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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

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

v.

Horry County, ... Appellant.

FINAL BRIEF OF RESPONDENTS

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court abuse its discretion in finding that the City demonstrated a likelihood of success on the merits of its claim that the County may not continue imposing the Hospitality Fee within the municipalities without their consent in view of the Home Rule amendments to the South Carolina Constitution, as well as provisions of the Code of Laws recognizing and preserving the rights of municipalities in this State to be free from the imposition of a county's will within its corporate limits absent express statutory authority or municipal consent and in view of the plain language of the County's ordinance?

II. Did the circuit court abuse its discretion by ruling that it has the power to preliminarily enjoin unlawful conduct causing irreparable harm when no adequate remedy at law exists notwithstanding the fact that the enjoined conduct commenced before the filing of an action to stop it?

III. Did the circuit court abuse its discretion in ruling that the City is exempt from posting security under Rule 65(c), SCRCP, because it is a political subdivision of the State and, alternatively, recognizing security voluntarily subsequently provided by the City was sufficient in view of commitments by the City and the other municipalities to escrow additional revenues to supply security, along with the fact that the City has multiple means of raising any additional needed revenue?

IV. Can the County avoid the law of the case that the City, and the putative class members, will suffer irreparable harm by resorting to unpreserved arguments that lack merit and create situations the County previously argued would be catastrophic and cause mayhem?

STATEMENT OF THE CASE

I. The Proceedings Before the Circuit Court.

The City of Myrtle Beach ("City") commenced this action on March 20, 2019, to challenge the imposition of a 1.5% uniform service charge by Horry County ("County") on accommodations, prepared food and beverage, and admissions provided within the corporate limits of the City and all other Horry County municipalities[1] ("Hospitality Fee") from and after January 1, 2017. **(R. pp.35-54)** By order of the Honorable Roger M. Young, Sr., dated May 6, 2019, the action was assigned to the Business Court and the Honorable William H. Seals, Jr. pursuant to this Court's Administrative Order No. 2019-01-30-01. **(R. pp.1-2)** The primary relief sought by the City, on behalf of itself and a class of similarly situated plaintiffs ("Proposed Class"), is for declaratory and injunctive relief to stop the continued collection of the Hospitality Fee within the municipalities and the use of funds collected for purposes beyond the scope of those expressly enumerated in the County's Ordinance Number 105-96 ("Ordinance 105-96") imposing the Hospitality Fee, both of which require the consent of the City and Other Municipalities which has not been given. Secondarily, the action seeks recovery under quantum meruit and unjust enrichment, through the imposition of a constructive trust, to provide a pro rata refund to all members of the Proposed Class who have paid the Hospitality Fee after it terminated nearly three years ago by its own terms. **(R. pp.37-54, Complaint)**[2]

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[1] In addition to the City, the affected municipalities whose corporate limits are within Horry County include the Town of Atlantic Beach, the Town of Aynor, the Town of Briarcliffe, the City of Conway, the Town of Loris, the City of North Myrtle Beach, and the Town of Surfside Beach (hereinafter referred to as the "Other Municipalities"). Other than the Town of Briarcliffe, all of these municipalities were extant when Ordinance 105-96 was adopted.

[2] Critically, the City does not seek a judgment for itself of the amount collected by the County during the period in question; the City, like any other political subdivision, business, resident, or visitor to the municipalities, has been subjected to the collection of the Hospitality Fee since January 1, 2017, on its purchases of accommodations, food and beverage, and

The procedural history of this case is lengthy despite its infancy. The gravamen of this appeal concerns the City's Motion for Preliminary Injunction filed on May 3, 2019, wherein the City sought to preliminarily enjoin the County's continued imposition of the Hospitality Fee within *all* Horry County municipalities during the pendency of this litigation. **(R. pp.335-539)** On May 14, 2019, the County simultaneously opposed the City's motion and filed its own motion to enjoin the City from collecting certain unrelated hospitality and accommodations taxes under City Ordinance Nos. 2019-22 and 2019-23, which were duly enacted under S.C. Code Ann. §§ 6-1-500, *et seq.*, and 6-1-700, *et seq.*, respectively ("Local Tax Ordinances"). **(R. pp.539-779)** The City separately submitted a reply in support of its Motion for Preliminary Injunction **(R. pp.799-870)** and an opposition to the County's motion. **(R. pp.982-1100)** The County did not file a reply in support of its motion to enjoin the Local Tax Ordinances.

The circuit court held a hearing on both injunction motions on June 14, 2019. It thereafter issued an order on June 21, 2019, granting the City's motion and denying the County's motion ("Injunction Order"). **(R. pp.6-22)** Therein, the circuit court thoroughly analyzed and expressly found that the City had established each of the five elements necessary for entitlement to injunctive relief against the County's continued imposition of the Hospitality Fee. **(R. pp.10-18)** By contrast, the circuit court found that the County had failed to demonstrate a likelihood of success on the merits with respect to the claimed invalidity of the Local Tax Ordinances and therefore found it unnecessary to address any of the City's arguments regarding the other four elements required for entitlement to injunctive relief on the County's part. **(R. pp.18-20)**

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amusements within its corporate limits, and therefore seeks—and, if successful, would be entitled to—only a refund of the Hospitality Fee that it has actually paid and incurred on applicable purchases during that time.

On June 25, 2019, the County filed a motion pursuant to Rules 52(b), 54(b), and 59(e), SCRCP, seeking reconsideration of the Injunction Order on, *inter alia*, the ground that the circuit court had erred in not requiring the City, a political subdivision of the State that is exempt from this requirement under Rule 65(c), SCRCP, to post security. **(R. pp.1108-1119)** This motion was made notwithstanding the County's own assertion that it did not have to post a security for its requested injunction of the Local Tax Ordinances on the basis that it considered the "segregat[ion of] revenue from the 1.5 percent paid by the City within its borders pending the outcome of this litigation" to be acceptable and sufficient security for the County's own proposed injunction. **(R. p.1113)** Notwithstanding the clear prohibitions of the Injunction Order and the broad relief sought by the preliminary injunction, the County issued a press release shortly after the Injunction Order stating that it would continue to collect the Hospitality Fee in the Other Municipalities, based solely on the fact that the Other Municipalities were not named parties in the litigation. **(R. pp.1131-34)** On June 29, 2019, the City filed a Motion for Rule to Show Cause as to why the County should not be held in contempt due to its willful violation of the Injunction Order in continuing to collect the Hospitality Fee within the Other Municipalities despite the clear language and directive of the circuit court's order to the contrary. **(R. pp.1120-45)** The City submitted a supplemental supporting memorandum on July 1, 2019 to further demonstrate that the County had, in fact, continued collecting the Hospitality Fee in the Other Municipalities notwithstanding the Injunction Order. **(R. pp.1146-69)** The parties submitted their respective oppositions to and replies in support of these two motions. **(R. pp.1170-76; 1294-1315)** On July 10, 2019,[3] the court heard and denied both motions ("Reconsideration Order").[4] **(R. pp.23-24)**

[3] The transcript for this hearing mistakenly indicates that it was held on July 11, 2019.

The County filed its Notice of Appeal from the Injunction Order and Reconsideration Order on July 11, 2019. **(R. pp.1316-37)** On same date, the County also filed a motion to certify the appeal to this Court under Rule 204(b), SCACR. The following day, the County moved the circuit court for a stay or supersedeas to prevent the injunction from taking effect during the appeal.[5] **(R. pp.1338-53)** On July 15, 2019, the County further moved the circuit court to stay the underlying case pending this appeal. **(R. pp.1354-56)** The following day, the County submitted a supplemental supporting memorandum in support of its motion for supersedeas. **(R. pp.1357-64)** The circuit court denied the supersedeas motion on July 17, 2019 ("Order Denying Supersedeas") **(R. pp.25-29)**, and the County amended its Notice of Appeal to include this order. **(R. pp.1365-91)** In the Supersedeas Order, the circuit court accepted the City's suggestion that the injunction be modified pursuant to Rule 62(c) to require it to escrow the revenues collected by the City under the Local Tax Ordinances during the pendency of the litigation. **(R. pp.26-27)** The Supersedeas Order further ordered the parties to engage in mediation within twenty days of the order and appointed Karl A. Folkens, Esquire, with the agreement of the parties, to serve as mediator. **(R. p.27)** Also on July 18, 2019, the circuit court agreed to stay the case, with the exception of court-ordered mediation. **(R. pp.29-31)** Mediation has not resolved this dispute, but is ongoing.

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[4] The Reconsideration Order specifically noted that the circuit court considered itself to be "extremely lenient" in denying the City's motion for a rule to show cause because the Injunction Order expressly characterized the relief being sought as applying within all municipalities in Horry County, in addition to the fact that the City's complaint, the oral arguments on the motions, and the case caption all made it clear that all municipalities in Horry County were within the ambit of the preliminary injunction that was issued. **(R. p.23)**

[5] Counsel for the City promptly contacted the circuit court to see if it desired a response to the County's motion for supersedeas, and in response to the County's continued assertion regarding the posting of security under Rule 65(c), SCRCP, reiterated its willingness to have the injunction modified under Rule 62(c), SCRCP, to direct the City to hold revenues derived from the Local Tax Ordinance in escrow, consistent with the County's argument. **(R. pp.1503-04)**

In sum, the circuit court granted the City's Motion for Preliminary Injunction, denied the County's Motion for Preliminary Injunction, denied the County's Motion to Reconsider and the City's Motion for Rule to Show Cause, denied the County's Motion to Stay or Supersedeas During Pendency of Appeal, and granted in part the County's Motion to Stay Case Pending Appeal. The limited issue before the Court in this appeal is the propriety of the Injunction Order and Reconsideration Order, respectively.

II. The Appellate Proceedings Before the Court of Appeals and This Court.

Following the circuit court's issuance of the Order Denying Supersedeas, on July 19, 2019, the County filed a Petition for a Writ of Supersedeas with the court of appeals, along with a nearly 1,300-page appendix, and sought to have the court grant it on an *ex parte basis*. **(R. pp.1392-1420)** The primary thrust of the County's petition was that the circuit court erred in not requiring that the City post a bond in the amount of $28 Million under Rule 65(c), SCRCP. As the City explained in its original return and memorandum in opposition to the Petition, notwithstanding its belief that no security was required under Rule 65(c), the City and the other municipalities in Horry County which have enacted Local Tax Ordinances agreed to escrow such tax collections during the pendency of this litigation to provide security to the County. **(R. pp.1454-55)** Furthermore, the City obtained an $8.815 Million surety bond to eliminate any remaining financial risk the County identified in the Petition.[6] **(R. pp.1566-67)** The City supplemented its return with evidence of the purchase of the surety bond on August 5, 2019, on which date the County also filed its reply in support of the petition. **(R. pp.1562-63)** The court of

[6] By obtaining this bond, the City did not, and does not, concede such a bond can be required of a municipality and reserves all arguments that the circuit court's order was proper in all respects. However, the County's argument regarding the sufficiency of the security is now moot in view of the security which has been provided, which is now more than the amount the County argued to the circuit court would provide it with reasonable security during the injunction. (**R. p.1111**, County Motion for Reconsideration; **p.1359**)

appeals denied the County's petition on August 7, 2019. On September 10, 2019, over the County's filed written objection, the court of appeals granted the City's first motion for extension of time to file the within Initial Brief of Respondents. On September 26, 2019 this Court certified the appeal for its direct review.

