

**FAX COVER SHEET**

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TO  
COMPANY  
FAX NUMBER 18037341499  
FROM Lisa Gibson  
DATE 2020-03-30 14:56:32 EDT  
RE City of Myrtle Beach v. Horry County; Appellant Case No.  
201-001134

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**COVER MESSAGE**

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Please see attached for filing.



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March 30, 2020

**VIA FACSIMILE**

The Honorable Daniel E. Shearouse  
Clerk of Court  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29201


**Re: City of Myrtle Beach v. Horry County  
Appellant Case No. 2019-001134**

Dear Mr. Shearouse:

Enclosed for filing please find the Return to Motion to Supplement Record in the captioned matter. We are filing the Return via facsimile pursuant to the Court's March 20, 2020 Order and have served counsel of record as shown on the certificate of service.

If you have any questions, please do not hesitate to contact me.

Respectfully yours,



Wm. Grayson Lambert

WGL:lg  
Enclosures

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM Horry COUNTY  
Court of Common Pleas

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

Appellate Case No. 2019-001134

Case No. 2019-CP-26-01732

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

v.

Horry County,..... Appellant.

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RETURN TO MOTION TO SUPPLEMENT RECORD

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Pursuant to Rule 240(e), SCACR, the County submits its Return to the City's motion to supplement the record on appeal.

**Introduction**

Making many of the same arguments from its motion to take judicial notice, the City now moves to supplement the record on appeal, seeking to include County Council meeting minutes from November 19, 2019 and December 16, 2019. These County Council meeting minutes did not even exist at the time the circuit court entered the injunction at issue in this appeal. This motion should meet the same fate as the motion to take judicial notice because the City's request violates Rule 210(c),

SCACR, and because the material it seeks to include is not relevant to the arguments on appeal.

### Argument

#### **I. The City's request to supplement the record on appeal violates Rule 210(c).**

Under the Appellate Court Rules, the record on appeal "shall not . . . include matter which was not presented to the lower court." Rule 210(c), SCACR. The City insists, in a single sentence, that this requirement is satisfied because the City attached the County Council minutes to its second motion to lift the stay to the circuit court. *See* Mot. 4.

This brief attempt to address Rule 210(c) glosses over how and when the City submitted the post-injunction County Council minutes to the circuit court. A closer look at what actually happened demonstrates that Rule 210(c) does not allow the City to supplement the record on appeal in this manner.

The City first presented the post-injunction County Council minutes to *this* Court—not the circuit court—when the City moved on January 16, 2020 for this Court take judicial notice of the minutes. This County opposed the motion, and ultimately, the Court denied it.

Only after the City put the minutes before this Court did the City present the minutes to the circuit court for the first time, as an attachment to the City's motion to lift the stay pending appeal (a stay to which the City had consented). In other words, the City belatedly went to the circuit court and put the County Council minutes before it after the City already had tried to get the minutes before this Court.

The County is aware of no case in which our appellate courts have approved of what the City did here. And for good reason. To allow a party to do this would, in effect, give a party the ability to include in the record on appeal a document that was not actually before the circuit court when the circuit court decided the order on appeal. A party could go back to the circuit court and file a Rule 60 motion (or some other, more creative filing), and then it could move to supplement the record on appeal under Rule 212,<sup>1</sup> as the City has attempted to do here, saying that Rule 210(c)'s requirement was met.

Rule 212 does not exist for this reason. As seen from subsection (a), Rule 212 ensures that the appellate court can consider the same record the circuit court considered when deciding a case. Thus, if the parties do not designate everything that needs to be in the record on appeal for the appellate court to fulfill its function of “review[ing] decisions of lower courts for errors,” Rule 212 allows either the appellate court or the parties to supplement the record with matters that were “before the lower court.” *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring and dissenting in part). Rule 212 was not intended to serve as a backdoor for a litigant to introduce new information to an appellate court that was never considered by the circuit court in deciding the issues on appeal.

