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,

v.

City of Myrtle Beach, ...Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in ruling that the plain language of section 6-4-10(4)(b) permits the City of Myrtle Beach to disburse all accommodations tax revenue available to it in a given year to its general operating fund for police, fire and parks personnel expenditures because the City's municipal service expenditures were comparatively higher than South Carolina municipalities with similar permanent populations?

2. Did the Circuit Court err in relying on extrinsic evidence to support its ruling, despite stating that the basis for its opinion was the plain language of section 6-4-10(4)(b) and without first finding the statute to be ambiguous?

3. Assuming, *arguendo*, that reliance on extrinsic evidence in the absence of an ambiguity finding was proper, did the Circuit Court err in its interpretation and application of law to the extrinsic evidence admitted?

4. Did the Circuit Court err in ruling that the City of Myrtle Beach's fiscal year 2008-2009 disbursement of accommodation tax revenues was proper, an issue that was not, and jurisdictionally could not have been, before the Circuit Court?

STATEMENT OF THE CASE

Appellant Tourism Expenditure Review Committee ("TERC") commenced its underlying action for declaratory judgment pursuant to S.C. Code Ann. § 15-53-20 (2005) and Rule 57 of the South Carolina Rules of Civil Procedure ("SCRCP") against Respondent City of Myrtle Beach ("COMB" or "City") by service of a May 6, 2010 summons and complaint. **(R.pp.30-40)**, Summons and Complaint. Thereby, TERC sought a declaratory judgment as to the meaning of S.C. Code Ann. §6-4-10(b)(4) (2004). Id. The COMB answered and made a counterclaim for declaratory judgment with respect to the meaning of §6-4-10 on May 28, 2010. **(R.pp.41-45)**, Answer and Counterclaim.

On October 19, 2010, the Town of Hilton Head Island ("Town") moved to intervene in the action pursuant to Rule 24(b), SCRCP. **(R.pp.50-65)**, Town Motion to Intervene. TERC opposed the Town's motion. **(R.pp.66-80)**, TERC Return to Town Motion to Intervene. After a hearing was held on the Town's motion on March 16, 2011, the circuit court issued an order denying the Town's motion. **(R.pp.22-29)**, Order Denying Town Motion to Intervene. No appeal was taken from this order.

A non-jury trial was held on July 11, 2011, at the Richland County Judicial Center before the Honorable William H. Seals, Jr. Both parties submitted trial briefs reflecting their respective positions to the Court in advance of the hearing. **(R.pp.81-106)**, Trial Briefs. At trial, the COMB introduced testimony of a City employee and other evidence, including three (3) letters between the parties,[1] and a 2007 United States Department of Justice Study on local police department sizes, to all of which TERC timely objected. **(R.pp.231-272).** In response, but subject to its earlier objections, TERC introduced the COMB's fiscal year 2008-2009 A-Tax

[1] (1) TERC January 27, 2009 letter to the COMB, **(R.pp.225-26)**; TERC January 4, 2010 letter to the COMB, **(R.p.227)**; and (3) COMB January 7, 2010 responsive letter, **(R.pp.228-29).**

compliance report, and the text of the preamble to 1984 S.C. Act No. 316, which is the enactment later codified as S.C. Code Ann. §§ 12-35-710 *et seq.* (1984), the statutory predecessor of S.C. Code Ann. §§ 6-4-5 *et seq.* (2004 and Supp. 2010). **(R.pp.288-90)**, 2008-2009 Compliance Report; Preamble to 1984 S.C. Act No. 316.

Thereafter, the circuit court ruled in favor of the COMB on its counterclaim and thereby rejected TERC's interpretation of the statute.[2] **(R.pp.3-18)**, Circuit Court Order. TERC timely filed a motion for reconsideration of the circuit court's Order pursuant to Rule 59(e), SCRCP, on August 1, 2011. **(R.pp.109-128)**, TERC Motion for Reconsideration. Thereafter, the circuit court again contacted the parties by electronic mail, inquiring as to the issues raised in TERC's motion for reconsideration and directing the parties to submit further written briefs and proposed orders. **(R.p.387).** In accordance with the circuit court's direction, the COMB filed a return to TERC's motion, **(R.pp.129-134)**, TERC submitted a reply, **(R.pp.135-143)**, and both parties submitted proposed orders. Subsequently, the circuit court issued an order dated August 31, 2011, denying TERC's motion for reconsideration. **(R.pp.19-21),** Order Denying Rule 59(e). TERC filed and served its notice of appeal on September 9, 2011, pursuant to Rule 73, SCRCP, and Rule 203 of the South Carolina Appellate Court Rules ("SCACR"). **(R.p.144)**, Notice of Appeal.

[2] Via an electronic mail message on July 11, 2011, the same day of the trial, the circuit court notified the parties that it had found in favor of the COMB and requested a proposed order to that effect. **(R.p.386).** TERC disputed some of the matters contained in the resulting COMB proposed order, by way of a July 18, 2011 letter to the circuit court. **(R.pp.107-08).** However, unbeknownst to TERC, the circuit court had already signed the COMB's proposed order, a file stamped copy of which TERC received several days after July 18, 2011. **(R.pp.3-18).**

STATEMENT OF THE FACTS

I. Statutory Framework

Under S.C. Code Ann. § 12-36-920(A) (Supp. 2010), a sales tax of seven percent (7%) is imposed by the state on accommodations provided to transients in South Carolina. One component of that tax is a two percent (2%) "local" accommodations tax (i.e., the A-Tax) which, pursuant to S.C. Code Ann. § 12-36-2630(3) (1977 & Supp. 2010), must be credited to cities and counties in accordance with §§ 6-4-5, *et seq*. TERC is the legislatively created committee that is designated, under S.C. Code Ann. § 6-4-35 (Supp. 2010), to oversee tourism-related expenditures of A-Tax revenues to ensure compliance with §§ 6-4-5 *et seq*.

Although TERC ultimately determines whether expenditures are in compliance with the statute, the initial review of tourism-related expenditures from the A-Tax revenues begins on the local level. All municipalities and counties which are: (1) located in county areas where more than fifty thousand dollars ($50,000) in A-Tax revenues are collected annually; and (2) which annually receive in excess of fifty thousand dollars ($50,000) in A-Tax revenue distributions, are required to appoint a local advisory committee ("Committee").[3] See S.C. Code Ann. § 6-4-25 (2004). The Committee consists of seven members, the majority of whom must be appointed from the hospitality industry, including two representatives of the lodging industry. Id. Under § 6-4-25, the Committee's function is to review applications for disbursements of the A-Tax revenues received by the city or county and make recommendations regarding such applications to the city's or county's governing body. After the governing body of these cities and counties

[3] Qualifying municipalities and counties are also required to file an annual report with TERC, no later than October 1 of each year, detailing the Committee's recommendations and how the A-Tax revenues segregated under § 6-4-10(3)-(4) were disbursed. See § 6-4-25(D).

considers the recommendations of the Committee, it makes a decision as to whether to grant an application. Only then are funds to be disbursed to the successful applicants.

