 116–17, 118). Like the municipalities, the Board of Education and Department of Transportation encouraged the County to implement the RIDE Report, which meant adopting the Hospitality Fee. If the municipalities were passing those resolutions to comply with some (unstated) State law, then the Board of Education and Department of Transportation would have had no reason to adopt resolutions of their own.

What explains all of these resolutions, both from the municipalities and other entities, is the political context in which the County adopted the Hospitality Fee. Earlier in 1996, voters in Horry County rejected a local option sales tax to finance a proposed comprehensive road plan. These resolutions demonstrated broad support for the County's plan to finance a road-construction plan with the Hospitality Fee, despite the results of the referendum. In other words, the resolutions had nothing to do with any legally required consent, but instead were a show of unanimity for addressing the County's road problems.

2. The language of Ordinance 105-96 did not require the City's consent.

The circuit court also wrongly concluded that the text of Ordinance 105-96 shows that the City's consent to the Hospitality Fee was required.

Of course, the starting point for analyzing Ordinance 105-96 is the plain language of the Ordinance itself. The word "consent" appears nowhere in Ordinance 105-96. Ordinance 105-96 does not make the Hospitality Fee conditioned upon any municipal consent or approval. There is no basis to disregard the plain language of Ordinance 105-96 and insert the word "consent" when there is no indication that such forced construction is necessary. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. By inserting the word "consent" into Ordinance 105-96, the circuit court improperly disregarded the plain meaning of the Ordinance.

Rather than sticking to the plain language of the Ordinance, the circuit court focused on two provisions. *First*, the circuit court looked to § 1(G) of Ordinance 105-96 in reaching its conclusion. This section provides that the "funds derived from the one and one-half percent fee shall be deposited into 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." (R. p. 103 (emphasis added)). According to the circuit court, that the road plan had to be developed "in concert" with the municipalities meant that the municipalities' consent was required.

Not so. As a threshold matter, that is not what the Ordinance says. Section 1(G) merely contemplates that the County will work with the municipalities in implementing the road plan. Pursuant to § 1(G), the County alone still had the authority to "adopt" the road plan. The municipalities were simply to be worked with in implementing it. Section 1(G) does not give the municipalities any authority over the Hospitality Fee. Section 1(G) does not grant the municipalities any control over

whether or if the Hospitality Fee could be collected or how the revenue from the fee could be spent. Furthermore, for revenue to exist to fund the road plan, the County had to have already adopted the Hospitality Fee, which it did in § 1(A) of the Ordinance. Section 1(A) makes no mention of municipal consent or approving the fee "in concert" with the municipalities.

Second, the circuit court pointed to § 1(H)'s twenty-year sunset provision. The circuit court noted that the municipal resolutions referred to this same timeframe, so the twenty years must be the maximum amount of time the County could collect the Hospitality Fee.

Again, the circuit court was mistaken. Treating the municipalities' reference to twenty years in their resolutions as having any legal significance assumes that the municipalities had to consent to the Hospitality Fee. The references to twenty years are not actually proof that consent was required.

Interpreting this recital as consent has at least one other problem. This reference to twenty years says nothing about the City consenting to the Hospitality Fee. It refers only to the County's partnership with the State. If this were actually the City's legally required consent, then this recital would have said something about the municipality consenting for that length of time, rather than merely referring to a partnership between the County and the State.

In reality, the more plausible interpretation of the references to twenty years in the municipal resolutions is that they simply describe Ordinance 105-96, as it existed upon enactment. Those recitals outline how the road plan suggested by the

RIDE Report would relieve traffic, require funding, and involve the Hospitality Fee "for a period of up to 20 years in partnership with the State of South Carolina." (R. p. 107; *see also* R. pp. 111, 112, 114, 116, 118, 119). They never mention municipal consent, so they cannot reasonably be read to be about municipal consent.

Ultimately, nothing in Ordinance 105-96 required municipal consent. Again, the word "consent" never even appears in that document. Because it does not say anything about consent, the language of Ordinance 105-96 does not support the City's position, nor does it justify the circuit court's conclusion that the City is likely to succeed on its argument that the City's consent was required for the County to adopt the Hospitality Fee.

