

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

Tourism Expenditure Review Committee.....Appellant

vs.

City of Myrtle Beach.....Respondent.

**RESPONDENT CITY OF MYRTLE BEACH'S
FINAL BRIEF**

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STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court properly ruled that the plain language of S.C. Code Ann. § 6-4-10 (4)(b) permits the City of Myrtle Beach to disburse substantially all of its accommodations tax revenues (A-Tax revenues) in a given year for tourism related expenditures in connection with police, fire and parks expenditures.**
- II. The Circuit Court properly admitted extrinsic evidence to support its ruling on the plain language of S.C. Code Ann. § 6-4-10(4)(b).**
- III. The Circuit Court properly interpreted and applied the law to the evidence in the record.**
- IV. The Circuit Court properly ruled that the City of Myrtle Beach's method of disbursement of A-tax revenues in the fiscal year 2008-2009 was proper.**

STATEMENT OF CASE

The present case is the Tourism Expenditure Review Committee's (TERC) appeal from the Final Order of the Hon. William B. Seals, Circuit Court Judge, in connection with a declaratory judgment action filed by TERC. To TERC and its attorneys credit the declaratory judgment action was filed in lieu of TERC's finding approximately four million dollars of the City's A-TAX expenditures non-compliant. Such a finding would have would have had a devastating effect on the City's public safety budget as well as the public safety budget of many other areas with high concentrations of tourism. Also, TERC's finding of noncompliance would have reversed approximately 20 years of prior compliance decisions made by TERC and its predecessor, South Carolina Department of Revenue.

The present appeal represents the third attempt of TERC to get an appellate court to reject adverse lower court rulings and adopt one of its interpretations of the Accommodations Tax Act. S.C. Code Ann. § 6-4-10. The first attempt was a joint appeal by TERC and the City. That appeal was dismissed for being moot. *Tourism Expenditure Review Committee, Appellant-Respondent, v City of Myrtle Beach, Respondent-Appellant*, Unpublished Opinion No. 2011-UP-464. The second appeal from the administrative law court is now pending before the S.C. Court of Appeals and deals with the City's authority over its own general funds. The second attempt is captioned: *City of Myrtle Beach, Respondent, v Tourism Expenditure Review Committee, Appellant*, Case No. 10-ALJ-30-0421-CC.

The present case was tried non-jury. The City offered the testimony of its Budget Director Michael Shelton together with documents. TERC did not offer any witnesses and relied solely on documents and the argument of its attorneys. The trial court made factual findings and conclusions of law and issued a final order in favor of the City of Myrtle Beach. The Court found: 1) the City properly allocated substantially all of its 2008-2009 A-Tax special funds to additional services for tourists under the facts in the present case; and 2) the City's method of comparing its expenditures for law enforcement, traffic control, public facilities, and highway and street maintenance expenditures with similar expenditures for other SC municipalities with similar permanent population sizes to determine the amount of A-Tax discretionary funds that the City may allocate to such expenditures was proper and in compliance with S.C. Code Ann. § 6-4-10(b).

TERC moved to have the Court reconsider and amend its final order. After the trial court refused to amend its final order, TERC filed the present appeal.

STATEMENT OF FACTS

The Tourism Expenditure Review Committee (TERC) is an oversight committee created by S.C. Code Ann. § 6-4-35. TERC serves as the oversight authority on all questionable tourism-related expenditures and to that end, all reports filed pursuant to S.C. Code Ann. § 6-4-25(D)(3) must be forwarded to TERC for review to determine if they are in compliance with this chapter. (R. p. 90)

The City of Myrtle Beach (City) is a duly incorporated municipality located in Horry County, South Carolina. The City has a high concentration of tourism activity as contemplated under S.C. Code Ann. § 6-4-10(4). (R. p. 91)

At all times pertinent to this matter, and as required by S.C. Code Ann. § 6-4-25(A) of the South Carolina Code (2004), the City had a seven member local advisory committee to consider and make recommendations to the Myrtle Beach City Council (“City Council”) on applications for the expenditure of revenue generated from the state accommodations tax provided for under S.C. Code Ann. § 12-36-920(A) and § 12-36-2630(3) and allocated to the accommodation tax (“A-Tax”) fund created under S.C. Code Ann. § 6-4-10(4). In fiscal year 2008-2009, all applications for A-Tax funds were presented to the local advisory committee. (R. p. 91)

