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TO: Hon. Daniel E. Shearouse

FAX NO: 803-734-1499

FROM: John M. S. Hoefer, Esq.

DATE: April 3, 2020 **TIME:** _____

TOTAL NUMBER OF PAGES, INCLUDING COVER SHEET: 21

Message: Please see attached for filing in accordance with Supreme Court Order No. 2020-02-20-01 a Reply and Memorandum, Certificate of Service, and transmittal letter in Appellate Case No. 2019-001134. Please return the extra copy of the filing letter with your file stamp at your convenience. Thank you.

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April 3, 2020

VIA TELECOPIER NO. 803-734-1499

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

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

Dear Mr. Shearouse:

Attached for filing and pursuant to Rule 240, of the South Carolina Appellate Court Rules, Respondent City of Myrtle Beach, for Itself and a Class of Similarly Situated Plaintiffs, ("City") respectfully submits its **Reply and Memorandum in Support of Motion to Supplement Record** in the above-referenced appeal.

As permitted by the Court's Order 2020-02-20-01 issued March 20, 2020 ("Order"), please note that we are (1) not filing any copies as permitted under Section (d) of the Order, (2) filing this document via facsimile transmission as permitted under Section (c)(4) of the Order, and (3) serving counsel for Appellant via electronic mail as permitted under Section (g)(3) of the Order and enclose a certificate of service to that effect. I would appreciate your acknowledging receipt of this document by file-stamping the copy of this letter attached and returning it to me.

If you have any questions or need additional information, please do not hesitate to contact me.

With best regards, I am

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

John M.S. Hoefer

Enclosure

cc: Henrietta U. Golding, Esquire (via electronic mail)
James K. Gilliam, Esquire (via electronic mail)
Adam R. Artigliere, Esquire (via electronic mail)
W. Grayson Lambert, Esquire (via electronic mail)

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.

RESPONDENT'S REPLY AND MEMORANDUM IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD

Pursuant to Rules 212 and 240, SCACR, Respondent City of Myrtle Beach, for Itself and a Class of Similarly Situated Plaintiffs ("City"), submits this reply and memorandum to the return of Appellant Horry County ("County") to the City's motion for leave to supplement the Record on Appeal to include documentation of two separate actions taken by the Horry County Council ("County Council"). For the reasons set forth below and in the City's motion and supporting memorandum, this Court should grant leave to supplement the record to include two documents setting forth undisputed facts that bear directly on the matters currently pending before this Court.

INTRODUCTION

The County does not dispute the facts City seeks to have included in the record—that County Council voluntarily terminated the I-73 SCDOT financial participation agreement and

rejected the proposed settlement agreement in principle that would have provided funding for I-73, thereby removing I-73 as the specific improvement which would have its costs recovered from the Hospitality Fee revenues. Neither has the County requested that any additional facts be included as was its right under Rule 212(b), SCACR. Instead, the County advances misguided procedural arguments, misrepresentations (and misquotations) of the City's arguments, and plainly incorrect legal arguments. Accordingly, these facts established by the meeting minutes identified by the City directly undermine the County's arguments to this Court, are relevant to this appeal, and thus are proper supplements to the record.

LAW/ANALYSIS

I. The South Carolina Rules of Appellate Procedure and this Court's Precedent Permit Supplementation of the Record to Include These Facts.

The County asserts in Section I of its Return that "the City's request [to supplement the record] violates Rule 210(c), SCACR." Return at 1-2. The County is wrong.