Under §§ 6-4-5 *et seq.*, the first twenty-five thousand dollars ($25,000) of A-Tax Funds allocated to a county or municipality is taken off the top and allocated to the general fund of the recipient. See § 6-4-10(1). Thereafter, an additional five percent (5%) of the A-Tax Fund allocation is also placed in the recipient's general fund. See § 6-4-10(2). Thirty percent (30%) of the remaining balance is then allocated to a "special fund" under § 6-4-10(3) and used for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity. Any remaining A-Tax Funds (sixty-five percent (65%) of the allocation) are then allocated to a separate, special fund ("65% Fund") that must be used for tourism-related expenditures. § 6-4-10(4).

The annual reports submitted by municipalities and counties to TERC detail how A-Tax Funds received by a city or county have been spent, whether or not the expenditures were recommended for approval by the Committee, and a list of the members of the Committee. TERC reviews these reports to determine if the disbursements comply with the statute as contemplated by § 6-4-35(B)(1)(a). If, after that review is conducted, TERC finds an expenditure to be questionable, the affected county or municipality is notified of the question in writing and offered an opportunity to submit any additional information which it desires TERC to consider in making its determination of whether a questioned expenditure complies with the requirements of the statute. Id. After considering any such additional information, TERC makes a final determination of compliance, or non-compliance, which is also communicated to the affected city or county. In the event that TERC determines that an expenditure is non-compliant, it certifies that determination to the State Treasurer who, in turn, withholds the amount of the

non-compliant expenditure from subsequent distributions of A-Tax revenues to that city or county. Id. The dispute at the heart of this appeal arises from the parties' opposing interpretations of § 6-4-10(4)(b), as it relates to the disbursement of the remaining A-Tax revenues in the 65% Fund.

II. Factual Background

The history of this and other pending actions between these parties emanates from several years of divergent and opposing opinions as to the meaning and application of the State's A-Tax statute. The facts leading to TERC's filing of this declaratory judgment action began during the COMB's fiscal year 2007-2008; therefore, in order to provide a clearer picture as to the parties' opposing viewpoints, TERC provides the following additional factual background.

PAST FISCAL YEAR EXPENDITURES OF THE COMB

After reviewing the report submitted by the COMB pursuant to § 6-4-25(D)(3), which detailed the expenditure of A-Tax revenues for fiscal year 2007-2008, TERC notified the COMB, by letter dated January 27, 2009, that it questioned the expenditure of substantially all of the A-Tax revenues available to the COMB on operating expenses for police, fire and parks personnel in light of § 6-4-10(4)(b)'s proscription on utilizing A-Tax revenues for municipal services "normally" provided by the City. **(R.pp.225-26)**, TERC January 27, 2009 Letter. TERC also put the COMB on notice that it did not agree with the City's comparison of its level of municipal service expenditures with the expenditures of other municipalities solely on the basis of permanent populations. Id. The COMB responded, by February 9, 2009 letter, wherein it relied principally on RR#98-22, **(R.pp.273-87)**, asserting that the COMB should be able to use the available A-Tax revenues for qualifying municipal operating expenses and that TERC lacked jurisdictional oversight of "tourism-related" expenditures from its general fund. **(R.pp. 291-93)**,

COMB February 9, 2009 Letter. The COMB also asserted that TERC's approval of expenditures for police, fire and parks personnel in a prior fiscal years supported COMB's position. Id.

TERC responded to the COMB by letter dated April 22, 2009, in which it questioned whether COMB's grant of 100% of the A-Tax revenues expended to the COMB's general fund was appropriate given the statutory limitation included in § 6-4-10(4)(b), that permitted the 65% Fund's use only on "additional" municipal services not "normally provided by the county or municipality." **(R.pp.294-97)**, TERC April 22, 2009 Letter. Recognizing the "hardship" a decision to certify the COMB's entire A-Tax disbursement might impose on the City, TERC noted that it had found the COMB's fiscal year 2006-2007 expenditures compliant with the A-Tax statute under similar circumstances and therefore would not certify the entire amount to the State Treasurer as non-compliant on that ground. Id. However, TERC put the COMB on notice of its interpretation of § 6-4-10(4)(b) and that it would review the COMB's fiscal year 2008-2009 expenditures under the new interpretation. Id.

2008-2009 EXPENDITURES

Prior to submitting its fiscal year 2008-2009 A-Tax report to TERC, and thus prior to TERC's review of the report on COMB's state A-Tax disbursements for that year, the COMB filed an action with the Administrative Law Court ("ALC"), Docket No. 09-ALJ-30-0435-IJ, seeking a "petition for a declaratory judgment" as to the meaning of § 6-4-10(4)(b), as well as a temporary and permanent injunction preventing TERC from reviewing the COMB's fiscal year 2008-2009 expenditures. The purpose of the City's filing was to preclude TERC from reviewing, and potentially certifying to the State Treasurer as non-complaint, the COMB's fiscal

year 2008-2009 A-Tax disbursement. **(R.pp.298-326).** TERC opposed[4] the COMB's filing in the ALC, arguing, *inter alia*, that the ALC did not have jurisdiction to issue a declaratory judgment. **(R.pp.327-79)**, TERC Return in Opposition. The ALC ultimately determined that it would not consider COMB's declaratory judgment filing.[5]

The COMB submitted its annual report to TERC on September 30, 2009, pursuant to § 6-4-25(D)(3), detailing its expenditures of A-Tax revenues in fiscal year 2008-2009. **(R.pp.214-224)**, COMB FY 2008-2009 Report. The report showed that the Myrtle Beach City Council had granted all of the A-Tax revenues made available for disbursement in fiscal year 2008-2009, approximately $4.6 Million, to the COMB's general fund for police, fire and parks personnel expenses, and had made no grants to outside organizations for tourism-related activities. Id. Notably, as further detailed in this report, the City Council's grant was approximately $700,000 more than the COMB had requested for support of these personnel expenses. Id. The COMB had requested $3,977,794 in A-Tax revenues in fiscal year 2008-2009, which represented

[4] However, TERC agreed with the premise of the COMB's declaratory judgment filing – i.e., that the best course of determining the meaning of section 6-4-10(4)(b) would be through a declaratory judgment action, hence TERC's later filing of the current action in the circuit court, the court with jurisdiction to consider a declaratory judgment action. **(R.pp.380-81).**

[5] Through a subsequent Freedom of Information Act ("FOIA") request, TERC learned that the COMB had, in fiscal year 2008-2009, disbursed revenues out of its general operating fund to four outside (i.e., non-municipal department) entities, totaling $302,545, requested for tourism-related activities; however, these outside entities had not submitted funding requests that were reviewed by the Committee as provided for in § 6-4-25. TERC therefore determined that the COMB's disbursements to these outside entities had not complied with the statutory mandates of §§ 6-4-5 *et seq.* and certified to the State Treasurer to withhold the funds from the COMB's next A-Tax revenue disbursement. Thereafter, the COMB filed a contested case request with the ALC based on TERC's non-compliance certification, 10-ALJ-30-0421-CC, and the two pending matters before the ALC were consolidated in one contested case, although the issues raised in the COMB's original "petition for a declaratory judgment" were excluded. **(R.pp.383-85)**, ALC Order of Consolidation. The contested case hearing was held before the Honorable Carolyn C. Matthews on December 2, 2010, and an appeal from the final order in that case is currently before this Court, City of Myrtle Beach v. Tourism Expenditure Review Committee, Case Tracking No. 2011194346.