Although the local advisory committee makes recommendations on applications for the expenditure of the A-Tax fund and such recommendations must be considered by the City under S.C. Code Ann. § 6-4-25, the ultimate decision as to the final disbursement of A-Tax revenues is vested with City Council. (R. p. 91)

During fiscal year 2008-2009, applications for expenditures from the fund created under S.C. Code Ann. § 6-4-10(4) were submitted to the City’s local advisory committee for their recommendations. A report of the local advisory committee’s recommendations and City Council’s final actions regarding these applications was made to TERC on September 30, 2009, as required by § 6-4-25. (R. p. 91)

The report showed that: (a) the staff for the City of Myrtle Beach requested that \$3,977,794, which was 84.97% of the \$4,681,464 in available A-Tax funds for fiscal year 2008-2009, be expended on “support of operating expenses for services provided above

and beyond permanent population throughout the year, to include additional Police, Fire and Parks personnel”; (b) the local advisory committee recommended that \$3,065,294, which was 65.48% of the available A Tax funds, be expended to “support of operating expenses for services provided above and beyond permanent population throughout the year to include additional Police, Fire and Parks personnel”; and (c) City Council voted to use \$4,664,951, which was 99.65%, of the available A Tax funds for “[s]upport of operating expenses for services above and beyond permanent population throughout the year to include additional Police, Fire and Parks personnel.” (R. p. 92)

By letter dated January 4, 2010, TERC notified the City that it had reviewed the City’s September 30, 2009, report and questioned: (a) whether the City’s expenditure of approximately \$4.6 Million on police, fire and parks personnel complied with the requirement of S.C. Code Ann. § 6-4-10(4)(b) that monies in the fund created under S.C. Code Ann. § 6-4-10(4)(a) not be used as an additional source of revenue to provide services normally provided by the City; and (b) whether, by dedicating this amount to the City’s general fund and subsequently approving expenditures on various tourism-related events and projects from the City’s general fund, the City was employing a procedure to authorize expenditures of local accommodations tax funds, generated under S.C. Code Ann. § 12-36-2630(3), which was contrary to the requirements of S.C. Code Ann. § 6-4-25(A-C). (R. pp. 92-93)

By letter dated January 7, 2010, Michael W. Shelton, Budget Director for the City, responded to TERC’s January 4, 2010, letter as follows: “For FY2008-09, total expenditures for the departments in question were:

Police Department	\$20,008,175
Fire Department	11,138,096

Cultural & Leisure Services	<u>10,998,109</u>
Total	\$42,144,380

Thus in the Police Department, at 76.7% of total, tourist-related expenditures amount to more than \$15 million—far greater than the \$4.6 million of accommodations tax money spent for such services. I would also point out that we have been reviewing our reports to TERC and to the Accommodations Tax Oversight Committee, which existed prior to TERC’s formation. Thus far, we have located records going as far back as the 1998-99 fiscal year. In each case, the reports show that the City spent substantial amounts of these funds for these identical purposes. The expenditures were not questioned until the 2006-07 fiscal year, at which time we provided additional information regarding our rationale for the expenditures and TERC found them to be compliant.” (R. p. 93)

In addition, the number of visitors to the City was estimated by the Myrtle Beach Chamber to be 13.7 million visitors annually. The City spends approximately \$14 million more for its police department than the average municipality of a similar population size. According to the U.S. Census Bureau Report for 2010 the City of Myrtle Beach has a permanent population of 27,109 residents. According to 2007 a report released by the U.S. Department of Justice, the average amount spent for law enforcement for cities with a population of 27,109 was approximately \$6,099,525. For FY2008-09, the City’s total expenditures for its police department were \$20,008,175. (R. p. 94)

Presently the City has a total of 206 officers, not including 2 sworn personnel operating as Police Chief and Captain, 52 detention/communications officers, 2 animal control officers or 13 civilian employees for a total of 275 Police Department employees.

