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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY

Hon. Marvin H. Dukes, III, Master In Equity
and Special Circuit Judge

Case Number 2020-000687

PETER MICHAEL BUONAIUTO, SR., Individually, and on Behalf of
All Others Similarly Situated,

Appellant,

v.

THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA,

Respondent.

INITIAL BRIEF OF THE TOWN OF HILTON
HEAD ISLAND, SOUTH CAROLINA

Curtis L. Coltrane
South Carolina Bar Number 1344
COLTRANE & WILKINS, LLC
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5550
Attorneys for The Town of Hilton Head Island,
South Carolina

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STATEMENT OF ISSUES ON APPEAL

WHEN THE APPLICABLE LAW AND ONLY EVIDENCE IN THE RECORD SHOW THAT A CONTRACT IS NOT ONE FOR "PROCUREMENT" AS IS DEFINED BY THE STATUTES AND ORDINANCES GOVERNING THE CONTRACT, SHOULD THE COURT GRANT SUMMARY JUDGMENT ON A CLAIM THE CONTRACT VIOLATES THE PROCUREMENT CODE?

STATEMENT OF THE CASE

This case was commenced by Peter Michael Buonaiuto, Sr., by the filing of a Summons and Complaint on November 22, 2016.¹ In his Complaint, Peter Michael Buonaiuto, Sr. (hereinafter, “Buonaiuto”), alleged that on or about December 1, 2015, The Town of Hilton Head Island, South Carolina (hereinafter, the “Town”), and the Hilton Head Island - Bluffton Chamber of Commerce, Inc. (hereinafter, the “Chamber”), made an agreement related to the Chamber’s selection as the organization to receive the “thirty percent fund” described in S. C. Code Ann. § 6-4-10(3)(Supp. 2020)(hereinafter the “December 1, 2015, Agreement”).² Buonaiuto alleged that the December 1, 2015, Agreement was made in violation of the Town procurement code.³ By way of relief, Buonaiuto sought to have the December 1, 2015, Agreement declared void, and to require that any future agreement regarding the Town’s selection of the organization to be the recipient of the “thirty percent fund” be subject to the Town’s procurement code.

On January 4, 2017, the Town filed a Motion to Dismiss Buonaiuto’s Complaint under Rule 12(b)(6), SCRCF.⁴ By an Order of the Hon. Carmen T. Mullen filed on March 20, 2017, the Town’s Motion to Dismiss was denied.⁵

¹ R. pp.:____. Although the caption of the Complaint is set up to define Buonaiuto as the representative of a class, no class certification was pursued by Buonaiuto.

² The December 1, 2015, Agreement is in the Record as the Exhibit to the Buonaiuto Complaint. R. pp.____.

³ The Town’s procurement code is codified as § 11-1-111, *et seq.*, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983).

⁴ R. pp.:____.

⁵ R. pp.:____.

The Town filed its Answer on March 24, 2017.⁶ In its Answer, the Town denied the material allegations of the Complaint, and alleged, among other things, that the allocation and distribution of the “thirty percent fund” is solely governed by S. C. Code Ann. § 6-4-10, *et seq.* (Supp. 2021).⁷

By an Order of the Hon. Jerri Ann Roseneau filed on August 22, 2017, this case was referred to the Hon. Marvin H. Dukes, III.⁸

On September 10, 2019, the Town filed its Motion for Summary Judgment. The motion was supported by the affidavits of William G. Miles, Stephen G. Riley and John M. Troyer.⁹

On January 31, 2020, Buonaiuto filed his Motion for Summary Judgment. Buonaiuto did not file any affidavits in support of his motion.¹⁰

⁶ R. pp.:____.

⁷ S. C. Code Ann. § 6-4-10(3)(Supp. 2020), reads, in relevant part:

(3) Thirty percent of the balance must be allocated to a special fund and used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity. To manage and direct the expenditure of these tourism promotion funds, the municipality or county shall select one or more organizations, such as a chamber of commerce, visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program.

⁸ R. pp.:____.

⁹ R. pp.:____. The Affidavit of John M. Troyer was not correctly scanned when it was filed on September 10, 2020. The document filed on September 10, 2019, was missing page 2. The Affidavit of John M. Troyer was re-filed on February 4, 2020, and the re-filed document included all pages. R. pp.:____.

¹⁰ R. pp.:____.