84.97% of the $4,681,464 in available A-Tax revenues. Id. After its review, the Committee had recommended that the COMB receive $3,065,294 in A-Tax revenues in fiscal year 2008-2009, which represented 65.48% of the available A-Tax revenues. Id. Notwithstanding the COMB's funding request and the Committee's recommendations, the COMB City Council, charged with the duty of disbursing available A-Tax revenues in a given year, voted to disburse $4,664,951 to the COMB general fund, which represented 99.65% of the available A-Tax revenues. Id.

By January 4, 2010, letter, TERC notified the COMB that it questioned whether or not the City Council's grant of substantially all of the A-Tax revenues expended in fiscal year 2008-2009 to the COMB general fund complied with § 6-4-10(4)(b), because the COMB appeared to be using the A-Tax revenues as an additional source of funds to provide services normally provided by the City. **(R.p.227)**, January 4, 2010 Letter. TERC also requested further information from the COMB regarding its procedures. Id. The COMB responded by January 7, 2010 letter, asserting that it could use A-Tax revenues in the manner that it did, based on its comparison of operating expenses to other counties and municipalities with similar permanent populations. **(R.pp.228-30)**, COMB January 7, 2010 Letter. In support of its position, the COMB relied upon RR#98-22. Id.

Following further correspondence between the parties not pertinent to this appeal, TERC replied to the COMB by letter dated May 6, 2010. **(R.pp.380-82)**, TERC May 6, 2010 Letter. Therein, TERC informed the COMB of its view that the COMB's disbursement of substantially all of the available A-Tax revenues to the City's general fund for police, fire and parks personnel expenses was not consistent with the legislative intent of §§ 6-4-5 *et seq.* Id. However, TERC once more informed the COMB that, because it had previously allowed the COMB to use a substantial portion of available A-Tax revenues for the COMB's general fund expenses for

police, fire and parks personnel expenses, certification to the State Treasurer's Office that the entire expenditure of $4.6 Million of A-Tax revenues by the COMB was non-compliant (and that this amount should therefore be withheld from future disbursements to the COMB) would not be reasonable. Instead, TERC informed the COMB a declaratory judgment action was the proper, and most reasonable, vehicle to ascertain the meaning of the statute, and that TERC had filed the declaratory judgment action underlying the instant appeal on that same day. Id.

SUMMARY OF ARGUMENT

The parties present opposing interpretations of § 6-4-10(4)(b). In filing the action underlying the instant appeal, TERC sought a declaration that: (1) the 65% Fund may only be used by the COMB as a source of revenue to fund additional police, fire, and parks personnel expenses, over and above what the COMB itself normally spends on police, fire, and parks personnel and (2) the fact that the COMB has a high concentration of tourism activity does not in and of itself permit the City to expend the entire 65% Fund proceeds on municipal services such as police, fire, and parks personnel. By contrast, the COMB counterclaim sought a declaration that: (1) § 6-4-10(4)(b) permits a municipality to use all of its tourism-related funds on a single category of eligible expenditures; (2) TERC's oversight authority is limited to determining whether the county or municipality has complied with § 6-4-10(4)(b) as written; (3) the COMB's method of comparing the amount of its municipal services expenditures to other counties or municipalities with similar permanent populations in order to determine the amount attributable to tourists is appropriate; and (4) TERC may not expand its oversight authority through policy interpretations.

The result reached in the circuit court's orders ("Orders") is contrary to the plain language of § 6-4-10(4)(b) and violates the General Assembly's clear legislative intent. Further, despite ruling that its decision was based upon the plain meaning of § 6-4-10(4)(b), the circuit court erroneously looked beyond the statute for substantiation of its rulings, relying on testimony and other extrinsic evidence without first finding an ambiguity. Moreover, the circuit court erred in its interpretation and application of law to the extrinsic evidence admitted. Finally, the circuit court erred as a matter of law in sanctioning the COMB's fiscal year 2008-2009 disbursement of A-Tax funds, an issue that was not, and jurisdictionally could not be, before the circuit court.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 279-80, 580 S.E.2d 163, 165 (Ct. App. 2003) (citing Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991); Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001)). The standard of review applied by an appellate court for a declaratory judgment action is therefore determined by the nature of the underlying issue. See Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 557 S.E.2d 670 (2001). "To make this determination, an appellate court must look to the essential character of the cause of action." Sloan v. Greenville County, 380 S.C. 528, 534, 670 S.E.2d 663, 666 (Ct. App. 2009) (citing Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000)). "The issue of statutory interpretation is a question of law for the court." Sloan at 534, 670 S.E.2d at 667 (citing Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)). "In an action at law tried without a jury, [an appellate court] reviews the lower court only to correct errors of law." Seago v. Horry County, 378 S.C. 414, 422, 663 S.E.2d 38, 42 (2008) (citing Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998)). However, an appellate court is "free to decide questions of law with no deference to the trial court." Sloan at 534, 670 S.E.2d at 667.

ARGUMENT

I. The Circuit Court erred as a matter of law in ruling that the plain language of section 6-4-10(4)(b) permits a municipality to expend accommodation tax revenues on services normally provided by the municipality.[6]

a. The plain language of section 6-4-10(4)(b) supports the position advanced by the Tourism Expenditure Review Committee.

The circuit court erred as a matter of law in finding that the plain language of § 6-4-10(4)(b) supports the proposition advanced by the COMB that a municipality may expend A-Tax revenues for services normally provided by the municipality. As will be demonstrated to this Court, although the circuit court Orders purport to be based on the plain meaning of the statute, they nevertheless rely solely on extrinsic evidence to substantiate the rulings contained therein.

By contrast, TERC's position in this case is founded solely on the plain meaning of § 6-4-10(4)(b), i.e., that the statutory language is not ambiguous, and the circuit court erred in looking beyond the four corners of the statute to deny the declaratory judgment sought by TERC (and grant the declaratory judgment sought by COMB). TERC asserts that a municipality with a high concentration of tourism activity may only use A-Tax funds for those municipal services which are in addition to the services normally provided by the municipality. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. See Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) (citation omitted). "The legislature's intent should be

[6] The arguments contained under this heading address Issues on Appeal Nos. One and Two.

ascertained primarily from the plain language of the statute." Bass v. Isochem, 365 S.C. 454, 470, 617 S.E.2d 369, 377 (Ct. App. 2005).

Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992). The language must also be read in a sense which "harmonizes with its subject matter and accords with its general purpose." Mun. Ass'n of S. Carolina v. AT & T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (quoting Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

In pertinent part, § 6-4-10(4)(b) provides:

> The funds received by a county or municipality which has a high concentration of tourism activity[7] may be used to provide

[7] The term "high concentration of tourism activity" is not explicitly defined within Title 4 Chapter 6. TERC, consistent with the view of the Department of Revenue – which, pursuant to the now-repealed S.C. Code Ann. § 6-4-30 (2004), previously exercised some of the authority devolved upon TERC by 2001 Act No. 74, § 3.A of the General Assembly – has interpreted the term as applying to any "county area" defined under section 6-4-5(1) as collecting over $900,000 in A-Tax revenues. See South Carolina Department of Revenue Ruling No. 98-22 ("RR#98-22"); *cf.* S.C. Code Ann. § 6-1-730(B) (Supp. 2010) (wherein legislature adopted the same $900,000 threshold for certain local hospitality tax disbursements). It is undisputed that the COMB has a high concentration of tourism activity, as contemplated under section 6-4-10(4).