206 sworn officers are engaged in the direct delivery or direct command and supervision of law enforcement services. (R. p. 94) The average number of sworn officers is 62.33 for municipalities with similar populations. (R. p. 94)

Based upon an estimate of the number of annual visitors to the Myrtle Beach area conducted by D.K. Shiflett & Associates, Ltd. for the Myrtle Beach Area Chamber of Commerce, approximately 15.2 million people visited the area in 2007. The average length of stay for leisure travelers was 5 days (3 days for business travelers) according to data presented in the Chamber's 19th Annual Statistical Abstract, available on that organization's web site. That total may amount to the equivalent of an *average* daily population of 208,000 people in addition to the area's permanent residents. In terms of orders of magnitude and taking into considerations increases in the number of tourists, this average is fairly consistent with information prepared by a consultant to a local developer and provided to the City in 2004 in which the City of Myrtle Beach was estimated to have had an *average* daily population of about 105,000, approximately 4.3 times the size of its permanent population. Except for the large influx of tourists, the record does not indicate any significant differences between the City and other similar sized municipalities. (R. p. 94-95)

In 2009, the City received \$4.6 million in accommodation tax funds that were allocated to special fund under S.C. Code Ann. § 6-4-10(4). The City allocated substantially all of the \$4.6 million to public safety services. (R. p. 95)

The City compared its government service expenditures for law enforcement, with similar government service expenditures of other municipalities in South Carolina

having similar sized permanent populations to determine the amount of money the City could spend for such tourism related expenditures. (R. p. 95)

STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable. The standard of review depends on the nature of the underlying issues. *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct.App.2003). When the purpose of the underlying dispute is to construe the rights of parties under a statute, the action is one at law. See *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 497, 544 S.E.2d 637, 639-640 (Ct.App.2001). In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, “ [w]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.’ ” *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct.App.2003).

I. The Circuit Court properly ruled that the plain language of section 6-4-10(4)(b) permits the City of Myrtle Beach to disburse substantially all of its accommodations tax revenues (A-Tax revenues) in a given year for tourism related expenditures in connection with police, fire and parks expenditures.

A. *The plain language interpretation of S.C. Code Ann. § 6-4-10(b).*

The pertinent language of S.C. Code Ann. § 6-4-10(b) that was construed by the trial court is:

The funds received by a county or municipality which has a high concentration of tourism activity may be used to provide additional county and municipal services

including, but not limited to, law enforcement, traffic control, public facilities, and highway and street maintenance, as well as the continual promotion of tourism. The funds must not be used as an additional source of revenue to provide services normally provided by the county or municipality but to promote tourism and enlarge its economic benefits through advertising, promotion, and providing those facilities and services which enhance the ability of the county or municipality to attract and provide for tourists.

“Tourism-related expenditures” include:

1. advertising and promotion of tourism so as to develop and increase tourist attendance through the generation of publicity;
2. promotion of the arts and cultural events;
3. construction, maintenance, and operation of facilities for civic and cultural activities including construction and maintenance of access and other nearby roads and utilities for the facilities;
4. the criminal justice system, law enforcement, fire protection, solid waste collection, and health facilities when required to serve tourists and tourist facilities. This is based on the estimated percentage of costs directly attributed to tourists;
5. public facilities such as restrooms, dressing rooms, parks, and parking lots;
6. tourist shuttle transportation;
7. control and repair of waterfront erosion;
8. operating visitor information centers.

S.C. Code Ann. § 6-4-10(4)(b).

From the outset, TERC has misconstrued the trial court’s interpretation of *S.C. Code Ann. § 6-4-10(b)*. In its brief, TERC claims the trial court erred as a matter of law in finding that a municipality may expend A-Tax revenues for services “normally provided by the municipality.” [Initial Appellant Brief p.13] TERC’s claim is an incorrect statement of the trial court’s finding. The trial court found: “Because the City is an area with a high concentration of tourism activity, it may allocate its entire A-Tax

discretionary fund to law enforcement, traffic control, public facilities, and highway and street maintenance expenditures *provided the expenditures are related to the additional costs associated with providing for the tourism activity under the authority of S.C. Code Ann. § 6-4-10(4)(b).*” (emphasis added). (R. p. 11)

The City does not contend that A-Tax revenues may be used as an additional source of revenues to fund normal municipal services simply because the City is an area with a high concentration of tourism. The City contends it may use A-Tax funds to pay for a portion of its tourism related expenditures associated with the additional law enforcement, traffic control, public facilities, and highway and street maintenance services needed to provide for the large number of tourists visiting the area on a year round basis.