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<sup>1</sup> Although the order denying the City's motion to take judicial notice was without prejudice to the City's right to supplement the record on appeal under Rule 212, that order did not say that or imply that a Rule 212 motion would be granted. A motion to supplement the record on appeal under Rule 212 still must meet the requirements of the Appellate Court Rules.

## **II. The County Council minutes are not relevant to this appeal.**

Even if supplementing the record on appeal were procedurally proper, the motion should still be denied because the minutes are not relevant to the issues on appeal.

### **A. The County's decision not to renew the participation agreement with SCDOT is irrelevant.**

According to the City, the County's decision at its November 19 meeting not to renew the participation agreement with SCDOT is relevant because it means there is now no I-73 and thus no specific improvement for which the Hospitality Fee will be used, in violation of *C.R. Campbell Construction Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437, 438 (1997). This argument misses the mark on what *Campbell* and State law require.

#### **1. The Hospitality Fee can be used for things other than I-73.**

*Campbell* requires only that the revenue from a uniform service fee have a "specific improvement contemplated" that benefits the people who pay the fee. *See id.* Put another way, revenue from the fee cannot go into a county's general fund to be used for any purpose a county sees fit. Instead, a county must designate a particular use for that revenue that benefits those who pay the fee.

State statutes work the same way and provide that a fee that was in effect on accommodations before March 15, 1997 (as the Hospitality Fee was) may be used for any of seven tourism-related purposes set forth in section 6-1-530. *See* S.C. Code §§ 6-

1-530; 6-1-760(B).<sup>2</sup> This statutory framework complies with *Campbell* because tourists are the payers of the accommodations fee (which is a fee on sleeping or lodging accommodations), and therefore, the revenue from the accommodations fee must be used to benefit tourism. Section 6-1-530 merely codifies tourism-related expenditures for a fee on accommodations and is a specific, legislative implementation of this Court's decisions on uniform service fees when tourists are the payers of the fee, as is the case with the County's Hospitality Fee.

As the County explained in its merits briefs, the Hospitality Fee was initially designated to fund projects identified in the RIDE Report. (R. p. 172.) Then, as those projects were completed, the County permitted the Hospitality Fee revenue to be used for all of the tourism-related purposes permitted by section 6-1-530. (R. pp. 184–85.) Namely, the County announced its intention to use some of the Hospitality Fee revenue for construction of I-73, and some of the revenue for police, fire protection, emergency medical services, and emergency-preparedness operations related to tourism. (R. pp. 766–67.)

The County's decision to use some of the revenue for I-73 is simply a specific application of section 6-1-530, which allows for revenue to be used for "highways, roads, streets, and bridges providing access to tourist destinations." S.C. Code § 6-1-

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<sup>2</sup> The revenue from the other parts of the Hospitality Fee (that is, the fees on prepared food and beverage and admissions to places of amusement) does not have these same statutory restrictions, but its use is controlled by *Campbell*. Nevertheless, all of the County's Hospitality Fee revenue has the same tourism-related uses, which as explained here, comport with State law as tourists are payers of each part of the Hospitality Fee. (R. pp. 184–85.)

530(A)(4). Likewise, the County's decision to use some of the revenue for police, fire protection, emergency medical services, and emergency-preparedness related to tourism is also a specific application of section 6-1-530(B)(1). All of these uses—from the original RIDE Report projects to the current uses—benefit tourists, who are the payers of the Hospitality Fee. *See Campbell*, 325 S.C. at 235, 481 S.E.2d at 438 (a fee is valid if, *inter alia*, “the revenue generated from a uniform service charge [is] used to benefit the payers of the fee, even if the general public also benefits”). Therefore, the revenue from the Hospitality Fee has valid uses other than I-73.

The County has not sought to use revenue from the Hospitality Fee in a manner that is inconsistent with state law. The fact that the County cancelled the participation agreement with SCDOT is not evidence that the County seeks to use revenue from the Hospitality Fee impermissibly.

**2. The County can change the use of the Hospitality Fee revenue without municipal consent.**

The major premise of the City's argument is that the specific improvement for which a fee is used cannot change. Yet, there is no basis in law for this position.

