

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

NOV 19 2019

S.C. SUPREME COURT

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

Appellate Case No. 2019-001134

Case No. 2019-CP-26-01732

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

v.

Horry County, ..... Appellant.

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FINAL REPLY BRIEF OF APPELLANT

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Wm. Grayson Lambert  
BURR & FORMAN LLP  
Post Office Box 11390  
Columbia, S.C. 29211

James K. Gilliam  
Adam R. Artigliere  
BURR & FORMAN LLP  
Poinsett Plaza  
104 South Main Street  
Suite 700  
Greenville, SC 29601

Henrietta U. Golding  
BURR & FORMAN LLP  
2411 Oak Street, Suite 206  
Myrtle Beach, SC 29577

*Counsel for Appellant*

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## INTRODUCTION

Reaching the correct answer requires asking the correct question. In this case, the question is whether State law allows the County to adopt the Hospitality Fee and direct how that revenue will be used without the City's consent. It is not, as the City puts it, whether the County can provide a service within the City without the City's consent. That is because the services being provided with the revenue from the Hospitality Fee (which are those services authorized by S.C. Code § 6-1-530) are not being provided within the City.

To go about answering the right question, this Court must look to specific statutes over general ones. *E.g.*, *Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468–69 (2010). The specific statutes here are S.C. Code § 6-1-330(A) and S.C. Code § 6-1-760(B), on which the County has relied. Under those statutes, the Hospitality Fee remains in effect (as long as certain requirements are met) until the County repeals it.

The City tries to brush these specific statutes aside and focus on general statutes in arguing that the County is infringing upon its dignity by collecting the Hospitality Fee without its consent. This argument falls flat because the General Assembly defines the powers of counties and municipalities. In this instance, the General Assembly has spoken clearly and authorized the County to collect the Hospitality Fee without municipal consent. *See* S.C. Code §§ 6-1-330(A); 6-1-760(B). Moreover, other statutes and decisions from this Court make clear that the City's dignity as a political subdivision is not impaired by the Hospitality Fee.

Beyond the merits, the injunction that the circuit court issued has other flaws as well. The injunction changed the *status quo ante*, even if that term means (as the City insists) the last uncontested status between the parties. The injunction lacks sufficient security, despite the City's belated attempts to fix the problem. And the injunction is unnecessary to protect the City from any irreparable harm, as the City's delay in bringing this lawsuit proves.

## ARGUMENT

### **I. The County did not need the City's consent to adopt or extend the Hospitality Fee.**

#### **A. This argument is preserved.**

Beginning a flawed theme that runs throughout its brief, the City claims the County has not preserved its argument about power. The County has done so, as this was the central issue below.

Error-preservation rules do not require a party to use the exact name of a legal doctrine to preserve an issue for appellate review. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). A litigant is required only to raise the issue fairly to the trial court, thereby giving the trial court an opportunity to rule on the issue. *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595–96 (2010).

The issues of whether the County possessed the power to collect the Hospitality Fee without municipal consent and use the funds as it sought to do in its amendments to Ordinance 105-96 were the issues squarely facing the circuit court. On appeal, the issue squarely facing this Court is whether the circuit court erred in answering these questions. *See State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (“[T]he

ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court.”).

The County argued in the circuit court that it had the power to enact the Hospitality Fee. (R. p. 552). It also cited S.C. Code § 6-1-330(A) multiple times. (R. pp. 550–51; *see also* R. p. 295, lines 10–16). Indeed, it argued at length that the City’s consent was never required for the County to collect the Hospitality Fee. (*E.g.*, R. pp. 547–55). The circuit court ruled on this issue. (R. pp. 10–15).

The City’s preservation argument seems to suggest that the County is confined to copying and pasting the exact words that it used in the circuit court. That is not what error-preservation rules require. All error-preservation rules seek to do is ensure that the issues that are raised on appeal were raised to and ruled upon by the circuit court below. *Neuman*, 384 S.C. at 402, 683 S.E.2d at 271. Because the issues here were, they are preserved.