* * *

Simply saying the City consented in 1996 and has to consent now is insufficient. For the County to have to seek the City's consent, some constitutional or statutory provision has to require that consent. No provision does. Instead, State law gives the County the power to adopt and amend the Hospitality Fee, all without any municipal consent. The City is therefore *un*likely to succeed on the merits. Thus, the circuit court abused its discretion in granting the City's motion for an injunction.

II. The injunction upsets the *status quo ante*.

The Supreme Court has repeatedly held that a preliminary injunction may be issued "*only* if necessary to preserve the status quo ante." *Poynter Invs., Inc.*, 387 S.C. at 586, 694 S.E.2d at 17 (emphasis added); *see also, e.g.*, *Richland Cty.*, 422 S.C. at 310, 811 S.E.2d at 768; *Hook Point, LLC v. Branch Banking & Tr. Co.*, 397 S.C. 507,

511, 725 S.E.2d 681, 683 (2012); *Compton*, 392 S.C. at 366, 709 S.E.2d at 642; *Cty. Council of Charleston v. Felkel*, 244 S.C. 480, 483–84, 137 S.E.2d 577, 578 (1964).

The reason for this rule is obvious: "a temporary injunction is [used] to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation." *Cty. Council of Charleston*, 244 S.C. at 483–84, 137 S.E.2d at 578.

The injunction in this case does not preserve the *status quo ante*; it destroys it.

A. The circuit court ignored this law.

The circuit court flouted this instruction in granting the injunction. Without citing, much less analyzing, the Supreme Court's holdings in cases like *Poynter Investments*, the circuit court simply said that it "believe[d]" that "if preliminary injunctions were issued only to preserve the status quo, then a preliminary injunction should never be issued." (R. p. 20).

With all due respect to the circuit court, what it "believes" does not matter. What matters is what the law is. The Supreme Court is the head of the State's unified judicial system, *see* S.C. Const. art. V, §§ 1, 5, and the Supreme Court has made clear that an injunction may be issued "only" if necessary to preserve the *status quo ante*. Thus, in deciding whether to impose an injunction, a circuit court cannot ignore the *status quo ante*.

Additionally, the circuit court's conclusion that no injunction could ever be issued under this rule is incorrect. That much is obvious from the case law. *See, e.g.*,

Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 457, 626 S.E.2d 34, 38 (Ct. App. 2005).

By ignoring the *status quo ante*, the circuit court entered an injunction stopping the County from collecting a fee that it has been collecting for more than twenty-two consecutive years. The County started collecting the Hospitality Fee on January 1, 1997 and continued collecting it until enjoined from doing so on June 21, 2019 in the City and on August 10, 2019 in the other municipalities. The circuit court erred in ignoring the *status quo ante*, and for this reason, the injunction should be reversed.

B. The City's attempts to avoid this law are unpersuasive.

Just as the circuit court's effort to address the Supreme Court's instruction about the only reason to issue a preliminary injunction comes up short, the City's attempts to avoid that holding are equally lacking. *First*, the City has tried to shorten the timeframe involved to make the change to the *status quo ante* appear less drastic. The City agrees the County could collect the Hospitality Fee until January 1, 2017 (the original sunset date). The City contends the *status quo ante* that is being upset by the injunction is the *status quo ante* in effect since January 1, 2017. Thus, the City contends the County was illegally collecting the Hospitality Fee for two and one-half years when the injunction was issued.

This attempt at a distinction does not matter. The injunction changes the *status quo ante*, whether that is viewed as one that had existed for more than twenty-two years (from when the Hospitality Fee initially took effect) or two-and-a-half years (from

after the original sunset date passed). Either way, the *status quo ante* changed: The County was able to collect the Hospitality Fee, but now it is not. And that violates clear Supreme Court precedent.