South Carolina's Appellate Court Rules draw a distinction between "matter . . . presented to the lower court or tribunal" under Rule 210(c), SCACR, and the inclusion of additional "fact[s] which do[] not appear in the record on appeal" through supplementation per Rules 210(h) and 212, SCACR. To be sure, these minutes have been presented to the lower court. The timing of the City's now ruled-upon motion for appellate judicial notice and the motion to the circuit court to lift its stay to allow Plaintiffs to amend and supplement their complaint is irrelevant to the instant motion, as the relevant fact — which the County does not dispute — is that the documents have now been presented to the circuit court. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). The County suffers no prejudice from the submission of these facts in a motion under Rule 212(b) (even where it does not consent to the consideration of these facts), as its rights are

protected in this instance by the requirement of Rule 212(b) that it "designate any supplemental materials which that party desires to add if the Court grants the motion."[1]

The County makes much of the fact that the City presented documents establishing these facts to the circuit court only after it had moved this Court to take appellate judicial notice of same and contends that the timing of these submissions in view of Rule 210(c) compels denial of the instant motion. Return at 2-3. This argument ignores the plain language of Rules 210(h) and 212(b). *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (holding courts must read a statute so that "no word, clause, sentence, or part shall be rendered surplusage, or superfluous"); *see also Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (per curiam) (holding that the same rules of construction for interpreting statutes apply to court rules). Rules 210(h) and 212(b) allow for an exception to the rule limiting consideration of facts to those originally contained in the record on appeal. Rule 210(c), SCACR, proscribes a party from including in the record on appeal matter which was not presented to the court below – something that the City has not done. By contrast, Rules 210(h) and 212(b) expressly permit a party to move for leave to supplement the record on appeal with facts which do not appear therein. *See* Rule 210(h), SCACR ("**[e]xcept as provided by Rule 212** . . . the appellate court **will not consider any fact** which does not appear in the record on appeal") and Rule 212(b), SCACR ("[w]ithout [written consent of all attorneys of record] . . . **a party** desiring to supplement the Record on Appeal **must move the appellate court for leave to do so**") (emphasis supplied).

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[1] The County, however, has chosen not to designate any such supplemental materials. The City submits that this is a reflection of the fact that there is no dispute regarding the accuracy of the facts advanced in the City's Rule 212(b) motion.

Under the County's theory, a party may never avail itself of the plain language of Rule 212 if the material with which it seeks to supplement the record was not before the trial court when it made its original ruling. Yet this Court clearly has the discretion to consider a fact not contained in the record on appeal, and Rule 210(h) does not restrict this Court's review to facts appearing in the record on appeal if it grants a Rule 212(b) motion. *See Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001) (affirming a circuit court order granting a temporary injunction on mootness grounds after the lower court order ruling on the merits was presented on a motion to supplement the record on appeal which was granted by this Court); *cf. Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg Cnty. Water & Sewer Auth.*, 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006) ("[n]othing in the appellate court rules permits a party to **unilaterally** add **after created evidence** to the record") (emphasis supplied). As recently as last October, this Court accepted a party's motion to supplement the record with a demonstration of material actions taken by one of the parties during the pendency of the appeal, which matter was not before the trial court when it considered the appealed issues but which bore on the subject matter of the appealed dispute.[2] *Bazen v. Bazen*, 428 S.C. 511, 528, 837 S.E.2d 23, 32 (2019) (granting the supplementation of the record and relying upon the supplemented information in reaching the Court's decision).

Moreover, this Court has recognized that it may properly consider facts not contained in the record on appeal in appropriate circumstances — which the City submits exist here — even without application of Rule 210(h) and Rule 212(b). For example, in *State v. Orr*, 225 S.C. 369, 82 S.E.2d 523 (1954), this Court considered in an appeal from a criminal conviction the fact that the appellant had a habeas corpus proceeding pending in another circuit court when he was

[2] In that case, the party's motion was made at the oral argument before the Court, and the Court granted the motion by subsequent written order. *Bazen*, 428 S.C. at 528, 837 S.E.2d at 32.

removed to another county and tried in the circuit court in which he was convicted. Even though "[n]o facts relating thereto are shown in the transcript of record" and "[t]hey appeared only in appellant's brief," this Court considered that fact "as a matter of grace." *Id.* at 372, 82 S.E.2d at 525.