On February 7, 2020, Buonaiuto filed a memorandum in support of his motion.¹¹ On February 9, 2020, the Town filed a memorandum in support of its motion.¹²

On February 10, 2020, a hearing on the motions was convened by the Hon. Marvin H. Dukes, III. On March 23, 2020, the Hon. Marvin H. Dukes, III, filed his Order, granting the Town's motion and denying Buonaiuto's motion.¹³

Buonaiuto filed and served his Notice of Appeal on April 22, 2020.¹⁴

¹¹ R. pp.:____.

¹² R. pp.:____.

¹³ R. pp.:____.

¹⁴ R. pp.:____.

STATEMENT OF FACTS

The following relevant facts are established by the affidavits filed in support of the Town's motion, and no counter-affidavit or other evidence was filed by Buonaiuto. These facts are undisputed.

The Town is the recipient of "Accommodations Tax" revenue that is levied and collected by the State of South Carolina, which is allocated to the Town, and which must be distributed by the Town as required by S. C. Code Ann. § 6-4-10(3)(Supp. 2020).¹⁵

The Chamber is a not for profit organization that has an ongoing tourism promotion program.¹⁶

The Chamber has been selected by the Town as the recipient of the "thirty percent fund".¹⁷

The Chamber uses the "thirty percent fund" solely for advertising and promotion of tourism to develop and increase tourist attendance through the generation publicity.¹⁸

In its role as recipient of the "thirty percent fund," the Chamber does not deliver or provide any "supplies, services or construction" to the Town.¹⁹

¹⁵ Affidavit of Stephen G. Riley, R. pp.:____; Affidavit of John M. Troyer, R. pp.:____.

¹⁶ Affidavit of Stephen G. Riley, R. pp.:____. Affidavit of William G. Miles, R. pp.:____.

¹⁷ Affidavit of Stephen G. Riley, R. pp.:____. Affidavit of William G. Miles, R. pp.:____.

¹⁸ Affidavit of William G. Miles, R. pp.:____.

¹⁹ December 1, 2015, Agreement, R. pp.____; Affidavit of Stephen G. Riley, R. pp.:____. Affidavit of William G. Miles, R. pp.:____; Affidavit of John M. Troyer, R. pp.:____.

The terms of the December 1, 2015, Agreement, obligate the Chamber to deliver reports and other information to the Town to demonstrate the Chamber's compliance with the requirements with the requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2020), and § 4-12-10, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983), and § 4-12-20, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983).²⁰

Under the plain language of the December 1, 2015, Agreement, and in fact, the Chamber does not does not deliver or provide any "supplies, services or construction" to the Town.²¹

²⁰ December 1, 2015, Agreement, R. pp.____; Affidavit of Stephen G. Riley, R. pp.:____. Affidavit of William G. Miles, R. pp.:____; Affidavit of John M. Troyer, R. pp.:____.

²¹ December 1, 2015, Agreement, R. pp.____; Affidavit of Stephen G. Riley, R. pp.:____. Affidavit of William G. Miles, R. pp.:____; Affidavit of John M. Troyer, R. pp.:____.

STANDARD OF REVIEW

Under Rule 56, SCRCP, summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.²²

Under Rule 56, SCRCP, summary judgment must be granted:

[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In determining whether any material issue of fact exists, the evidence and all inferences that can be drawn from the evidence must be viewed in the light most favorable to the non-moving party, or the party resisting the motion.²³ The purpose of summary judgment is to expedite the disposition of cases that do not require the services of a fact-finder.²⁴ For purposes of summary judgment, an issue is ‘material’ if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action.²⁵ Once the moving party has met its burden of demonstrating that no genuine issue of material fact exists, a party defeats summary judgment by affirmatively demonstrating the presence of a genuine issue of material fact. Rule 56(e), SCRCP, states a party may not rest upon the mere allegations or denials of his pleadings.²⁶

²² *Café Associates Limited v. Gengross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

²³ *Redwend Limited Partnership v. Edwards*, 354 S.C. 58, 581 S.E.2d 496 (Ct.App. 2003).

²⁴ *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

²⁵ *P.P.G. Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App., 1988).

²⁶ *Hoard ex rel. Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010).