> **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.

(Emphasis added).

Although the terms "additional" and "normal" are not defined within the context of county or municipality service level expenditures, it is appropriate for this Court to interpret the terms based on their usual meaning. "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) (citation omitted); see also Santee Cooper Resort v. South Carolina Pub. Serv. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) ("Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation."). S.C. Code Ann. § 6-4-10(4)(b) clearly provides that A-Tax Funds may only be used to provide **additional** services not **normally** provided by the municipality. By contrast, the circuit court's construction, which follows the COMB's suggested reading of § 6-4-10(4)(b), would permit a county or municipality to use A-Tax Funds as an additional source of annual, general fund

revenue. However, in order to harmonize and give effect to the expressed intent of the legislature, these terms can only mean that the COMB may use A-Tax revenues to supplement the City's revenues that it ordinarily expends on municipal services.

This point is further confirmed by the General Assembly's use of the specific article "the" rather than a more general article like "a" in the statute. See § 6-4-10(4)(b) ("The funds must not be used as an additional source of revenue to provide services normally provided by **the** county or municipality ....") (emphasis added). The plain meaning of the language used by the General Assembly indicates that a municipality should look at its own service level expenditures, rather than look to the cost of services provided by **other** municipalities with similar permanent populations, in order to determine the amount of its municipal services expenditures which are attributable to tourists, as is asserted by the COMB. The General Assembly is presumed to know and intend the consequences of the legislation that it passes and courts are not at liberty to hold that the General Assembly has included futile and superfluous language. See State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) (stating that in seeking intention of legislature, a court must presume General Assembly intended by its action to accomplish something and not to do a futile thing). Consequently, the General Assembly's inclusion of the introspective, specific article "the" supports TERC's position that a municipality is required to consider its own personnel service expenditure levels to determine which uses of A-Tax revenues for municipal services are appropriate and does not allow for a comparison of service level expenditures among differing municipalities.

Moreover, under the circuit court's erroneous interpretation, the limitations on the use of A-Tax revenues in § 6-4-10 are rendered a nullity for the COMB and any other municipality (or county) with a high concentration of tourism activity, as they would be enabled to simply

transfer all of the A-Tax revenues in a given year to their general funds for normal operating purposes and no incentive is left to provide funding for "tourism-related expenditures" by way of the statutorily prescribed method. See § 6-4-10 (providing specific guidelines for the use of A-Tax Funds received by a county or municipality collecting more than fifty thousand dollars from local accommodations tax). A statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention should be rejected by this Court. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (citing Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994)). As is evidenced by the COMB's own actions, any municipality (or county) with a high concentration of tourism could simply bypass § 6-4-10's restrictions, § 6-4-25's procedures, and § 6-4-35's oversight by disbursing all available A-Tax Funds to its general fund. See Kiriakides, 312 S.C. at 275, 440 S.E.2d at 366 (declining to give effect to a party's interpretation of a statute that would lead to an absurd result); see also In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous....") (citation omitted). The General Assembly saw fit to create and give the Committee and TERC this statutory authority; the circuit court Orders, which adopted the COMB's proposed construction of the statute, sanction the COMB's bypass of the General Assembly's grant of authority.

Additionally, the General Assembly understands the distinction and limitation placed on use of tax funds to supplement and support the municipal services expenditures "normally" provided by a municipality with a high concentration of tourism. In S.C. Code Ann. §§ 6-1-700 *et seq.* (2004 & Supp. 2010), which establishes the rights and procedures related to a local

government's ability to impose, collect and use an additional local hospitality tax, the General Assembly expressly permits a local government to do with local hospitality tax revenues exactly what the COMB is trying to do with the State A-Tax revenues. Specifically, S.C. Code Ann. § 6-1-730 provides that a county with a high concentration of tourism activity, i.e., one meeting the same $900,000 in state A-Tax revenues criteria discussed in n.7, supra, is permitted to use all of the revenues collected under the local hospitality tax to supplement the municipality's normal expenditures on police, fire protection, emergency medical services, and emergency-preparedness operations. § 6-1-730(B)(1). By contrast, those counties without high concentrations of tourism activity are only permitted to use up to fifty percent (50%) of the collected local hospitality tax revenues for those services normally provided. § 6-1-730(B)(2). Therefore, the General Assembly knows how to relax, and has expressly relaxed, a limitation on the use of tax funds in areas of high concentrations of tourism activity. However, with respect to the State's A-Tax revenues, the General Assembly saw fit to include language that limited a municipality's use of A-Tax funds on municipal services to those in addition to the services normally provided by the municipality. The canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*" suggests that the General Assembly's differing treatments of State A-Tax revenues and local government's hospitality tax revenues in areas with high concentrations of tourism activity was intentional. This canon means that "to express or include one thing implies the exclusion of another, or of the alternative." Black's Law Dictionary 602 (7th ed. 1999). As applicable here, the General Assembly's failure to expressly allow a municipality with a high concentration of tourism activity to use all of the State A-Tax revenues on municipal services expenditures, contrasted against the permitted uses of local hospitality revenues provided for in § 6-1-730(B)(1) and (2), was deliberate and should be

enforced by this Court. See Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) (restating the maxim that the expression of one thing is the exclusion of another).

Moreover, the circuit court erred as a matter of law because, in interpreting the plain language of § 6-4-10(4)(b), its Orders are devoid of analysis of an important portion of the statutory provision in question. Notably, although the initial Order recites the statute in its introduction, the circuit court does not discuss the plain language of the second sentence of the section, which expressly provides that A-Tax "funds must not be used as an additional source of revenue to provide services normally provided by the county or municipality...." § 6-4-10(4)(b). TERC submits that an order declaring the meaning of § 6-4-10(4)(b) is inadequate as a matter of law in the absence of a discussion regarding the import of the clear legislative limitation contained in its second sentence, and the interplay between those two portions of the same section. That conflict, as evidenced by the two distinct interpretations of § 6-4-10(4)(b) presented by the parties in this action, is at the heart of this declaratory judgment action. Additionally, this language was specifically raised by TERC in its pleadings, Trial Brief, and at the hearing, and served as the basis for the declaratory judgment sought by TERC in this action.[8]

[8] In this regard, the circuit court's analysis may be a function of a misperception of the claim made by TERC. Specifically, the initial Order misapprehends TERC's position in this case when it states that "[t]he Court does not agree with TERC's claims that areas with high concentrations of tourism should not be allowed to use A-Tax funds for law enforcement, traffic control, public facilities, and highway and street maintenance expenditures." Neither TERC's pleadings nor its argument during the trial of this case, including its submitted Trial Brief, asserted such a position. To the contrary, TERC's position in this matter has consistently conformed to the plain reading of section 6-4-10(4)(b): A-Tax revenues may be used by municipalities with high concentrations of tourism for municipal services, but only to the extent that they are in addition to those services that the particular municipality itself normally provides. Similarly, the circuit court's initial Order also erroneously suggests that "[u]nder TERC's reasoning areas with a high concentration of tourism could never use their A-Tax discretionary funds for tourism related government services because they normally have a high concentration of tourism activity and all

Instead of addressing this statutory provision, the circuit court focused only upon the language of the first sentence of § 6-4-10(4)(b), and supports it ruling by reference to extrinsic evidence[9] in order to reach its conclusion that the General Assembly intended to allow municipalities to use State A-Tax revenues to offset the costs of municipal services they normally provide. The circuit court failed to reach the heart of the dispute before it, and misinterpreted the part of the provision it did analyze; therefore, the decision of the circuit court must be reversed.

b. The Circuit Court erred as a matter of law in admitting and relying upon on extrinsic evidence to support its ruling where it did not find the statute to be ambiguous.