STATEMENT OF FACTS

I. Development and Enactment of the Hospitality Fee.

The Hospitality Fee arises out of Horry County Ordinance 105-96, which was filed with the Horry County Clerk of Court in Book Number 1895 at Page 838 on or after October 15, 1996, and which implemented recommendations made by the Road Improvement and Development Effort ("RIDE") Committee, created by the South Carolina Department of Transportation at the direction of Governor David Beasley, to address certain transportation infrastructure needs and improvements within Horry County and the methods by which to fund them.[7] **(R. pp.6-7; 369)** The creation of the RIDE Committee was itself a reaction to the County's unsuccessful attempt to obtain an affirmative referendum vote to allow a twenty-five year countywide local option sales tax to fund road improvement projects throughout the County, including projects within the City. **(R. pp.358-408)** Horry County voters rejected the March 1996 referendum by a more than 2-1 margin. **(R. p.370)**

The RIDE Committee issued its report in September 1996, recommending the adoption

[7] Ordinance 105-96 extended the 1.5% uniform service charge into both incorporated and unincorporated areas of Horry County, and imposed a separate 1.0% uniform service charge in the unincorporated areas as well. The County subsequently added a 2.5% county-wide uniform service charge on rental cars, and a 0.5% accommodations tax in unincorporated Horry County. Unless stated otherwise, the term "Hospitality Fee" as used herein only refers to the 1.5% uniform service charge imposed on accommodations, food and beverage, and amusements provided within the corporate limits of the City and the Other Municipalities, and does not include the additional fees and taxes imposed by the County in the unincorporated portions of Horry County.

of a road improvement plan in Horry County ("RIDE Report") which included a "1.5 Percent Hospitality Fee" to provide a portion of the funding. **(R. pp.365-408)** The RIDE Report envisioned a hospitality fee providing local funding for up to twenty years to finance its projects. **(R. p.383)** Consonant with the RIDE Report, Ordinance 105-96, in pertinent part, established the Hospitality Fee by providing that:

> **(A) Establishment of Hospitality Fee.** There is established **a uniform service charge**, hereinafter referred to as the "hospitality fee," equal to one and one-half percent (1.5%) within the geographic confines of Horry County..."

(Emphasis in Original and Supplied) **(R. p.359)**. It also mandated that:

> (G) **Disposition of Hospitality Fee.** All revenues collected fro[m] the hospitality fee shall be deposited in two separate funds. 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.

(Emphasis in Original and Supplied) ("Fee Use Provision") **(R. p.361)** It further provided that the Hospitality Fee would take effect on January 1, 1997, and terminate twenty years after its effective date, *i.e.*, January 1, 2017, by stating:

> (H) **Sunset. The imposition of the one and one-half (1.5%) percent hospitality fee for infrastructure will terminate** (a) on 8/1/97 if an appropriate agreement or legislation is not *in* place fro[m] the State of South Carolina to provide their share of the short term funding plan outlined by RIDE or (b) **twenty years from the effective date of this ordinance.**

(Emphasis in Original and Supplied) ("Sunset Provision") **(R. p.362)**

Consistent with State law, Ordinance 105-96 thus required municipal consent as to the imposition of the Hospitality Fee for improvements under the RIDE Report, how those improvements would be implemented, and how those improvements would be funded, prior to collection of the Hospitality Fee and provision of those services within the municipalities' corporate limits. Consistent with S.C. Code Ann. § 5-7-260, the governing body of the City,

Myrtle Beach City Council ("City Council"), adopted a resolution supporting the recommendations of the RIDE Report, which City Council understood to "propose[] implementation of a 1.5 percent hospitality fee for a period of up to 20 years in partnership with the State of South Carolina, who will contribute substantial funding," and "urged Horry County Council to enact the necessary ordinances to implement the RIDE committee report." **(R. pp.409-11)** The Other Municipalities likewise took official action in the adoption of their own resolutions, all of which contained similar language to the City's resolution, supporting the recommendations of the RIDE Report and consenting to the imposition of the Hospitality Fee within their corporate limits "for a period of up to 20 years."[8] **(R. pp.412-20)**

Consistent with the consent obtained by each of the impacted municipalities, the Horry County Council enacted Ordinance 105-96 to establish the Hospitality Fee to fund the improvements provided for in the RIDE Report. Its stated purpose was to take advantage of "[c]urrent law allow[ing] local government to levy reasonable and necessary fees to provide needed infrastructure" to improve roads in the County, **(R. p.359)**, and thus, under the Fee Use Provision, required 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," *i.e.*, the RIDE Report. **(R. p.361)** (emphasis added). No other use of these funds was contemplated or permitted. Ordinance 105-96 became effective January 1, 1997. Moreover, under the Sunset Provision, and under the limited consent provided by the municipalities, the ordinance terminated on January 1, 2017. **(R. pp.362, 410, 413-14, 416-17, 419-20)**

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[8] The South Carolina Department of Transportation and the Horry County Board of Education also adopted resolutions supporting the RIDE Report. Notably, however, these non-municipal resolutions did not mention the Hospitality Fee or "urge[]" the County to enact any ordinances. **(R. p.411)**

To obtain financing for the road improvement plan recommended in the RIDE Report, the County submitted an application to the South Carolina Transportation Infrastructure Bank ("SIB") for state funding in the form of a loan ("Original SIB Application"). **(R. pp.421-39)** The Original SIB Application contained copies of the municipal resolutions consenting to the Hospitality Fee. **(R. pp.684-96)** The County thereafter submitted an amended application to the SIB ("Amended SIB Application"). **(R. pp.440-73)** In the Original and Amended SIB Applications, the County referred to the 1.5% Hospitality Fee provided for in Ordinance No. 105-96 as being the "[s]ource of [l]ocal [r]evenue" to fund the County's required contribution to the estimated cost to complete the RIDE Project. **(R. pp.432, 452)**

On November 18, 1997, County Council adopted its Resolution Number 224-97 which, *inter alia*, reaffirmed that the Hospitality Fee enacted under Ordinance 105-96 is "to be used to provide the county portion of funding for the RIDE Plan" and, at the request of the SIB, reaffirmed the County Council's "support for the RIDE Plan," stating that it "supports, endorses and approves [the County's] amended application to [SIB] to be presented on November 24, 1997." **(R. pp.474-75)**

II. The County's Unlawful Attempt to Expand and Indefinitely Extend the Hospitality Fee Without Consent of the Affected Municipalities.

The record before this Court is clear: although Ordinance 105-96 terminated on December 31, 2016 by its own terms (as reflected in the Sunset Provision), the City and Other Municipalities only consented to the Hospitality Fee's imposition within their respective corporate limits for a period of twenty years, and the ordinance's purpose was expressly limited under the Fee Use Provision to funding the projects identified in the comprehensive road plan contained in the RIDE Report, the County attempted to unilaterally amend Ordinance 105-96 to first extend, and then later eliminate, the Sunset Provision, as well as modify its purpose by

purporting to ignore the Fee Use Provision. Indeed, on three occasions relevant to this appeal, the County unilaterally attempted to expand and extend the duration of the Hospitality Fee beyond its twenty-year authorization without either consulting or securing the consent of the City or the Other Municipalities. In addition, the County has repeatedly adopted resolutions indicating its intent to utilize revenues from the Hospitality Fee for purposes other than the RIDE Report's comprehensive road plan, including to fund general police power obligations of the County. **(R. pp.476-502)** Neither the City nor any Other Municipality has consented to the continued imposition of the Hospitality Fee within their respective corporate municipal limits beyond twenty years or for the altered purposes.

The first such attempt by the County occurred on April 20, 2004, when it entered into an agreement with SIB to extend the repayment period on the SIB loans by five years. **(R. p.731-34)** Consistent with that agreement, the County Council adopted Ordinance 11-04, wherein it purported to modify the Sunset Provision by providing that "the one and one-half percent (1.5%) portion of the Hospitality Fee deposited into the Road Special Revenue Fund, hereby is extended for *an additional period not to exceed five years*, which extension expires January 1, 2022."[9] **(R. p.733)** (emphasis added). However, Ordinance 11-04 was never codified in the County's Code of Ordinances as required by S.C. Code Ann. § 4-9-120. The language of Ordinance 11-04 appeared only in an "Editor's Note" in the County's Code of Ordinances and was never codified. **(R. p.8**; *see also* **R. p.557 & n. 5** (the County acknowledging that Ordinance 11-04 was only

[9] The stated purpose of this purported extension was to allow extra time, if needed, for the County to re-pay its SIB loans. Thus, it is arguable whether Ordinance 11-04 extended the Hospitality Fee at all, even under the County's reading, as a determination of whether the Hospitality Fee was extended was conditioned on the circumstances existing at the expiration of the Sunset Provision, which could not be determined in 2004 when the ordinance was adopted.

"referenced" in the Code of Ordinances).) In any event, the City did not consent to this ordinance, and it appears that no other Horry County municipality did either.[10]

In 2016, and on the eve of the Hospitality Fee's expiration under the Sunset Provision, County Council enacted Ordinance No. 93-16, attempting to amend Ordinance 105-96 to unilaterally lengthen the termination date of the Sunset Provision so that "[t]he imposition of the one and one-half (1.5%) Hospitality Fee for infrastructure *will* terminate on January 1, 2022." (**R. p.481**, § 1(E) (emphasis added)) Ordinance 93-16 purported to further grant County Council authorization to use all revenues generated thereunder—including those generated by the Hospitality Fee imposed within the municipalities—for a variety of purposes not set out in Ordinance 105-96 (**R. pp.481-82**, § 1(F)) Specifically, Ordinance 93-16 purported[11] to unilaterally modify the Fee Use Provision of the Hospitality Fee to allow for revenues received by the County to be spent on non-roadway uses falling under the general revenue obligations of the County, including for:

> A. tourism-related buildings including, but not limited to, civic centers coliseums, and aquariums;
> B. tourism-related cultural, recreational, or historic facilities;
> C. beach access and renourishment;
> D. advertisements and promotions related to tourism development;
> E. water and sewer infrastructure to serve tourism-related demand; and
> F. operation and maintenance of police, fire protection, emergency medical services, and emergency-preparedness operations.

Id. Once more, the City did not consent to this ordinance, and it appears that no other Horry County municipality did either.

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[10] In the Complaint, the City alleged that Ordinance 11-04 was codified. However, upon review of additional County Council records, that appears not to be the case, and the City has twice stated its intent to amend the complaint to conform with the evidence under Rule 15, SCRCP, at the appropriate time. **(R. pp.303-04, 322)**

[11] In addition to the legal infirmity of such an amendment without municipal consent, Ordinance 93-16 is ambiguous in view of the internal inconsistency arising out of the fact that the Fee Use Provision remained intact notwithstanding this amendment. (**R. pp.481**, § 1(D)(1)).

