

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Master-in-Equity

SC Court of Appeals

Marvin H. Dukes, III

Case No. 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.

RECORD ON APPEAL

Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

Curtis L. Coltrane
S.C. Bar No. 1344
COLTRANE & WILKINS, LLC
P.O. Box 6808
Hilton Head Island, SC 29938
(843) 785-5550
Attorney for Respondent

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT)	CASE NUMBER 2016-CP-07-2483
PETER MICHAEL BUONAIUTO, SR.,)	
INDIVIDUALLY, AND ON BEHALF)	
OF ALL OTHERS SIMILARLY SITUATED,)	
)	
Plaintiff,	)	ORDER GRANTING SUMMARY
	)	JUDGMENT
vs.)	
)	
THE TOWN OF HILTON HEAD ISLAND,)	
SOUTH CAROLINA,)	
)	
Defendant.)	

This case is before the undersigned on cross Motions for Summary Judgment filed by The Town of Hilton Head Island, South Carolina (hereinafter, the “Town”), on September 10, 2019, and by Peter Michael Buonaiuto, Sr. (hereinafter, “Buonaiuto”), on January 31, 2020. The cross Motions for Summary Judgment were based on the pleadings, the Motions of the parties; the affidavits of William G. Miles, Stephen G. Riley and John M. Troyer served with the Town’s Motion; and, the memoranda of the parties. The cross Motions for Summary Judgment were heard on February 10, 2020, at the Beaufort County Courthouse. Present were Taylor M. Smith, IV, representing Buonaiuto, and Curtis L. Coltrane, representing the Town.

SUMMARY JUDGMENT STANDARD

Under Rule 56, SCRCF, 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.¹ Under Rule 56, SCRCF, summary judgment must be granted:

¹ *Café Associates Limited v. Gengross*, 305 S.C. 6, 406 S.E.2d 162 (1991)

[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.² The purpose of summary judgment is to expedite the disposition of cases that do not require the services of a fact-finder.³ 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.⁴ 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), SCRCF, states a party may not rest upon the mere allegations or denials of his pleadings.⁵

CLAIMS AND DEFENSES OF THE PARTIES

In his Complaint, Buonaiuto alleges these facts:

1. The Town is a political subdivision of the State of South Carolina.
2. The Town is the recipient of “Accommodations Tax” revenue that is levied and collected by the State of South Carolina, which is credited to the Town, and which must be allocated by the Town under the text of S. C. Code Ann. § 6-4-10(3)(Supp. 2019),

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

³ *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

⁴ *P.P.G. Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App., 1988).

⁵ *Hoard ex rel. Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010).

which reads, in 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 (hereinafter, the “thirty percent fund”).
3. Under S. C. Code Ann. § 11-35-10, *et seq.* (Supp. 2019), the Town is required to adopt a procurement code.
4. The Town has adopted a procurement code, codified as § 11-1-111., *et seq.*, *Municipal Code of The Town of Hilton Head Island, South Carolina, 1983.*
5. In November of 2015, the Town entered into a contract with the Hilton Head Island-Bluffton Chamber of Commerce, Inc. (hereinafter, the “Chamber”), styled “Contract for Professional Services,” related to the designation of the Chamber as the recipient of the thirty per cent fund.⁶
6. The Town did not publicly bid the contract between the Town and the Chamber (hereinafter, the “December 1, 2015, Contract”).

Based on these allegations, Buonaiuto alleged a single cause of action, seeking a declaratory judgment that the Town acted in violation of §11-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island, 1983*, when it entered into the December 1, 2015, Contract with the Chamber.

ANSWER OF THE TOWN

In its Answer, the Town denied the material allegations of the Complaint and

⁶ The contract is dated December 1, 2015. *See*: Complaint, paragraph 16, Exhibit “A” to

asserted other affirmative defenses not relevant to the Motions.

THE MOTION FOR SUMMARY JUDGMENT OF THE TOWN

In its Motion for Summary Judgment, the Town argues that Buonaiuto’s claim fails because neither the Town’s allocation of the thirty per cent fund as required by S. C. Code Ann. § 6-4-10(3)(Supp. 2019), nor the December 1, 2015, Contract are “procurement” as defined in §11-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island*, 1983.

THE MOTION FOR SUMMARY JUDGMENT OF BUONAIUTO

In his Motion for Summary Judgment, Buonaiuto argues that the December 1, 2015, Contract is styled as a “Contract for Professional Services,” and that it sets out requirements for “services” to be provided by the Chamber to the Town. As a result, Buonaiuto argues that compliance with §1-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island*, 1983, was required.

APPLICABLE LAW RELATING TO STATUTORY INTERPRETATION

In South Carolina, where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.⁷ In interpreting a statute, words must be given their plain and ordinary meaning with resort to subtle or forced construction to limit or expand the statute’s operation.⁸

Complaint, Answer, paragraph 12.

⁷ *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

⁸ *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007); *Paschal v. State Election Commission*, 317 S.C. 434, 454 S.E.2d 890 (1995).

STATUTES GOVERNING THE ALLOCATION AND
EXPENDITURE OF ACCOMMODATIONS TAXES

The “Accommodations Tax” is imposed by S. C. Code Ann. § 12-36-920(A)(Supp. 2019), which reads, in relevant part:

A sales tax equal to seven percent is imposed on the gross proceeds derived from the rental or charges for any rooms, campground spaces, lodgings, or sleeping accommodations furnished to transients by any hotel, inn, tourist court, tourist camp, motel, campground, residence, or any place in which rooms, lodgings, or sleeping accommodations are furnished to transients for a consideration.

The Accommodations Tax is composed of three separate taxes that are described in S. C. Code Ann. 12-36-2630 (Supp. 2019). Material to this case is the two percent “Local Accommodations Tax” described in S. C. Code Ann. 12-36-2630(3)(Supp. 2019), as follows:

a two percent local accommodations tax, which must be credited to the political subdivisions of the State in accordance with Chapter 4, Title 6. The proceeds of this tax, less the department's actual increase in the cost of administration and the expenses of the Tourism Expenditure Review Committee established pursuant to Section 6-4-35, must be remitted quarterly to the municipality or the county in which it is collected.

The allocation and expenditure of the “Local Accommodations Tax” is governed by S. C. Code Ann. § 6-4-10 (Supp. 2019). Material to this case is S. C. Code Ann. § 6-4-10(3)(Supp. 2019), which reads:

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. If

no organization exists, the municipality or county shall create an organization with the same membership standard in Section 6-4-25. To be eligible for selection the organization must be organized as a nonprofit organization and shall demonstrate to the municipality or county that it has an existing, ongoing tourism promotion program or that it can develop an effective tourism promotion program. Immediately upon an allocation to the special fund, a municipality or county shall distribute the tourism promotion funds to the organizations selected or created to receive them. Before the beginning of each fiscal year, an organization receiving funds from the accommodations tax from a municipality or county shall submit for approval a budget of planned expenditures. At the end of each fiscal year, an organization receiving funds shall render an accounting of the expenditure to the municipality or county which distributed them. Fees allocated pursuant to this subsection must not be used to pledge as security for bonds and to retire bonds. Also, fees allocated pursuant to this subsection 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, and not used to pledge as security for bonds and to retire bonds.

THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA,
PROCUREMENT CODE

The procurement code of the Town 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.

§ 11-1-113, *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.