**B. The City’s analysis on consent is wrong because its framing of the issues is wrong.**

Immediately apparent from the City’s brief is that its approach to answering whether consent was required is much different from the County’s. The City’s approach emphasizes the supposed dignity of municipalities and limits on a county providing services within those municipalities. *See* City’s Br. 15. This approach, however, asks the wrong questions. The right questions are more concrete: (1) whether the County may impose the Hospitality Fee under State law without municipal consent, and (2) whether the County may use the revenue from the Hospitality Fee as it has sought to do in its amendments to Ordinance 105-96.

Despite its misguided framework, the City does correctly note that a county's exercise of power is subject to "the Constitution and general law of this State." City's Br. 21 (citing S.C. Code § 4-9-25). Where the City goes off-track is the statutes to which it turns to say what the general law of the State is. When interpreting statutes, specific statutes control over general ones. *Denman*, 387 S.C. at 138, 691 S.E.2d at 468–69. But instead of looking at statutes like § 6-1-330 and § 6-1-760 that discuss fees imposed by local governments before 1997 (as the Hospitality Fee was), the City focuses on statutes that do not specifically address any requirements of municipal consent to the Hospitality Fee. Indeed, the City admits as much. *See* City's Br. 25.

1. **No provision in State law requires the City's consent to the Hospitality Fee.**
  - i. **No specific statute relating to the Hospitality Fee mandates municipal consent.**

Rather than dive straight into the more general statutes on which the City relies, the specific statutes provide a better starting point for determining what "the general law of this State" is when it comes to the County's power to adopt the Hospitality Fee without municipal consent. The City offers a response only on § 6-1-330(A), without ever bothering to engage with § 6-1-760(B). *See* City's Br. 34. The County has demonstrated how the Hospitality Fee meets all of the requirements of § 6-1-760(B). *See* County's Br. 13. That means the Hospitality Fee "remains authorized and effective after the date" that section took effect. S.C. Code § 6-1-760(B).

Although the City at least responded to the County's argument on § 6-1-330(A), its response is unpersuasive. The City first tries to separate the first three sentences

of that subsection from the last sentence. But this violates the rule that “identical words and phrases within the same statute should normally be given the same meaning.” *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 100, 705 S.E.2d 28, 34 (2011). The word “fee” appears five times in the first three sentences, and then once in the final sentence. Under the rules of statutory construction, this word refers to the same type of fee throughout the statute. The last sentence simply makes clear that a fee adopted before December 31, 1996 remains valid even if it did not go through the process outlined in that section.

As for what fee remains valid, the last sentence of § 6-1-330(A) sets forth the criteria that must be met: “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.” S.C. Code § 6-1-330(A). The Hospitality Fee meets all of these criteria:

- It is a fee. (R. p. 101).
- It was imposed by County Council, the local governing body. (R. p. 101).
- It has not been repealed by County Council. (R. pp. 184, 193).

Therefore, the Hospitality Fee “remains in force and effect.” S.C. Code § 6-1-330(A).

The City seeks to avoid this construction by arguing that the Hospitality Fee was not just the 1.5 percent fee but rather includes the specific road plan and original sunset date. *See* City’s Br. 34. Mashing all of the provisions in Ordinance 105-96 together, however, improperly conflates the fee itself with other provisions in the ordinance. The fee is simply the 1.5 percent charge—that is it. The other provisions

deal with how the revenue from that fee will be used (§ 1(G)) and how long the fee will be in place (§ 1(H)). (*Compare* R. pp. 101–02, *with* R. pp. 103–04). The County is free to amend these other provisions without repealing the Hospitality Fee itself, so the fee remains effective under § 6-1-330(A). *See Sloan v. Greenville Cty.*, 356 S.C. 531, 555–65, 590 S.E.2d 338, 351 (Ct. App. 2003); *cf.* Letter to Daniel S. McQueeney, Jr., at 3 (S.C.A.G. Oct. 8, 2019), <http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2019/10/McQueeneyD-OS-10400-FINAL-Opinion-10-8-2019-02112364xD2C78-02114916xD2C78.pdf> (“[U]nless the Legislature provided otherwise, municipal councils are free to conduct municipal business how they see fit.”).