Finally, emboldened by the fact that no challenge to the attempted modifications in Ordinance No. 93-16 had arisen, on May 2, 2017, County Council adopted Ordinance No. 32-17, purporting to further amend Ordinance No. 93-16 and Ordinance 105-96 to repeal the Sunset Provision altogether, with Ordinance 32-17 providing that "[the Sunset Provision] is hereby repealed and of no further effect. Such 1.5% Hospitality Fee shall continue indefinitely in the absence of further action by County Council pursuant to ordinance." **(R. pp.489-91)** In support of this unilateral action that once again occurred without the consent of the City or the Other Municipalities, the County stated:

> County Council, upon advice received and after due consideration has determined that the sunset of the 1.5% Hospitality Fee does not serve the interests of the County, its residents, or visiting tourists and that the County faces substantial infrastructure challenges in the coming years that are eligible for funding pursuant to the terms of the Hospitality and Local Accommodations Fee Ordinance and that it is in the bests interests of the County, its citizens, and its visiting tourists, to provide for the continued imposition of the 1.5% Hospitality Fee beyond January 1, 2022, in order to meet such challenges.

(R. p.490)

The County admitted in two subsequent resolutions that one of the intended effects of Ordinance Nos. 93-16 and 32-17 is to "extend [the Hospitality Fee's] imposition" within the municipalities. **(R. p.500, R. p.502)** With the SIB loan due to be paid off, these resolutions further expressed the County's intention to use Hospitality Fee revenue on non-RIDE projects—*i.e.*, not for the "comprehensive road plan adopted by the County in concert with the municipalities"—in direct contravention of the Fee Use Provision. (*E.g.*, **R. p.500** (proposing to "dedicate $30,000,000 annually of the 1.5% Hospitality Fee to construct the Horry County segments of I-73," which is not part of the plan provided for in the RIDE Report); **R. p.502** (directing staff to draft an ordinance allowing the Hospitality Fee to be used for "all eligible uses," "eligible tourism-related public safety expenditures that lead to tourist destinations," and

"other tourism-related purposes besides roads")) Once again, there is no evidence the County requested the consent of the City or Other Municipalities prior to the enactment of any amendments changing the Fee Use and Sunset Provisions, or that any of them in fact consented, as required by law.

On March 7, 2019, the City adopted ordinances, effective July 1, 2019, imposing within the City's corporate limits 3% accommodations and 2% hospitality **taxes**[12] as permitted by S.C. Code Ann. §§ 6-1-500, *et seq.* and S.C. Code Ann. §§ 6-1-700, *et seq.*, respectively. **(R. pp.503-15)** Similar ordinances have been adopted by the City of North Myrtle Beach, Town of Surfside Beach, City of Conway, and Town of Aynor (*i.e.*, the Local Tax Ordinances) **(R. p.516-25, 1509-27).**

STANDARD OF REVIEW

"An order granting or denying an injunction is reviewed for abuse of discretion." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Accordingly, an order granting temporary injunctive relief "will not be overturned unless the order is clearly erroneous. *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007).

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[12] The circuit court recognized the distinction this Court identified in *Brown v. Horry County* between uniform service charges (such as the Hospitality Fee) and taxes. **(R. p.19**, Injunction Order at 14 ("[T]he County's argument misapprehends the distinction between uniform services charges and taxes. Under South Carolina law, uniform service charges (such as the Hospitality Fee) and taxes (such as the Local Tax Ordinances) are fundamentally different means of raising revenue.") (citing *Brown*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992) ("Although a service charge may possess points of similarity to a tax, it is inherently different and governed by different principles.")) In addition, Ordinance 105-96 states that the Hospitality Fee is a uniform service charge **(R. p.101)**, as does Mr. Spivey in his affidavit, **(R. p.777-78)**. *See Brown*, 308 S.C. at 184, 417 S.E.2d at 567 (holding that an ordinance's designation of a charge as a fee instead of a tax may be some evidence as to its nature). The County has not appealed from the circuit court's finding in that respect, nor would it do so, as the County did not have the authority to impose hospitality and accommodations *taxes* at the time the County enacted the Hospitality Fee and has consistently asserted in every ordinance and resolution which it has adopted that the Hospitality Fee is a uniform service charge. **(R. pp.476-502)**

An appellate court must therefore determine whether "[t]he facts alleged [are] sufficient to support a temporary injunction and [whether] the injunction [is] ...reasonably necessary to protect the rights of the moving party." *Id.*

SUMMARY OF ARGUMENT

At its core, this case is about the dignity of local governments under Home Rule and involves the unlawful attempt by the County to continue collecting a uniform service charge, *i.e.*, the Hospitality Fee, within the corporate limits of the City and the Other Municipalities without their consent as required by law and the County's own ordinance. The City, for itself and a class of similarly situated plaintiffs, brought this action primarily seeking declaratory and injunctive relief to prevent the County's collection of the Hospitality Fee going forward, along with a refund of the Hospitality Fees improperly collected by the County on and after January 1, 2017, when the Ordinance terminated. The primary relief sought in the Complaint has been temporarily achieved by the City through the issuance of a preliminary injunction by the circuit court which enjoined the County's continued collection of the Hospitality Fee within the corporate limits of the City and Other Municipalities and which is the sole subject of this appeal. Respondents' secondary claim will seek to recover for the Proposed Class members who have paid the Hospitality Fee on and after January 1, 2017.

In short, the discrete issue presented in this case is:

> May a county perform its services or functions and impose and collect a uniform service charge for same within the corporate limits of a municipality in perpetuity without the consent of such municipality?

The City submits the answer is *no*, which position is substantiated by express provisions of the South Carolina Constitution, applicable statutes, the plain language of the County ordinance imposing the Hospitality Fee, and operative opinions of this Court and the Attorney

General's Office that support the City's position. For its part, the County submits that this case comes down to *power*. On that contention, the City actually agrees. **This case is a poster child for an *abuse of power* by a political subdivision that believes that the right of independent governance conferred on other political subdivisions may be trampled at its whim and discretion**. As set forth herein, and as emphatically found by the circuit court, the County does not have the power to unilaterally enact, alter, and enforce an ordinance imposing a uniform service charge within the corporate limits of the City and Other Municipalities without their consent.

The record demonstrates that the circuit court did not abuse its discretion in enjoining the County's unlawful imposition of the Hospitality Fee within the City and the Other Municipalities. In fact, because the facts and evidence in this case are largely uncontested, this case presents a straightforward application of the law, and the record will demonstrate that the circuit court faithfully applied the law and the opinions of this Court to the County's unlawful actions.

ARGUMENT[13]

Because it was seeking a temporary injunction restraining the County from continuing to impose the Hospitality Fee, the City was obligated to establish below that "(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). The City also had

[13] The County does not appeal the circuit court's holding that the County acted in an arbitrary, oppressive, or capricious manner, that there is no adequate remedy at law, or that an injunction is reasonably necessary. Those holdings are now the law of the case for purposes of this appeal. *See Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 249, 772 S.E.2d 505, 508 (2015).

to demonstrate that an injunction was "reasonably necessary to protect [its] legal rights ... in the pending action." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50-51, 674 S.E.2d 505, 508 (Ct. App. 2009), *modified on other grounds by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010). Further, because the County is a governmental body, the City was also required to demonstrate that the County's actions in illegally collecting the Hospitality Fee within the corporate limits of the respective municipalities beyond the Fee's express 20-year term, and its proposed use of the collected proceeds on projects beyond the scope of those approved, without the required consent of the municipalities was an exercise of the County's powers which were arbitrary, oppressive, or capricious. *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018).

For the reasons explained below, the circuit court did not abuse its discretion in finding that the City demonstrated each of the required elements to enjoin the County's unlawful collection of the Hospitality Fee during the pendency of this case. As a matter of law, the County could impose a uniform service charge within the corporate limits of the City—or any of the Other Municipalities—only with the consent of that municipality. Furthermore, the plain language of the ordinance creating the Hospitality Fee (i.e., Ordinance 105-96) demonstrates that municipal consent is required and that the City and Other Municipalities provided such consent only for a limited duration and for a specific list of enumerated projects. Thus, by the Ordinance 105-96's own terms, and because no municipality agreed or consented to the imposition of the Hospitality Fee within its corporate limits after January 1, 2017, the County lacked the constitutional and statutory authority to unilaterally extend and continue imposing the Hospitality Fee in the City and the Other Municipalities.

The evidence before the circuit court overwhelmingly supported its determination that the County's unilateral actions to impose its will within the corporate limits of independent political subdivisions without the permission of their governing bodies, constituted an abuse of power and authority that contravened constitutional and statutory provisions, as well as other explications of the law. The County does not directly address any of the legal infirmities with respect to its conduct identified by the circuit court; instead, it seeks to reframe the issues on appeal through unpreserved arguments and alleged procedural defects to the injunction that fail to meaningfully address the actual issues before the Court. For all of these reasons, and as demonstrated below, the Court should affirm the circuit court's enjoinment of the Hospitality Fee.

I. The Circuit Court Correctly Held the City Demonstrated a Likelihood of Success on the Merits of Its Claim that Municipal Consent is Required Before the County Can Collect the Hospitality Fee Within the Corporate Limits of Any Municipality.

The merits of the City's underlying claims are relevant here "only to the extent necessary to determine whether [the City] has made a sufficient prima facia showing of entitlement to relief." *Compton v. S.C. Dept. of Corrs.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). "The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005), *modified on other grounds by Poynter Invs.*, 387 S.C. at 587, 694 S.E.2d at 17. "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1991). Hence the City need not "prove an absolute legal right"; it need only "present a reasonable question as to the existence of such a right." *AJG Holdings*, 382 S.C. at 51, 674 S.E.2d

at 509.

A. The County's New "Framework" Argument Is Unpreserved.

The County asserts that, "[a]s 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." (Initial Br. of Appellant at 10 (emphasis supplied.) Inconsistently with its acknowledgment here and elsewhere (see discussion at n. 13, *supra*) that the Hospitality Fee is a uniform service charge, the County appears to suggest that its propriety should be assessed based upon whether it is a valid exercise of the taxing power granted local governments under S.C. Const. art. X, § 6. (*Id.* at 10-11, n.6) To be sure, the circuit court employed the proper framework in recognizing that the Hospitality Fee is a uniform service charge and not a tax, *see* n. 12, *supra*, the validity of which is determined under statutory provisions adopted pursuant to S.C. Const. art. VIII, §§ 7 and 13. But to the extent the County feels otherwise, it should have raised the alleged failure to employ the proper framework to the circuit court so that it could have corrected the alleged error below. The County did not. This is the first time in the myriad briefing undertaken in this case that the County has proffered this framework. To the extent the County contends this constitutes any error on the circuit court's part, it is unpreserved. *See Lapp v. S.C. Dep't of Motor Vehicles*, 387 S.C. 500, 507, 692 S.E.2d 565, 569 (Ct. App. 2010) ("To be preserved for appellate review, an issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.").