FINDINGS AND CONCLUSIONS

1. Under S. C. Code Ann. 12-36-2630 (Supp. 2019), the Town is credited the two percent “Local Accommodations Tax.”
2. The “Local Accommodations Tax” must be allocated by the Town as directed in S. C. Code Ann. § 6-4-10 (Supp. 2019).
3. Under S. C. Code Ann. § 6-4-10(3)(Supp. 2019), the Town must: “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” to “manage and direct the expenditure of these tourism promotion funds,” and the recipient of the thirty percent fund must use it “only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity.”⁹
4. The Chamber has been selected by the Town as the recipient of the thirty percent fund in compliance with S. C. Code Ann. §6-4-10(3)(Supp. 2019).
5. The Town and the Chamber executed the December 1, 2015 Contract which is styled “Contract for Professional Services.”¹⁰
6. Buonaiuto’s argument that the style of the December 1, 2015, Contract, determines its effect and meaning is contrary to the law of South Carolina. The title

⁹ S. C. Code Ann. § 6-4-10(3)(Supp. 2019), is not ambiguous, and the text of the statute must be given its plain and ordinary meaning.

¹⁰ See: Complaint, paragraph 16, Exhibit “A” to Complaint, Answer, paragraph 12; Affidavit of Stephen G. Riley, paragraph 12; Affidavit of William G. Miles, paragraph 13; Affidavit of John M. Troyer, paragraph 8.

given to a contract and the descriptive terms used in it do not determine the meaning.¹¹ Rather, the text of the contract and what it actually calls for determines the meaning.¹² The title of the December 1, 2015, Contract, does not determine the meaning of the contract, and neither limits nor expands what the December 1, 2015, Contract actually does.¹³

7. §1-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island*, 1983, is applicable only to “public purchasing” of “supplies, services and construction” by the Town. § 11-1-113, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983), states that the Town’s procurement code applies to contracts for the procurement of “supplies, services, and construction” by the Town.¹⁴

8. The only evidence is that under the December 1, 2015, Contract, the Chamber

¹¹ *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 South Carolina 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.

¹² *Thompson v. Ford Motor Co.*, 200 S.C. 393, 21 S.E.2d 34, 47 (1942), in which the South Carolina 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.

¹³ *See Also: In re Carolina Utilities Supply Company, Inc.*, 118 B.R. 412, 415 (Bankr. D.S.C. 1990),

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.

¹⁴ § 11-1-113, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983), is not ambiguous, and the text of the ordinance must be given its plain and ordinary meaning.

does not deliver any supplies, services or construction to the Town.¹⁵

9. Rather, the December 1, 2015, Contract sets out reporting requirements to be followed by the Chamber to demonstrate its compliance with S. C. Code Ann. 6-4-10(3)(Supp. 2019).¹⁶

10. S. C. Code Ann. § 6-4-10(3)(Supp. 2019), restricts the use of the thirty percent fund, and the restricted uses do not include the delivery of any supplies, services or construction to the Town.¹⁷ By the plain language of the statute, the Town: “. . . shall distribute the tourism promotion funds to the organization selected or created to receive them.” The organization to which funds are allocated 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.¹⁸

11. The selection of the organization to manage the thirty percent fund is not the procurement of services, supplies, or construction by the Town. Rather, it is the fulfillment of the statutory mandate imposed on the Town to allocate the thirty percent fund. The Town must: “. . .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

¹⁵ See: Affidavit of William G. Miles, paragraph 14; Affidavit of John M. Troyer, paragraph 9.

¹⁶ See: Affidavit of William G. Miles, paragraph 14; Affidavit of Stephen G. Riley, paragraph 12; Affidavit of John M. Troyer, paragraph 9.

¹⁷ See: S. C. Code Ann. 6-4-10(3)(Supp. 2019); Affidavit of William G. Miles, paragraph 8; Affidavit of Stephen G. Riley, paragraph 4, 9; and, Affidavit of John M. Troyer, paragraph 7.

¹⁸ Because S. C. Code Ann. § 6-4-10(3)(Supp. 2019), restricts the use of Local Accommodations Tax funds, and because the restricted uses do not include the delivery of any supplies, services or construction to the Town, the use of any Local Accommodations Tax funds for the delivery of any supplies, services or construction to the Town would violate the statute.

the tourism promotion funds to the organizations selected or created to receive them.”¹⁹

12. In *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*,²⁰ the South Carolina Supreme Court considered whether the allocation of the thirty percent fund to the Chamber made it subject to the Freedom of Information Act.²¹ The South Carolina Supreme Court held that it did not, ruling that the allocation and expenditure of the thirty percent fund is governed by a specific statute, and when a specific statute covers a subject (i. e., the Accommodations Tax statute), general statutes (such as the Freedom of Information Act) do not apply.²²

13. The argument made by Buonaiuto 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 governed by S.C. Code Ann. § 6-4-10(3)(Supp.2019), which is a specific statute. The procurement code of The Town of Hilton Head Island, South Carolina, is a general ordinance governing the public purchasing of supplies, services and construction by the Town, and is a general ordinance. Under *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, supra.*, the Town’s procurement code has no

¹⁹ S. C. Code Ann. § 6-4-10(3)(Supp. 2019).

²⁰ *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).

²¹ S. C. Code Ann. § 30-4-10, *et seq.* (Supp. 2019).

²² Specifically, 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).

application to the allocation and expenditure of the thirty percent fund.²³

CONCLUSION

Because:

- (1) the allocation and expenditure of the thirty percent fund is not procurement, but rather is the fulfilment of the duties imposed by S. C. Code Ann. § 6-4-10(3)(Supp. 2019), on both The Town of Hilton Head Island, South Carolina, and The Hilton Head Island-Bluffton Chamber of Commerce, Inc.; and,
- (2) the only evidence in the record is that The Hilton Head Island-Bluffton Chamber of Commerce, Inc., does not deliver any supplies, services or construction to The Town of Hilton Head Island, South Carolina, under the terms of the December 1, 2015, Contract; and,
- (3) under S. C. Code Ann. § 6-4-10(3)(Supp. 2019), the use of the thirty percent fund for the delivery of supplies, services or construction using accommodations tax funds is prohibited; and,
- (4) the South Carolina Supreme Court has ruled that the allocation and expenditure of the thirty percent fund is governed by a specific statute, and that general statutes have no application to it;

the claim of Peter Michael Buonaiuto, Sr., fails, and the Town of Hilton Head Island,

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

²³ In his Memorandum filed on February 7, 2020, Buonaiuto relies on an opinion of the South Carolina Attorney General [June 1, 2005, John M. Tolar, Esq., 2005 WL 1609298 (S.C.A.G.)]. This opinion addresses a different question from that presented by this case. In the June 1, 2005, Opinion, the Attorney General opined that recipients of ATAX funds are required to comply with a local government's procurement code in the recipient's expenditure of the funds. That is not the question presented by Buonaiuto in this case., and the Attorney General's opinion appears to conflict with the ruling in *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, supra*.

South Carolina, is entitled to summary judgment.

Accordingly, it is Ordered that the Motion for Summary Judgment of Peter Michael Buonaiuto, Sr., is denied, and the Motion for Summary Judgment of The Town of Hilton Head Island, South Carolina, is granted.

IT IS SO ORDERED.

(Signature on Following Page)



Beaufort Common Pleas

Case Caption: Peter Michael Buonaiuto Sr VS Hilton Head Island Town Of

Case Number: 2016CP0702483

Type: Order/Summary Judgment

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2020-03-23 14:24:09 page 13 of 13

Peter Michael Buonaiuto, Sr.