Moreover, assuming that the City were correct that these other provisions are actually part of the Hospitality Fee, the County still has the power to amend those provisions. Under § 6-1-330(A), the Hospitality Fee remains in place “until repealed” by the County. That statute does not take away the County’s broad authority to amend its own ordinances. *See Sloan*, 356 S.C. at 555–65, 590 S.E.2d at 351 (Ct. App. 2003); *see also* County’s Br. 18–23. Amending the Hospitality Fee is all the County has done. (*See* R. pp. 184–85, 193, 733).

The City’s only response to the County’s power to amend its ordinances is that the City had to consent to any change in the Hospitality Fee. That, however, assumes that the City is right on the central issue in this case. It does not actually answer the question of whether § 6-1-330(A) requires municipal consent (which that statute says nothing about).

Just as the City never offered any response to § 6-1-760(B) on the continuing effect of the Hospitality Fee, the City also never responded to the County's explanation of how § 6-1-530 controls how revenue from the Hospitality Fee may be used. The County has always used the Hospitality Fee revenue as that statute permits. All its recent change has done is allow the County to employ that revenue for the full range of permissible uses, rather than be limited only to roads. (R. pp. 184–85, 205); *see also* S.C. Code § 6-1-530 (listing permissive uses for the revenue from the Hospitality Fee).

Under these statutes, the County has the power to adopt the Hospitality Fee and to direct how the revenue is used, without any requirement of municipal consent. In light of these statutes, the Hospitality Fee does not conflict with any State law, so it is valid. *See S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006) (explaining an ordinance is valid if it does not conflict with “the Constitution or general law of this state”).

**ii. The City's reliance on more general statutes is misplaced.**

The thrust of the City's consent argument ignores the statutes that speak directly to the Hospitality Fee and focuses instead on more general provisions about the powers of counties and municipalities. In addition to focusing on the wrong statutes, the City also asks the wrong question about the County's ability to provide services within the City. *See* Br. 15. Not surprisingly, with the wrong focus, the City reaches the wrong answer.

Starting with the wrong inquiry, the City insists that the County misapprehends that a service fee like the Hospitality Fee requires a service for which the fee is imposed. *See* City's Br. 23 (citing *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992)). The County does understand this point. And the Hospitality Fee has always been connected to a service. First, it was the projects outlined in the RIDE Report. (R. p. 103). Now, it is broader range of statutorily approved services under § 6-1-530. (R. pp. 184–85). But in both instances, the Hospitality Fee is being used for certain, specified services, as *Brown* requires and as contemplated by § 6-1-530.

What the City never does (as the circuit court never did) was point to a particular service *within the City* that the County is supposedly providing right now without the City's consent. If roads were previously built within the City with its consent, then those services could not have been improper. But where the City falls short is showing how the County is currently providing any services that would require the City's consent.

Were the County currently using the Hospitality Fee revenue to build roads in the City or provide police services in the City, then the City's consent would be necessary. *See* S.C. Code §§ 4-9-40; 4-9-41; 5-7-30. But that is not what is happening with the revenue. The revenue is being used exactly how State law allows under § 6-1-530 and not in any way that would require the City's consent.

Additionally, the City repeatedly insists that the "services" that were provided with the Hospitality Fee revenue were joint ones to which the City agreed. *See, e.g.*, City's Br. 22. This is wrong in multiple ways. For one, it treats Ordinance 105-96 and

the City's 1996 resolution as requiring and giving the City's consent, but those documents do neither. *See infra* Part I.C. For another, the record contains no evidence of how the City worked with the County to provide any service. And for a third, if the Hospitality Fee were an intergovernmental agreement pursuant to § 4-9-41, some written documentation of that agreement and a division of responsibilities would presumably exist. None does.

With the City's misunderstanding of the "service" involved here clarified, it becomes clear that the various statutes the City cites do not require consent to the Hospitality Fee. For example, there is no joint administration of any services that would implicate Article VIII, § 13(A), § 4-9-40, or § 4-9-41. There is no service the County is providing within the City that infringes on the City's authority under § 5-7-30. And § 4-9-25 and § 4-9-30(5) simply require the County to follow the law.