The circuit court's initial Order states that its ruling is based on the plain meaning of § 6-4-10(4)(b). **(R.pp.12-14).** Notwithstanding this pronouncement, and in support of its "plain meaning" ruling, the circuit court relies exclusively on extrinsic materials presented by the COMB to substantiate its position. Similarly, although the COMB contended throughout this litigation that its position is also supported by the plain language of the statute and presented

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expenditures would be part of the services normally provided by the City," **(R.p.13)**. However, this, too, is incorrect as TERC's interpretation is perfectly in line with the General Assembly's intent, evidenced by the preamble to the enabling legislation. See discussion infra, Section II.a. TERC concedes that areas of high concentration of tourism activity may use A-Tax revenues for municipal services; however, such uses should be non-recurring exceptions, rather than the rule, see Title 12, Chapter 35 (Preamble Section 1) ("from time to time"), and not recurring yearly expenditures, funding for which the county or municipality is looking to supplant with non-qualifying State A-Tax revenues, see Preamble Section 1 ("[t]he purpose of this act is not to provide an additional source of revenue for . . . services normally provided by the county or municipality"). **(R.p.288)**, Preamble to 1984 S.C. Act No. 316. 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 non-recurring, eligible events, which would both promote tourism and enlarge the economic benefits of the area. Thus, TERC asserts that its position is not accurately portrayed in the above-quoted statements included in the initial Order by the circuit court and should therefore be vacated.

[9] Kennedy v. S. Carolina Ret. Sys., 345 S.C. 339, 346-47, 549 S.E.2d 243, 246-47 (2001) (holding that, in order to consult materials beyond the borders of the act itself, a court must first find that the statute is ambiguous).

extraneous testimony and other extrinsic evidence to the court in the event that it found the statute ambiguous, the circuit court, without first finding an ambiguity in the statute, nevertheless relied upon the extraneous material to support its rulings.[10] **(R.pp.14-17).** TERC contends that this is a legal contradiction that cannot stand: either a decision is based on the plain language, and substantiation for that decision is rooted solely in the words of the statute; or, a Court makes a finding that the statute is unclear and ambiguous, and it endeavors to fulfill the General Assembly's intent by looking to extrinsic evidence. See Kennedy, 345 S.C. at 346-47, 549 S.E.2d at 246-47 (holding that, in order to consult materials beyond the borders of the act itself, a court must first find that the statute is ambiguous). The circuit court erred in looking outside the statute when the plain language clearly dictates otherwise and without first having found an ambiguity within the language of the statute. State v. Hudson, 336 S.C. 237, 246-47, 519 S.E.2d 577, 582 (Ct. App. 1999) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning.") (citing Paschal, 317 S.C. at 436, 454 S.E.2d at 892); City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the **statute** is clear and explicit, the court cannot rewrite the **statute** and inject matters into it which are **not** in the legislature's language.") see also Contra

[10] As noted above, TERC objected to this evidence on the basis of both relevancy and hearsay, the former objection being grounded in the fact that the extrinsic evidence and testimony is inappropriate in a declaration of the meaning of an unambiguous statute. **(R.pp.163-64).** The circuit court reserved ruling on TERC's objections and the testimony and materials were allowed. **(R.p.164).** Thereafter, the circuit court's Order relied exclusively on the extrinsic materials presented by the COMB to support its plain meaning holding. **(R.pp.3-18).** TERC raised the circuit court's legal error in this regard in its motion for reconsideration, **(R.pp.109-28)**; however, the circuit court's order denying TERC's Rule 59(e), SCRCP motion failed to address TERC's assignations of error. **(R.pp.19-21)**; see Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (holding that once an issue has been properly raised in a Rule 59(e) motion, it is preserved).

Independence Ins. Co. v. Indep. Life & Acc. Ins. Co., 218 S.C. 22, 34, 61 S.E.2d 399, 405 (1950) ("The purpose of construction is to ascertain the legislative intent from the words used; and, if these are susceptible to any sensible meaning, **the court cannot add to them other words which would give them a different meaning without making, instead of construing, the statute**.") (emphasis added) (quoting Banks v. Columbia Ry., G. & E. Co., 113 S.C. 99, 101 S.E. 285 (1919)).

Furthermore, this Court has held, in an *en banc* decision, that, in order to look beyond the plain meaning, a court is first required to make a finding of ambiguity. Stringer v. State Farm Mut. Auto. Ins. Co., 386 S.C. 188, 193, 687 S.E.2d 58, 60 (Ct. App. 2009), reh'g denied (Jan. 20, 2010), cert. denied (May 6, 2011) (discussing a trial court's error, in the context of an insurance contract, in construing a contract without first finding an ambiguity existed). Where there is no ambiguity, the court is bound to rely solely on the terms of the statute and give them their plain, ordinary and popular meaning. Id. The circuit court made no finding of an ambiguity in § 6-4-10(4)(b). Moreover, at the hearing, the COMB admitted that the materials it introduced to the circuit court were meant for the court's consideration in the event that it found an ambiguity. **(R.pp.161-62)**, Transcript at 17-18 ("And that's the reason we're not just going based on oral arguments on the statute. We do think that the statute is clear to us, but there is always room for ambiguity, and so you have a choice to decide how you want to have this thing interpreted. And you'll have as much information as we think is appropriate for you to determine what's the best way to decide what 20 [sic] – 6-4-10(b)(4) [sic] means."). Therefore, the COMB expressed knowledge and intent that the materials it was presenting were to be used by the circuit court in the event it found an ambiguity. The circuit court Orders instead considers materials outside of

the record and construes the statute in favor of the COMB without a finding of ambiguity, which constitutes reversible error.

Additionally, the materials relied upon in the initial Order are not relevant to an interpretation of the statute and constitute inadmissible hearsay, properly objected to by TERC. In relying on these materials,[11] the circuit court Orders contradict their ruling that the decision is based solely on the plain meaning of the statute. At trial, TERC objected to the COMB's introduction of documents and studies on multiple grounds. **(R.pp.164, 173, 177-80).** First, because the action was filed and accepted in this Court's jurisdiction as a declaratory judgment action, construing the language of § 6-4-10(4)(b), TERC argued that the materials and testimony proposed by the COMB were not relevant to the Court's analysis. Secondly, because the studies and other documents referenced in the initial Order were out of court statements proffered for the truth of the matters asserted therein, TERC objected to them on the grounds of hearsay. Despite the fact that the materials do not fit within a hearsay exception, and despite their having been proffered by the COMB solely as reference, the facts and figures contained in the studies were included by the circuit court in the initial Order as findings of fact. Once more, if the Orders were based on the plain language of the statute, then these materials should have been excluded as impermissible extrinsic evidence; regardless, however, these materials are inadmissible hearsay and cannot serve as substantiation for the Orders.