The circumstances of this case make consideration of the facts the City has identified in its motion to supplement appropriate whether it is considered under the pertinent provisions of the South Carolina Appellate Court Rules or as a matter of grace. This is an appeal from an order imposing an injunction, and it is beyond dispute that our appellate courts have the authority under Rule 220(a), SCACR, to modify this injunction. *See, e.g., City of Rock Hill v. Public Service Comm'n of S.C.*, 308 S.C. 175, 417 S.E2d 562 (1992); *see also Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993). And, as noted above, this Court has approved a motion to supplement the record on appeal in cases involving circuit court injunctions, and otherwise, to take into account facts or occurrences arising after the lower court has ruled, *see Curtis, Bazen, supra*, and gives lie to the County's contention that Rule 212 exists only to "ensure[] that the appellate court . . . consider[s] the same record the circuit court considered when deciding a case." Return at 3. Moreover, the County does not dispute the accuracy of the facts City seeks to have this Court consider.

Begrudgingly, in a footnote, the County acknowledges that this Court's order denying the City's motion for appellate judicial notice of these uncontested facts expressly provides that it was without prejudice to the City's right to move under Rule 212. Return at 3, n.1. The County's suggestion that this Court's consideration of the instant motion would "serve as a backdoor for a litigant to introduce new information to an appellate court that was never considered by the circuit court" and is thus improper in "deciding the issues on appeal" (Return

at 3) is astonishing in its temerity. Moreover, this suggestion by the County is remarkably oblivious to the impropriety of allowing facts it repeatedly asserted in it's brief to this Court which are indisputably no longer accurate to continue to form a basis for its arguments. *See* City Motion to Suppl. Record at 2, n. 1 (citing *Winrose Homeowners' Assoc., Inc. v. Hale*, 428 S.C. 563, 573 n. 10, 837 S.E.2d 47, 52 n. 10 (2019)) and at 3, nn. 4-6.[3]

II. The Facts Which Will Supplement the Record on Appeal Are Undeniably Relevant to this Appeal and the County's Assertions to this Court.

Without a valid procedural objection to the City's motion, the County next submits that these facts are not relevant to this appeal. In order to do so, the County resorts to a number of legal and factual misstatements. Viewed through the proper lens, the County's argument rings hollow.

A. The County Council meeting minutes are relevant to refute the County's repeated statements to this Court that the Hospitality Fee is proper because it will fund I-73.

The City's opening motion and memorandum detailed the County's oft-repeated refrain that the Hospitality Fee revenues will go towards the I-73 project. City Mot. at 3. If this were not relevant and pertinent to this appeal, the County would not have mentioned it at least five times in its briefing. And now, the County does not want this Court to know that it has taken affirmative steps to remove any obligation it had to fund I-73 and prevent Hospitality Fee funds from contributing to it.

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[3] The County cites but one authority in this section of its Return, specifically *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012), which it contends supports its assertion that Rule 212 only permits the record to be supplemented with matters which were before the lower court. Return at 3. However, even a cursory review of the partial concurrence and partial dissent upon which the County relies, reveals that it did not pertain in any way to a motion to supplement the record on appeal under Rule 212(b) as expressly contemplated under Rule 210(h). Because no issue involving evidence outside the record on appeal or a motion to supplement the record on appeal to consider facts not presented in the lower court is discussed in this Court's opinion, it is inapposite.

First, it cancelled its participation agreement with SCDOT, the very agreement whereby the County would have contributed funding to I-73. Though the County originally extended the agreement while the injunction was in place, it then cancelled the agreement *early*[4] and after the City and County's authorized representatives entered into the settlement agreement in principle that would have provided the needed funding. In other words, the County backed out of the agreement despite knowing the County had the revenue source to fund it. Then, the County rejected the settlement agreement in principle that would have provided these funds. Its public justification for doing so (as revealed in the minutes) was a series of falsehoods and strawmen that merely masked the County's decision to no longer support I-73. The County's inability to confirm, even now, that it *will* dedicate Hospitality Fee revenues to I-73 if it begins collecting them again proves the point.