On a related note, even if the timeframe is two-and-a-half years instead of over two decades, the County still waited two years and almost three months to bring this lawsuit. This delay indicates that the City could not have been suffering an irreparable harm from the Hospitality Fee being collected after January 1, 2017 (as it must have been to obtain a preliminary injunction), which means that the circuit court should not have entered the injunction.

Second, the City has tried to reframe the *status quo ante* analysis by casting it as requiring a court to enforce the "last uncontested status" between the parties, which the City insists was January 1, 2017, the day the Hospitality Fee was originally set to expire. (R. pp. 1231–32, 1458–59). As a threshold problem with this argument, that is not the law in this State. *See Cty. Council of Charleston*, 244 S.C. at 483–84, 137 S.E.2d at 578 (explaining that the "sole object of a temporary injunction is to preserve the subject of controversy in the condition which it is *at the time of the Order*" (emphasis added)).

And in any event, the City is wrong that January 1, 2017 was the "last uncontested status" between the parties. The "last uncontested status" was, in reality, December 31, 2016. On the last day of 2016, both the City and the County agreed that the County could still collect the Hospitality Fee within the City. Their disagreement came the next day, on January 1, 2017, when the County maintained

that it could continue collecting the Hospitality Fee but the City objected. (At least, theoretically, the City objected on January 1, 2017, even though the City did not say so on that date and waited over two years to bring this lawsuit.)

Third, the City has pointed back to old cases about municipal officials wrongly diverting public funds as justification for the injunction in this case. (*See* R. pp. 1457–58 (citing *Shillito v.. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939))). Those decisions are much narrower than the City needs them to be to prevail here. They are about the "diversion of public funds," not about the imposition of a fee itself. *E.g.*, *Shillito*, 214 S.C. at 22, 51 S.E.2d at 99. Moreover, given the Supreme Court's recent jurisprudence on taxpayer standing, it is not clear that the cases on which the City relies are even still good law. *See Bodman v. State*, 403 S.C. 60, 742 S.E.2d 366 (2013); *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012); *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 669 S.E.2d 337 (2008). The City's reliance on cases like *Shillito* and *Kirk* therefore do not help it avoid the Supreme Court's holding that a preliminary injunction may be issued "only" to preserve the *status quo ante*.

III. The injunction violates Rule 65(c) because insufficient security was required from the City.

Rule 65(c) requires a party to provide security to obtain a preliminary injunction, so that if the injunction was wrongly entered, the enjoined party may be made whole. That rule provides:

> no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sums as the court deems proper, for the payment of such

> costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Rule 65(c), SCRCP.

The circuit court cast aside the plain language of this rule, stating that it instead "believe[d] that a bond as required by Rule 65 is not necessary and/or required for these parties." (R. p. 24; *see also* R. p. 26). Although the circuit court eventually required some security from the City and the City has proactively tried to add more security, the security is inadequate, so the injunction still violates Rule 65(c).

A. The plain language of Rule 65(c) requires the City to give security for the injunction.

Without any analysis, the County cannot be sure why the circuit court believed no bond was required, but presumably the circuit court agreed with the City that, as a political subdivision of the State, no security was required. (*See* R. pp. 1230, 1450–52, 1504). This position is incorrect.

Rule 65 exempts only "the State or an officer or agency thereof" from the security requirement. Rule 65(c), SCRCP. No one else. To be exempt, therefore, the City must qualify as one of those three.

Working in reverse order, the City is not a State agency. These agencies are the "executive or regulatory bod[ies]" of the State. *S.C. Pub. Interest Found. v. Courson*, 420 S.C. 120, 124, 801 S.E.2d 185, 187 (Ct. App. 2017) (quoting *State Agency*, Black's Law Dictionary (10th ed. 2014)). They include entities like the Department of Transportation, the Department of Archives and History, and the Department of Natural Resources. When the State lists of all of its departments,

agencies, and boards, it tellingly does not include any municipalities on that list. *See SC State Government – Departments, Agencies, Boards*, SCIWAY, https://www.sciway.net/gov/state_agn.html (last visited Aug. 7, 2019).