TERC does not dispute the City incurs additional costs for law enforcement, traffic control, public facilities, and highway and street maintenance services because of the large influx of tourists. Instead TERC claims that because the City is an area with a high concentration of tourism, the City’s additional tourism related costs for public safety are normal for an area with high concentrations of tourism. (Initial Appellant’s Brief p. 15) TERC claims A-Tax funds may only be used to provide additional public safety services not normally provided by the City with a high concentration of tourism. (Initial Appellant’s Brief p. 16)

What is a normal provision of public safety services? Normal is defined as conforming to a standard; usual, typical, or expected. Oxford Dictionaries, Oxford University 2011. The dispute between TERC and the City is over how to determine the

standard for normal municipal public safety services versus additional tourism related public safety services. Should the City consider only its own budget or should the City be allowed to look to other areas with similar permanent populations but without high concentrations of tourism?

In the definition of “tourism related expenditures” the General Assembly directs TERC and the City to make a determination for qualifying tourist related expenditures public safety services based on the estimated percentage of costs directly attributed to tourists. S.C. Code Ann. § 6-4-10(4)(b)(4). SCDOR interpreted the General Assembly’s direction as follows:

Under Code Section 6-4-10(4)(b)(4), monies in the Tourism-related Fund can be used for the criminal justice system, law enforcement, fire protection, solid waste collection, and health facilities when required to serve tourists and tourist facilities. The amount that may be expended on this category must be based on the estimated percentage of costs directly attributable to tourists. Tourism-related funds cannot be used for these purposes by counties or municipalities that do not have high concentration of tourism activity. Examples of qualifying expenditures under this category would include salaries for extra police during the peak tourist season, monies spent to hire extra garbage service around tourist facilities during the tourist season or to provide other services that are required because of the high concentration of tourism.

When considering the percentage of costs that are attributable to tourism, the Department of Revenue will consider the number of permanent residents for the county or municipality as compared to the number of tourists

S.C. REVENUE RULING #98-22.

Unlike some areas which have a strong tourist season followed by a season when no tourists visit, the City of Myrtle Beach’s tourist season lasts all year long. (R. p. 186) The City has an estimated average daily population of 208,000 people. The permanent resident population of the City is between 27,109 and 30,000. Presently the City has a

total of 206 officers, not including 2 sworn personnel operating as Police Chief and Captain, 52 detention/ communications officers, 2 animal control officers or 13 civilian employees for a total of 275 Police Department employees. 206 sworn officers are engaged in the direct delivery or direct command and supervision of law enforcement services. The national average number of sworn officers is 62.33 for municipalities with similar populations to the City of Myrtle Beach. (R. p. 94)

Using SCDOR's example, approximately 30% of the City's law enforcement budget is for normal municipal public safety services while 70% of its budget can be attributed to the estimated costs associated with tourists. When considering the City had an estimated \$20 million law enforcement budget for 2008-2009, the estimated costs associated with tourists would be \$14 million. The City's allocation of approximately \$4 million in A-Tax revenues towards payment of \$14 million estimated additional public safety costs associated with tourists is a reasonable and practical interpretation of S.C. Code Ann. § 6-4-10(4)(b)(4).

Prior to filing the declaratory judgment, SCDOR and later TERC permitted the City to look at other areas with similar permanent populations but without high concentrations of tourism. *S.C. Revenue Ruling #98-22*. However, TERC now claims the additional tourism related public safety costs are the new norm for the City of Myrtle Beach and the City can only look at its own budget for its standard of normality. TERC has written out of the statute the language on the estimated public safety costs associated with tourists. See S.C. Code Ann. § 6-4-10(b)(4) ("Tourism related expenditures")

TERC reaches its conclusion that the norm should be restricted to only what is contained in the City's budget by focusing on the General Assembly's use of the definite article "the" instead of the indefinite article "a" when referring to the entity that provides the public safety services. According to TERC in the present case, "the" municipality can only mean the City of Myrtle Beach. TERC's focus is misplaced in construing S.C. Code Ann. § 6-4-10(b)(4). When construing a statute, the indefinite article "a" may be substituted for the definite article "the" in a proper case. *Vinton v. Hoskins*, 174 Or. 106, 147 P.2d 892 (1944); See AMJUR STATUTES § 159. The S.C. Supreme Court has held recently a statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Travelscape, LLC v. South Carolina Dept. of Revenue* 391 S.C. 89, 705 S.E.2d 28 (S.C.,2011) The City contends the present case is a proper case for such a substitution. *Id.*

The City's practice of comparing the City's public safety expenditures with other municipalities with similar permanent populations is a practice that has occurred for more than 20 years. The practice was recognized by SCDOR in S.C. Revenue Ruling #98-22. When TERC was formed it recognized and approved the City's practice. The language in the statute has not changed since 1984.