Town of Hilton Head Island

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Paige Chamberlain Ornduff	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
---	--

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion to Dismiss is respectfully denied.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge **Judge Code** **Date**

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE
(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The “Information for the Judgment Index” section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the “Judgment in Favor of” column, enter the name of the party to whom the judgment is awarded. In the “Judgment Against” column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the “Judgment Amount” column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate “N/A” in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section “For the Clerk of Court Office Use Only” should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through “Circuit Court Judge” and indicate “Arbitrator” in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title “Circuit Court Judge” below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the “Judgment Amount To Be Enrolled” box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.



Beaufort Common Pleas

Case Caption: Peter Michael Buonaiuto Sr VS Hilton Head Island Town Of

Case Number: 2016CP0702483

Type: Order/Form 4

So Ordered

s/Carmen T Mullen 2142

Electronically signed on 2017-03-19 18:22:46 page 5 of 5

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-07-2483

Peter Michael Buonaiuto, Sr.,
individually, and on behalf of all others
similarly situated,

Plaintiff,

vs.

The Town of Hilton Head Island,

Defendant.

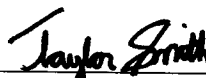
SUMMONS

2016 NOV 22 PM 2:17
DEPT. AN. DISTRICT CLERK
SOUTH CAROLINA
COURT OF COMMON PLEAS

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint upon the subscriber, at his office, P. O. Box 50143, Columbia, South Carolina 29250, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint in the time aforesaid, a judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,



Taylor M. Smith IV
James C. Harrison, Jr.
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
taylor@harrisonfirm.com (email)
jim@harrisonfirm.com (email)
ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
November 22, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-07- 2483

**Peter Michael Buonaiuto, Sr.,
individually, and on behalf of all others
similarly situated,**

Plaintiff,

vs.

The Town of Hilton Head Island,

Defendant.

COMPLAINT

2016 NOV 22 PM 2:18
CLERK OF COURT
OFFICE OF THE CLERK
COURT OF COMMON PLEAS
BEAUFORT COUNTY, S.C.

The Plaintiff, complaining of the Defendant herein, alleges:

1. Plaintiff Michael Buonaiuto, Sr. (hereinafter "Plaintiff") is citizen, resident, taxpayer, and registered elector of the Town of Hilton Head Island and Beaufort County. Buonaiuto possesses standing to bring this lawsuit as a Town of Hilton Head Island and Beaufort County taxpayer. He brings this action individually and on behalf of all others similarly situated.

2. Defendant Town of Hilton Head Island (hereinafter "Defendant") is a South Carolina municipal corporation and a political subdivision of the state.

3. This Court possesses jurisdiction under the following decisions, which address public importance and taxpayer standing: South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank, 403 S.C. 640, 744 S.E.2d 521 (2013), American Petroleum Institute v. S.C. Dep't. of Revenue, 382 S.C. 572, 677 S.E.2d 16 (2009), South Carolina Public Interest Foundation v. Harrell, 378 S.C. 441, 663 S.E.2d 52 (2008), Sloan v. Department of Transportation, 379 S.C. 160, 666 S.E.2d 236 (2008), Sloan v. Hardee, 357 S.C. 495, 640 S.E.2d 457 (2007); Cornelius v Oconee County, 369 S.C. 531, 633 S.E.2d 492 (2006); Sloan v. Department of Transportation, 365 S.C. 299, 618 S.E.2d 876 (2005), Sloan v. Wilkins, 362 S.C.

430, 608 S.E.2d 579 (2005); Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004); Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), Sloan v. School District of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), Baird v. Richland County, 333 S.C. 519, 511 S.E.2d 69 (1999), Newman v. Richland County Historic Preservation Commission, 325 S.C. 79, 480 S.E.2d 72 (1997); and under S.C. Code Ann. § 15-53-10 et seq., known as the Uniform Declaratory Judgment Act.

4. In addition to having an interest in how millions of dollars in accommodation tax revenue is spent to promote tourism locally, Plaintiff also has a private interest in who is selected to receive such revenue, as he operates a local business, Hilton Head Visitors and Convention Bureau, Inc., which provides marketing and mass communication services to its clients and promotes tourism locally.

5. A favorable order to Plaintiff in this matter would vindicate both the important public interest of taxpayers, with whom Mr. Buonaiuto is similarly situated, but also his private interest in seeing that such local revenues are spent in a manner that promotes tourism locally.

6. This action raises statutory issues of great public importance, namely the proper interpretation of the South Carolina Code of Laws and the Code of Ordinances of Hilton Head Island, but also including what local business with chosen to be the “town’s selected designated marketing organization (DMO) [to] manage and direct the expenditures of the thirty percent special fund as designated by S.C. Code Ann. Section 6-4-10(3) (Supp. 1997) for tourism promotion.” Section 4-12-20(a). Plaintiff asks the Court to grant him standing based upon the great public importance of the statutory issues this action raises.

7. Under state law, the allocation of accommodation tax (“A-Tax”) revenues received by a county or municipal government is set forth in S.C. Code Ann. § 6-4-10, et seq.

8. Subsection 3 provides in part:

(3) Thirty percent of the balance must be allocated to a special fund (“the Thirty Percent Fund”) and used 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.

9. For more than thirty years, the Hilton Head Island-Bluffton Chamber of Commerce has received thirty percent fund A-Tax revenues from the town of Hilton Head Island and has served as the town’s DMO.

10. Until earlier this year, Section 4-12-20(a) of the Town of Hilton Head Island Code of Ordinances provided “the visitors and conventions bureau shall be the designated non-profit organization to manage and direct expenditures of the thirty percent (30%) special fund as designated by S.C. Code Ann. Section 6-4-10(3) (Supp. 1997) for tourism promotion.”

11. In 1981, the South Carolina Legislature adopted, and the Governor signed, the South Carolina Consolidated Procurement Code, S.C. Code of Laws § 11-35-10 et seq. This chapter provides that “[a]ll political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983.” S.C. Code of Laws § 11-35-50.

12. Subsequently, the Town of Hilton Head Island adopted the “Procurement Code of the Town of Hilton Head Island,” Section 11-1-111 et seq., on October 3, 1983.

13. “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.” Section 11-1-112.

14. The Procurement Code of the Town of Hilton Head Island “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. It shall apply to every expenditure of public funds irrespective of their source.”

Section 11-1-113.

15. The procurement code has no provision which excepts certain contracts, or other expenditures of public money, from Section 11-1-113.

16. Upon information and belief, Defendant entered into an agreement in November 2015, entitled “Contract for Professional Services,” with the Hilton Head Island-Bluffton Chamber of Commerce (hereinafter “Chamber”) to apparently formalize the arrangement whereby the Chamber serves as the Town’s DMO. The contract was signed by Stephen G. Riley, Town Manager, and William G. Miles, President & CEO of the Chamber. A copy of the contract is attached hereto as Exhibit A.

17. At no point prior to entering this agreement did the Defendant publicly bid, nor otherwise subject to its procurement code, this contract to serve as the town’s DMO.

18. Earlier this year, Defendant changed its procurement code by revising Section 4-12-20(a), which now provides “[t]he town’s selected designated marketing organization (DMO) shall manage and direct the expenditures of the thirty (30) percent special fund as designated by S.C. Code Ann. Section 6-4-10(3) (Supp. 1997) for tourism promotion.”