Nor is the City an officer. A State officer is a natural person. *Cf.* S.C. Const. art. VI (providing requirements for "officers" that apply to natural persons).

That leaves the City having to be "the State" to be exempt from the security requirement. And this is the phrase on which the City has hung its proverbial hat. The City says that the State is exempt because it can "raise revenue through taxation" to pay any damages, which the City can do too as a political subdivision. (*See* R. pp. 1450–52).

This argument has two problems. *First*, it wrongly treats a political subdivision as the same thing as the State. Being dependent on the State for its existence does not mean that the City *is* the State. Nor does it mean that the City, as political subdivision, is entitled to the same legal protections as the State. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977) (explaining that cities cannot claim a state's sovereign immunity under the Eleventh Amendment).

Second, it ignores the plain language of Rule 65(c). What the City is asking the Court to do is reject the plain language of that rule and instead find some underlying purpose that would implicitly exempt the City through a novel interpretation of the Rule. Of course, the Court cannot do that. Courts must follow the plain language of a rule. *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581; *see also Ex parte Wilson*, 367 S.C. 7,

15, 625 S.E.2d 205, 209 (2005) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."). "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003).

That is the case here. The plain language of Rule 65(c) is unambiguous: Only the State, its agencies, and its officers are exempt from the security requirement. The language plainly does not exempt political subdivisions from the security requirements of Rule 65(c), and the Court should not and cannot ignore this plain language.

Had the drafters of Rule 65(c) wanted to exclude political subdivisions from the security requirement, they could have easily done so. In fact, that is exactly what some other states have done, specifically exempting political subdivisions from the security requirement by rule. *See, e.g.*, Fla. R. Civ. P. 1.610(b); La. Stat. Ann. § 13:4581; Mass. R. Civ. P. 65(c); Pa.R.C.P. No. 1531(b). But South Carolina's rule does not do that. And therefore the City is required to give security to obtain the injunction.

B. The security required by the circuit court is inadequate.

The City must provide sufficient security for "the payment of such costs and damages as may be incurred or suffered by" the County if the injunction "is found to have been wrongfully enjoined or restrained." Rule 65(c), SCRCP. Rule 65(c) requires that the security be sufficient to compensate the County for the damages sustained while the injunction is in place. Here, the circuit court originally required no security

for the injunction, but later, the circuit court did require some security, when it ordered the City to escrow "the new tax revenues collected" pursuant to the City's new local accommodations and hospitality taxes. (R. p. 26). In doing so, the circuit court maintained that no security was required from the City, but the circuit court never explained this seeming contradiction of requiring a security if, in its view, Rule 65(c) did not require it. (*See* R. pp. 26–27). Whatever the circuit court's thinking, the security it required is still insufficient.

The County's Hospitality Fee included a 1.5 percent fee on accommodations, prepared food and beverage, and admissions and a 2.5 percent fee on rental cars. The City's new taxes do not increase its existing fees[9] up to the level of the County's Hospitality Fee for anything except accommodations. Put differently, a person in Myrtle Beach is now collectively charged .5 percent less on prepared food and beverage, 1.5 percent less on admissions, and 2.5 percent less on rental cars. All told, the City will collect more than $5 million less under its new taxes than the County collected as part of the Hospitality Fee. (R. p. 1363). Therefore, simply escrowing the new revenue is not sufficient to make the County whole, if the injunction is reversed.

Moreover, this escrow requirement does nothing to provide any security for the injunction as it applies in the other municipalities in the County. This part of the injunction (which takes effect August 10 (R. pp. 23–24)) will prevent the County from collecting over $10 million in annual revenue. (R. p. 1363). If the appellate court

[9] The City is still collecting the hospitality fee it adopted in 1996. (*See* R. pp. 512–15).

reverses the injunction, the County will be entitled to recover the revenue that it was prohibited from collecting while the injunction was in place. No one knows for sure what North Myrtle Beach, Conway, and Surfside Beach (the only other municipalities that have adopted local accommodations and hospitality taxes like the City has (R. pp. 517–20, 522–25, 1509–17)) may have done with the revenue they had collected by that time. And no one will have collected any of the Hospitality Fee revenue within Atlantic Beach, Aynor, or Loris (which have not adopted and thus will not be collecting new taxes) while the injunction was in place.