The only difference between the 2008-2009 expenditure and prior expenditures is that the City allocated 99.6% of its A-Tax revenues to public safety. In prior years the percentage of the allocation for public safety services was substantial but the allocation was less than 99.6%. If the City follows the procedures contained in the Accommodations Tax Act, the City may allocate 100% of its a-Tax revenues to a single

category of expenditures such as law enforcement or public safety. S.C. Revenue Ruling #98-22.

The procedure used by the City in its 2008-2009 allocation of A-Tax revenues followed the requirements of the Accommodations Tax Act. (R. p. 4) City staff members presented a request for A-Tax revenues to the local A-Tax advisory committee for municipal services which it related to tourism and which it estimated would be attributable to tourists. (R. p. 5) City staff based its request on the amount it anticipated spending for law enforcement services as compared to the amounts other cities with similar permanent populations had spent for law enforcement services. (R. p. 176) The local A-Tax advisory committee reviewed City staff's request and made its own recommendation for a lower amount. (R. pp. 171-172) The matter was then taken up by City Council who considered the recommendations of City staff and the local A-Tax advisory committee and rejected both the City staff's request and the local A-Tax advisory committee's recommendations. (R. p. 172) City Council used its own discretion and decided to allocate substantially all of its A-Tax revenues for law enforcement services. (R. p. 172) Thereafter the City duly reported its allocation to TERC on the report forms provided by TERC. (R. p. 5)

TERC also claims the City's comparison of its public safety expenditures to other areas is improper because no two areas in South Carolina are alike. TERC's claim is not supported by the record. TERC did not offer any evidence to show that South Carolina municipalities with similar permanent populations are not comparable. The trial court found as a matter of fact: "Except for the large influx of tourists, the Court was not made

aware of any significant differences between it and other similar sized municipalities.”

(R. p. 11).

The City contends TERC cannot provide a reasonable or practical alternative for determining whether an expenditure for public safety services qualifies for an expenditure of A-Tax revenues. In a footnote 8 of its brief, TERC claims that the City should distinguish between qualified tourism related expenditures and unqualified tourism related expenditures by determining whether the expenditures are reoccurring yearly expenditures. TERC provided the following example in its brief:

As an example, should the COMB decide to host a non-recurring event, like a parade in honor of one or more of its citizens, that is expected to draw tourists to the area, then the COMB would be justified under the statute in using A-Tax revenues to help off-set the additional municipal services costs for such nonrecurring, eligible events, which would both promote tourism and enlarge the economic benefits of the area. [Appellant’s Brief, footnote 8, p. 20]

TERC’s suggestion on the reoccurrence of the expenditure is not practical. As mentioned above, the City’s concentration of tourism is year round. Using TERC’s example of a parade, how much in A-Tax revenues should TERC allow the City to allocate to tourism related expenditures used in the construction and maintenance of public facilities or to highway and street maintenance services? How should the City account for and report those A-Tax expenditures to TERC? Do TERC’s same restrictions apply to the City’s reoccurring tourist promotions and reoccurring out of market tourism advertising expenditures?

The City contends its method of determining compliant A-Tax revenue expenditures is proper and it uses a reasonable and practical method for determining tourism related expenditures that comply with the Accommodations Tax Act.

Travelscape, LLC v. South Carolina Dept. of Revenue 391 S.C. 89, 705 S.E.2d 28

(S.C.,2011). The fact that TERC may not consider public safety the best use of the City's A-Tax revenues does not amend the plain language of the statute. If TERC wants to further limit the City's discretion over the expenditure of A-Tax revenues, TERC should take that matter to the General Assembly and amend the statute.

II. The Circuit Court properly admitted extrinsic evidence to support its ruling on the plain language of S.C. Code Ann. § 6-4-10(4)(b).