19. At no point since entering the attached agreement has Defendant publicly bid, or otherwise subjected to its procurement code, this contract to serve as the town’s DMO

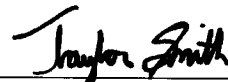
20. Plaintiff is entitled to a declaratory judgment, under S.C. Code of Laws §.15-53-10 et seq., that Defendant violated its Code of Ordinances, and specifically its procurement code, when it entered the attached agreement with the Chamber.

21. Plaintiff is also entitled to rescission of the agreement and an injunction requiring Defendant to subject any proposed DMO contract to the town's procurement code prior to Defendant entering such an arrangement.

WHEREFORE, the Plaintiff prays:

- (a) For an order of this Court declaring: (1) Defendant violated its Code of Ordinances, and specifically its procurement code, when it entered the attached agreement with the Chamber, (2) the attached agreement is rescinded, and (3) an injunction requiring Defendant to subject any proposed DMO contract to the town's procurement code prior to Defendant entering such an arrangement;
- (b) To grant Plaintiff his costs and attorneys' fees under S.C. Code Ann. § 15-77-300;
- (c) For such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Taylor M. Smith IV
Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
taylor@harrisonfirm.com (email)
drew@harrisonfirm.com (email)
ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
November 22, 2016

C 69-2015

CONTRACT FOR PROFESSIONAL SERVICES

THIS CONTRACT FOR PROFESSIONAL SERVICES ("Contract") is entered into by and between THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA, a municipal corporation organized and existing under the laws of the State of South Carolina ("Town") and HILTON HEAD ISLAND - BLUFFTON CHAMBER OF COMMERCE, a nonprofit corporation existing under the laws of the State of South Carolina ("Chamber").

WHEREAS, accommodations tax is a state and local tax that is levied on the lodging industry and South Carolina Code Section 6-4-10(3) requires thirty percent of the state received accommodation tax be awarded to a nonprofit corporation and allocated to a special fund used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity ("Promotional Fund").

WHEREAS, the Promotional Fund is not part of the general fund of the Town.

WHEREAS, nonprofit corporations are formed and governed pursuant to the South Carolina Non Profit Act ("Act") and the Act requires the corporation to be governed by a board of directors.

WHEREAS, the Town has determined that entering into a contract with certain non-profit corporations which receive tax funding is in the best interest of the Town so these non-profit corporations will satisfy certain compliance and operating standards.

WHEREAS, the Chamber believes that entering into a contract with the Town is in the best interest of its members and will provide for improved long-term planning.

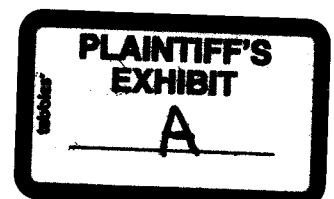
NOW, THEREFORE, it is hereby agreed to as follows:

1. Mutual Compliance with Laws. The Town and the Chamber agree that each of them shall adhere to all applicable laws which govern their respective entities. These laws include Title VII of the Civil Rights Act of 1964, the Age Discrimination Employment Act of 1967, Title I of the Americans with Disabilities Act of 1990, the Equal Pay Act of 1963, the Fair Labor Standards Act of 1938, the Immigration Reform and Control Act of 1986, the South Carolina Wage Act, the South Carolina Worker's Compensation Act, all laws related to the South Carolina Accommodation Tax, the South Carolina Non-Profit Corporation Act, and all laws administered and enforced by the South Carolina Department of Revenue and the Internal Revenue Service.

2. Chamber Obligations.

2.1 Audit. The Chamber agrees to provide an independent auditor's report to the Town on an annual basis with regard to each of its fiscal years (July 1st to June 30th). The audit shall be delivered to the Town by November 15th after the applicable fiscal year end.

The following standards shall apply to the audit and/or the auditor.



(a) The audit shall be conducted in conformity with the statements, rules, policies, and procedures set forth by the American Institute of Certified Public Accountants (the "AICPA").

(b) The audit shall be performed in accordance with generally accepted auditing standards (the "GAAS").

(c) The auditor must comply with all applicable statements on auditing standards (the "SAS") that are issued by the Auditor's Standing Board of the AICPA.

(d) The auditor must maintain malpractice insurance in an amount equal to at least One Million and No/100 Dollars (\$1,000,000.00).

(e) The auditor must provide evidence of successful completion of the peer review process approved by the AICPA.

2.2 **DMO Report.** In addition to the audit, the Chamber shall also produce and deliver to the Town a schedule of revenues and expenses for each fiscal year (the "Report") for the destination marketing organization division of the Chamber ("DMO"). The DMO revenue shall include all accommodation tax revenue received from the Town and/or the State of South Carolina. This Report shall be produced under the standards set forth above in Section 2.1(a), (b), and (c) and by the same auditor that has satisfied the standards set forth above in Section 2.1(d) and (e). The Report shall be delivered to the Town by November 15th after the applicable fiscal year end.

2.3 **Auditor.** The Chamber agrees that it will cause its finance committee to interview other auditing firms when the existing contract with its auditor expires. A town staff member or a council member, at his/her election, shall participate with the finance committee during this process provided the individual demonstrates sufficient financial acumen (consistent with best practices for nonprofit finance/audit committee members) and agrees to all policies and procedures which apply to the Chamber's board of directors. The Chamber makes no representation or assurance that the individual who participates with the finance committee will be covered with directors and officers liability insurance.

2.4 **Tax Returns.** The federal and state tax returns shall be prepared and filed by a tax professional that must execute the returns as a tax preparer as defined by the Internal Revenue Code, the South Carolina tax code, and/or their regulations. This requirement will insure that such professional tax return preparer is subject to all penalties set forth in the Internal Revenue Code or the South Carolina code concerning tax preparers.

2.5 **Promotional Fund.** The Chamber shall manage and direct the expenditure of the Promotional Fund. In addition, the Chamber shall be eligible to apply for annual supplemental grants from the accommodation tax pool and from the emergency reserve fund established by the Town. All public funds received by the Chamber shall be subject to the auditing and reporting requirements of this Contract.

2.6 **Process.** The Chamber shall submit a budget of planned expenditures for the Promotional Fund ("Budget") and a marketing plan ("MP") for each fiscal year. The MP shall be recommended by the Chamber's marketing council and the MP and the Budget shall be approved by the board of directors of the Chamber. The Town may elect to have a staff

member or council member participate as a member of the marketing council provided the individual agrees to all policies and procedures which apply to the Chamber's board of directors. The Chamber makes no representation or assurance that the individual who participates on the marketing council will be covered with directors and officers liability insurance. The Budget and MP will then be submitted to the Town's accommodations tax ("ATAX") committee for review and recommendation. Upon the recommendation by the ATAX committee, the Budget and MP shall be forwarded for approval by the Town. The ATAX committee and the Town shall make all reasonable efforts to provide review and approval in a timely manner since private funds, state funds and placement of public relations and marketing programs are dependent on meeting deadlines. The Chamber shall submit the Report to the Town by November 15th after the applicable fiscal year end.

2.7 **Inspection Rights.** The Town Manager (or a designee that satisfies the same standard to interview auditors as set forth in Section 2.3), or a representative from the Town's Finance and Administration Committee (who also satisfies the same standard to interview auditors as set forth in Section 2.3) may, upon reasonable notice, inspect the necessary financial records, including third party invoices, of the Chamber in order to verify compliance of the Report in all material respects. This inspection right shall not be exercised more than twice in each fiscal year, unless otherwise agreed to by the parties.