The COMB has previously attempted to explain away the circuit court's patent contradiction by stating that the extrinsic materials offered by the COMB, and cited as substantiation in the initial Order, were merely "factual applications" of the initial Orders' plain

[11] In addition to the studies listed below, the circuit court also repeatedly relies on RR#98-22, which belies the circuit court's insistence that its decision is based on the plain meaning of the statute.

meaning ruling. **(R.p.129)**, COMB Response to TERC Motion for Reconsideration. However, the initial Order clearly provides the discussion of extrinsic materials as support for its "plain meaning" holding, not as an application of that holding to a set of facts. This discrepancy is unexplainable and legally dispositive. For this and other reasons argued herein, the circuit court's Orders are erroneous as a matter of law and should be reversed.

c. The Circuit Court erred as a matter of law in ruling that the City of Myrtle Beach's method of comparing its municipal service expenditures to the expenditures of other South Carolina municipalities with similar permanent populations is supported by the plain language of section 6-4-10(4)(b).

Similarly, the circuit court erred in ruling that the plain language of § 6-4-10(4)(b) supports its conclusion that municipalities with high concentrations of tourism may compare their levels of municipal services to the expenditures of other South Carolina municipalities with similar permanent populations, regardless of whether or not they, too, had a high concentration of tourism activity. The circuit court's construction of § 6-4-10(4)(b) not only improperly allows a municipality to disregard the specific language and implication of other, more general language in the statute, but it also reads additional provisions into the statute, namely, that municipalities with high concentrations of tourism are authorized to compare their expenditures with other municipalities in order to determine the appropriateness of utilizing A-Tax revenues. Contra Independence Ins. Co., 218 S.C. at 34, 61 S.E.2d at 405 ("The purpose of construction is to ascertain the legislative intent from the words used; and, if these are susceptible to any sensible meaning, **the court cannot add to them other words which would give them a different meaning without making, instead of construing, the statute**.") (emphasis added) (quoting Banks, 113 S.C. 99, 101 S.E. 285). TERC submits that it is not appropriate to look outside the statute when the plain language clearly dictates otherwise, and the circuit court erred as a matter of law in so doing. Hudson, 336 S.C. at 246-47, 519 S.E.2d at 582 ("If a statute's language is

plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning.") (citing Paschal, 317 S.C. at 436, 454 S.E.2d at 892).

Furthermore, comparing the level of services a municipality would be providing if it had the same permanent population as another county or municipality not situated in an area with a high concentration of tourism activity is entirely inapt, since it assumes that the two municipalities are similar. The statute treats municipalities with high concentrations of tourism activity differently from those that do not have a high concentration of tourism activity, see § 6-4-10(4)(b) (limiting subsection (b)'s application to those counties or municipalities with high concentrations of tourism), a status which COMB holds and of which it is taking advantage, yet the construction of § 6-4-10(4)(b) by the circuit court allows the COMB to use a municipality that does **not** have a high concentration of tourism as its comparison point. This is an "apples and oranges" comparison that effectively permits a municipality to supplant a portion of the municipal tax revenues needed for services normally provided by a municipality with State A-Tax revenues. This leads to an absurd result prohibited by the rules of statutory construction. See Kiriakides, 312 S.C. at 275, 440 S.E.2d at 366 (declining to give effect to a party's interpretation of a statute that would lead to an absurd result). Concomitantly, the circuit court erred as a matter of law in approving the COMB's proposed method of avoiding the statutory oversight of TERC, and its holding should be reversed.

II. Assuming, *arguendo*, that reliance on extrinsic evidence was proper, the Circuit Court erred in its interpretation and application of law to the extrinsic evidence admitted.

Notwithstanding TERC's contention that the circuit court Orders are not based on the plain language of § 6-4-10(4)(b), but instead relies on extrinsic materials for support which in

and of itself constitutes grounds for reversal of the circuit court, TERC also submits that the circuit court erred in its analysis of the extraneous evidence upon which it relied.

a. The preamble of the enacting language to the statutory predecessor of sections 6-4-5 *et seq.*, sections 12-35-710 *et seq.* (1984), supports the position of the Tourism Expenditure Review Committee.

As an alternative to its plain meaning argument, and offered to the circuit court in the limited circumstance that it found § 6-4-10(4)(b) to be ambiguous, TERC submitted to the court the preamble of the enabling language of the statutory predecessor to § 6-4-10(4)(b).[12] TERC submits that, if the circuit court could properly look beyond the plain language of the statute (which was and remains disputed by TERC), the preamble is clear evidence of the General Assembly's intent in § 6-4-10(4)(b) which is controlling and should have also been considered. "If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 25, 579 S.E.2d 334, 337-38 (Ct. App. 2003) (citing State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002)); see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. See Hudson, 336 S.C. at 247, 519 S.E.2d at 579. In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002).

[12] The enabling language was argued to the circuit court, **(R.pp.153-56)**, but was not included in the Order. TERC raised the circuit court's failure to rule on the enabling language, in light of its decision to look beyond the four corners of section 6-4-10(4)(b), in its motion for reconsideration; therefore, the enabling language is properly before this Court. **(R.pp.117-19)**; see Coward Hund, 336 S.C. 1, 518 S.E.2d 56 (holding that once an issue has been properly raised in a Rule 59(e) motion, it is preserved).

Furthermore, the Supreme Court has held that the preamble to an act is often useful in explaining otherwise unclear legislative intent. See Brown v. Cont'l Ins. Co., 315 S.C. 393, 395, 434 S.E.2d 270, 272 (1993) (citing Treasurers of the State v. Lang, 18 S.C.L. (2 Bail.) 430 (1831)); see also State v. Thrift, 312 S.C. 282, 305-06, 440 S.E.2d 341, 354 (1994) (preamble of an act may be used as a guide in determining legislative intent); City of Spartanburg v. Leonard, 180 S.C. 491, 186 S.E. 395 (1936) (holding that the preamble, though not a part of the effective portion of a statute, may nevertheless supply the guide to the meaning of the act). The statutory predecessor to §§ 6-4-5 *et seq.*, §§ 12-35-710 *et seq.* (1984), discussed in Thompson v. Horry County, 294 S.C. 81, 82-85, 362 S.E.2d 646, 647-49 (Ct. App. 1987), included a preamble in its enacting language that provided:

> The General Assembly finds that areas of the State which have a high concentration of tourism activity **may also be required from time to time** 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 purpose of this act is not to provide an additional source of revenue for counties and municipalities required 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.

(R.pp.288-290), Act No. 316, Acts and Joint Resolutions of the General Assembly of South Carolina, Regular Session, 1984, 63 Stat. at Large 1570 (1984) (emphasis supplied). As is evident, this

language is substantially similar to the language currently included in § 6-4-10(4)(b). However, the additional language contained in the preamble to the enabling legislation is telling: the inclusion of the phrase "from time to time" reflects the General Assembly's intent that municipalities with high concentrations of tourism not be allowed to simply rely on A-Tax revenues for additional, yearly revenue supplanting normal municipal revenue disbursements. Instead, it contemplated only using A-Tax revenues for the provision of those services in unique circumstances warranting their need to help promote tourism and enlarge the economic benefits of the area, which conforms to the plain language of the statute and TERC's suggested reading. *Cf.* Brown, 315 S.C. at 395, 434 S.E.2d at 272 (holding that where the preamble to the statute suggests a different meaning than the plain language of the statute, the preamble does not control). Again, while TERC submits that its position is fully supported by the plain language of § 6-4-10(4)(b), should this Court conclude that the statute is ambiguous (which the circuit court failed to do), TERC submits that the enabling language of the statutory predecessor to § 6-4-10(4)(b) supports TERC's position and that the circuit court's findings to the contrary should be reversed.

b. The Circuit Court misinterprets South Carolina Department of Revenue Ruling #98-22.