ARGUMENT NUMBER 1

BUONAIUTO’S CLAIM FAILS AS A MATTER OF LAW, BECAUSE (A) THE DISTRIBUTION OF THE THIRTY PERCENT FUND BY THE TOWN IS NOT “PROCUREMENT,” AND THE TOWN’S PROCUREMENT CODE HAS NO APPLICATION TO THE PERFORMANCE OF THE TOWN’S DUTIES IMPOSED BY S. C. CODE ANN. 6-4-10(3)(SUPP. 2020); (B) THE DISPOSITION OF THIS CASE IS GOVERNED BY *DOMAINSNEWMEDIA.COM, LLC V. HILTON HEAD ISLAND-BLUFFTON CHAMBER OF COMMERCE. INFRA.*; AND, (C) THE TITLE OF THE DECEMBER 1, 2015, AGREEMENT DOES NOT DETERMINE ITS EFFECT

a. The Town’s procurement code does not govern the December 1, 2015, Agreement.

The procurement code for The Town of Hilton Head Island, South Carolina, governs “public purchasing” of supplies, services and construction by the Town. § 11-1-112, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983), reads:

The purpose of this chapter is to provide for the fair and equitable treatment of all purposes involved in public purchasing by the town, to maximize the purchasing value of public funds in procurement, and to provide safeguards for maintaining a procurement system of quality and integrity.

§ 11-1-112, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983), reads, in relevant part:

This chapter applies to contracts for the procurement of supplies, services, and construction, entered into by this town after the effective date of this chapter unless the parties agree to its application to contracts entered into prior to the effective date.

By its express terms, §11-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island*, (1983), is applicable to “public purchasing” by the Town. It applies to the “expenditure of public funds” for the “procurement of supplies, services and construction” by the Town.

The only evidence in the record is that the Chamber does not deliver any supplies,

services or construction to the Town under the terms of the December 1, 2015, Agreement.²⁷ The plain text of the December 1, 2015, sets out reporting requirements to demonstrate its compliance with S. C. Code Ann. 6-4-10(3)(Supp. 2020), and § 4-12-10, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983), and § 4-12-20, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983).²⁸ There is no text in the December 1, 2015, Agreement, by which the Chamber delivers any service, supply or construction to the Town.²⁹ There is no evidence in the record that any “supplies, services or construction” are supplied to the Town by the Chamber. The only evidence is to the contrary.³⁰

The language of S. C. Code Ann. § 6-4-10(3)(Supp. 2020), restricts the use of the “thirty percent fund” to “advertising and promotion of tourism to develop and increase tourist attendance through the generation publicity.” No other use of the “thirty percent fund” is authorized. Under plain text of the statute, the Chamber cannot use any part of the “thirty percent fund” for the delivery of any “supplies, services or construction” to the Town.³¹ By the plain language of the statute, on receipt of accommodations tax funds, the

²⁷ Affidavit of William G. Miles, R. pp.____; Affidavit of Stephen G. Riley, R. pp.____; and, December 1, 2015, Agreement, R. pp.____; Affidavit of John M. Troyer, R. pp.____.

²⁸ Affidavit of William G. Miles, R. pp.____; Affidavit of Stephen G. Riley, R. pp.____; and, Affidavit of John M. Troyer, R. pp.____.

²⁹ December 1, 2015, Agreement, R. pp.____.

³⁰ Affidavit of William G. Miles, R. pp.____; Affidavit of Stephen G. Riley, R. pp.____; and, Affidavit of John M. Troyer, R. pp.____.

³¹ S. C. Code Ann. 6-4-10(3)(Supp. 2020); Affidavit of William G. Miles, R. pp.____; Affidavit of Stephen G. Riley, R. pp.____; and, Affidavit of John M. Troyer, R. pp.____.

Town: “. . . shall distribute the tourism promotion funds to the organization selected or created to receive them.” The organization receiving the funds must use the fund: “. . . only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity. . .,” and not for any other purpose.³²

Because the plain language of S. C. Code Ann. § 6-4-10(3)(Supp. 2020), restricts the use of the funds, and because the restricted uses do not include the delivery of any supplies, services or construction to the Town, the use of any accommodations tax funds for the delivery of any “supplies, services or construction” to the Town would violate the plain terms of the statute.³³

The selection of the organization to manage the “thirty percent fund” is not the purchasing of services, supplies, or construction by the Town, rather, it is the fulfillment of the statutory mandate imposed on the Town by S. C. Code Ann. § 6-4-10(3)(Supp. 2019) to: “. . .select one or more organizations, such as a chamber of commerce, visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program;” and, to: “immediately . . . distribute the tourism promotion funds to