B. South Carolina Law Prohibits the Imposition or Continuation of the Hospitality Fee by the County Within the Corporate Limits of the City or Other Municipalities Without Their Consent.

The County's attempt to unilaterally—and permanently—impose its will within the corporate limits of the City and the Other Municipalities violates South Carolina law, including the basic tenets of Home Rule. The legal authorities undergirding the City's arguments in this case are fundamental to the proposition that independent political subdivisions are legally and functionally autonomous entities. Those authorities work in concert to create uniform rules and guidelines that govern the interactions and respective authorities of those entities. At base, these provisions dictate mutual consent and agreement amongst political subdivisions, rather than unilateral actions that impose the will of elected bodies beyond geographical confines of the areas they represent. The County's actions giving rise to this lawsuit and the preliminary injunction before this Court on appeal do not comport with South Carolina law.

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

In addition, **Article VIII, § 13(A) of the Constitution**, titled "Joint administration of functions and exercise of powers," states in pertinent part that "[a]ny county, incorporated municipality, or other political subdivision ... may agree with ... any other political subdivision for the joint administration of functions and exercise of powers and the sharing of the costs

thereof." Accordingly, the joint administration of functions and powers, is permitted, but only where it is agreed to by both the county and the municipality. Here, a joint exercise of powers was undertaken in 1996 when City and the Other Municipalities consented and agreed that the County could impose a uniform service charge within the corporate limits of the municipalities for the specific purpose of road improvements pursuant to the "road plan" which the Fee Use Provision of Ordinance 105-96 provides was "adopted by the County in concert with the municipalities of the County." The City, the Other Municipalities, and the County each possessed in 1996, and still possess today, the statutory authority to make road improvements within their respective jurisdictions under S.C. Code Ann. §§ 5-7-30 and 4-9-30. However, under this constitutional provision, the County has no authority to impose a uniform service charge within the municipalities for road improvements to occur wholly outside the municipalities' corporate limits (*e.g.*, the long discussed but never constructed Interstate Highway 73 project, R. p.) unless the municipalities consent or agree "to a joint ... exercise of powers and the sharing of the costs," which it is undisputed they have not.

Likewise, the County is statutorily constrained to ensure that its ordinances are consistent with the Constitution and any applicable statute, including **S.C. Code Ann. § 4-9-25**, which provides that the County may only "enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State." Consistent with that authority, **S.C. Code Ann. § 4-9-30(a)(5)** empowers the County to "assess ... uniform service charges ... for functions and operations of the county, including, but not limited to ... roads," but only if the exercise of that power is "within the authority granted [to the County] by the Constitution." Further, any exercise of this power is expressly "subject to the general law of this State." *Cf.* § 4-

9-25;[14] *Commissioners of Public Works of the City of Laurens v. City of Fountain Inn*, Opinion No. 27917 (S.C. Sup. Ct. filed Sept. 18, 2019) (Shearouse Adv. Sh. No. 37 at 7) ("City of Laurens") and related discussion, *infra* at p. 26.[15]

The County overlooks the language of § 4-9-30(a), yet its authority to provide services within municipalities is expressly restricted by S.C. Const. art. VIII, § 13(A) and the County is not empowered to act contrary to the general law provisions set out S.C. Code Ann. § 4-9-40 and § 4-9-41. In particular, **S.C. Code Ann. § 4-9-40** empowers the County to "perform any of its functions ... [and] furnish any of its services within the corporate limits of any municipality ... **by contract** with [a] municipal governing body **subject always** to the general law and Constitution of this State regarding such matters." (Emphasis supplied) Moreover, "where such service is being provided by the municipality or has been budgeted or funds have been applied for that **such service may not be rendered without the permission of the municipal governing body**." (Emphasis supplied).

In addressing the applicability of this statute below, the County made the astonishing assertion that it is not providing any service that the City could possibly be providing, but rather that the County is only collecting a fee. **(R. p.553)** In its initial brief, the County doubles-down

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[14] Even assuming that the validity of the Hospitality Fee could be determined by reference to whether it is a lawful tax, which it is not, subsection (17) of § 4-9-30 provides that "[t]he governing body of any county shall not create a special tax district ... any portion of which falls within the corporate boundaries of a municipality, except upon the concurrence of the governing body of the municipality."

[15] The City recognizes that the Court's opinion in *City of Laurens* is the subject of a petition for rehearing filed October 3, 2019, seeking reinstatement of the court of appeals opinion in that case. Even assuming this petition were to be granted, it would not change the analysis in the instant appeal as the court of appeals' opinion in that case also recognizes that consent is required when one local government entity seeks to provide its services within the territory of another local government entity. *See Commissioners of Public Works of the City of Laurens v. City of Fountain Inn*, Op. No.5559 (S.C. Ct. App. filed May 16, 2018) (Shearouse Adv. Sh. No. 20 at 10).

on this assertion, arguing that the circuit court did not identify a service which the County is providing in connection with the Hospitality Fee, (Initial Br. of Appellant at 15), or a particular joint function the municipalities and the County undertook, (*id.*), incredibly casting the decision to adopt the Hospitality Fee in 1996 as solely "a County decision," notwithstanding the RIDE Report, the plain language of Ordinance 105-96, and the respective municipal resolutions recognizing the need for, and providing, consent to same. Such revisionist history is curious, as discussed below, as the legality of the Hospitality Fee from its inception hinges upon the County's provision of services consonant with the established purposes identified in Ordinance 105-96. However, it is without question that *the City* has the authority and does provide services to its residents and visitors with respect to road design, construction, maintenance and operation as specifically authorized by S.C. Code Ann. § 5-7-30. **(R. p.834)**[16] Thus, under the plain language of S.C. Code Ann. §§ 4-9-30(a)(5) and 4-9-40, the County's imposition of the Hospitality Fee within the corporate limits of the City (and the Other Municipalities) must be tied to the provision of a specific identified service within and for the benefit of the payers of the fee within those municipalities.

The County's memoranda in the circuit court and the court of appeals and its initial brief in this Court demonstrate that it very clearly misapprehends the correlation between the provision of *services* (*e.g.*, road improvements identified in the RIDE Report under Ordinance 105-96) and the enactment of a uniform *service* charge. Under the established and controlling precedent of this Court in *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992) and *C.R. Campbell Const. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437 (1997), a uniform

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[16] As noted above, the County has adopted resolutions indicating that it intends to use revenues from the Hospitality Fee for a variety of other functions and services, including public safety, which City is also statutorily authorized to provide and does provide. **(R. p.834)**

service charge may only be imposed if it is tied to a specific service and "if (1) the revenue generated is used to the benefit of the payers, even if the general public also benefits (2) the revenue generated is used only for the specific improvement contemplated (3) the revenue generated by the fee does not exceed the cost of the improvement and (4) the fee is uniformly imposed on all the payers," *C.R. Campbell*, 325 S.C. at 236, 481 S.E.2d at 438 (interpreting *Brown* and specifying the above four-part test for determining whether a uniform service charge is legally valid). Under this Court's enunciations in *Brown* and *C.R. Campbell*, in order for a uniform service charge to be valid, it must be tied to a specific service provided by the imposing political body and for the specific improvements enumerated in the ordinance.

Consequently, the Hospitality Fee was a valid uniform service charge since its inception only if it was collected for the specific road improvement services specified in Ordinance 105-96 which, by its plain language, was limited to the road projects specifically enumerated in the RIDE report (which did not contemplate the I-73 project identified by the County for receipt of the Hospitality Fee revenues on a going forward basis, much less the provision of general police protection services identified by the County for the remainder in its various ordinances and resolutions adopted without municipal consent). Further, because the municipalities only consented to the imposition of the Hospitality Fee within their corporate limits for a period of twenty years, the County's unilateral extension of the duration of the fee indefinitely violates the further specific restriction of § 4-9-40 that "such service may not be rendered without the permission of the municipal governing body."

Additionally, **S.C. Code Ann. § 4-9-41(A)** authorizes a county to "provide for the joint administration of any [of its] functions and exercise of [its] powers" with a municipality, but only subject to the express limitation of § 4-9-41(B) that it not diminish or alter the City's

"political integrity" in engaging in such functions or exercising such powers. As the City has asserted, the County's actions in imposing a uniform service charge within municipal limits without bespeaking the City's (or the Other Municipalities') consent, unquestionably acts in a "manner t[hat] result[s] in diminution or alteration of the political integrity of any of the participant subdivisions" which had previously consented to the imposition of the Hospitality Fee for a limited duration of only twenty years and for the specific purpose enumerated in the RIDE Report and further destroys the rights of municipal voters, all in contravention of the express proscriptions of § 4-9-41(B). *Cf. City of Laurens*, *supra* (Shearouse Adv. Sh. No. 37 at 13).

The foregoing provisions of law comport with the provisions and underlying purpose of Home Rule, on which subject this Court has stated that "by enacting the Home Rule Act, S.C. Code Ann. § 5-7-10, *et seq.* (1976), the legislature intended to ... restore autonomy to local government." *Williams v. Town of Hilton Head Island, S.C.*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) (holding that Home Rule "bestow[s] upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government). The County's suggestion that the General Assembly provided municipalities autonomy from the State, but simultaneously delegated the State's authority over local municipal governments to the governments of counties in which municipalities are located, is absurd.

In fact, **S.C. Code Ann. § 5-7-30** empowers the City to enact regulations, resolutions and ordinances with respect to a variety of matters, including roads, streets and public safety. Although this section may not specifically provide that consent of the municipalities "was statutorily required," as suggested by the County (Initial Br. of Appellant at 23), when viewed in

the context of this Court's pronouncement in *Williams* that "S.C. Code Ann. § 5-7-10, *et seq.* (1976) ... intended to ... restore autonomy to local government," 311 S.C. at 422, 429 S.E.2d at 805, the County's contention rings hollow, as the plain language of this section gives the City the power to control its own roads and law enforcement.[17] Moreover, nothing in this section authorizes a County to impose a uniform service charge for roads and law enforcement within the municipalities' limits. But even if it did, it would be in conflict with S.C. Const. art. VIII, §§ 7 and 13(A) and S.C. Code Ann. § 4-9-30, § 4-9-40, and § 4-9-41.

In addition, S.C. Code Ann. § 5-7-60 empowers the City and the Other Municipalities to perform any of their respective functions and provide any of their respective services in areas outside their corporate limits, which would include the unincorporated areas of Horry County, by contract and, where a county is already providing such service, to do so only with the permission of such county. The limitations in § 5-7-60 are nearly identical to those imposed on the County by § 4-9-30 and § 4-9-40 for the County's provision of services within the corporate limits of the municipalities. Under the County's rubric, however, the City would have the ability to discharge its functions, exercise its powers, and impose uniform service charges relating to same, *outside* its corporate limits without the County's agreement and consent.