The circuit court, in relying on an isolated portion of RR#98, fails to give full weight to the analysis of this ruling, and therefore misapplies the import of the 13 year old, non-binding administrative opinion.[13] As discussed above, and contrary to the position attributed to it in the initial circuit court Order, TERC does not dispute the fact that § 6-4-10(4)(b) permits a municipality with a high concentration of tourism activity to expend A-Tax revenues on

[13] Administration of State A-Tax funds was formerly under the oversight of the South Carolina Department of Revenue. See n.7, supra.

municipal services to the extent that the expenditures are for services in addition to those services that the particular municipality itself normally provides. Moreover, TERC acknowledges that RR#98-22 suggests that a municipality with a high concentration of tourism activity may compare the number of its permanent residents with the number of tourists that visit the locality in order to determine the cost of providing municipal services that are directly attributable to tourists. TERC also acknowledges that it has, at times since its inception in 2001, relied upon RR#98-22 when evaluating questionable tourism-related expenditures under § 6-4-35. However, nowhere in RR#98-22 does it suggest that it is appropriate for a municipality with a high concentration of tourism activity to look to **other** municipalities with similar permanent populations (especially those without a high concentration of tourism activity) in order to determine the municipal costs attributable to tourists. See RR#98-22, **(R.pp.273-287)**, Questions and Answers 5, 6, 14, 19, and 31.

Furthermore, a Department of Revenue Ruling is, at most, an advisory opinion, and courts are not required to follow their decisions. See RR#98-22, Scope, p.1 ("A Revenue Ruling is the Department of Revenue's official **advisory opinion**....) (emphasis added); **see also** South Carolina Department of Revenue Ruling #05-2, p. 2 ("A Revenue Ruling does not have the force or effect of law. It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion."). Additionally, although the Department of Revenue and TERC have held differing views over the interpretation of §§ 6-4-5 *et seq.*,[14] this Court is not required to enforce TERC's previous position regarding the

[14] As noted by TERC during the trial, because its interpretation of section 6-4-10 has changed, TERC did not assert, as is its right according to case law, that its interpretation was entitled to deference by the Court. **(R.p.150).** Cf. Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842-43 (1984) ("The fact that the agency has from time to time changed its

meaning of the statute where it is contrary to the plain language of the statute. *Cf.* Media Gen. Communications, Inc. v. South Carolina Dep't of Revenue, 388 S.C. 138, 149-50, 694 S.E.2d 525, 530-31 (2010) ("An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language.") (citing Etiwan Fertilizer Co. v. South Carolina Tax Comm'n, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950)); see also Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation.") (citation omitted). Similarly, TERC, having interpreted a statute to mean one thing in the past, is under no obligation to continue interpreting a statute the same way going forward, as long as its interpretation is not contrary to the plain language of the statute. See Chevron U.S.A., 467 U.S. at 863-64 (stating that an agency, in order to come to an informed decision, "must consider varying interpretations and the wisdom of its policy on a continuing basis.").

As noted above, the impetus for the filing of the declaratory judgment action underlying this appeal lies in the contrary interpretations of TERC and the COMB with respect to what municipal services are considered normal and how the use of A-Tax Funds as an additional source of revenue for those services already provided by the municipality are limited under § 6-4-10(4)(b). The circuit court cited RR#98-22 in support of the conclusion that the COMB may compare the personnel costs of providing certain municipal services to the costs of other

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interpretation of the term 'source' does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute.").

municipalities with similar permanent populations. However, as stated above, the comparison methodology adopted by the circuit court does not appear in RR#98-22. There exists no support for this comparison in either the plain language of §§ 6-4-5 *et seq.*, or RR#98-22.

The COMB has previously relied upon one sentence appearing in RR#98-22 to support its position:

> 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 that visit **the** locality, taking into consideration the average length of stay for such tourists.

(R.p.279), RR#98-22 at 7 (emphasis added); **(R.p.105)**, COMB Trial Brief at 17. However, both the plain language of § 6-4-10(4)(b) and RR#98-22 use the specific article "the" rather than a more general article like "a" when referencing the number of tourists visiting, or municipal services provided by the municipality in question. See § 6-4-10(4)(b) ("The funds must not be used as an additional source of revenue to provide services normally provided by **the** county or municipality ....") (emphasis added); RR#98-22.

By contrast, RR#98-22 **does** provide examples of determining the costs of municipal services attributable to tourism that actually support TERC's interpretation of the plain meaning of the statute. RR#98-22 states that a municipality must show that the amount expended on costs for additional municipal services are based upon the estimated percentage of the municipality's total costs incurred in providing the service in question **that are directly attributable to tourists**. One means suggested by RR#98-22 for making such a showing is to determine the

difference in costs incurred during the tourist season and the non-tourist season.[15] **(R.p.279)**, RR#98-22 at 7. Consistent with TERC's reading of the statute above, the comparison suggested to municipalities by RR#98-22 is entirely introspective, and does not suggest that a municipality may look to other areas lacking high concentrations of tourism activity to determine what is **normally** provided by **the** municipality. See § 6-4-10(4)(b). Comparing the number of tourists that visit a municipality, or the level of services a municipality would be providing if it had the same permanent population as another county or municipality not situated in an area with a high concentration of tourism activity, is inapt since it assumes that the two municipalities are similar when they clearly are not. Consequently, RR#98-22, when read in its entirety, supports the positions advanced by TERC and not the result reached by the circuit court and the circuit court's reliance on RR#98-22 constitutes reversible error.

c. The Circuit Court misinterprets the holding of this Court in Thompson v. Horry County, 294 S.C. 81, 362 S.E.2d 646 (Ct. App. 1987).

The initial Order erroneously cites this Court's decision in Thompson v. Horry County in support of its conclusion that a municipality should be allowed to compare the costs of providing its municipal services with those of another municipality with a similar permanent population. However, the reliance on Thompson in the circuit court's initial Order misconstrues its clear holding. In Thompson, this Court analyzed the predecessor version of §§ 6-4-5 *et seq.* to determine the reasonable geographic area in which a municipality could spend available A-Tax Funds. This Court stated, and thus limited the scope and applicability of the opinion, that the only issue before it related to the geographical area in which a county or municipality could

[15] However, as noted by testimony presented by the COMB, the City has an average daily population of 104,000, as compared to the claimed permanent population of 27,109; therefore, the COMB has a consistent and constant tourist presence, as opposed to the peaks and valleys it may have historically experienced. **(R.pp.183, 185-87)**, Transcript at 39, 41-43.

spend A-Tax revenues. 294 S.C. at 84, 362 S.E.2d at 648 ("In this case, the second requirement [–that expenditures must be made primarily in the geographical areas of the county in which the proceeds of the tax are collected where it is practical–] is in issue.").