2.8 **Legal Opinion.** The Chamber shall select and retain a law firm, with the consent of the Town, to deliver a third party opinion to the Town which opines that all expenditures from the Promotional Fund as set forth in the Report are in compliance with the then current requirements of South Carolina Code Section 6-4-10(3) and the Chamber is validly existing as a non-profit corporation under the laws of South Carolina. The legal opinion shall be addressed to the Town and the cost shall be equally divided by the Town and the Chamber. The legal opinion form and content shall adhere to the guidelines, to the extent applicable, of the South Carolina Third Party Legal Opinion Report approved by the Corporate, Banking and Securities Law Section of the South Carolina Bar on December 10, 2014 and approved by the House of Delegates of the South Carolina Bar on January 22, 2015.

3. **Performance Standards.**

3.1 **DMO Standard.** The Chamber and the Town agree that Destination Marketing Association International ("DMAI") is the industry leader in setting standards and accreditations with regard to destination marketing organizations. The Chamber agrees that it shall adopt policies and procedures and operate in a manner which satisfies the applicable standards set forth by DMAI under their categories of governance, finance, human resources, technology, marketing, visitor services, group services, sales, communications, membership, management and facilities, brand management, destination development, research and marketing intelligence, innovation, and stakeholder relationships with the goal of receiving accreditation by DMAI. The Chamber shall maintain accreditation with DMAI.

3.2 **Organizational Standard.** The United State Chamber of Commerce provides criteria to receive accreditation by a local chamber of commerce. The Chamber shall maintain the four star accreditation by the United States Chamber of Commerce.

3.3 **DMO's Industry Metrics.** The Chamber shall provide the Finance and Administration committee of the Town ("Committee") with certain tourism metrics and/or

reports such as:

- (a) revenue per available room;
- (b) occupancy rates;
- (c) visitor spending studies;
- (d) return on investment for visitor spending per dollar of investment;
- (e) local tax revenues generated by visitors;
- (f) number of visitors;
- (g) number of referrals made to area businesses and number of website hits and click through(s) made to area businesses;
- (h) numbers related to mail fulfillment and other contacts;
- (i) industry awards received for marketing and public relations efforts;
- (j) number of jobs created by tourism;
- (k) events held and participation in events by Chamber members; and
- (l) update on its public relations efforts to include the number of media impressions and the dollar equivalent for the media impressions.

It is understood and acknowledged that such metrics and/or reports may change from time to time based upon best practices, available funding and the goals set forth in the MP. The Committee shall review the data provided under this Section and evaluate the performance of the DMO. The evaluation shall consider the above metrics and reports, collectively, and shall be compared with peers and other factors that affect the tourism industry such as the state of the economy, weather, condition of the lodging properties, etc. The Committee shall report a summary of its evaluation to the Town Council.

If the Town Council determines that the Chamber has underperformed, it shall retain an industry recognized expert that has been recommended by DMAI ("Expert") to confirm its determination and to recommend strategies and policies to cure the deficiencies which have created the underperformance (the "Cure Plan").

In such an event, the Chamber shall cooperate with the Town Council and the Expert to implement the Cure Plan. If, after one year from the date of the delivery of the Cure Plan, the Town Council, after consultation with the Expert, determines the implementation of the Cure Plan has not occurred, the Town Council shall have the right to terminate this Contract by written notice, said termination to be effective sixty (60) days after said notice is given.

4. Chamber Covenants and Representations.

4.1 The Chamber covenants and represents that it has all necessary licenses and consents required for the Chamber to enter into and fully perform this Contract.

4.2 The Chamber covenants and represents to perform all tasks required under this Contract with a degree of skill and care of reputable organizations of the same profession in South Carolina.

4.3 The Chamber covenants and represents to properly withhold from all wages, commissions, salaries, and fees paid by Chamber to third parties or employees, agents, or sub-contractors of Chamber, all amounts required by state or federal law to be withheld for or on account of taxes, social security payments, or other withholdings mandated by law or regulation.

4.4 The Chamber covenants and represents that the MP shall include a public relations plan and a social media plan.

4.5 The Chamber covenants and represents that the Report shall include as exhibits the prior years' calendar of events and a dashboard of year over year tourism metrics as historically reported.

4.6 The Chamber covenants and represents to maintain www.ThinkHiltonHeadIsland.org and to post five (5) years of audits and tourism metrics as historically been reported.

4.7 The Chamber covenants and represents that it will comply with all state accommodation tax laws in administering the Promotional Fund.

4.8 The Chamber shall cause DMO revenue, less expenses, derived from DMO non programing activities to accrue for the benefit of the DMO.

5. Town Covenants and Representations.

5.1 The Town hereby covenants and represents that it will comply with all state accommodation tax laws in administering all such funds to the Chamber and other non-profit corporations.

5.2 The Town hereby covenants and represents that it shall comply will all such laws and procedures in a manner not to discriminate against one non-profit corporation versus another non-profit corporation.

5.3 The Town covenants and represents that it shall cause the Funding to promptly be paid to the Chamber in order for the Budget and MP to be implemented.

5.4 The Town hereby covenants and represents not to disturb, violate, request to be violated, any laws, loan covenants, policies and procedures, including but not limited to, all federal and state laws, and the South Carolina Non-Profit Act which effect the Chamber.

5.5 The Town hereby covenants and represents that Town has the lawful authority required under State law and Town's ordinances to enter into and perform this Contract.

6. **Term.** Since the current fiscal year's budget and MP have already been approved, this Contract shall be effective as of the 1st day of December 1, 2015, and shall continue for a period of five (5) years (the "Initial Term"), unless otherwise terminated as herein provided. If, at the expiration of the Initial Term, the Chamber has maintained the Performance Standards set forth in Section 3.1, 3.2, and 3.3 hereof, without interruption, then this Contract shall be extended by an additional five year term. Provided, however, each party shall have the ability to terminate this Contract upon the expiration of the Initial Term by providing the other party written notice during the month of November, 2019.

7. **Termination.**

7.1 If the Performance Standards set forth in Section 3.1 or 3.2 hereof have not been complied with in all material aspects as determined by DMAI, the United States Chamber of Commerce, or the Town, the Town shall provide written notice to the Chamber of the deficiency and the Chamber shall have one hundred eighty days (180) days to cure the deficiency. If the deficiency is not cured, the Town may terminate this Contract by providing ninety (90) day written notice to the Chamber. In addition, the Town shall have the right to terminate the contract by providing ninety (90) day notice if the auditor or DMAI determines fraud has occurred in the operation of the Chamber.

7.2 With respect to the Performance Standard set forth in Section 3.3 above, the termination process set forth in Section 3.3 shall control.

8. **Updates.** The Town acknowledges that the DMO makes a minimum of two public presentations to the ATAX committee each fiscal year. In addition to these appearances, the DMO shall report to the Committee on two other occasions during the fiscal year. These appearances shall be scheduled as to not interfere with any other presentation the DMO is making to a governmental body.

9. **Other Provisions.**

9.1 **Headings.** Headings to paragraphs in this Contract shall not interpret or alter the meaning of the words in the respective paragraph, nor any other provision of this Contract.

9.2 **Notices.** All notices to each party to this Contract shall be in writing, and sent as follows:

Town:

Town of Hilton Head Island, South Carolina
Attn: Stephen G. Riley, Town Manager
One Town Center Court
Hilton Head Island, SC 29928

Chamber:

Hilton Head Island - Bluffton Chamber of Commerce, Inc.
Attn: William G. Miles, President & CEO
1 Chamber of Commerce Drive
Hilton Head Island, SC 29928

9.3 **Form of Notice.** All notices required or permitted under this Contract shall be sent certified mail with signature required.