TERC claims the court may not admit or rely on extrinsic evidence to support its ruling on the plain language of a statute unless the court first declares the statute to be ambiguous. The City disagrees. The City contends a court may not admit or rely on extrinsic evidence or the rules of statutory interpretation to *change* the meaning of the plain language of an unambiguous statute. *Travelscape, LLC v. South Carolina Dept. of Revenue* 391 S.C. 89, 705 S.E.2d 28 (S.C.,2011). However, a court may admit and rely on extrinsic evidence and the rules of statutory interpretation to demonstrate that the court's interpretation of a statute as a whole is consistent with the plain language used and it effectuates the intent of the legislature. *Id.*

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hardee v. McDowell*, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009) (internal quotation omitted). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). A statute as a whole must receive practical, reasonable, and fair

interpretation consonant with the purpose, design, and policy of lawmakers. *Travelscape, LLC v. South Carolina Dept. of Revenue* 391 S.C. 89, 705 S.E.2d 28 (S.C.,2011).

In the trial court's discussion of the plain language of the statute, the trial court does not defer to extrinsic evidence or to the rules of statutory interpretation to change the meaning of the plain language of S.C. Code Ann. § 6-4-10(4). (R. pp. 12-14) The trial court uses common sense and reasoning to discuss the plain language of that statute. The trial court also uses common sense and reasoning to refute TERC's claims on the meaning of S.C. Code Ann. § 6-4-10(4). (R. pp.12-14). The trial court's approach is similar to the approach used by most courts when discussing statutory interpretations.

One recent example is the case of *Travelscape, LLC v. South Carolina Dept. of Revenue* 391 S.C. 89, 705 S.E.2d 28 (S.C.,2011). In *Travelscape*, the court construed the plain language of the statute and referred to the facts throughout the opinion to show the application of the court's interpretation of how the statutes involved applied to the parties and facts in that case. The trial court in the present case used a similar approach.

III. The Circuit Court properly interpreted and applied the law to the evidence in the record.

TERC claims the trial court erred in analyzing the evidence in the record. TERC claims the trial court failed to properly consider the preamble to the enabling language of the statutory predecessor to S.C. Code Ann. § 6-4-10(b)(4). In addition, TERC claims the trial court misinterpreted S.C. Revenue Ruling #98-22 and the holding of the court in *Thompson v. Horry County*, 294 S.C. 81, 362 SE 2d 646 (Ct. App. 1987). The City disagrees with each one of TERC's claims.

a. Preamble – “from time to time.”

TERC claims the inclusion of the phrase “from time to time” in the preamble to the statutory predecessor to S.C. Code Ann. § 6-4-10(b)(4) demonstrates conclusively the General Assembly’s intent that municipalities with high concentrations of tourism not be allowed to rely on A-Tax revenue supplanting normal revenue disbursements. TERC’s claim reveals a lack of understanding of the actions and decisions of the City.

TERC’s claim suggests that the City has determined that all future allocations of A-Tax revenues will be used automatically to provide public safety services without regard to the annual procedures required by the Accommodations Tax Act. There is nothing in the record to support TERC’s claim. When making its 2008-2009 A-Tax Revenue allocation, City staff submitted a request to the local A-Tax advisory committee; the advisory committee made its recommendation to City Council; and City Council exercised its discretion to make the A-Tax revenue allocation. The City duly reported that allocation to TERC. City Council did not enact an ordinance or resolution in which they declared that all future A-Tax Revenues would be used for public safety. Every fiscal year, the City is permitted under the act to use its discretion on how to use its A-Tax revenues.

TERC has jumped the gun in making the assumption that because the City allocated substantially all of the City’s A-Tax revenues to public safety in the 2008-2009 fiscal year, every subsequent A-Tax revenue allocation will be made automatically to public safety. TERC’s assumption is akin to claiming that because the City allocated \$10,000 in A-Tax Revenues to a fall motorcycle rally event in 2003, that \$10,000 would be allocated automatically to every similar motorcycle rally event occurring thereafter. Obviously, the City did not divest itself of its discretionary authority under the act in

making the 2008-2009 allocation. The City's contention is that it has the discretion to allocate its A-Tax Revenues on an annual basis in such manner as its City Council believes is in the best interest of its citizens.

b. The significance of Thompson v Horry County.

The significance of the case of the Court of Appeals case of *Thompson v. Horry County*, 294 S.C. 81, 362 SE 2d 646 (Ct. App. 1987) is that it recognized the wisdom of allowing local governments to have the discretion and flexibility to allocate their A-Tax revenues in their own jurisdictions in accordance with the Accommodations Tax Act. The trial court's Final Order simply acknowledges that its ruling is consistent with that part of the opinion of the S.C. Court of Appeals. *Id.*

c. S.C. Revenue Ruling #98-22.