The interpretation advanced by the County here is precisely the view on the autonomous provision of governmental services that this Court unanimously rejected in *City of Laurens*, wherein the Court evaluated a municipality's ability to provide services beyond its corporate

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[17] The General Assembly has also conferred specific authority to municipalities with respect to the construction and maintenance of roads within corporate limits. *See, e.g.*, S.C. Code Ann. §§ 5-27-10 to -120. Furthermore, even the State must obtain municipal consent for work on state highways when they are situated within their corporate limits. *See* S.C. Code Ann. § 57-5-820. It would be most curious indeed that the General Assembly would interpret Home Rule as giving counties powers that are denied the State itself in regard to roadways affecting municipalities. Yet, that is the effect of the County's argument in the instant case.

limits under § 5-7-60. The Court found the section to unambiguously provide that "municipalities 'may' furnish their services to areas outside of their corporate limits 'by contract' except within the designated service area of another." *City of Laurens*, (Shearouse Advance Sheet No. 37 at 12). "Thus ... municipalities have the opportunity—not the right—to furnish their services by contract to nonresidents." *Id.* (holding that the City of Laurens-subsidiary Laurens Commission of Public Works had no legal right to provide services beyond the city's boundaries absent certification, *i.e.*, consent, from Laurens County, the governing body of the unincorporated area). The Court further rejected the City of Laurens' argument that consent of Laurens County was not required, holding that to permit the City of Laurens to "unilaterally" decide to provide its services outside of the city's boundaries "would lead to an absurd result." *Id.* (finding that the City of Laurens' construction of § 5-6-70 would grant it "unfettered discretion to unilaterally lay exclusive claim to an area ... outside its corporate boundaries ... [and the] authority to charge whatever rates it pleased"). The Court further emphasized the concept and attendant safeguards of electoral representation, stating that "[w]hen a municipality provides services to its residents, there are inherent safeguards—through the electoral process and otherwise—that ensure accountability," while the City of Laurens' construction would leave "the municipality [] wholly unaccountable to the nonresident customers." *Id.* (Shearouse Advance Sheet No. 37 at 13).

The Court's holdings in *City of Laurens* flow naturally against the arguments advanced by the County in this case. The permission required to be obtained by a municipality under § 5-7-60 and the permission required to be obtained by a county under § 4-9-40 operate in the same way to require "consent." Thus, under *City of Laurens*, permission of the City and the Other Municipalities is required for the County to impose the Hospitality Fee within the municipal

corporate limits for the provision of services provided in and for the benefit of those municipalities. The circuit court order thus correctly applied that concept in enjoining the County's unilateral conduct taken without permission or consent of the impacted municipalities.

In addition to the above-cited Constitutional and statutory provisions and opinions of the Court, this conclusion is also supported by multiple opinions of the Attorney General, which have repeatedly concluded that the County's underlying position in this matter (*i.e.*, that the local interests of municipalities and their residents must give way to the County's putative economic interests) is contrary to the law. In one such opinion that explores in-depth the demarcation of authority between counties and municipalities on the apropos subject of construction and maintenance of roadways, the Attorney General specifically concludes that a county has no power with respect to roads located within a municipality and, in so doing, observes that "[t]he Legislature did not grant county councils the ability to exercise any power within the territory of a municipality **without the permission of the municipal council**." *See* 2016 WL 7031993[18] (emphasis supplied).[19]

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[18] This particular opinion discusses many, if not all, of the Constitutional provisions and statutes advanced by the City in support of its legal claims in this case, determining that "county councils cannot exercise their police power within the territorial limits of municipalities without the consent of the municipal councils." 2016 WL 7031993 at *3. It further cites an Attorney General opinion dated February 25, 1988, for the proposition that "in section 4-9-40, 'the legislature, itself, seems to have, at least, implicitly recognized a limitation on the authority of counties to act within the boundaries of municipal corporations,'" and "[b]y reasonable implication, a county could not exercise power within an incorporated municipality unless such an agreement existed or, in effect, the municipality has assented to the county's exercise of power." *Id.* at *4-5 (citing 1988 WL 383501).

[19] *See also* 1984 WL 249691 (recognizing the autonomy of a municipality within its borders to the exclusion of a county with respect to a referendum for the sale of mini-bottles by non-profit entities); 1988 WL 383501 (recognizing that the Home Rule amendments to the Constitution and associated legislative enactments do not permit a County to regulate bingo within municipal corporate limits and stating that "[o]ur beliefs are in accordance with the general law on this issue. Counties and cities are viewed co-equal political subdivisions which are independent of each other politically, geographically, and governmentally"); 2011 WL

In sum, South Carolina law thus preserves the autonomy of municipalities within their borders and absent their consent or an express statutory provision to the contrary. The County enacted the Hospitality Fee under S.C. Code Ann. § 4-9-30(5)(a). *See Brown*, 308 S.C. at 182-84, 417 S.E.2d at 566-67. However, Section 4-9-30(5)(a) does not grant the County the authority to unilaterally impose, and thus the County is constitutionally and statutorily constrained by its authorized powers from unilaterally imposing, the Hospitality Fee within the limits of any municipality. *See* S.C. Code Ann. § 4-9-40. Hence the municipalities provided written consent to the Hospitality Fee, but only until January 1, 2017. Because the municipalities have not consented to the imposition of the Hospitality Fee within their corporate limits beyond that date, the County's collection of it from and since that date was unlawful. Further, because the County's ordinances attempting to modify the duration and scope of the Hospitality Fee are legally inoperative, they could not and did not extend the life of, or permitted uses of revenues derived from, the Hospitality Fee. The County's authority to collect these fees terminated on January 1, 2017—just as the County, RIDE Report, SIB loan, and consenting municipalities all contemplated and agreed and the circuit court did not abuse its discretion in determining that the City established a likelihood of success on the merits in view of this clear South Carolina law.

C. The Plain Language of Ordinance 105-96 Demonstrates That (1) Municipal Consent to the Hospitality Fee is Required, (2) the Projects Authorized to be Funded by the Hospitality Fee Are Limited by the RIDE Report, and (3) the Hospitality Fee Was Expressly Limited to an Authorized Duration of Only Twenty Years.

With the backdrop of what South Carolina law required—and still requires—of the County in order to impose the Hospitality Fee within the City and the Other Municipalities, the inquiry naturally shifts to whether Ordinance 105-96 itself requires that municipalities consent to

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3918176 (concluding that a county may not enforce its non-smoking ordinance within the corporate limits of municipalities because it infringes upon the autonomy of municipalities under Home Rule unless a municipality chooses to allow it by agreement).

the imposition of the Hospitality Fee within their corporate limits. The circuit court correctly found that it does.

"[W]hen interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used." *Charleston Cnty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). In discerning legislative intent, "[a]n ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Id.* at 68, 459 S.E.2d at 843. While the language used must be taken in its "ordinary and popular meaning," the Supreme Court has admonished against reviewing "the phraseology of an isolated section or provision" in a vacuum. *Id.* (internal citations omitted). The language as a whole must be "considered in the light of its manifest purpose," and language will not be given a reading that is "repugnant to the meaning" of the ordinance as a whole "or destructive of its obvious intent." *Id.* (internal citations omitted). "In ascertaining the intent of the lawmaking body, the ordinance must be read as a whole; sections ... must be construed together and each given effect." *Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994).

The terms of Ordinance 105-96 are self-limiting and require consent. It allowed only for the collection of a uniform service charge "which will be used to *implement a comprehensive road plan adopted by the County in concert with the municipalities of the County.*" **(R. p.361)** (emphasis added) The County therefore could collect the Hospitality Fee only to the extent the municipalities consented to this "comprehensive road plan." As the County acknowledged and represented to the SIB, and which it does not dispute here, this "comprehensive road plan" was the RIDE Plan. **(R. p.423)** The Fee Use Provision thus allowed the County to collect the Hospitality Fee to the extent the municipalities agreed to the RIDE Report **(R. p.361)**, and

Ordinance 105-96 expressed this universal understanding and agreement in the form of the Sunset Provision, which expressly limited the imposition of the Hospitality Fee to a period of twenty years. **(R. p.362)** The Hospitality Fee was thus tied to a specific use and timeframe, and the municipalities were required to agree to these parameters, which they did in their resolutions that explicitly referenced the Hospitality Fee's twenty-year term. **(R. pp.409-20)** Its meaning is clear. The fact that the word "consent" does not appear in Ordinance 105-96 is of no moment. If the County could alter the Sunset and Fee Use Provisions at will, the mandate that the fee support "a comprehensive road plan adopted by the County in concert with the municipalities of the County" would be given no effect or meaning.

The County has gone through great lengths trying to dissect Ordinance 105-96 at the expense of reading it as a whole, thus violating the mandate that this Court must give the ordinance a "practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers" *Somers*, 319 S.C. at 68, 459 S.E.2d at 843, and effect to all of its parts. *Krawcheck, supra*. The circuit court correctly rejected the County's repeated attempts to isolate discrete phrases within Ordinance 105-96 in order to give itself power that is contrary to South Carolina law.

D. The Municipalities Consented to Ordinance 105-96 For the Limited Duration of Twenty Years and For the Specific Projects Identified in the RIDE Report, but Not to Any Extension or Expansion of the Hospitality Fee.

The County next makes a tortured argument that the municipal resolutions specifically referencing the imposition of the Hospitality Fee and "urg[ing the] Horry County Council to enact expeditiously the necessary ordinances to implement the RIDE Committee report" is not "consent" to the Hospitality Fee. The argument is as simple as it is weak: they do not provide consent because they do not use the word "consent." This is absurd. Only in the County's mind

do the statutory requirements that a county's exercise of its functions, the provision of its services, and the imposition of its uniform service charges within a municipality be done on a "joint" basis in which costs are "shared," or by "contract," or with the "agree[ment]" or the "permission" of the municipality, not require the "consent" of the municipality. The question is rightly posited: if the municipalities' consent to enact the Hospitality Fee was not required, why, then, were the municipalities' respective consents sought and provided in the form of formal resolutions passed by each governing body?

In sum, the City and the Other Municipalities duly consented to the Hospitality Fee as Ordinance 105-96 and South Carolina law require. But they have not consented to the County's extension of the Sunset and Fee Use Provisions. In the absence of that consent, the circuit court correctly held the City has demonstrated a likelihood of success on the merits of its claims.

E. The County's Broad Reading of S.C. Code Ann. § 6-1-330(A) Does Not Comport With South Carolina Law and Does Not Excuse the County's Unlawful Unilateral Actions With Respect to the Hospitality Fee.

Beyond its unsupported assertion that it has the discretionary "power" to disregard the autonomy and independence of co-equal political subdivisions and its assertion of procedural defects in the Injunction Order which the City disposes of below, the County's principal legal argument is based on grandfathering language in S.C. Code Ann. § 6-1-330(A). In short, the County contends that the grandfather provision in subsection (A) acts to validate the Hospitality Fee notwithstanding any post-adoption modifications to its terms and application, *i.e.*, changes to Fee Use and Sunset Provisions, that are taken by the County in violation of Constitutional and statutory protections afforded impacted local governments. But like its arguments regarding the Constitutional and statutory limitations on the exercise of its power to impose a uniform service charge, the County's argument misapprehends the language and effect of § 6-1-330. And

acceptance of the strained rationalization underlying this argument would render § 6-1-330 unconstitutional, an absurd result that could not have been intended by the General Assembly and which the circuit court correctly disposed of below.