As a brief aside, it is unclear why the circuit court held that the countywide injunction would not take effect for a month after its July 10 order. (*See* R. pp. 23–24). If in fact these other municipalities have been suffering some irreparable harm from the County's collection of the Hospitality Fee (as the circuit court must have thought to have entered the injunction in the first place), then having the injunction not take effect until August 10 is inexplicable.

But back to the security issue. Rather than requiring a bond from the City when the injunction was entered or requiring more money to be escrowed, the circuit court thought escrowing only the new revenue was sufficient because the City has other ways to "raise revenue": establishing new taxes, raising millage rates, or issuing bonds. (R. p. 26). The circuit court cites no proposition of law, either in the text of Rule 65(c) itself or opinions from our appellate courts, recognizing the potential prospective ability of a political subdivision to raise revenue through taxes as an exemption to the security requirements of Rule 65(c). The circuit court's creation of

this exemption is novel, and it radically departs from the plain language of Rule 65(c) and the case law on that rule. This departure is tantamount to a judicially imposed tax on the City's residents if the injunction is reversed, which violates Article X, § 6 of the South Carolina Constitution.

C. The City's belated attempts to add more security are likewise inadequate.

After the County appealed the injunction, the City has twice sought to add to the security that the circuit court required.

First, the City claims that more security is now in place than required by the circuit court's July 17 order, (*see* R. p. 26), because North Myrtle Beach, Conway, and Surfside Beach have adopted (or, the City says, intend to adopt) resolutions escrowing revenue from their new local accommodations and hospitality taxes, (*see* R. pp. 1454–55). This argument, however, has multiple shortcomings. For one, neither North Myrtle Beach, Conway, nor Surfside Beach are required to escrow this money by court order, so nothing is stopping them from repealing those ordinances at any point (or simply not adopting them at all). For another, even the City acknowledges that this new security still leaves the injunction unsecured in the amount of approximately $8 million annually. While $8 million is less than $15 million, it still is an unacceptably (and unnecessarily) large amount for which no security exists on an annual basis.

On a more fundamental level, this argument about new security raises the question of why North Myrtle Beach, Conway, and Surfside Beach are escrowing this revenue at all. They are not parties to this litigation, so they are not subject to the jurisdiction of this Court or to the jurisdiction of the circuit court on remand. North

Myrtle Beach, Conway, and Surfside Beach cannot be required to pay any damages stemming from the injunction, if it is determined to be wrongly entered. That burden is squarely and solely on Myrtle Beach. Thus, these three municipalities' attempts to escrow revenue appear to be a litigation tactic designed to avoid having the injunction reversed for failing to comply with Rule 65(c).

Second, the City has obtained an $8.8 million bond, which it claims makes the security issue moot.[10] (*See* R. p. 1562). It does not.

The City's use of $8.8 million erroneously counts the funds escrowed by nonparties, North Myrtle Beach, Conway, and Surfside Beach (assuming Conway follows through with escrowing that revenue (*see* R. pp. 1513–17)), in its calculations of how much is already secured.

In determining whether the security is adequate, this Court cannot take into account any actions by nonparties in escrowing funds. The nonparties, again, are not within the jurisdiction of the Court. They are not required to escrow any funds by court order, and they could, at any time, choose to stop doing so. Furthermore, the nonparties cannot be ordered to use any escrowed funds to pay damages to the County if the injunction is reversed. The whole point of the security requirement of Rule 65(c) is to pay damages to the County if the injunction is reversed on appeal. *See Atwood Agency*, 374 S.C. at 73, 646 S.E.2d at 884. Therefore, the analysis of whether

[10] As of the date of this Initial Brief, the circuit court has not ordered the City to obtain this $8.8 million bond. Because this is not required by court order, it should not be considered in determining whether the security is adequate.

the security is adequate can only be conducted by examining those funds under court order and those parties who are within the jurisdiction of the Court. Thus, even with all of the actions the City has taken, the security in place remains inadequate, as the injunction is still unsecured in the amount of approximately $7.5 million annually. (*See* R. p. 1455 (discussing the estimated amounts to be escrowed by the nonparties)).