Absent a valid, specific improvement to be funded by the Hospitality Fee, it no longer is a valid uniform service charge. *C.R. Campbell Const. Co. v. City of Charleston*, 325 S.C. 235, ___, 481 S.E.2d 437, 438 (1997);[5] *Brown v. Cnty. of Horry*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992). Thus, the County's arguments that the Hospitality Fee continues to be valid based on its dedication to I-73 (which the City disputes, but is irrelevant for the current discussion), and that it had the right to dedicate funds to I-73 regardless of municipal consent, are moot as the County Council has taken official public action to eliminate the Hospitality Fee revenues as a

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[4] On August 28, 2019, County Council extended the SCDOT participation agreement to December 31, 2019, and gave the municipalities until November 26, 2019, to get "the cities on board." City Mot. to take Judicial Not., Ex. D. The parties signed the settlement agreement in principle to provide I-73 funding on November 15, and the County nevertheless cancelled the SCDOT agreement on November 19. City Mot., Ex. B at 6.

[5] "Under *Brown,* a fee is valid as a uniform service charge 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 ___, 481 S.E.2d at 438 (emphasis supplied).

funding source to defray the costs of the proposed I-73 project. The record should be supplemented with the facts demonstrating the County's material change of heart.

B. The County's Return is riddled with misstatements.

To support the fiction that the cancellation of the SCDOT financial participation agreement and rejection of a settlement agreement in principle that would have provided funding for I-73 is irrelevant (while the County also maintains that its desire to use the revenues on I-73 somehow still is relevant), the County lays out a number of misstatements, misconceptions, and misdirected assertions regarding the law and the City's arguments. These include, but certainly are not limited to, the following:

- "*Campbell* requires only that the revenue from a uniform service charge have a 'specific improvement contemplated' that benefits the people who pay the fee." Return at 4.

"A service charge is imposed on the theory that the portion of the community which is required to pay it receives some special benefit as a result of ***the*** **improvement made** with the proceeds of the charge." *Brown*, 308 S.C. at 185, 417 S.E.2d at 568 (emphasis supplied). In *C.R. Campbell*, a follow-up case to *Brown* that was also authored by Justice Moore, the Supreme Court clarified that a uniform service charge must satisfy four criteria:

> (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 ___, 481 S.E.2d at 438 (emphasis added). A uniform service charge must not just be tied to a specific project, it must be tied to the *cost* of a specific project. While the use must benefit the payer, that alone is not enough; there must be a specific project and the

fee cannot generate more revenue than is necessary for it.[6] There is more to a uniform service charge than the County leads on.

- "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." Return at 4.

The County cites § 6-1-760 in support of this passage to suggest here and elsewhere that it can change the fee use provision of the Hospitality Fee ordinance so long as the new use is one listed in § 6-1-530. Return at 5, 9. This patently is not what § 6-1-760 provides. In pertinent part, this section states: "[A]ny ordinance enacted by county or municipality prior to March 15, 1997, imposing an **accommodations fee** . . . , and the revenue from which is used for the purposes enumerated in Section 6-1-530, remains authorized and effective after the effective date of this section." (Emphasis supplied.) Per this section, the *original* fee (as it applies to accommodations only) is grandfathered if, among others, it is used for a purpose set out in § 6-1-530. It does not give the County carte blanche to extend the application of the fee to other transactions or change the fee use provision at will to any of those uses.[7] Neither does it mean that any use consistent with § 6-1-530 automatically satisfies *Brown* and *C.R. Campbell*, as the County also suggests. It can hardly be maintained that giving a county government unfettered discretion to collect a uniform service charge from within the corporate limits of municipalities on transactions other than accommodations and without their input or consent and then to spend

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[6] To the extent the County suggests otherwise on Page 6 of its return and believes that benefit to the payer is enough, the County is wrong.