As an initial matter, the County's actions in the circuit court give lie to its current assertion that § 6-1-330(A) is a "statutory directive from the General Assembly" requiring that the Hospitality Fee remain[] in effect 'until repealed.'" (Initial Br. of Appellants at 22) Following the hearing on the motions for preliminary injunction, but before the circuit court issued the Injunction Order, the County wrote to the circuit court and asserted that "there are many legal issues for which there is no direct guidance from any legal decisions and the state statutes cited by the parties do not directly, nor indirectly, provide answers." **(R. p.1500)** Also, attached to the County's June 19 correspondence to the circuit court was an unsolicited proposed order in which the County stated that "[w]ith no case law interpreting the statutory provisions the Parties invoke, neither Party has established that it is likely to prevail in this matter, so neither is entitled to a preliminary injunction." **(R. pp.1501-02)**

Now, when it is seeking appellate relief which will allow it to continue imposing a uniform service charge under an ordinance which, by the consent of the City and the other municipalities, became effective on January 1, 1997, by its own terms terminated on January 1, 2017, and provided for the use of the revenue on a specific improvement that has been completed, the County contends that the circuit court ignored "the statutory directive" and "express state[ment]" of the General Assembly in § 6-1-330(A) that allows it to impose that charge in perpetuity.[20] To say the least, the County's criticism of the circuit court in regard to its

[20] During the reconsideration hearing when the circuit court asked "[h]ow many years did Horry County think that they could just continue to run this [Hospitality Fee]? Forever?," counsel for the County stated, "[y]es sir." **(R. p.311)**

ruling that the Hospitality Fee provision of Ordinance 105-96 is not grandfathered under this statute is unfounded. Allowing the County to now circle back, change the positions it took below, and criticize the circuit court for not giving § 6-1-330(A) a reading which essentially guts Home Rule would constitute a "miscarriage of justice" that should not inure to the benefit of the County.

Even on the merits, however, § 6-1-330(A) does not support the County's argument. It provides:

> (A) A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. A local governing body must provide public notice of any new service or user fee being considered and the governing body is required to hold a public hearing on any proposed new service or user fee prior to final adoption of any new service or user fee. Public comment must be received by the governing body prior to the final reading of the ordinance to adopt a new 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.

The first three sentences of subsection (A) do not apply to the Hospitality Fee enacted in 1996, as § 6-1-330 was not enacted until 1997 through Act No. 138; the operative grandfathering language appears in the last sentence. As the circuit court correctly held, the impact of the grandfathering provision on Ordinance 105-96 did not exempt the Hospitality Fee and the County from complying with Constitutional and statutory provisions requiring municipal consent; it merely ensured the Hospitality Fee was not invalidated by the new procedural requirements imposed by Chapter 1's enactment of Hospitality and Accommodation *taxes* under §§ 6-1-520 and 6-1-720. If the County's position is to be believed, the grandfathering of the Hospitality Fee allowed the County to maintain the fee "forever" without regard to the consent requirements spelled out under South Carolina law, and to change the purpose of the uniform service charge (and use of funds derived therefrom) for any or no reason in perpetuity at the

County's sole discretion. The plain language of § 6-1-330(A) belies that proposition, however, as the phrase "remains in force and effect" refers to the status, scope and duration of the fee in place as of December 31, 1996, which, for the Hospitality Fee, was limited in duration to twenty years and the expenditure of funds from which was constrained to the projects identified in the RIDE report.

The County's interpretation of § 6-1-330(A) is without merit, would lead to absurd results, and the circuit court's rejection of same should be affirmed.

II. The Circuit Court's Order Preserves the *Status Quo Ante* by Not Allowing Additional Hospitality Fee Collections But Not Returning Any Past Collections at This Stage.

The County's written opposition to the City's Motion for Preliminary Injunction contained no mention of the *status quo ante*. **(R. pp.542-62)** At the hearing on this motion, the County devoted just two sentences of argument to the alleged effect of an injunction on the status quo between the parties. **(R. p.298)** However, the County did not argue that the grant of an injunction in favor of the City would upset the *status quo ante*; instead, the County argued that granting **the *County's* motion for injunction** of the City's Local Tax Ordinances **would preserve the status quo**. The distinction in the argument presented below is not a matter of semantics. Only in the motion for reconsideration did the County first make the argument that preservation of the *status quo ante* through the denial of the City's motion for injunction should impact the circuit court's consideration.

However, as its other arguments and outright disparagements of the City were demonstrated to be wholly without merit, the County has since gradually elevated those two sentences to prominence and now an entire—yet unpreserved—section of its brief on appeal. (Initial Br. of Appellants at 29-33) Per the County, the legality of the County's actions in

continuing to impose the Hospitality Fee is irrelevant. The effect of this contention is that it does not matter how long how long the County has been collecting the Hospitality Fee; all that matters is that it "was able to collect the Hospitality Fee, but now it is not." (Initial Br. of Appellant at 31-32) In its view, this one fact means a court cannot preliminarily enjoin the County from collecting it. The County's contention in this regard is illogical and would lead to an absurd result: *i.e.*, that the law commands that all parties *must* carry on as they were at the time of the lawsuit or the order on a motion for preliminary injunction, even if the actions to be enjoined are unlawful, illegal, and causing irreparable harm. Such contention is contrary to law, reason, and common sense. *See* Injunction Order at 15 ("Lastly, the County proffers the argument that a preliminary injunction should only be issued to preserve the status quo. However, this Court believes if preliminary injunctions were issued to only preserve the status quo, then a preliminary injunction should never be issued, even though the rules in South Carolina allow same. This position in and of itself is not logical.").

"The power of the court to grant an injunction is in equity." *Strategic Res. Co.*, 367 S.C. at 544, 627 S.E.2d at 689. As this Court has reminded, a court's equitable power is "not bound by cast-iron rules" but instead "exists to do fairness and is flexible and adaptable to particular exigencies." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App. 2006)). In line with this guiding principle, a preliminary injunction "should be granted when it appears prima facie that such injunction is necessary to preserve the right asserted by the plaintiff." *Seaboard Air Line Ry. v. Atl. Coast Line R. Co.*, 88 S.C. 477, ___, 71 S.E. 39, 39 (1911). This laudable goal gave rise to the oft-quoted language that a preliminary injunction seeks to protect the "status quo." *See, e.g., Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E. 60, 61 (1973)

("[T]he sole purpose of a temporary injunction is to preserve the status quo, and thus avoid possible irreparable harm to the plaintiff, pending litigation."); *Cnty. Council of Charleston v. Felkel*, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964) ("The sole object of a temporary injunction is to preserve the subject of the controversy in the condition which it is in at the time of the Order until opportunity is offered for full and fair deliberate investigation and the preserve the existing status during litigation.").

The County simply regurgitates this general purpose behind a preliminary injunction without giving it much thought. The true question the County presents is what does "status quo" mean: is a court limited to only allowing the parties to carry on as they were at the time of the order, even if the party to be enjoined is acting unlawfully and causing irreparable harm that lacks an adequate legal remedy, or can a court stop unlawful and harmful conduct and preserve the status quo by prohibiting future actions but not restoring the injured party to his prior position, as the circuit court did here? If the County's argument is to be believed, then courts would not be permitted to issue mandatory injunctions compelling the requested relief of the moving party; however, such authority is inherent in the courts of this state and the *status quo ante* is not required to be maintained in the face of illegal conduct. *See, e.g., Carter v. Lake City Baseball Club*, 218 S.C. 255, 269, 62 S.E.2d 470, 476 (1950).

Case law and the Rules of Civil Procedure confirm the answer is the latter.[21] For instance, in *County Council of Charleston*, which the County cites in support of its argument, this Court

[21] The City notes at least one decision from the court of appeals appears to support the County's argument, but only at first blush. *See MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 369, 588 S.E.2d 635, 638 (Ct. App. 2003) ("While we are troubled by the Baileys' continued insistence they are able to conduct business which is strikingly similar to the business they sold and with which they agreed not to compete, we agree with the trial court that an injunction would alter the status quo."). The *Bailey* court ultimately held that the factual circumstances presented made the issuance of a preliminary injunction "a close call" and that it

enjoined a landowner's continued sale of lots pending the litigation and found such an injunction preserved the status quo. 244 S.C. at 483-84, 137 S.E.2d at 578. Similarly, the Court preliminarily enjoined an elderly couple's close associate from continuing to spend and otherwise dispose of assets she allegedly obtained through elder abuse and exploitation. *Grosshuesch v. Cramer*, 367 S.C. 1, 6, 623 S.E.2d 833, 836 (2005). A record company obtained a preliminary injunction enjoining the defendants' on-going pirating of phonographic recordings. *Columbia Broadcasting Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 478, 189 S.E.2d 305, 312 (1972). Also, similarly, the Court recognized the power of a circuit court to preliminarily enjoin the collection of an existing but allegedly unlawful government assessment (in that case, a tax).[22] *Santee River Cypress Lumber Co. v. Query*, 168 S.C. 112, ___, 167 S.E. 22, 24 (1932). Not only does a court have the power to enjoin that assessment, "the duty rests upon it" to do so. *Id.* at ___, 167 S.E. at 22. And Rule 65(e), SCRCP, requires notice before preliminarily "*suspend[ing]* the general and ordinary business of an individual, partnership, association or corporation." (emphasis added).

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was "unable to say the trial court abused its discretion in refusing to the alter the status quo by restricting the Baileys' activities." *Id.* at 370, 588 S.E.2d at 639. This necessarily presumes the circuit court could have preliminarily enjoined the defendants even if doing so "alter[ed] the status quo."

[22] Similarly, this court also has long upheld a circuit court's power to enjoin the unlawful use and diversion of public funds. *Shillito v. City of Spartanburg*, 214 S.C. 11, 21, 51 S.E.2d 95, 99 (1948); *Kirk v. Clark*, 191 S.C. 205, ___, 4 S.E.2d 13, 15 (1939). The County suggests these cases are no longer good law in light of the Supreme Court's recent taxpayer standing cases. (Initial Br. of Appellant at 33) This contention fails for a number of reasons. First, it is unpreserved as the County did not raise this argument to the circuit court. *See Lapp*, 387 S.C. at 507, 692 S.E.2d at 569. Second, the County merely suggests in a conclusory fashion that this *may* be the case and therefore has abandoned this argument. *See Potter v. Spartanburg School Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011). Third, it is wrong. This Court has reaffirmed that standing exists to enjoin unlawful government assessments. *Myers v. Patterson*, 315 S.C. 248, 251, 433 S.E.2d 841, 843 (1993); *see also S.C. Public Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 118-19, 804 S.E.2d 854, 858-59 (2017) (finding "taxpayer standing" through the public importance exception).