Ultimately, despite the City's protestations, the only plausible interpretation of these late attempts to add more security is that the City recognizes that it is, in fact, required to provide security under Rule 65(c) and that the security the circuit court required is inadequate. Nevertheless, the City's attempts to correct those problems fall short, and the injunction should be reversed.

D. The City cannot rely on its putative class allegations as a basis for injunctive relief.

At various times in this litigation, the City has insisted that the County does not understand the nature of its putative class claim. (*See* R. pp. 1429, 1450, 1459–60). The County does in fact grasp the nature in which this case has been styled.[11] But there is, of course, a big difference between a litigant asserting class claims and a court certifying a class. Although the class allegations appear to have no bearing

[11] One open question is whether the City and the other municipalities would collect their new local accommodations and hospitality taxes if the County could continue collecting the Hospitality Fee while this litigation was pending. That no municipality imposed such taxes until this lawsuit was filed strongly suggests that the municipalities have no appetite to impose these taxes if the Hospitality Fee is in place. Thus, if they stop collecting those taxes while the County collects the Hospitality Fee, segregating the Hospitality Fee collected in the municipalities would ensure the municipalities could be made whole if the City did prevail in this litigation.

on the whether the injunction should stand, the Court, to the extent it matters at this stage, should realize that the City's putative class cannot possibly be certified.

The City's proposed class includes "[a]ll individuals, corporations, companies, associations, firms, partnerships, joint stock companies, political subdivisions, counties, municipalities, state agencies, and instrumentalities of the State" who have paid the 1.5 percent piece of the Hospitality Fee within a municipality in the County since January 1, 2017. (R. p. 38). As part of the relief sought, the City demanded a constructive trust be imposed on all of this revenue collected within the municipalities since January 1, 2017 and that all class members be refunded what they have paid. (R. p. 54).

Almost immediately apparent from the proposed class and the relief sought is that no court will ever be able to identify the vast majority of people in the class. People from around the country come to the Grand Strand for vacation every year. Neither the City nor the County has a way to identify every person (or even a substantial percentage of people) who stayed in a hotel, ate in a restaurant, or visited an amusement park during their vacation. Without a way to identify the members of the class, the class cannot be certified. *See, e.g.*, *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) ("The plaintiffs need not be able to identify every class member at the time of certification. But if class members are impossible to identify without extensive and individualized fact-finding or mini-trials, then a class action is inappropriate." (internal quotation marks and alteration omitted)).

A second problem with the proposed class is that the City is not an adequate class representative. *See* Rule 23(a)(4), SCRCP (requiring that "the representative parties will fairly and adequately protect the interest of the class"). When interests between the representatives and absent class members conflict, the representative is not adequate. *See Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990).

That is the case here. Even through the early stages of this litigation, the City's focus on its status as another political subdivision of the State and its own new local accommodations and hospitality taxes demonstrates that the City is unlike the average class member, who would have simply lived in or visited Horry County during the past few years. Really, the City should be looking to be a representative for a class limited to only the other municipalities in the County (although that number is so small that a class is not actually needed).

In light of these insurmountable hurdles with class certification (there are others too, including but not limited to (1) the minimal amount of any damages suffered by the class members, *see* Rule 23(a)(5), SCRCP (requiring the amount in controversy for each class member to exceed one hundred dollars), and (2) the fact that the class members are not entitled to a refund for paying a fee that is later declared illegal, *see* Letter to Edwin C. Haskell, III, 2001 WL 790268, at *2 (S.C.A.G. June 22, 2001) ("the voluntary payment of a tax or fee made pursuant to an assessment later declared illegal may not be recovered")), the City cannot invoke its

putative class as a basis for stopping the County from collecting the Hospitality Fee while the litigation is pending.