9.4 **Merger, Amendment, and Waiver.** This Contract contains all the terms of all agreements, oral or written, between the parties, and is the only document containing all such terms. This Contract merges all prior discussions, negotiations, contracts, agreements, and understandings between Town and Chamber concerning the subject matter described herein. This Contract may only be amended or varied by a written instrument signed by a

duly authorized signatory of Town and Chamber. Forbearance by Town from enforcing the strict terms of this Contract shall not be a waiver of any other term of this Contract, nor shall such forbearance entitle Chamber to rely upon such forbearance in the future.

9.5 Independent Contractor Status. Chamber shall not, by entering into this Contract, become a servant, agent, or employee of Town, but shall remain at all times an independent contractor. This Contract shall not be deemed to create any joint venture, partnership, or common enterprise between Chamber and Town, and the rights and obligations of the parties shall not be other than as expressly set forth herein.

9.6 Attorney's Fees, Dispute Resolution. In the event of a dispute between the parties, the prevailing party in any dispute shall be entitled to an award of all reasonable attorneys and costs, including the costs of appeal, if any.

The parties have executed this Contract effective as of the date set forth in Section 6 above.

TOWN:

Town of Hilton Head Island, South Carolina

By: _____


Stephen G. Riley, Town Manager

CHAMBER:

Hilton Head Island Bluffton Chamber Of
Commerce, Inc.

By: _____


William G. Miles, President & CEO

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

Peter Michael Buonaiuto, Sr., individually, and on behalf of all others similarly situated,)

CIVIL ACTION COVERSHEET

Plaintiff(s))

2016-CP -07- 2483

vs.)

The Town of Hilton Head Island)

Defendant(s))

Submitted By: Taylor M. Smith IV
Address: Harrison & Radeker, P.A., P.O. Box 50143, Columbia, SC 29250

SC Bar #: 101584
Telephone #: (803) 779-2211
Fax #: (803) 779-6700
Other:
E-mail: taylor@harrisonfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.
NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), General (130), Breach of Contract (140), Fraud/Bad Faith (150), Failure to Deliver/Warranty (160), Employment Discrim (170), Employment (180), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case #, Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Assault/Battery (370), Slander/Libel (380), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Administrative Law/Relief: Reinstate Drv. License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Confession of Judgment (770), Petition for Workers Compensation Settlement Approval (780), Other (799)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Comm. (990), Employment Security Comm (991), Other (999)
Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Sexual Predator (510), Permanent Restraining Order (680), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Pre-Suit Discovery (670)
Other (799) DJ Action

Submitting Party Signature:

Taylor Smith

Date: 11/22/16

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 14 TH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL CASE NO.: 2016-CP-07-2483
)	
Peter Michael Buonaiuto, Sr., individually,)	
and on behalf of all others similarly situated,)	
	)	DEFENDANTS' MOTION TO DISMISS
Plaintiff,	)	AND DEFENDANTS' MEMORANDUM
	)	IN SUPPORT
vs.)	
)	
TOWN OF HILTON HEAD ISLAND,)	
)	
Defendants.)	
)	

TO: PLAINTIFF PETER MICHAEL BUONAIUTO, SR., INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND HIS ATTORNEY, TAYLOR M. SMITH, IV, ESQUIRE:

COMES NOW the Defendant, by and through its undersigned counsel, hereby move the Court for an Order dismissing the Plaintiff’s Complaint pursuant to Rule 12(b)(6). First, the Complaint should be dismissed because S.C. Code Ann. § 6-4-10 and Municipal Code Sec. 4-12-20 control rather than the Procurement Code and alternatively because even if the Procurement Code does control, the Plaintiff failed to exhaust his administrative remedies. Therefore, the Complaint fails to allege sufficient facts to state a cause of action upon which this Court may grant relief.

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion “must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case.” Gray v. State Farm Auto Ins.

Co., 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997).

(1) **12(b)(6)- Failure to State Facts Sufficient for a Cause of Action:** S.C. Code Ann. § 6-4-10 dictates how, when, and to whom the 30 percent “Special Fund” is to be disbursed. Further, Municipal Code Sec. 4-12-20, adopted by ordinance, expressly provides that the Chamber “shall be the designated non-profit organization to manage and direct the expenditures of the 30 percent Special Fund as designated by S.C. Code Ann. § 6-4-10.”

The State Procurement Code Section 11-35-50 essentially delegates the authority to adopt appropriate procurement policies to the political subdivisions. The interaction between the imposition of the State requirements and the local procurement codes has been addressed by our courts in Glasscock Company, Inc., v Sumter County, 361 S.C. 483, 490, 604 S.E. 2d 718, 721 (Ct. App. 2004). In that case, Glasscock, a waste management provider, sued Sumter County claiming that they failed to comply with the procurement code when they adopted ordinances that extended two existing waste management contracts with a competitor (wrapped into those extensions was also a land purchase for a transfer station). The Court analyzed the manner in which the County dealt with these contracts and held:

That *local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances* and procedures is entirely consistent with our state’s now firmly rooted constitutional principle of “home rule.” By the ratification of Article VIII of our state constitution in 1973, substantial responsibility for city and county affairs devolved from the General Assembly to the individual local governments.

Glasscock urges this Court to construe section 11-35-50 as mandating sealed competitive bids in virtually every instance of public procurement. This approach would effectively strip our state’s local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt. Indeed, such a reading of section 11-35-50 runs wholly contrary to the home rule authority vested in local government by our constitution. We reject Glasscock’s argument.

In reaching this conclusion, we do not intend to diminish the vital role sealed bidding procurement procedures play in ensuring open, accountable

government. To be sure, we recognize the general applicability of competitive sealed bids under the Sumter County Procurement Ordinance. In the present case, however, we address only a narrow exception to that general rule. Whether a contract should be approved by ordinance and therefore exempt from the sealed bid requirement is a function of County Council's discretion, the exercise of which they are accountable for as publicly elected officials. "In reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions 'should not be upset on appeal unless [they are] arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power.'" *Sloan v. Greenville County*, 356 S.C. 531, 555-56, 590 S.E.2d 338, 351 (Ct. App. 2003) (quoting *Smith v. Georgetown County Council*, 292 S.C. 235, 238-39, 355 S.E.2d 864, 866 (Ct.App.1987)).

In addition, a South Carolina Attorney General Opinion dated June 1, 2005 in which the Georgetown County Attorney asked the Attorney General if those entities receiving ATAX funds had to follow the procurement code. After a lengthy discussion on procurement and public funds, relying on Glasscock, the Attorney General opined that:

Referencing the above, in my opinion, inasmuch as the accommodations tax funds funneled by Georgetown County to organizations for tourism promotion are public funds, those organizations in receipt of such funds should follow established county procurement procedures in expending such funds. However, as indicated above, local governments are afforded latitude in establishing their own individual procurement ordinances and procedures. As noted, pursuant to *Glasscock Company, Inc.*, supra, counties are afforded "flexibility" in determining what is "appropriately competitive" as to the public business transacted. Therefore it would be a matter for resolution by the County to determine the exact procurement procedures to be followed. As a result, in my opinion, Georgetown County would ***have flexibility in determining matters regarding the relevancy of its particular procurement policies as to the expenditure of accommodation tax funds***, such as the dollar amount at which point there must be compliance with such policies. S.C. Att'y Gen. Op., 2005 S.C. AG LEXIS 72 (June 1, 2005).