The one provision the City cites that actually has some bearing on the analysis here is Article VIII, § 7, which allows the General Assembly to "provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties." S.C. Const. art. VIII, § 7; *see also id.* art. VIII, § 9 (providing that these same things for municipalities "shall be established by general law"). This Court has held that these constitutional provisions mean that "the General Assembly is constitutionally empowered to determine the parameters of local government authority." *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 484 S.E.2d 104, 107 (1997). The General Assembly did that in § 6-1-330(A) and § 6-1-760(B), when it said that the Hospitality Fee the County adopted remained in force and effect as long as

it continues to meet certain statutory criteria (which it does) and has not been repealed (which it has not been), without any reference to needing municipal consent.

The City's reliance on this Court's recent decision in *Commissioners of Public Works of City of Laurens v. City of Fountain Inn* ("*City of Laurens*"), Opinion No. 27917 (S.C. Sup. Ct. Sept. 18, 2019) (Shearouse Advance Sheet No. 37), is of no more help than the statutes the City cited. For one thing, that case involved an attempt to go outside of a municipality's borders. *Id.* at 12. Here, the Hospitality Fee applies only within the County, so there is no power grab outside of its boundaries.<sup>1</sup>

For another, the Court's concern in *City of Laurens* was the antidemocratic nature of what the municipality and commission were doing. *Id.* at 13. When a political subdivision operates within its own area, "there are inherent safeguards—through the electoral process and otherwise—that ensure accountability." *Id.* With the Hospitality Fee, these safeguards are in place. County voters (who include people who live in the City) may elect members of County Council who support the Hospitality Fee, or they may elect members who do not. Either way, the choice of whether the Hospitality Fee remains in place is driven by the voters themselves.

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<sup>1</sup> The City may be a separate political subdivision, but it is still within the County. Cities and counties cannot be entirely separate, as the City seems to want them to be. People who live in municipalities also live in counties. They pay taxes to cities and counties. They vote for leaders of cities and counties. Thus, although every person in this State may not belong to a municipality, "the county unit is an essential part of every South Carolinian's existence." *Burriss v. Anderson Cty. Bd. of Educ.*, 369 S.C. 443, 457, 633 S.E.2d 482, 489 (2006).

## 2. The Hospitality Fee does not hurt the City's "dignity."

The City harps on the County's supposed abuse of power and how that abuse harms the City's dignity as a separate political subdivision. This argument, however, suffers from multiple flaws.

*First*, it flows from the City's misframing of the issues. As explained already, the County is not providing any services *within the City* that the City is authorized to provide and that would require some contract between the City and the County for the County to provide. *See* S.C. Code §§ 4-9-40; 4-9-41; 5-7-30. Rather, the County has adopted a countywide fee to provide services that § 6-1-530 authorizes the County to provide.

*Second*, this argument puts more weight on Home Rule than the concept can bear. As this Court has repeatedly observed, this doctrine is fundamentally about "how power is allocated between the General Assembly and local governments." *Cty. of Florence v. W. Florence Fire Dist.*, 422 S.C. 316, 321, 811 S.E.2d 770, 773 (2018); *see also Williams v. Town of Hilton Head Island*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) (explaining that the Home Rule Act and related constitutional amendments abolished Dillon's Rule and "restore[d] autonomy to local governments" after taking power away from state government); *Duncan v. York Cty.*, 267 S.C. 327, 335, 228 S.E.2d 92, 95 (1976) ("The demise of the delegation as it formerly existed, and the inconvenience of persons having to go to the State House and to the State Legislature in Columbia to seek laws of purely local nature, brought about a clamor for what is commonly referred to as 'home rule.'"). The powers given to counties and municipalities

may be interconnected because the State has to draw lines of who can do what, but at its core, Home Rule is about how these local governments relate to the State and the General Assembly not being allowed to pass legislation concerning a specific county, not about how local governments relate to each other. Even under Home Rule, the General Assembly still “determine[s] the parameters of local government authority.” *Morris*, 324 S.C. 30, 484 S.E.2d at 107.

*Third*, in determining those parameters, the General Assembly has allowed counties to collect local accommodations and hospitality taxes within municipalities without the consent of those cities and towns. *See* S.C. Code § 6-1-520(A) (allowing a county to impose a countywide local accommodations tax of up to 1.5 percent without municipal consent); *id.* § 6-1-720 (allowing a county to impose a countywide hospitality tax of up to 1 percent without municipal consent). Were a tax or fee without municipal consent something that damaged the political integrity of municipalities, the General Assembly never would have given counties this power.