[7] Tellingly, the County does not address how using the Hospitality Fee for entirely new projects can be considered "grandfathered" under a fee that was only to be used for RIDE projects. This is because it cannot and upends the very concept of grandfathering. The City would further note that the County's reliance upon § 6-1-330(A) is likewise misplaced as its argument in this regard is contrary to its plain language – which only relieves its governing body from the requirement that it re-enact its ordinance imposing the Hospitality Fee "by a positive majority." *See* discussion at Resp. Br., pp. 32-35.

the money collected at its will on seven broad categories of expenses under the general umbrella of "tourism" is using revenue from the fee for the "*specific* improvement contemplated."[8]

Moreover, the County's acknowledgment that "revenue from the fee cannot go into a county's general fund to be used for any purpose the county deems fit" (Return at 4) cannot rescue it from the requirements of *Campbell* and *Brown* that a uniform service charge be used only to recover the cost of a specific improvement. *Cf. City of Myrtle Beach*, 407 S.C. at 305, 755 S.E.2d at 428 ("[w]here a special fund is created or set aside by statute for a particular purpose, it … may be applied only to the purpose for which it was created or set aside, and not diverted to any other purpose" [internal citation omitted]). This Court's holdings in *Campbell* and *Brown* provide the same type of legal limitation – albeit not statutory – on the use of the uniform service charge revenues from the Hospitality Fee as did the tax statute in *City of Myrtle Beach.* And the County's use of these revenues for any purpose other than payment of the costs of the road projects identified in Ordinance 105-96 is improper.

Similarly, the County's contention that "the fee is not the same thing as the use of the fee," Return at 7, has no bearing on the validity of the Hospitality Fee as it is a uniform service charge. The "dichotomy" claimed by the County to exist as a result of this putative distinction amounts to nothing more than a backhanded assertion that the Hospitality Fee is a tax and not a

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[8] The County's assertion that the taxing provisions of § 6-1-530 and § 6-1-760(B) comprise a "statutory framework [that] complies with *Campbell*" with respect to a uniform service charge under S.C. Code Ann. § 4-9-30(5)(a) (Return at 3-4), even if correct (which the City disputes), cannot support the County's opposition to this motion. This is so because the County has not complied with the statutory framework requiring that every ordinance receive three public readings, which indisputably applies to the adoption of the uniform service charge at issue in this case under S.C. Code Ann. § 4-9-120. *See* City Mot. at 4, n. 7. Even a proper use of revenues derived from a tax (which, again, the Hospitality Fee is not) does not remedy a failure to comply with statutory procedural requirements regarding same. *See City of Myrtle Beach v. Tourism Expenditure Review Comm.*, 407 S.C. 298, 303-304, 755 S.E.2d 425, 428 (2014).

uniform service charge – an assertion to which the County has steadfastly and understandably refused to give direct voice. *See* n. 7, *infra*.

- "The County's decision to use some of the revenue for I-73 is simply a specific application of section 6-1-530 . . . ." Return at 5.

Section 6-1-530 on its face applies only to a local accommodations *tax*. It does not apply to uniform service charges. The Hospitality Fee is *not* a local accommodations tax. The circuit court so found **(R. p.19)**, and the County has not challenged this finding on appeal.[9] Nothing concerning the Hospitality Fee here can "simply" be an application of § 6-1-530.

- "The County can change the use of the Hospitality Fee revenue without municipal consent." Return at 6.

This, of course, is one of the central issues in this appeal. The City refers the Court to its merits briefing on this issue for a complete explanation as to why the County is wrong. The County further asserts that "the City's arguments about having to consent to the Hospitality Fee therefore have no impact on this motion." Return at 8. Even if that were correct (which the City disputes) it does not bear on the question of whether this Court should grant leave to supplement the record on appeal to include facts demonstrating the County's justification for the fee, regardless of consent, no longer exists.