As a starting point, nothing in *Campbell* or *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992), restrains a governing body from changing the use of the revenue from a uniform service charge. Nor does any State statute. Thus, no provision of State law (whether statutory or common) prohibits a county from changing the service funded by a uniform service fee, as long as the service benefits the people who pay the fee. And given the broad power of counties to amend ordinances, *see, e.g.*,

*Sloan v. Greenville Cty.*, 356 S.C. 531, 555–65, 590 S.E.2d 338, 351 (Ct. App. 2003), there is no reason to imply such a limitation from *Campbell*, *Brown*, or the statutes.

Moreover, nothing in State law requires municipal consent to change the use of the revenue. The City has not pointed to any specific provision requiring consent for a change in how revenue from a uniform service charge is used. Indeed, there is no such provision.

For all its arguments about having to consent to the Hospitality Fee (which are incorrect, *see infra* Part II.B.), those are irrelevant on this point because the *fee* is not the same thing as the *use* of the fee. Consider section 6-1-300, which defines a “fee” as “a charge required to be paid in return for a particular government service.” S.C. Code § 6-1-300(6). The charge—that is, what is paid—is the fee, and in exchange for paying the charge, the payer gets some benefit (*i.e.*, the use of the fee). That is in accord with *Brown* and *Campbell*.

In *Brown*, the fee was a \$15 fee imposed on each vehicle registered in the county. *Id.* at 181–82, 417 S.E.2d at 566. The use of that fee was to maintain roads. *Id.* at 185, 417 S.E.2d at 568. In *Campbell*, the fee was a .25 percent transfer fee on the purchase price of real property. 325 S.C. 235, 481 S.E.2d at 437. And the use was “for acquiring, improving, operating, and maintaining parks and public recreational facilities.” *Id.* In both cases, the *fee* was distinct from its *use*. Indeed, this dichotomy is necessary for the four-part test to make sense. *See id.*, 481 S.E.2d at 438 (stating that for a uniform service charge to be valid it must, among other things, be used to benefit the payer and for the specific use contemplated by the fee). That test assumes

a fee has been imposed, and then the fee must satisfy four requirements to be valid.

*See id.*

All of the City's arguments about having to consent to the Hospitality Fee therefore have no import on this motion, when its argument is about the use of that fee. To the extent the City has conflated the fee and its use, its arguments are misguided.

**3. The timing of the decision not to renew the participation agreement has no impact on the analysis here.**

The participation agreement, had it been renewed, would have obligated the County (not the City or any other municipality) to contribute to funding certain costs required by SCDOT for I-73. With a significant portion of the County's revenue source currently enjoined, the County could not responsibly continue to commit to SCDOT.

That the County waited not to renew the participation agreement indicates that the County actually did want (contrary to the City's assertion, *see* Mot. 6 n.9) to continue its efforts to move forward with I-73. But when a decision had to be made, the County had no choice because the injunction was still in place. As the County noted in response to the motion to take judicial notice, that the I-73 project cannot move forward right now does not mean that it cannot move forward if the County is allowed to collect the Hospitality Fee again. Regardless, the fact there is currently not a participation agreement in place between the County and SCDOT is of no consequence to this appeal.

\* \* \*

Ultimately, the revenue from the Hospitality Fee does not have to be used for I-73, and the County's decision how to use that revenue does not require municipal consent. Therefore, the November 19 meeting minutes are irrelevant to this appeal.

**B. The County's rejection of the settlement in principle is also irrelevant.**

The City's argument about the County rejecting the settlement in principle is straightforward enough: If the County demanded all municipalities agree to the settlement, then the County's argument that the municipalities were not required to consent to the Hospitality Fee must be wrong. *See* Mot. 6. This argument improperly equates the legal requirements for the Hospitality Fee with the County's strategic considerations regarding settlement.