*Fourth*, this Court has already approved of a countywide accommodations fee, without any indication that the fee undermined the political integrity of a municipality. In *Hospitality Ass’n of South Carolina v. County of Charleston*, the plaintiffs challenged three ordinances,<sup>2</sup> one of which was a Charleston County ordinance “imposing a 2% fee

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<sup>2</sup> One of these ordinances was the City of Charleston ordinance cited in the County’s opening brief. The two other ordinances (from Charleston County and Hilton Head) from before December 31, 1996 were ones that the County did not realize existed when it filed its opening brief. *See* County’s Br. 12. Still, that four ordinances existed rather than two does nothing to change the substance of the County’s argument that the General Assembly had a small number of particular fees in mind when it adopted § 6-1-330(A).

on the gross proceeds from the rental of any accommodations furnished to transients within Charleston County,” which was to be used for capital projects and tourism. 320 S.C. 219, 222, 464 S.E.2d 113, 115 (1995); *see also* Charleston Cty. Ord. No. 910, § 2 (Nov. 16, 1993) (codified at Charleston Cty. Ord. § 13-62). In upholding that fee (which is essentially the same as the Hospitality Fee on accommodations) against a challenge that it conflicted with State tax law, this Court never showed any concern that a countywide fee harmed the dignity of Charleston, Mt. Pleasant, Sullivans Island, Summerville, or any other municipality in Charleston County. *See* 320 S.C. at 228–29, 464 S.E.2d at 118–19.

One other part of *Hospitality Ass’n of South Carolina* deserves mention: the way this Court analyzed the issue. The Court framed its analysis of the validity of the Charleston County ordinance the exact same way that the County has approached the question here. The Court first asked whether Charleston County had the power to enact the ordinance, and it then examined whether that ordinance conflicted with State law. *See id.* at 224, 464 S.E.2d at 117.

**C. Neither Ordinance 105-96 nor the City’s 1996 resolution supports the City’s consent argument.**

The City argues that not only did the law require its consent when the County adopted the Hospitality Fee, but also that the City in fact gave its consent. In support of this argument, the City looks to Ordinance 105-96, (R. pp. 101–05), and its 1996 resolution “urging” the County to adopt the Hospitality Fee, (R. pp. 107–08). A careful review of both documents shows neither involves the City’s consent to the adoption and collection of the Hospitality Fee.

1. **The ordinance says nothing about consenting to the Hospitality Fee.**

If municipal consent were legally required, surely Ordinance 105-96 would have included something to the effect of “the Hospitality Fee shall take effect within a municipality only upon that municipality’s giving of consent.” But Ordinance 105-96 did nothing like that. The word “consent” never appears in it, and for such a critical legal requirement, that is a big deal, despite the City’s attempts to downplay it.

The major problem with the City’s argument is that the City is asking the Court to rewrite Ordinance 105-96 and insert the word “consent” into the ordinance. In making this argument, the City is asking the Court to disregard the rules of statutory construction. Pursuant to those rules, the Court must “give terms their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” *Centex Int’l, Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013). And when those terms are plain and unambiguous and convey a clear meaning, the Court cannot impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The City makes no argument that Ordinance 105-96 is ambiguous. Quite the opposite, the City contends the language of Ordinance 105-96 plainly requires municipal consent. *See* City’s Br. 29–30. If the City were correct, the word “consent” should somewhere appear in Ordinance 105-96, but it does not. Therefore, the plain and unambiguous language of Ordinance 105-96 does not support the City’s construction.

And without the City making any argument for how Ordinance 105-96 is ambiguous (indeed, no ambiguity exists), there is no reason to insert the word “consent” into the ordinance. To do so would result in a forced construction of Ordinance 105-96.

Furthermore, for all of the City’s insistence that Ordinance 105-96 be read as a whole (which it must, of course), *see* City’s Br. 29–31, the City is actually the one who fails to do so. The City trains its focus exclusively on § 1(G) when arguing that Ordinance 105-96 requires municipal consent. Understandably so, because without the word “consent” anywhere in the ordinance, the City has to hang its proverbial hat somewhere. So it turns to § 1(G)—the only place any version of the word “municipal” appears in the entire ordinance. Section 1(G) provides that the Hospitality 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).