- The City has argued that the minutes reflecting the County's rejection of the settlement agreement in principle indicate that consent to the Hospitality Fee is required. Return at 9-11.

At no point has the City made this argument. The City noted that this is ironic. City Mot. at 6. But it has not advanced this argument as a justification to grant either this motion or the motion to take judicial notice. Rather, the City noted—correctly—that the reasons for rejecting

[9] As previously noted, this is for good reason. If the Hospitality Fee were a tax, the 1.5% charge on prepared food and beverage within the municipalities would be unlawful under S.C. Code Ann. § 6-1-720. The charge imposed on rental cars and admissions likewise would be unlawful because no statutory authority exists for a tax by the County on same.

the settlement agreement in principle were contrived to mask County Council's decision to no longer support I-73. City Mot. at 6. The County's decision to no longer support I-73, and no longer devote any Hospitality Fee revenues towards it, is the core of this motion.

- "[A]nother municipality could still opt out of the class and bring its own lawsuit, thinking it could get a more favorable result that way. . . . 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 issues alive beyond any theoretical class settlement in this case." Return at 10.

Here again, the County misrepresents the full nature of the proposed class settlement as it ignores the fact that it included funding for I-73 which the County has now disavowed. Furthermore, because the City as the proposed class representative seeks permanent injunctive relief that would prevent this fee from being collected anywhere within the municipalities,[10] the class would be certified as a mandatory, *i.e.*, not an opt out class in this respect. *Berry v. Schulman*, 807 F.3d 600, 612 (4th Cir. 2015); *Juris v. Inamed Corp.*, 685 F.3d 1294, 1317 (11th Cir. 2012); *Int'l Union, United Auto., Aerospace, & Agricultural Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007); *Caroline C. ex rel. Carter v. Johnson*, 174 F.R.D. 452, 467 (D. Neb. 1996); *see also Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) (observing that Rule 23, SCRCP, "endorses a more expansive view of class action availability than its federal counterpart"). A municipality may object to certification, and if it is successful at opposing certification the settlement agreement in principle would terminate. But if the class is certified, no municipal class member would have an opportunity to opt out with respect to the permanent injunctive relief that is being sought.

[10] Or anywhere in the County if the circuit court lifts the stay and grants the City's pending motion to amend and supplement the complaint. *See* n. 8, *supra*.

This is a practical requirement; injunctive relief of this nature cannot be granted with opt-out rights. The County's concern is of no moment.[11]

- Rule 408, SCRE, bars consideration of the County's rejection of the settlement agreement in principle. Return at 11.

The County's arguments here rests on an incomplete, and thereby misleading, quotation from the City's motion. The City did not simply submit that this rejection "'is an admission . . . and runs counters to the principal legal justification advanced by the County in this appeal." Return at 10. As the County well knows, the full quote is:

> The County's December 16, 2019, action to reject a settlement agreement in principle reached in mediation to fund the I-73 Project unless all municipalities consent to participate in the funding of same (in addition to being ironic) is an admission *that reinforces the fact that there is no specific improvement, service or project which will be funded by the Hospitality Fee* and runs counter to the principal legal justification advanced by the County in this appeal *bearing on its ability to impose the Hospitality Fee absent municipal consent*.

City Mot. at 6 (emphasis supplied). The footnote at the end of this passage read,