Furthermore, under the former version of § 6-4-10(4)(b) discussed in Thompson, there existed a clause with respect to the "'C' Fund" – referred to as the "65% Fund" in this case – which provided that counties or municipalities were required only to be "substantially in compliance" with the requirements of the statutory section. See S.C. Code Ann. § 12-35-710 *et seq.* (1984) (amended 2001) (removing "substantial compliance" language). However, the General Assembly amended the statute to provide oversight authority over A-Tax revenues to TERC, and removed the "substantial compliance" standard associated with the geographic "flexibility" discussed by this Court in Thompson.

Consequently, the import of Thompson is limited to the scope of the issue before the Court of Appeals in that case and the circuit court's reliance upon Thompson as substantiation for its decision in this declaratory judgment action is in error. TERC does not contend, contrary to ruling of the circuit court's initial Order, that the COMB does not have flexibility as to how it spends A-Tax revenues. Rather, TERC contends that it is authorized to execute the oversight authority delegated to it by the General Assembly under § 6-4-35 in evaluating questionable tourism-related expenditures. Consequently, the circuit court's reliance on Thompson for its "plain language" holding is misplaced and constitutes reversible error.

III. The Circuit Court erred in sanctioning the City of Myrtle Beach's fiscal year 2008-2009 disbursement of accommodation tax revenues.

In its conclusion, the circuit court held that "[t]he Court finds and declares 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.17)**, Order at 14. The issue of the COMB's

2008-2009 disbursement of A-Tax Funds was not an issue before the Court in this declaratory judgment action.[16] In response to TERC's Rule 59(e), SCRCP, motion on this point, the COMB generically stated that "[a]ll issues decided by the Court were raised either in TERC's complaint or the City's counterclaim." **(R.p.132)**, COMB Return to Motion for Reconsideration at 4. However, review of the COMB's Answer and Counterclaim reveals no mention of the issue. **(R.pp.41-45)**, COMB Answer and Counterclaim. At the trial, counsel for the COMB asserted that the COMB "[has] brought a counterclaim basically saying that the 2008-2009 expenditure was proper", **(R.p.161)**, Transcript at 17, but this, too, is contradicted by the record on appeal. **(R.pp.41-45)**, COMB Answer and Counterclaim.

The COMB did not move to amend its pleadings under Rule 15, SCRCP, either prior to, during, or after the trial. Further, the issue of the COMB's 2008-2009 expenditures was not tried by express consent. Instead, counsel for the COMB attempted to inject the issue at trial, **(R.p.161)**, Transcript at 17 ("And we have brought a counterclaim basically saying that the 2008-2009 expenditure was proper."), without support, and TERC clearly did not recognize the COMB's motivation in doing so and expressly refuted that the COMB's 2008-2009 allocation was at issue. **(R.pp.150, 156, 163)**, Transcript at 6, lines 15-23, p. 12, lines 4-14, p. 19, lines 20-25. However, a party is not permitted to amend its pleadings by implied consent if the parties did not recognize it as an issue at trial, even if evidence in the record exists to support the amendment. See Dunbar v. Carlson, 341 S.C. 261, 268, 533 S.E.2d 913, 917 (Ct. App. 2000) (holding that implied consent will not be found if the parties did not recognize it as an issue at trial) (citing Williams v. Addison, 314 S.C. 35, 443 S.E.2d 582 (Ct. App. 1994)). Furthermore,

[16] In its Answer and Counterclaim, the COMB did not request this Court to declare its 2008-2009 disbursement proper. Moreover, TERC timely objected to the COMB's counterclaim(s) and moved to dismiss in accordance with Rule 12(b)(6), SCRCP, which had been raised as a specific defense in TERC's reply.

if a court allows an amendment or the introduction of evidence under Rule 15(b), SCRCP, it is required to state in the record the reason or reasons for allowing the amendment or evidence; the circuit court Orders are devoid of such statements or analysis. See Rule 15(b), SCRCP ("Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor."). Instead, the initial Order simply adds a holding into its conclusion that is unsupported by the record. **(R.p.17)**, Order at 14.

Moreover, because the only reference to sanctioning the COMB's 2008-2009 expenditure was made by counsel during trial, the counsel's statement may not be viewed as evidence by the court and cannot orally add an unsupported counterclaim to an action during the trial. See South Carolina Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence.") (citing McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.")); see also Sessions v. Withers, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986).

Furthermore, the propriety of the COMB's 2008-2009 allocation of A-Tax revenues is beyond the jurisdiction of the circuit court. The ALC has sole subject matter jurisdiction to pass on issues related to a county or municipality's disbursement of A-Tax revenues under §§ 6-4-5 *et seq.* See S.C. Const. art. I, § 22; the South Carolina Administrative Procedures Act, S.C. Code

Ann. §§ 1-23-10 *et seq.* (2005 & Supp. 2010); § 6-4-35(B)(1)(a); and Rules 2(e) and 11, of the Rules of Procedure for the Administrative Law Court.[17]

Thus, while a decision by the circuit court with respect to the meaning of § 6-4-10(4)(b) was within the circuit court's jurisdiction for a declaratory judgment action filed pursuant to S.C. Code Ann. § 15-53-20 (2005), the propriety of the COMB's 2008-2009 disbursement was not cognizable before the circuit court, and, absent a finding of non-compliance by TERC, not even the ALC had jurisdiction to pass on the COMB's disbursement of A-Tax revenues. Consequently, the circuit court's holding in this regard should be reversed.

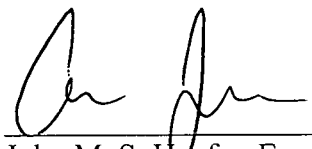
CONCLUSION

For the reasons set forth above, the Orders of the circuit court should be reversed. The circuit court erred as a matter of law in holding that the plain language of § 6-4-10(4)(b) permits a municipality to expend A-Tax revenues on services normally provided by the municipality, by comparing the municipality's service level expenditures to the expenditures of other South Carolina municipalities with similar permanent populations. Instead, the plain language of § 6-4-10(4)(b) supports the position advanced by TERC. Additionally, the circuit court erred as a matter of law in, notwithstanding its pronouncement that the holding was based on the plain language of the statute, admitting and relying upon on extrinsic evidence to support its holding without first finding an ambiguity in the statute. Furthermore and in the alternative, in relying on extrinsic materials, the circuit court erred in failing to consider the preamble of the enacting language of the statutory predecessor to the statute in question, in addition to misinterpreting and

[17] Although the last cited statutory provision refers to an "appeal" from an action of the TERC, it has been held that the TERC lacks authority to conduct contested cases and, thus, that jurisdiction over matters arising out of a determination of the TERC is contested case jurisdiction before the ALC. See, e.g., 2005 WL 3308567, Order of the Honorable Marvin F. Kittrell, May 5, 2005, Docket No. 04-ALJ-30-0382-CC.

misconstruing the extrinsic materials on which it relied. Finally, the circuit court erred in sanctioning the COMB's fiscal year 2008-2009 disbursement of A-Tax revenues, an issue that was not and could not be before it in the instant appeal.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Tourism Expenditure Review Committee, ...Appellant,

v.

City of Myrtle Beach, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Briefs of Appellant Tourism Expenditure Review Committee comply with Rule 211(b), SCACR.

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April 24, 2012

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PROOF OF SERVICE

This is to certify that I, an employee of the law offices of Wyche, Burgess, Freeman & Parham, P.A., have caused to be served this day one (1) copy each of Tourism Expenditure Review Committee's **Final Briefs and Record on Appeal** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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This 24th day of April, 2012