But the City is not giving its consent to the Hospitality Fee in § 1(G). Section 1(G) is the County’s declaration of its plan for how the revenue from the Hospitality Fee will be used. The title of § 1(G) (“Disposition of Hospitality Fee,” (R. p. 103)) gives that much away. The plain language of § 1(G) says nothing about the City or other municipalities giving their consent for the County to adopt and collect the Hospitality Fee.

The City has (once again) conflated the Hospitality Fee with other provisions in Ordinance 105-96. Put another way, just because something appears in Ordinance 105-96 does not make it the actual fee that the County adopted. The Hospitality Fee

itself was adopted in § 1(A). Neither the word “consent,” nor the word “municipal” appear anywhere in § 1(A). (R. pp. 101–02).

**2. The City’s resolution was about political support, not consent.**

The City tries to brush aside the County’s argument on its resolution, calling the County’s contention “absurd.” City’s Br. 31. But calling the argument that does not make it so.

As explained already, the Hospitality Fee was not a joint exercise; the County alone adopted it. *See* County’s Br. 23–24; (R. pp. 101–05). Thus, the City’s basis for rejecting the County’s argument is faulty. Moreover, the City’s argument ignores the fact that multiple other municipalities passed their resolutions *after* Ordinance 105-96 was adopted, without any exception in that ordinance for a municipality that did not pass a resolution. (*See* R. pp. 111, 112–13, 114, 116–17, 118). That Ordinance 105-96 did not include such an exception demonstrates that municipal consent was never required for the Hospitality Fee to take effect (and is a logical conclusion of reading that ordinance as a whole).

The City then posits a question regarding the municipal resolutions, asking why the County sought the resolutions if consent was not required. *See* City’s Br. 31–32. Had the City read the County’s brief more carefully, the City would have seen that the County has already answered this question: political support. *See* County’s Br. 26. Voters had rejected a referendum proposing a local option sales tax to support a road plan earlier that year. (R. p. 60). Getting other public entities to support the Hospitality Fee was important to show unanimity in addressing the County’s road

problems. The desire for political support is why the County also obtained resolutions from the Department of Transportation and the Board of Education. (*See* R. pp. 110, 115). If the resolutions were about legally required consent, the County would have had no need to get resolutions from either the Department of Transportation or the Board of Education.

**II. Even under the City’s *status quo ante* analysis, the circuit court should not have issued the injunction.**

**A. This County raised this argument below.**

The City insists the County never raised its *status quo ante* argument below. *See* City’s Br. 35. Actually, the County did raise it. During the June 14 hearing, the County raised this specific issue, noting that the Hospitality Fee had been in place since January 1, 1997, and the City was seeking to change the *status quo ante* with its new taxes and injunction. (R. p. 298, lines 10–19). The circuit court ruled on this issue. (R. p. 20).

**B. The last uncontested status was December 31, 2016—when everyone agreed the County could collect the Hospitality Fee.**

The City contends that what this Court has meant by the rule that injunctions may be issued only to preserve the *status quo ante* is not preserving the literal *status quo ante* but instead restoring the parties to their last uncontested status. Otherwise, the City says, a court would be powerless to stop illegal conduct if someone rushed to engage in it before a lawsuit was filed. *See* City’s Br. 37–39.

Accepting the City’s interpretation of this Court’s case law as correct, the circuit court was still wrong to issue the injunction. But before explaining why, the City’s

parade of horrors that supposedly could not be enjoined under the County's interpretation of *status quo ante* warrants attention. All of its examples—from violating a noncompete agreement to constructing a house in violation of ordinances or restrictive covenants—contemplate someone who starts doing the supposedly illegal conduct right before the lawsuit is filed. Here, by contrast, the Hospitality Fee had been in place for more than two decades, and more than two years had passed since the City claimed the Hospitality Fee had expired. Recognizing that the circuit court abused its discretion in issuing the injunction here will therefore do nothing to curb the important equitable power that courts in this State have long enjoyed.