The County has made its argument about why the Hospitality Fee does not require municipal consent in its merits briefing, but here it is in a nutshell: The General Assembly determines the powers of counties and municipalities. *See* S.C. Const. art. VIII, §§ 7; 9. The General Assembly spoke specifically about uniform service fees that existed at the time of the County's Hospitality Fee in sections 6-1-330(A) and 6-1-760(B). The Hospitality Fee has not been "repealed," S.C. Code § 6-1-330(A), and it meets the various requirements of section 6-1-760 to "remain[] authorized and effective," *id.* § 6-1-760(B). Neither of these statutes requires the County to have municipal consent for the Hospitality Fee to be valid. And these specific statutes control over the general ones on which the City relies, none of which addresses this specific fee nor mentions "consent." *See Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468–69 (2010). The City is therefore unlikely to

prevail on the merits, and the circuit court wrongly enjoined the County from collecting the Hospitality Fee.

Wholly unrelated to this analysis is the County's position on settlement. The agreement in principle required that all municipalities sign onto the settlement agreement. As the City implicitly admits, all municipalities did not. *See* Mot. 3 ("most of" the municipalities signed off on the agreement). Wanting all of the municipalities to sign onto the settlement agreement does not mean that the County actually believed their consent to the Hospitality Fee was necessary. Rather, the County wanted to ensure these claims could not be brought by any other municipality, the most likely plaintiff to bring such a claim. Even assuming the circuit court would agree to certify a class after a settlement agreement (not a sure thing, given the various issues facing class certification here, ranging from identifying every person who stayed at a hotel or ate at a restaurant in Horry County to the issue of whether plaintiffs can even recover what they paid if the Hospitality Fee is struck down), another municipality could still opt out of the class and bring its own lawsuit, thinking it could get a more favorable result that way. Indeed, in repeatedly attacking the County's motives for wanting all municipalities to sign off on the agreement, whether here or on the motion to take judicial notice, the City has overplayed the role of potential class and ignored how the municipalities may not necessarily be part of the class. The fact that at least one municipality did not sign off on the settlement in principle suggests that opting out may be an issue that keeps these legal questions alive beyond any theoretical class settlement in this case. The County's position is therefore not a manipulation of the

litigation process but a prudent approach to seeking finality through settlement, making *Winrose Homeowners' Ass'n, Inc. v. Hale*, 428 S.C. 563, 573 n.10, 837 S.E.2d 47, 52 n.10 (2019), an inapt comparison.

Moreover, and despite the City's protestations to the contrary here and in its reply in support of its motion to take judicial notice, the City is invoking the County's rejection of the settlement in principle in violation of Rule 408. That rule prohibits using statements in settlement negotiations "to prove liability." Rule 408, SCRE. According to the City, the December 16 minutes and the County's rejection of the settlement in principle if all municipalities did not sign onto it "is an admission . . . and runs counter to the principal legal justification advanced by the County in this appeal." Mot. 6. Put another way, the City says the County's actions in settlement discussions are proof that the County's legal arguments are wrong. That is exactly what Rule 408 prohibits.

### **Conclusion**

The motion should be denied.

Respectfully submitted:

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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM HORRY COUNTY  
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Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

Case No. 2019-CP-26-01732

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

v.

Horry County,..... Appellant.

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CERTIFICATE OF SERVICE

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I certify that this RETURN TO MOTION TO TAKE JUDICIAL NOTICE was served on counsel for the Respondent via electronic mail, pursuant to Supreme Court Order 2020-03-20-01, § (g)(3), on March 30, 2020, and a copy of that electronic mail is attached to this certificate:

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

s/ Wm. Grayson Lambert

**Lambert, Grayson**

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**From:** Lambert, Grayson  
**Sent:** Monday, March 30, 2020 2:41 PM  
**To:** John Hoefler; Chad Johnston; 'whumphrey@willoughbyhoefer.com'  
**Cc:** Golding, Henrietta; Gilliam, James  
**Subject:** City of Myrtle Beach v. Horry County, No. 2019-001134 - Return to Motion to Supplement Record on Appeal  
**Attachments:** Return to Motion to Supplement Record on Appeal.pdf

John, Chad, and Walker,

I hope you're doing well and staying safe. As allowed by the Supreme Court's order of March 20, I am serving via email the County's return to the motion to supplement the record on appeal. We will file this by fax, as allowed by that same order, and attach this email to the certificate of service.

Regards,  
Grayson