Under the County's theory of the law, however, a court could never enjoin a party that has started competing against his former employer in violation of a non-compete clause. A court could never order a party to stop disseminating trade secrets or cease improperly using a company's intellectual property if those violations have already started. A court could never order a party to cease construction of a home that violates permit conditions, local ordinances, or restrictive covenants. The courts of this state would be hapless to stop conduct they find unlawful and causing irreparable harm just because the offending party started his actions before a suit was filed. This undermines the very roots of their equity jurisdiction, defies commonsense, and encourages gamesmanship by incentivizing parties to "strike first" by starting a harmful course of conduct as soon as possible and thereby prevent a court from stopping it *pendente lite*. *See Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001) (holding that adopting such a rule "would imply that any party opposing a preliminary injunction could create a new status quo immediately preceding the litigation merely by changing its conduct toward the adverse party" which "would unilaterally empower the party opposing the injunction to impose a heightened burdened on the party seeking the injunction.").

The County's proffered "first in time" rule is the very sort of technicality this Court found antithetical to a circuit court's equitable jurisdiction. *See Hooper*, 386 S.C. at 116-17, 687 S.E.2d at 33. If the County's position were correct, none of the injunctions described above would issue because the "status quo" is that the parties already were engaging in the conduct to be enjoined.[23] In circumstances such as those present here, a preliminary injunction simply hits "pause" on the parties' conduct, neither allowing unlawful conduct to continue nor walking back anything that has already taken place. It imposes and enforces a détente pending ultimate

[23] Furthermore, mandatory preliminary injunctions would cease to exist as a matter of law.

resolution of the case. That preserves the status quo at the time of the order. This is precisely what the Fourth Circuit had in mind when it described a preliminary injunction as restoring the status quo of the "'last uncontested status between the parties which preceded the controversy.'" *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) (quoting *Stemple v. Bd. of Ed. of Prince George's Cnty.*, 623 F.2d 893, 898 (4th Cir. 1980)). Requiring a party who has "disturbed the status quo ante to reverse its actions" actually "restores, rather than upsets, the status quo ante." *Id.* (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004)).

As a point of fact, contrary to the County's attempt to recharacterize events leading to this point, the circuit court's order actually restored the parties to the last uncontested status on the Hospitality Fee preceding the instant controversy, as discussed in *Aggarao*, *supra*. At the point of last agreement, which was the passing of Ordinance 105-96 and the respective consent resolutions of the City and the Other Municipalities, all parties agreed to the imposition of the Hospitality Fee for the limited purpose expressed in the Fee Use Provision and the limited duration of twenty years expressed in the Sunset Provision. Thus, termination of the Hospitality Fee consonant with the parties' intention that it end on January 1, 2017, has been achieved through the circuit court's injunction. Allowing unlawful conduct to continue—which the County asks this Court to do—is what changes and upsets the status quo. The narrow construction urged by the County hamstrings a court from protecting a plaintiff's rights pending the litigation, which is the ultimate goal of a preliminary injunction.[24]

[24] South Carolina is not alone in rejecting this view. Courts in other jurisdictions likewise agree that the *status quo ante* cannot consist of, or prevail in the face of, illegal conduct. *See, e.g., N. Am. Soccer League, LLC v. U.S. Soccer Federation, Inc.*, 883 F.3d 32, 37 n. 5 (2d Cir. 2018) ("The 'status quo' in preliminary-injunction parlance is really a 'status quo ante.' This special 'ante' formulation of the status quo in the realm of equities shuts out defendants seeking

In this case, the circuit court's injunction stopped the future collection of the Hospitality Fee during the pendency of this litigation and did no more. The injunction left all parties as they were as of the date of the order, and as they intended to be as of the time the Hospitality Fee was introduced, thus fully preserving the status quo. The circuit court did not "flout" the law, as the County derisively contends. (Initial Br. of Appellant at 30; *see also id.* ("With all due respect to the circuit court, what it 'believes' does not matter. What matters is what the law is."). Quite the contrary, the circuit court correctly held that the County's "position in and of itself is not logical." **(R. p.20)** It simply is of no moment that the County was already collecting the Hospitality Fee when the City commenced this action. The County's unpreserved argument regarding *status quo ante* lacks merit, and this Court therefore should affirm the circuit court's order.

III. The Circuit Court Correctly Held That the City is Exempt from Rule 65(c), SCRCP, as a Political Subdivision of the State, and the City Nevertheless Has Voluntarily Provided Adequate Security.

The County submits that the circuit court erred in not requiring the City to post security under Rule 65(c), SCRCP. The circuit court did not err because the rule excepts from this requirement the State of South Carolina, of which the City is a political subdivision. But in an effort to avoid a dispute in this regard, the City provided two forms of security: an escrow of all its collections under its Local Tax Ordinances, estimated to total $12.77 Million in Fiscal Year

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shelter under a current 'status quo' precipitated by their wrongdoing.") (citations omitted); *FQCPRQ v. Brandon Invs., L.L.C.*, 930 So. 2d 107, 112 n. 1 (La. Ct. App. 2006) ("Clearly, if Party A began an illegal activity which was causing irreparable harm to Party B, Party B would not be denied an injunction merely because the status quo was now Party A causing Party B irreparable harm."); *Seaboard Air Line R. Co. v. Atl. Coast Line R. Co.*, 74 S.E.2d 430, 434 (N.C. 1953) ("'[A] court of equity may, by its mandate, compel the undoing of those acts that have been illegally done, as well as it may, by its prohibitive powers, restrain the doing of illegal acts.'") (citation omitted); *DeNoie v. Bd. of Regents of Univ. of Tex. Sys.*, 609 S.W.2d 601, 603 (Tex. Ct. Civ. App. 1980) (holding that the "[s]tatus quo can never be a course of conduct which is a prima facie violation of law").

2019-2020, and the posting of an $8.815 Million surety bond. **(R. pp.1452-55, 1562-67)** This covers 77% of the amount of security the County requested below and is sufficient in and of itself. Beyond that security, the Other Municipalities which have enacted their own Local Tax Ordinances also pledged to escrow their collections, thereby providing an additional $7.52 Million in security and bringing the total security available to *over* what the County expressly represented to the circuit court would be an appropriate security. **(R. p.1111**, Motion for Reconsideration) ("Without such an exemption for the City in Rule 65(c), the City must be required to provide security for its injunction which must be in the amount of not less than $28,000,000.00 Million."); **(R. p.1359)**. The County's argument in this regard is thus waived and moot. In any event, the circuit court did not abuse its discretion in considering the issue of security; therefore, even assuming that the requirement applies to the City, the City has complied with Rule 65(c).

A. The County Has Not Preserved Its Argument that the City Is Not Exempt from Posting Security.

As a threshold matter, the County did not preserve its principal argument that the City does not fall within Rule 65(c)'s exemption of the State from the security requirement. The County's opposition to the City's Motion for Preliminary Injunction generically, and in passing, referenced bonds. **(R. pp.560-61)** But it never asked the circuit court to order that the City obtain a bond; the County merely postulated that "the City is unlikely to be able to obtain a bond as security for an injunction" and that the County will suffer irreparable harm "[i]f the City cannot prove that it can obtain this bond[25] and repay the County for any Hospitality Fee not collected

[25] The County misleadingly claimed at the time that over $50 Million in annual revenues were at issue and any bond "will likely need to be nine figures." **(R. p.560)** The circuit court correctly found this $50 Million figure to be hyperbole. **(R. pp.16-17)** The County has since rightly abandoned those pronouncements.

while an injunction is in place." (*Id.*) The City argued in response that it is exempt from any bonding requirements as a political subdivision of the State. **(R. p.826)** At the hearing, the County never disputed the City's argument or raised the bond question in any way. **(R. pp.275-306)** The Injunction Order consequently did not discuss whether a bond should issue. The County did not claim that a bond is required, or that the City is not exempt from Rule 65(c), until its Motion for Reconsideration. **(R. pp.1110-11)** "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). Accordingly, any argument that a bond is required or that the City is not exempt from obtaining one is unpreserved for this Court's review.

B. The Plain Language of Rule 65(c), SCRCP, Exempts South Carolina Political Subdivisions from the Security Requirement.

The same rules of construction for interpreting statutes apply to court rules. *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (per curiam). Accordingly, Rule 65(c) must be given a reasonable reading in light of its intended purpose, *Enos v. Doe*, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App. 2008), and must be interpreted in a manner which is consistent with the law at the time of its adoption in 1985, *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970).

As is relevant here, Rule 65(c) exempts "the State" from the security requirement. At the time of Rule 65(c)'s adoption, our courts recognized that "[m]unicipal corporations are not independent entities" but instead "are political subdivisions of the state." *Hibernian Soc'y v. Thomas*, 282 S.C. 465, 472, 319 S.E.2d 339, 343 (Ct. App. 1984). As such, they are "creature[s] of the state," "have no other ancestor other than the state and its citizens," and do not "possess a separate sovereignty." *Georgetown Cnty. v. Davis & Floyd, Inc.*, 426 S.C. 52, 59, 824 S.E.2d 471, 475 (Ct. App. 2019) (citing *Hibernian Soc'y*, 282 S.C. at 472, 319 S.E.2d at 343); *see also*

id. at 60, 824 S.E.2d at 475 (observing that Home Rule "did not 'reverse the traditional view that local governments in this country do not possess inherent power'") (quoting Underwood, *The Constitution of South Carolina, Volume II: The Journey Towards Local Self-Government* 177)). As used here, "the State" necessarily includes political subdivisions such as the City (and the County for that matter, which made no mention of posting security in its motion for a preliminary injunction).[26] There was no need for the drafters of our Rule 65(c) to separately identify political subdivisions as a matter of South Carolina law, regardless of what drafters in other states have done.

The rationale for exempting the State further confirms political subdivisions are included within this rule. Rule 65, except for certain portions not relevant here, "is substantially the Federal Rule which, in turn, is very much the same as present State practice." Rule 65, SCRCP, Note. The Federal rule exempts the United States government because "[a]lthough the government later may be liable for [damages arising from an improperly issued injunction], security is unnecessary because there is no substantial risk that the United States will be financially unable to indemnify the enjoined party for any of the costs it is legally obligated to pay." 11A Fed. Prac. & Proc. Civ. § 2954 (3d ed.) Like the federal version, our Rule 65(c) contains a recognition that "the State or an officer or agency thereof" has the ability to raise revenue and there is no substantial risk that they will be unable to answer for damages incurred by a wrongfully entered injunction. Political subdivisions like the City have the same ability to raise revenue and therefore fall within the spirit, as well as the plain language, of Rule 65(c).

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[26] The County's reliance on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), is unavailing. (*See* Initial Br. of Appellant at 35.) That the City may not be entitled to immunity under the Eleventh Amendment to the United States Constitution has nothing do with whether the City is a part of the State under a South Carolina procedural rule.