³² Although the December 1, 2015, Agreement is styled as a “Contract for Professional Services,” the text of the document shows that no services, supplies or construction are delivered to the Town from the Hilton Head Island-Bluffton Chamber of Commerce, Inc. Rather, the December 1, 2015, Agreement sets out reporting requirements to be followed by the Hilton Head Island-Bluffton Chamber of Commerce, Inc., to demonstrate its compliance with S. C. Code Ann. 6-4-10(3)(Supp. 2020). December 1, 2015, Agreement, R. pp.____;

³³ In addition to the plain language of the statute, the canon: “*Expressio unius, exclusio alterius*,” applies. When the legislature includes one possibility in a statute, it excludes another by implication. *See: Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80–81, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002). Thus, where the General Assembly has stated the permissible use of the “thirty percent fund,” no other use is allowed.

the organizations selected or created to receive them.”

b. The disposition of this case is governed by *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*.³⁴

In the case of *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, supra.*, the Supreme Court considered whether the allocation of the “thirty percent fund” to the Hilton Head Island-Bluffton Chamber of Commerce, Inc., made the Hilton Head Island-Bluffton Chamber of Commerce, Inc., subject to the Freedom of Information Act.³⁵ The Supreme Court held that it did not, ruling that the allocation and expenditure of the “thirty percent fund” was governed by a specific statute, and where a specific statute covers a subject (such as the accommodations tax statute), more general statutes (such as the Freedom of Information Act) do not govern.³⁶

The argument made by Buonaiuto in this case is indistinguishable from the argument made in *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, supra.* The allocation and expenditure of the “thirty percent fund” is

³⁴ *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 814 S.E.2d 513 (2018), *reh'g denied* (June 26, 2018).

³⁵ The Freedom of Information Act is codified as S. C. Code Ann. § 30-4-10, *et seq.* (Supp. 2020).

³⁶ The Supreme Court held:

FOIA is a general statute; the A-Tax statute is a specific statute. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted).

Id., 814 S.E. 2d at p. 518.

governed by S. C. Code Ann. § 6-4-10(3)(Supp.2019), which is specific. The Town's procurement code is a general ordinance governing the public purchasing of supplies, services and construction by the Town. Under *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, supra.*, the procurement code has no application to the allocation and expenditure of the "thirty percent fund".

c. The title of the December 1, 2015, Agreement does not determine its effect.

Buonaiuto argues that the title of the December 1, 2015, Agreement determines its effect and meaning. This argument is contrary to the law of South Carolina, which is: Neither the form of a contract nor the name given it by the parties controls its interpretation.³⁷ The title given to a contract and the descriptive terms used in it are not controlling. Rather, the text of the contract and what it actually calls for is what is controlling.³⁸ As a matter of law, the title of the December 1, 2015, Agreement, does not determine the meaning of it, and the title neither limits nor expands what the December 1,

³⁷ *Bolt v. Ligon*, 144 S.C. 218, 142 S.E. 504, 505 (1928). *See Also: Greenwood Mfg. Co. v. Worley*, 222 S.C. 156, 161, 71 S.E.2d 889, 891 (1952), in which the Supreme Court held:

The primary test as to the character of the contract is the intention of the parties to be gathered from the whole scope and effect of the language used; and mere verbal formulas, if inconsistent with the real intention, are to be disregard[ed]. 12 Am.Jur., § 242, page 776; 46 Am.Jur., § 17, page 211.

³⁸ In *Thompson v. Ford Motor Co.*, 200 S.C. 393, 21 S.E.2d 34, 47 (1942), the Supreme Court that the name given by parties (in this case, an alleged agent), did not control what the text of the contact actually did:

It is not the descriptive name employed, but the nature of the business and the extent of authority given and exercised, which is determinative.

2015, Agreement actually does.³⁹

Because the only evidence in the record is that no “supplies, services or construction” of any kind are delivered to the Town by the Chamber, and because the statute governing the Chamber’s use of the “thirty percent fund” does not authorize use of the “thirty percent fund” for the delivery of “supplies, services or construction” to the Town, the title of the December 1, 2015, Agreement is of no significance.⁴⁰

³⁹ *In re Carolina Utilities Supply Company, Inc.*, 118 B.R. 412, 415 (Bankr. D.S.C. 1990) , includes the following text:

Courts will not be controlled by the nomenclature the parties apply to their relationship. (citation omitted) Neither the form of a contract nor the name given it by the parties controls its interpretation. In determining the real character of a contract courts will always look to its purpose, rather than to the name given it by the parties. * * * The proper construction of a contract is not dependent upon any name given it by the parties, or upon any one provision, but upon the entire body of the contract and its legal effect as a whole.