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[11] The County gratuitously references matters regarding class certification and the merits of the underlying class claims which do not bear upon the motion and have yet to be litigated. *E.g.,* Return at 10 ("[e]ven 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"). These comments also ignore the terms of the settlement agreement in principle, which was structured to avoid having to identify all of the fee payers by creating a fee abatement procedure on *future* transactions. *See* City Mot., Ex. A at 11. The County also fails to recognize that such class remedies which do not involve **direct** refunds to class members have been fashioned in similar cases (*see Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003)), and boldly suggests that even if its ordinance is deemed unlawful, it will be permitted to reap a windfall and retain the approximately $19 Million dollars in funds not needed to pay for the road project provided for in Ordinance 105-96. *Cf. Simkins v. City of Spartanburg*, 269 S.C. 243, 237 S.E.2d 69 (1977) (municipality's adoption of tax levy ordinance in advance of determination of assessed value of all taxable property resulting in surplus property tax collections of less than 1% of total budgeted revenue "is not so large a sum as to be termed a windfall" as "[i]t is expected that actual property tax collections could produce more or less than anticipated.") Collection and retention of uniform service charge revenues which exceed the cost of the specific improvement by $19 Million dollars would certainly be an impermissible windfall.

> As explained more thoroughly in the City's Reply and Memorandum in Support of Motion for the Court to Take Judicial Notice, the insistence on unanimity as a means of minimizing legal exposure is fictitious and contrived in order to mask the County's decision to not support I-73.

Id. at 6 n. 9.

That "principal legal justification" which does not exist anymore is funding I-73. The City has done nothing more than point out to this Court that the facts, as stated by the County, are no longer true. The City has been forced to do so because the County itself has not endeavored to ensure the Court has an accurate picture of facts relied upon by the County in its brief. Indeed, the County actively is trying to prevent the Court from having the true facts when deciding this case. The City's request that these facts be a part of the record simply does not implicate Rule 408 because the City is not using it to "prove liability" or the amount of a claim. *See Winrose Homeowners' Assoc., Inc. v. Hale*, *supra*. Regardless, County Council's public actions taken and statements made in public hearings (*see* City Mot. at 3, n. 4-6) are not confidential compromise negotiations that trigger Rule 408 in the first instance.

CONCLUSION

The City respectfully requests that the Court grant leave for the City to supplement the Record on Appeal to include Exhibits A and B to the City's motion. The City will assemble and file the Supplemental Record on Appeal immediately upon receipt of an order granting this motion.

[Signature page follows]

Respectfully submitted,

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Attorneys for Respondents

Columbia, South Carolina
April 3, 2020

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.

CERTIFICATE OF SERVICE

This is to certify that I, Cathy G. Caldwell, a legal assistant with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of Respondent City of Myrtle Beach's **Reply and Memorandum in Support of Motion to Supplement Record and Memorandum in Support** by electronic mail delivery of same to the recipients listed and at their Attorney Information System provided email addresses below:

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Cathy G. Caldwell

Columbia, South Carolina
This 3rd day of April, 2020

WILLOUGHBY & HOEFER, P.A.

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COPY

April 3, 2020

VIA TELECOPIER NO. 803-734-1499

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

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

Dear Mr. Shearouse:

Attached for filing and pursuant to Rule 240, of the South Carolina Appellate Court Rules, Respondent City of Myrtle Beach, for Itself and a Class of Similarly Situated Plaintiffs, ("City") respectfully submits its **Reply and Memorandum in Support of Motion to Supplement Record** in the above-referenced appeal.

As permitted by the Court's Order 2020-02-20-01 issued March 20, 2020 ("Order"), please note that we are (1) not filing any copies as permitted under Section (d) of the Order, (2) filing this document via facsimile transmission as permitted under Section (c)(4) of the Order, and (3) serving counsel for Appellant via electronic mail as permitted under Section (g)(3) of the Order and enclose a certificate of service to that effect. I would appreciate your acknowledging receipt of this document by file-stamping the copy of this letter attached and returning it to me.

If you have any questions or need additional information, please do not hesitate to contact me.

With best regards, I am

COPY

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

John M.S. Hoefer

Enclosure

cc: Henrietta U. Golding, Esquire (via electronic mail)
James K. Gilliam, Esquire (via electronic mail)
Adam R. Artigliere, Esquire (via electronic mail)
W. Grayson Lambert, Esquire (via electronic mail)