TERC claims the trial court misinterpreted S.C. Revenue Ruling #98-22 on the same grounds as it claimed the trial court misinterpreted S.C. Code Ann. § 6-4-10(b). TERC concedes that #98-22 supports the trial court's interpretation that tourism related expenditures can be determined by comparing expenditures for permanent residents with additional expenditures needed for tourists. However, TERC repeats its claim that comparisons of government services between different municipalities are not allowed by S.C. Revenue Ruling #98-22. TERC claims that the use of the definite article "the" in designating the particular A-Tax revenue expenditure area demonstrates SCDOR's intent to rule out comparisons with other municipalities as a means of determining tourism related expenditures. The City disagrees. (*That argument has been addressed in the Part I A. of Respondent's brief.*)

TERC also claims the trial court's comparison of government services between municipalities with high concentrations of tourism and municipalities without high concentrations of tourism is not valid because municipalities in South Carolina are not comparable. If TERC's claim was correct, the General Assembly's separation of municipalities/counties into only two classes based on the concentrations of tourism would be arbitrary and unreasonable. See *Foster v. South Carolina Dept. of Highways and Public Transp.* 306 S.C. 519, 413 S.E.2d 31 (S.C.,1992)(A broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples.)

TERC did not engage in any comparative analysis or offer any evidence to support its claim that localities in South Carolina are incomparable. TERC did not offer any rationale for the General Assembly or SCDOR's classification of municipalities/counties into only two classes. TERC just made the bare assertion that governmental services in municipalities are not comparable. The trial court noted TERC's lack of comparative analysis or evidence when it stated, "Except for the large influx of tourists, the Court was not made aware of any significant differences between it and other similar sized municipalities." (R. p. 11)

The City contends the Accommodations Tax Act and S.C. Revenue Ruling #98-22 properly classified municipalities/counties into two classes. The only distinguishing features in the two subclasses were those areas that had a high concentration of tourism and those that did not. The reoccurrence of events, differences of size of permanent populations, geographical areas, origins of tourists, average amounts spent by tourists, or the amount of services required by the tourists were not mentioned in the act or

SCDOR's ruling. Based on the fact the General Assembly chose to distinguish municipalities/counties on only the concentration of tourism, the City contends the trial court was correct when it compared normal governmental services based on the remaining similarities of municipalities/counties in South Carolina.

The City contends S.C. Revenue Ruling #98-22 expressly supports the trial court's interpretation of the act in question. Question 14 of the ruling gives the following example:

For example, assume that the City of North Myrtle Beach wishes to use some of their Tourism-related Funds on their police department. Tourism-related Funds could not be used to fund the police chief's salary, since this is a county (sic) expense that would be need to be funded whether North Myrtle Beach had any tourists or not. However, the money could be used to hire additional police because of the high concentration of tourism in North Myrtle Beach. The amount that can be spent on additional police must be based on the estimated percentage of costs attributable to tourists.

The above example demonstrates a proper use of A-Tax Revenues. The evidence in the record supports the trial court's finding that the use recommended by S.C. Revenue Ruling #98-22 was the same use made of A-Tax Revenues by the City in the 2008-2009 fiscal year. (R. p. 13)

IV. The Circuit Court properly ruled that the City of Myrtle Beach's disbursement of A-Tax revenues in the fiscal year 2008-2009 was proper.

In this part of its argument TERC claims that trial court's ruling on the disbursement of A-Tax revenues should be reversed because the City did not expressly name the 2008-2009 disbursement of A-Tax Revenues in its counterclaim. The City disagrees. The City contends the pleadings, trial brief of the City and the statements

made by the parties to the court in outlining their positions adequately placed the matter before the trial court. See *Harrington v. Blackston* 311 S.C. 459, 429 S.E.2d 826 (S.C.App.,1993).

Rule 8(f) of the South Carolina Rules of Civil Procedure states that “[a]ll pleadings shall be so construed as to do substantial justice to all parties.” Moreover, our Supreme Court has held that declaratory judgment actions must be liberally construed to settle legal rights and remove insecurity from legal relationships without awaiting a violation of the relationships. *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970); *Park v. Safeco Insurance Co. of America*, 251 S.C. 410, 414, 162 S.E.2d 709, 711 (1968).