IV. The City will not suffer an irreparable harm without the injunction.

Every injunction requires a party to show that it would suffer an irreparable harm without the injunction. *See Scratch Golf Co.*, 361 S.C. at 121, 603 S.E.2d at 908. As one circuit court in this State aptly put it, this typically involves "urgent situations where irreversible damage will result unless the challenged action is immediately halted." *Nichol v DePuy Spine, Inc.*, No. 2014-CP-23-4895, 2013 WL 10573017, at *2 (S.C. Com. Pl. Feb. 13, 2013) (Hill, J.).

That is far from the case here, for two separate reasons. *First*, the timeline belies the claim that any irreversible damage will occur without an injunction. According to the City, since January 1, 2017, the County has been wrongly collecting the Hospitality Fee. But the County had made its intentions to continue collecting the Hospitality Fee after this date clear as far back as 2004. The City never raised any objection to the County doing so, even informally.

Plus, January 1, 2017 was more than two years before the City filed this lawsuit. Were the City actually suffering some irreparable harm as of that date, it would not have sat idly for so long.

Moreover, even the events that transpired in the weeks before the lawsuit was filed suggest no harm is irreparable. The City's plot to bring this lawsuit appears to have involved waiting until the County paid back the State Infrastructure Bank loans in early 2019 and until the City had adopted its new local accommodations and

hospitality taxes. Then, and only then, did the City file this lawsuit. If the City were suffering some irreparable harm, it would not have let these machinations come together before filing the complaint. Instead, it would have urgently sought injunctive relief.

One final timing issue undercuts the circuit court's conclusion that the City (or anyone else) would suffer irreparable harm without the injunction: the July 10 order. In that order, the circuit court clarified that the injunction applied to all of the municipalities in the County, but the circuit court held that the injunction would not take effect countywide until August 10—far from "immediately halting" the County from collecting the Hospitality Fee. (R. pp. 23–24). Were a harm to the other municipalities one that was truly not capable of being remedied, then the circuit court never would have allowed a month to pass before the injunction would take effect. That the circuit court was willing to do so reveals that any harm here could be cured.

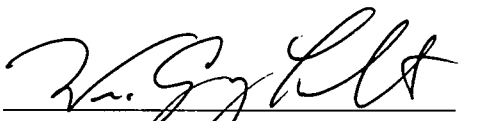
Second, the circuit court's conclusion that the City would suffer irreparable harm without the injunction because the City had no way to challenge the Hospitality Fee it paid is incorrect. Even accepting the circuit court's conclusion that the County's Board of Fee Appeals is inadequate, the circuit court had a far less drastic option for protecting the City: The County could have been instructed to escrow the 1.5 percent of the Hospitality Fee it collects during the litigation within the City (or even within all of the municipalities, if such a scope is appropriate). Such a resolution avoids upsetting the *status quo ante* and proves that the City will not suffer an

irreparable harm if the County keeps collecting the Hospitality Fee while the litigation is pending.

CONCLUSION

The circuit court's orders should be reversed and the County should be awarded damages (with interest) for the time in which it has been unable to collect the Hospitality Fee while the injunction has been in place.

Respectfully submitted:



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

Case No. 2019-CP-26-01732

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v.

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CERTIFICATE OF COUNSEL

I certify that this FINAL BRIEF OF APPELLANT complies with Rule 211(b), SCACR.

Wm. Grayson Lambert

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CERTIFICATE OF SERVICE

I certify that this FINAL BRIEF OF APPELLANT was served on counsel for the Respondent via hand delivery on November 19, 2019:

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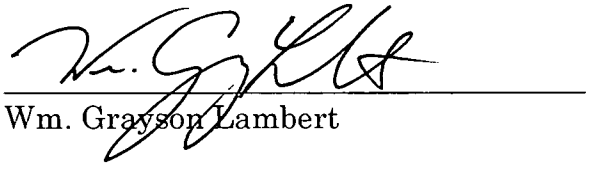

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