Because the Town Council went through the deliberative process of adopting Municipal Code Sec. 4-10-20 by Ordinance, it seems clear that this adoption would meet the Glasscock test and would not offend the findings of the Attorney General. Furthermore, it would appear that if the Town had selected anyone other than the Hilton Head Chamber of Commerce, then it would have violated Municipal Code Sec. 4-12-20.

Both the Town Procurement Ordinance and the Town's ATAX ordinance are properly adopted laws. If one were to assert that there is a conflict between Municipal Code Sec. 4-10 20 (ATAX) and Municipal Code Sec. 11-1-10 (Procurement) then section 4-10-20 would control. The Municipal Code directs us as to which section controls when there is a conflict between two sections of the Municipal Code. Municipal Code Sec. 1-3-10 (41) states:

Sec. 1-3-10. - Definitions and rules of construction.

In the construction of this Code and of all ordinances of the town, the following definitions and rules shall be observed, provided that these rules of construction shall not be applied to any section of this Code or an ordinance which contains any express provisions excluding such construction.

(41) Conflicting provisions. If the provisions of different articles of this Code conflict with or contravene each other, the provisions of each article shall prevail as to all matters and questions growing out of the subject matter of such article. If conflicting provisions be found in different sections of the same article, the provisions of the section which is last in numerical order shall prevail unless such construction be inconsistent with the meaning of such article.

It seems clear that the above code section should be interpreted to mean that the more specific Ordinance prevails. Accordingly, Municipal Code Sec. 4-12-10 deals very specifically with the ATAX funds and therefore, prevails over Municipal Code Sec. 11-1-10 as to the disposition of the Special Fund. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against the Town for simply following its own Ordinances pursuant to State law.

(2) **12(b)(6)- Failure to State Facts Sufficient for a Cause of Action:** The State Procurement Code establishes the exclusive original means of resolving procurement controversies between contractors and a governmental body. S.C. Code Ann. § 11-35-4210(c) provides that "*The rights and remedies granted in this article* to bidders, offerors, contractors, or subcontractors, either actual or prospective, *are to the exclusion of all other rights and remedies* of the bidders, offerors, contractors, or subcontractors against the State." Plaintiff waived his right to protest the procurement by failing to submit a written protest to the Town of

Hilton Head Town Manager within 10 days of the date of the award of procurement pursuant to §11-35-4210(1)(b) of the S.C. Code and Municipal Code Sec. 11-1-711. The South Carolina Supreme Court has indicated that dismissal may be proper under Rule 12(b)(6), SCRCPP, for failure to state a claim where the opposing party is required to exhaust its administrative remedies as a matter of law, but failed to do so. Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office, 346 S.C. 158 (S.C. 2001) (stating that exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute).

Pursuant to Rule 12(b)(6), SCRCPP, Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action, and accordingly should be dismissed. Therefore, the Town requests that this Court issue an Order dismissing the Plaintiff's Complaint pursuant to Rule 12(b)(6), SCRCPP. This Motion shall be based upon the pleadings, this Notice, Rule 12, SCRCPP, such law as is then and there applicable, the uncontroverted and material facts of this case, the discovery conducted thus far, and any affidavits or memoranda of law that may be submitted to this Court subsequent to the filing of this motion.

ALFORD & THORESON, LLC

By: /sGregory M. Alford
 Gregory M. Alford (6932)
 P.O. Drawer 8008
 Hilton Head Island, SC 29938
 (843) 842-5500 (843) 842-8400 (fax)
gregg@alfordlawsc.com
Attorney for Defendants

This 4th day of January 2017.
 Hilton Head Island, Beaufort County, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 14 TH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL CASE NO.: 2016-CP-07-2483
)	
Peter Michael Buonaiuto, Sr., individually,)	
and on behalf of all others similarly)	
situated,	)	ANSWER OF THE DEFENDANT
	)	TO PLAINTIFF'S VERIFIED
Plaintiff,	)	COMPLAINT
)	
vs.)	
)	
TOWN OF HILTON HEAD ISLAND,)	
)	
Defendants.)	
_____)	

TO: PLAINTIFF PETER MICHAEL BUONAIUTO, SR, AND HIS ATTORNEY, TAYLOR M. SMITH, IV, ESQUIRE:

COMES NOW the Defendant Town of Hilton Head Island, (referred to as "Defendant") reserving all rights to amend this Answer within thirty (30) days pursuant to Rule 15(a) *SCRPC*, reserving all rights to include in said amended answer any defenses and/or objections under Rules 8(c) and 12 *SCRPC*, and reserving all rights to make any motions under Rule 12 *SCRPC*, does hereby file this, the Answer to Plaintiff's Verified Complaint ("Complaint") as follows:

FOR A FIRST DEFENSE
General Denial

1. Any allegation(s), paragraph(s), or statement(s) not hereinafter expressly admitted, qualified, or explained is/are deemed to be denied, and Defendants demands strict proof thereof at time of trial.

2. That the Defendants are not required to respond to any administrative paragraph(s) that re-allege(s) foregoing paragraphs or allegations, but, in the event Defendants are required to make such a response, Defendants hereby deny the same and demands strict proof thereof at time of trial.

3. That the Defendants are not required to respond to any administrative paragraph(s) that does not set out facts or demand relief but, in the event Defendants is required to make such a response, Defendants hereby denies the same and demands strict proof thereof at time of trial.

4. That the Defendants are not required to respond to any paragraph(s) that state(s) a legal conclusion but, in the event Defendants are required to make such a response, Defendants hereby deny the same and demands strict proof thereof at time of trial.

5. Defendants hereby deny each allegation(s), paragraph(s), or statement(s) in the Complaint that state(s) any legal conclusion(s) and, to the extent an answer is required to the same, Defendants hereby deny said allegation(s), paragraph(s), or statement(s) and demands strict proof thereof at time of trial.

6. Defendants lack sufficient information to admit or deny the allegations of Paragraph 1, and therefore, deny the same and demands strict proof thereof at trial.

7. Defendant admits the allegations contained in Paragraph 2 of the Complaint.

8. Paragraphs 3 through 6 of the Complaint state a legal conclusion, and therefore no answer is required. To the extent an allegation of fact is alleged, Defendant denies the same and demands strict proof thereof.

9. Paragraphs 7 and 8 of the Complaint contain no allegations against Defendant, and therefore no answer is required. To the extent an allegation of fact is alleged, Defendant denies the same and demands strict proof thereof.

10. Defendant admits the allegations contained in Paragraph 9 of the Complaint.

11. Paragraphs 10 through 15 of the Complaint contain no allegations against Defendant, and therefore no answer is required. To the extent an allegation of fact is alleged, Defendant denies the same and demands strict proof thereof.

12. Defendant admits the allegations in Paragraph 16 of the Complaint.

13. Defendant denies the allegations in Paragraph 17 of the Complaint and demands strict proof thereof.

14. Defendant admits the allegations in Paragraph 18 of the Complaint.

15. Defendant denies the allegations in Paragraph 19 of the Complaint and demands strict proof thereof.

16. Paragraphs 20 and 21 of the Complaint state a legal conclusion, and therefore no answer is required. To the extent an allegation of fact is alleged, Defendant denies the same and demands strict proof thereof.