TERC alleged in its complaint: TERC has chosen not to act upon its interpretation of § 6-4-10(4)(b) by finding the City's 2008-2009 expenditures non-compliant under S.C. Code Ann. § 6-4-35(B)(i)(a) because it has previously permitted similar expenditures, albeit in lesser amounts, and does not believe that it would be reasonable to certify as non-compliant the City's 2008-2009 A-Tax expenditures on police, fire and parks personnel. (R. p. 34) The City alleged in its counterclaim: The City has compared its expenditures for law enforcement, traffic control, public facilities, and highway and street maintenance services with other municipalities with similar demographic features. The City has used that comparison among others to determine the amount of its expenditures that are based on the estimated percentage of costs attributable to tourists. The City is informed and believes that its method of comparing its costs to the costs of other municipalities with similar demographics is a reasonable method for determining the City's costs that are attributable to tourists. The City requested a

declaration from the Court that the City's method of determining its costs attributable to tourists is acceptable under the terms of the Accommodations Tax Act.

In the conclusion to the City's trial brief which was provided to TERC prior to trial, the City requested a ruling on the 2008-2009 A-Tax revenues. The conclusion contains the following request: "The City of Myrtle Beach asks this Court to find and declare that the City properly allocated substantially all of its 2008-2009 A-Tax special funds to additional services for tourists under the facts in the present case." (R. p. 106) The City's request for a ruling on the 2008-2009 disbursement was noted during opening statements of the attorneys for the parties. (R. p. 161)

Extensive evidence was introduced on the subject of the 2008-2009- expenditure of A-Tax revenues. TERC cross examined the City's witness on the subject and introduced evidence to support its position on the subject. Although not expressly named in the City's counterclaim, the matter of the 2008-2009 A-Tax revenue expenditures was before the court and the trial court was proper in making its ruling. *Harrington v. Blackston* 311 S.C. 459, 429 S.E.2d 826 (S.C.App.,1993).

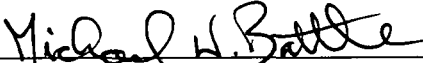
The City contends TERC is attempting to elevate form over substance with its argument about the 2008-2009 disbursement of A-Tax revenues. The City contends TERC's attempts to distinguish between the City's request for a declaration on the methods used by the City in disbursing the 2008-2009 A-Tax revenues and a declaration on the named disbursement of A-Tax revenues in its counterclaim falls in the category of a distinction without a difference. Since TERC has chosen not to contest the 2008-2009 A-Tax revenue disbursement, the trial court's ruling on that particular disbursement does

not prejudice TERC in any way. TERC's appeal of trial court's ruling on the 2008-2009 disbursement of A-Tax revenues should be dismissed. See *Miles v. Miles*, 303 S.C. 33, 36, 397 S.E.2d 790, 792 (Ct.App.1990) (This Court has long recognized an overriding rule: "whatever doesn't make any difference, doesn't matter.") What is important is the trial court's ruling affirming the City's method of determining its disbursement of 2008-2009 A-Tax revenues and finding that the City's method met the requirements of S.C. Code Ann. § 6-4-10(b).

CONCLUSION

For the forgoing reasons, the City of Myrtle Beach respectfully requests that the Final Order of the Hon. William B. Seals, Jr. be affirmed and that Tourism Expenditure Review Committee's appeal be dismissed.

Conway, SC
April 18, 2012


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Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-40-3001

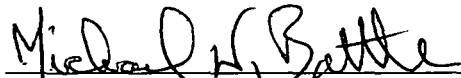
Tourism Expenditure Review Committee.....Appellant

vs.

City of Myrtle Beach.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief of Appellant complies with Rule 211(b), SCACR.



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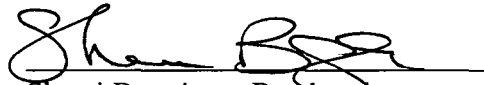
PROOF OF SERVICE

Sherri Benninga certifies that she is an employee with the law firm of Battle & Vaught, P.A., attorneys for Respondent City of Myrtle Beach, and that she has mailed the Final Brief of Respondent City of Myrtle Beach to the addressees shown this 18th day of April, 2012, with proper postage attached thereto.

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A handwritten signature in black ink, appearing to read "Sherri Benninga", written over a horizontal line.

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