The circuit court therefore did not err in holding that "a bond as required by Rule 65 is not necessary and/or required for these parties." **(R. p.24)**

C. The City Volunteered to Post Adequate Security Notwithstanding That It Is Exempt from Doing So.

Not wanting the true substance of this case to be obscured by procedural issues, the City volunteered two separate forms of the security that nevertheless provide adequate protection for the County. To the extent it applies, Rule 65(c) requires security "in such sum as the court deems proper." The County previously recognized in briefing before the court of appeals in this appeal that Rule 65(c) does not "necessitate[] a 'dollar-for-dollar security bond.'" (Reply in Supp. of Pet. for Writ of Supersedeas at 5) Case law confirms as much. *E.g.*, *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 295, 247 S.E.2d 315, 318-19 (1978) (affirming an injunction bond for $2,000 when damages were estimated to be $5,987, and increasing the bond to $50,000 when damages were estimated to be over $56,850). It instead is a matter within the discretion of the circuit court to determine what amount of security is "sufficient to protect [the enjoined party] in the event the injunction is ultimately deemed improper." *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007).

The County declared to the circuit court that security in the amount of $28 Million should be required of the City. **(R. p.1111; 1359)** In opposition to the County's Motion for Reconsideration, the City *sua sponte* proposed "to escrow the funds it collected under its local accommodations and hospitality taxes, which it began collecting on July 1, until the resolution of this matter." **(R. p.1230)** The City's proposal emanated from the County's offer to escrow Hospitality Fee collections as security for the injunction it sought. (*Id.*) The City thereafter reiterated its proposal and "welcome[d] a modification of the Court's order granting the injunction to formalize the City's commitment" as permitted under Rule 62 (c), SCRCP. **(R.**

pp.1503-04) The circuit court accepted the City's proposal and modified the injunction to require that the City escrow revenues collected under the Local Tax Ordinances. **(R. pp.25-28)** Per the County's own estimates, this provides approximately $12.77 Million in security. **(R. pp.1361-64)** The circuit court correctly found that this escrow, coupled with the numerous ways through which the City can raise revenue "to cover any difference between the amount of the escrow and any costs and damages the County might incur or suffer in the event the Court's injunction is reversed on appeal, is a proper sum under Rule 65(c) and adequately protects the County."[27] **(R. p.26)**

The County continued to protest. In response, the City of North Myrtle Beach, Town of Surfside Beach, and the City of Conway (all putative class members) pledged to escrow their Local Tax Ordinance collections as security for the injunction. **(R. pp.1454-55, 1509-27)** This provides an additional $7.52 Million in security. *Id.* Furthermore, the City obtained a surety bond in the amount of $8.815 Million.[28] **(R. pp.1562-67)** The total security voluntarily provided in response to the County's continuing demands is approximately $29.105 Million, which is greater than the amount the County requested be imposed. Setting aside the valid escrow pledges made by North Myrtle Beach, Surfside Beach, and Conway, the security available directly from the City still totals approximately $21.585 Million, which is 77% of what the County asked for. This

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[27] The circuit court's decision was "made independent of, but is certainly bolstered by, the Court's view . . . that the City is not even required to post a security bond under Rule 65(c) based on its status as a political subdivision." **(R. pp.26-27)** The County now suggests that the City's ability to raise revenue to cover any damages to the County "is tantamount to a judicially imposed tax on the City's residents" (Initial Br. of Appellant at 39) is wholly unpreserved and utterly preposterous. Were that true, the State and its political subdivisions would never be effectively liable in damages.

[28] This amount is the difference the County calculated between collections under the Hospitality Fee and the Local Tax Ordinances by the City, North Myrtle Beach, and Surfside Beach. **(R. pp.1454-55, 1509-27)** Notably, it does not account for Conway's Local Tax Ordinance collections.

is sufficient in and of itself. But it is more than sufficient considering either the pledges of these Other Municipalities or the City's uncontested ability to raise revenue through a variety of mechanisms should the need arise.[29]

D. The County's Arguments Against Class Certification Are Unpreserved, Irrelevant, and Meritless.

Nestled in the County's argument regarding security is a non sequitur attack on the City's ability to certify a class in this case. The City agrees "the class allegations appear to have no bearing on whether the injunction should stand." (Initial Br. of Appellant at 41-42) As far as this appeal is concerned, the County is correct in this regard and this Court need not read any further. These arguments are plainly irrelevant to the issues the County raises. Furthermore, the issues are entirely unpreserved. They were neither raised to nor ruled upon by the circuit court, and the County does not contend otherwise. Finally, the County's arguments are patently meritless; there will be no impediment to identifying class members who made purchases within the municipalities, the County utterly fails to identify any "conflict" between the City and "the average class member," the primary relief sought is declaratory and injunctive relief with respect

[29] Finally, should this Court conclude that the City is not entitled to the "State" exemption under Rule 65(c), the security required by the circuit court and the surety bond are not sufficient, the escrow resolutions adopted and to be adopted by the other municipalities cannot be considered, and the City's ability to raise revenue is insufficient to satisfy the security requirements of the rule, the Court may modify the injunction to require the City to give security of $28 Million dollars or such lesser amount as this Court may find proper in view of the security already given. Just as the circuit court has authority to modify an injunction that is the subject of an appeal with respect to the amount of security under Rule 62(c), SCRCP, this Court has the authority to modify an injunction on appeal. *See* Rule 220(a), SCACR. In this instance, should this Court determine that additional security is required, a remand would be unnecessary given that the County has asserted that $28 Million dollars is the proper amount of security **(R. p.1111; 1359)** and nothing would remain to be determined by the circuit court in this regard.

to the class as a whole as permitted under Rule 23(a)(5), SCRCP, and wrongfully-assessed uniform service charges collected involuntarily at the point of sale can be recovered.[30]

IV. The Circuit Court's Conclusion that the City and Class Members Will Suffer Irreparable Harm Is the Law of the Case, and this Court Must Reject the County's Ancillary Unpreserved and Meritless Arguments.

Before the circuit court, the County's sole argument on the element of irreparable harm was that the County's Board of Fee Appeals provides an adequate mechanism for aggrieved fee payers to challenge the Hospitality Fee.[31] **(R. pp.559-61)** The circuit court correctly found that it does not. **(R. pp.15-17)** The County does not challenge this holding in any form. In fact, it proceeds "[e]ven accepting the circuit court's conclusion that the County's Board of Fee Appeals is inadequate." (Initial Br. of Appellant at 45) The circuit court's holding on this element thus is the law of the case for purposes of this appeal and must be affirmed. *See Dreher*, 412 S.C. at 249, 772 S.E.2d at 508.

This Court therefore cannot consider the County's two *new* arguments regarding irreparable harm: the timing of the City's initiation of this litigation demonstrates it does not face irreparable harm, and the purported existence of a less drastic remedy means irreparable harm will not result in the absence of the injunction. Both are unpreserved and without merit, as the County failed to raise either of these arguments to the circuit court in its written opposition to the

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[30] Moreover, S.C. Code Ann. § 15-53-20, pursuant to which the City's first primary cause of action is brought, can clearly be brought as a class action under Rule 23(a), SCRCP, and S.C. Code Ann. § 15-53-120 permits an award of "other relief." Accordingly, even if this issue was appropriate for appellate review, which is not the case, the County's arguments are unavailing.

[31] At the hearing on the injunction motion, the County contended that the City claimed irreparable harm would result from paying both the Hospitality Fee and taxes imposed by the Local Tax Ordinances, which the County characterized as self-inflicted. **(R. pp.296)** That was the City's argument on why an injunction is reasonably necessary to protect the City and the class members' rights, not why irreparable harm would result. **(R. pp.351-52)** In any event, the County does not raise that argument here.

City's motion or during the motion argument.[32] *Lapp*, 387 S.C. at 507, 692 S.E.2d at 569. On the merits, the County's timing argument is specious. The irreparable harm the City and Class Members have suffered and will suffer without an injunction is the imposition of the Hospitality Fee without a meaningful process for redress. **(R. pp.350-51)** Time does not cure that ill; it only hastens it. The circuit court's decision to give the County one month to stop collecting the Hospitality Fee within the Other Municipalities merely was an opportunity for the County to get its house in order and does not, in any way, diminish the harm Ordinance 105-96, as amended, inflicts.

Neither is there a requirement under South Carolina law that an injunction be the least drastic means available. An injunction need only be "reasonably necessary to protect the legal rights of the plaintiff in the pending action." *AJG Holdings*, 382 S.C. at 50-51, 674 S.E.2d at 508. Here as well, the County does not appeal the circuit court's holding that the injunction is reasonably necessary; indeed, the County concedes an injunction "will presumably always be necessary if a party lacks an adequate remedy at law" (Initial Br. of Appellant at 10 n. 5), and the County does not challenge the circuit court's finding that no such remedy exists. Moreover, the County argued below that the "less drastic" relief it now believes the circuit court should have ordered, which would preclude it from using any Hospitality Fee revenues during the pendency of this case, would have caused a "fiscal catastrophe." **(R. p.778)** The circuit court quite correctly found this hyperbole to be false. **(R. pp.16-17)** But it strains credulity for the County to argue that the circuit court abused its discretion by not creating a situation the County originally said would be catastrophic.

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[32] The County briefly mentioned these arguments in its Motion to Reconsider. **(R. pp.1108-18)** This, of course, does not preserve these arguments. *Johnson*, 381 S.C. at 177, 672 S.E.2d at 570 ("An issue may not be raised for the first time in a motion to reconsider.")

As a final matter, the City would note for the record and for this Court's benefit that the County has not appealed the circuit court's denial of the County's motion to enjoin the Local Tax Ordinances. Thus, even if the County is successful in this appeal, both the Hospitality Fee and Local Tax Ordinances will be imposed at the same time during this litigation. Yet, and similar to above, the County previously argued that this very situation would cause irreparable harm and "mayhem" that is "presumably impossible to undo." **(R. p.561)** This is yet another example of the County advancing a position to this Court that is the exact opposite of what it argued below. (*Compare* Initial Br. of Appellant at 3 ("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.") *and* Pet. for Writ of Supersedeas at 19 (terming § 6-1-330(A) "black-letter law" and a "plain directive from the General Assembly" that compels ruling in the County's favor), *with* **R. p.1500** ("[T]here are many legal issues for which there is no direct guidance from any legal decisions and the state statutes cited by the parties do not directly, nor indirectly, provide answers."). The County's prior protestation that this arrangement will cause irreparable harm should bar it from now asking that this Court create that very situation.

The circuit court did not abuse its discretion in this regard and should be affirmed.

CONCLUSION

In sum, the evidence of record supports the circuit court's determination that the County's unilateral actions to impose its will within the corporate limits of independent political subdivisions, without the permission of their governing bodies, constituted an abuse of power and authority that contravened constitutional and statutory provisions, the plain language of the Hospitality Fee, as well as other explications of the law. The circuit court therefore did not abuse its discretion in enjoining the County's collection of the Hospitality Fee during the pendency of

this litigation and the orders of the circuit court should be affirmed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

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

v.

Horry County, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondents City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

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CERTIFICATE OF SERVICE

This is to certify that I, Elizabeth Kurtz, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of Respondent City of Myrtle Beach's **Final Brief** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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