⁴⁰ December 1, 2015, Agreement, R. pp.____; Affidavit of Stephen G. Riley, R. pp.:____. Affidavit of William G. Miles, R. pp.:____; Affidavit of John M. Troyer, R. pp.:____.

CONCLUSION

Buonaiuto has failed to show that the December 1, 2015, Agreement between the Town of Hilton Head Island, South Carolina, and the Chamber is “procurement” as defined the Ordinances of the Town. The only evidence in the Record is that the December 1, 2015, Agreement, sets out the reporting requirements for the Chamber to demonstrate that its use of the “thirty percent fund” has complied with the requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2020), and § 4-12-10, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983), and § 4-12-20, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983).

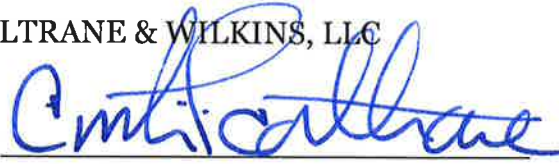
The statute and ordinances dictate that the only authorized use of “thirty percent fund” is for advertising and promotion of tourism to develop and increase tourist attendance through the generation publicity advertising and promotion of tourism to develop and increase tourist attendance through the generation publicity”. Any other use of the “thirty percent fund,” including delivery of any “services, supplies and construction” to the Town is prohibited.

For these reasons, The Town of Hilton Head Island, South Carolina, urges this Court to affirm the March 23, 2020, Order of the Hon. Marvin H. Dukes, III.

Respectfully Submitted:

COLTRANE & WILKINS, LLC

By:



Curtis L. Coltrane
South Carolina Bar Number: 1344
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5551
curtis@coltraneandwilkins.com

Hilton Head Island, South Carolina

This 22nd day of January, 2021.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY

Hon. Marvin H. Dukes, III, Master In Equity
and Special Circuit Judge

Case Number 2020-000687

PETER MICHAEL BUONAIUTO, SR., Individually, and on Behalf of
All Others Similarly Situated,

Appellant,

v.

THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Initial Brief and Designation of Matter to be included in Record on Appeal of The Town of Hilton Head Island, South Carolina, was, this day, served on Taylor M. Smith, IV, Esq., by placing a copy in the United States Mail, with first class postage affixed, addressed as follows: Taylor M. Smith, IV, Esq., Post Office Box 50143, Columbia, SC, 29250, and by email to "taylor@harrisonfirm.com".

Respectfully Submitted:

COLTRANE & WILKINS, LLC

By: _____



Curtis L. Coltrane
South Carolina Bar Number: 1344
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5551
curtis@coltraneandwilkins.com

Hilton Head Island, South Carolina

This 22nd day of January, 2021

COLTRANE & WILKINS, LLC
ATTORNEYS AT LAW

POST OFFICE BOX 6808
HILTON HEAD ISLAND, SC 29938
(843) 785-5551
(843) 785-5552 (FAX)

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Jan 22 2021

SC Court of Appeals

Curtis L. Coltrane
E-Mail: curtis@coltraneandwilkins.com
Certified Circuit Court Mediator
Certified Circuit Court Arbitrator
Certified Federal Court Mediator

Curtis L. Coltrane*
John W. Wilkins
*Also Member Virginia Bar

January 22, 2021

Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629 Columbia, SC 29211

Via Email to: ctappfilings@sccourts.org

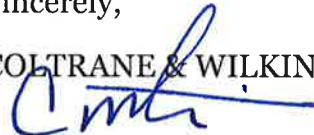
RE: Buonaiuto v. Town of Hilton Head Island
Case Number: 2020-CP-000687
Our File: THH-19-006

Dear Ms. Kitchings:

Enclosed, you will find the initial Brief of the Town of Hilton Head Island, the Designation of Matter to be included in the Record of Appeal of the Town of Hilton Head Island and a Certificate of Service showing Service of these items on Taylor M. Smith IV, Attorney for Peter M. Buonaiuto. Please let me know if anything further is needed in connection with this matter at this time. I thank you for your assistance in this matter and I look forward to hearing from you soon. I am,

Sincerely,

COLTRANE & WILKINS, LLC



Curtis L. Coltrane

CLC/cw
cc: Mr. Taylor M. Smith IV, Esquire
(Via U.S. Mail and Email to: Taylor@HarrisonFirm.com)
Mr. Joshua A. Gruber
Enc.: As Stated