Turning to why the City still loses under its interpretation of the law, the City argues that the last uncontested status was January 1, 2017, the day the Hospitality Fee was originally set to expire. *See* City's Br. 40. The County already explained why this is wrong, *see* County's Br. 32–33, yet the City simply ignored that argument, presumably because it has no answer to it. As a brief recap, if the City were right that on January 1, 2017, both parties agreed that the Hospitality Fee had expired, this case would not exist. But this case does exist because on January 1, 2017 the County believed it could still collect the Hospitality Fee, but the City said the County could not. (Of course, the City waited over two years—without any explanation of why—to make this belief public.) The last time the parties agreed about the validity of the Hospitality Fee was December 31, 2016, when both the City and the County recognized the County could collect it.

### **III. The injunction violates Rule 65(c).**

#### **A. This argument is also preserved.**

The City once again makes a preservation argument. *See* City's Br. 42. And the City is once again mistaken.

For one thing, a party should not even have to argue that a circuit court must comply with the Rules of Civil Procedure. A bond is mandatory if a court issues an injunction. *See* Rule 65(c) ("no restraining order or temporary injunction *shall* issue except upon the giving of security by the applicant" (emphasis added)).

In any event, the County invoked Rule 65(c) below and discussed whether the City could even obtain a bond sufficient for the County's potential loss. (R. pp. 560–61). Implicit in this argument was that a bond was necessary. When the circuit court's order issuing the injunction did not require a bond, (R. pp. 6–22), the County raised this issue again in its motion to reconsider, (R. pp. 1110–11). The court then explicitly decided a bond was "not necessary and/or required" from the City. (R. p. 24). Thus, this issue was raised and ruled on below, so it is preserved for this Court's review.

#### **B. The plain language of Rule 65(c) applies only to the "State."**

The City maintains that because it is a "creature" of the State, it is encompassed within the State's exception to Rule 65(c). City's Br. 43. It is not. That the City was created by the State does not mean any reference to the "State" in State law includes the City too.

This much is evident from looking to other parts of State law, such as the Tort Claims Act. That law (passed a year after the Rules of Civil Procedure went into effect)

created a framework for limiting sovereign immunity and listed what entities could no longer invoke sovereign immunity in certain cases: “The State, an agency, *a political subdivision*, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.” S.C. Code § 15-78-40 (emphasis added). Were the City’s argument here correct, “political subdivision” would be superfluous in this provision. But that type of reasoning would violate basic rules of statutory interpretation. *See Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017).

In other words, when the General Assembly wants to include political subdivisions in a provision of State law, it knows how. The General Assembly has not included these entities among those which are exempted from the security requirement in Rule 65(c). *See* 1985 S.C. Acts No. 100, § 1 (noting the Rules of Civil Procedure “were not disapproved by the General Assembly”). The City is therefore required to provide security for any injunction.

**C. The City’s efforts to moot this issue fall short.**

The City admits that its efforts to add security not required by the circuit court were an attempt to remove this issue from the case, almost as if the City knows its interpretation of Rule 65(c) is untenable. *See* City’s Br. 45–46. Its efforts, however, are insufficient to keep the Court from having to consider this issue.

As the County explained already, even taking into account the escrowed amount and the City's belated bond, about \$7 million in annual revenue is unsecured. That is a quarter of the \$28 million annual risk the County faces while the injunction is in place—far greater in both absolute and relative terms to the \$7,000 or 9 percent difference between the security and the potential loss in *Insurance Financial Services, Inc. v. S.C. Insurance Co.*, 271 S.C. 289, 295, 247 S.E.2d 315, 318–19 (1978), on which the City relies.

The City insists that multimillion dollar difference is made up by the “pledge” from North Myrtle Beach, Surfside Beach, and Conway to escrow the new taxes they collect. City's Br. 46. Yet the City has no rebuttal for the fact that none of these municipalities is *required* to escrow this money. Any of them could change its mind at any time. Thus, the injunction remains undersecured by millions of dollars, despite the City's attempts to correct the problem. This problem means the injunction violates Rule 65(c).

**IV. The City has no irreparable harm to warrant an injunction.**

**A. The County raised this issue below.**

The City's final preservation argument fares no better than any of its previous ones. *See* City's Br. 47–48. Below, the County argued that the City had wrongly delayed in bringing the lawsuit more than two-and-a-half years after the 2016 extension of the Hospitality Fee. (R. pp. 557–58). The circuit court ruled on this issue. (R. pp. 13–14). Although this argument was in the context of laches rather than irreparable harm, it

is the exact same argument here, so the circuit court had the opportunity to rule on it, which is all that is required. *See Neuman*, 384 S.C. at 402, 683 S.E.2d at 271.

**B. The delay in bringing this case undermines any irreparable harm argument.**

The City offers no explanation whatsoever for why it waited until March 20, 2019 to file this lawsuit, when its supposedly required consent had been lacking since January 1, 2017.<sup>3</sup> *See* City’s Br. 48. Were the City actually suffering a harm that monetary damages or a declaratory judgment could not remedy, then it would have filed a lawsuit when the court opened on January 2, 2017. It did not. It let more than twenty-six months go by. As Abraham Lincoln once observed, “actions speak louder than words.” 3 *Collected Works of Abraham Lincoln* 530 (Roy P. Basler, ed., 1953) (Cooper Union Address, Feb. 27, 1860). The City’s (in)action over these two years speaks volumes about whether an injunction was actually necessary.

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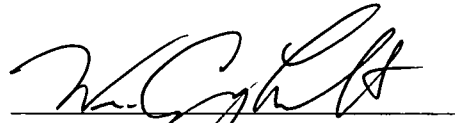
<sup>3</sup> Of course, the City is silent as to the fact that the loans for the roads built to implement the RIDE Report were not paid off until February 2019 and how this impacts anything in this case, from the scope of damages to the members of the class.

On the subject of class members, the City baldly claims that “there will be no impediment to identifying class members who made purchases within the municipalities.” City’s Br. 47. This is a bold claim. Identifying these class members will require subpoenaing every hotel, motel, restaurant, ice cream stand, putt-putt course, and amusement park (as well as others), and then it will necessitate that each subpoena recipient have kept records identifying every customer going back (by that point) more than three years, if the class goes back to January 2017. That is a massive—and unrealistic—undertaking. The Myrtle Beach Chamber of Commerce estimates that the area (which includes Georgetown County) has 1,800 full-service restaurants and 425 hotels. *See Industry Research*, Myrtle Beach Area Convention & Visitors Bureau, <https://www.myrtlebeachareacvb.com/industry-research> (last visited Oct. 14, 2019).

## 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:



Wm. Grayson Lambert  
S.C. Bar No. 101282  
BURR & FORMAN LLP  
Post Office Box 11390  
Columbia, S.C. 29211

James K. Gilliam  
Adam R. Artigliere  
BURR & FORMAN LLP  
Poinsett Plaza  
104 South Main Street  
Suite 700  
Greenville, SC 29601

Henrietta U. Golding  
BURR & FORMAN LLP  
2411 Oak Street, Suite 206  
Myrtle Beach, SC 29577

*Counsel for Appellant*

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

APPEAL FROM Horry COUNTY  
Court of Common Pleas

NOV 19 2013

Honorable William H. Seals, Jr., Circuit Court Judge <sup>S.C.</sup> SUPREME COURT

Appellate Case No. 2019-001134

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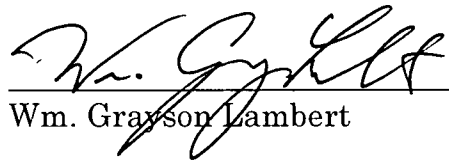
City of Myrtle Beach, For Itself and a Class of  
Similarly Situated Plaintiffs, ..... Respondents,

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CERTIFICATE OF COUNSEL

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

  
Wm. Grayson Lambert

THE STATE OF SOUTH CAROLINA  
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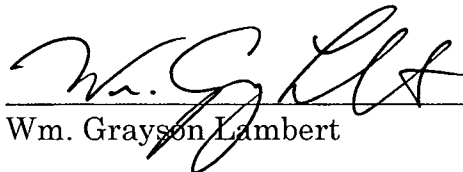
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CERTIFICATE OF SERVICE

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

John M.S. Hoefler  
Chad N. Johnston  
R. Walker Humphrey, II  
Willoughby & Hoefler, P.A.  
930 Richland Street  
Columbia, SC 29202

  
\_\_\_\_\_  
Wm. Grayson Lambert