FOR A SECOND DEFENSE
Statute of Limitations

17. Defendants do hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

18. Some or all of the Plaintiff's claims are or may be barred by the Statute of Limitations.

FOR A THIRD DEFENSE
Laches/Estoppel

19. Defendants do hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

20. Some or all of the Plaintiff's claims are or may be barred by the doctrines of laches and/or estoppel.

FOR A FOURTH DEFENSE
Failure to State a Claim

21. Defendants do hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

22. The Complaint must be dismissed for failure to state sufficient facts for a cause of action upon which a Court may grant relief, and in accordance with SCRCP 12(b)(6).

FOR A FIFTH DEFENSE
South Carolina Tort Claims Act

23. Defendants do hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

24. The South Carolina Tort Claims Act is designed to except the State and its political subdivisions from liability from certain claims sounding in tort. S.C. Code Ann. 15-78-10, *et seq.* (2012). That statute defines a political subdivision as “the counties, municipalities...” 15-78-30(h) (2012). The Tort Claims Act applies to all torts. S.C. Code Ann. 15-78-20(b) (2012).

25. Since Defendants are a political subdivision of the State of South Carolina, it is protected by the Tort Claims Act.

FOR A SIXTH DEFENSE
Legal Necessity

26. Defendants do hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

27. The State Procurement Code Section 11-35-50 delegates the authority to adopt appropriate procurement policies to the political subdivisions.

28. S.C. Code Ann. § 6-4-10 dictates how, when, and to whom the 30 percent “Special Fund” is to be disbursed. Municipal Code Sec. 4-12-20, adopted by ordinance, expressly provides that the Chamber “shall be the designated non-profit organization to manage and direct the expenditures of the 30 percent Special Fund as designated by S.C. Code Ann. § 6-4-10.”

29. Defendant’s actions were necessary to comply with the State Procurement Code Section 11-35-50, S.C. Code Ann. § 6-4-10, and Town of Hilton Head Island Municipal Code Sec. 4-12-20.

FOR A SEVENTH DEFENSE
Failure to Exhaust Administrative Remedies

30. Defendants do hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

31. The State Procurement Code establishes the exclusive original means of resolving procurement controversies between contractors and a governmental body. S.C. Code Ann. § 11-35-4210(c).

32. Plaintiff waived his right to protest the procurement by failing to submit a written protest to the Town of Hilton Head Town Manager within 10 days of the date of the award of procurement pursuant to §11-35-4210(1)(b) of the S.C. Code and Municipal Code Sec. 11-1-711.

33. The South Carolina Supreme Court has indicated that dismissal may be proper under Rule 12(b)(6), SCRCF, for failure to state a claim where the opposing party is required to

exhaust its administrative remedies as a matter of law, but failed to do so. Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office, 346 S.C. 158 (S.C. 2001).¹

WHEREFORE, having answered the Complaint, Defendants pray that this Court inquire into these matters and issue an Order dismissing the Plaintiff's Complaint and for any such further relief as this Court deems just and proper.

ALFORD & THORESON, LLC

By: s/Gregory M. Alford
Gregory M. Alford (6932)
P.O. Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500 (843) 842-8400 (fax)
gregg@alfordlawsc.com
Attorney for Defendant

This 24 day of March, 2017.
Hilton Head Island, Beaufort County, South Carolina.

¹ Stating that exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF BEAUFORT) CASE NO: 2016CP0702483
)

Peter Michael Buonaiuto Sr)
)
Plaintiff(s)) ORDER REFERRING NON-JURY
) ACTION TO THE BEAUFORT
) COUNTY MASTER IN EQUITY
)
vs.)
)
Hilton Head Island Town Of)
)
Defendant(s))
)

Pursuant to an Order of the South Carolina Supreme Court this Non-Jury matter is now referred to the Beaufort County Master in Equity with Finality. The Plaintiff is responsible for paying the Reference Fee pursuant to South Carolina Code of Laws Section 14-11-310. (\$100.00 for Partition Actions and Foreclosures and \$50.00 for all other cases); **however, if the Plaintiff's case is over, any remaining party seeking Affirmative Relief will be responsible for paying the fee.** The Reference Fee shall be paid within 30 days from the date this Order is signed or the Master will dismiss the case for non-payment of the Reference Fee.

IT IS SO ORDERED:

Jerri Roseneau
Beaufort County Clerk of Court

Dated: _____
Beaufort, South Carolina



Beaufort Common Pleas

Case Caption: Peter Michael Buonaiuto Sr VS Hilton Head Island Town Of

Case Number: 2016CP0702483

Type: Order/Referred to Master or Special Referee

So Ordered

s/Jerri Ann Roseneau, Beaufort County Clerk of
Court

Electronically signed on 2017-08-22 08:21:40 page 2 of 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT	)	CASE NUMBER: 2016-CP-07-2483
)	
PETER MICHAEL BUONAIUTO, SR.,)	
individually, and on behalf of all others)	
similarly situated,)	
)	
Plaintiff,	)	CONSENT ORDER SUBSTITUTING
	)	COUNSEL
)	
THE TOWN OF HILTON HEAD)	
ISLAND,)	
)	
Defendant.)	

This matter is before the undersigned on the joint motion of Gregory M. Alford and Curtis L. Coltrane, seeking an Order substituting Curtis L. Coltrane as counsel for the Town of Hilton Head Island, South Carolina. Taylor M. Smith, IV, counsel for Peter Michael Buonaiuto, Sr., consents to the Motion.

Therefore, It is Ordered:

1. Gregory M. Alford is relieved as Counsel to the Town of Hilton Head Island, South Carolina.

3. Curtis L. Coltrane is substituted as counsel for the Town of Hilton Head Island, South Carolina, in this case.

WE MOVE:

COLTRANE & WILKINS, LLC

ALFORD LAW FIRM, LLC

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

By: s/Gregory M. Alford
 Gregory M. Alford
 S. C. Bar Number 6932
 Post Office Box 8008
 Hilton Head Island, SC 29938
 (843) 842-5500
gregg@alfordlawsc.com

WE CONSENT:

HARRISON & RADEKER, P. A.

By s/ Taylor M. Smith, IV
Taylor M. Smith, IV
Post Office Box 50143
Columbia, SC 29250
(803) 779-2211
taylor@harrisonfirm.com

(Signature on Following Page)



Beaufort Common Pleas

Case Caption: Peter Michael Buonaiuto Sr VS Hilton Head Island Town Of

Case Number: 2016CP0702483

Type: Order/Substitution Of Counsel

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2019-03-01 11:48:08 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-07-2483

**Peter Michael Buonaiuto, Sr.,
individually, and on behalf of all others
similarly situated,**

Plaintiff,

vs.

The Town of Hilton Head Island,

Defendant.

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff Peter Michael Buonaiuto, Sr. (hereinafter "Plaintiff") hereby moves pursuant to Rule 56, SCRPC, and all other applicable law for summary judgment on the Plaintiff's claim in the above-captioned action, as more fully discussed below.

The grounds for this motion are as follows:

1. Upon motion, summary judgment "shall be rendered forthwith if 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 judgment as a matter of law." Rule 56(c), SCRPC.
2. The Plaintiff brought this action seeking (1) a declaratory judgment that Defendant violated its Code of Ordinances and specifically its procurement code, when it entered into the attached agreement with the Hilton Head Island-Bluffton Chamber of Commerce, (2) rescission of the attached agreement, and (3) an injunction requiring Defendant to subject any proposed destination marketing organization contract to the Defendant's procurement code prior to entering such an agreement. Plaintiff also

- requested an award of reasonable attorney’s fees, pursuant to S.C. Code Ann. § 15-77-300 and any other relief the Court may deem just and proper.
3. The “Procurement Code of the Town of Hilton Head Island,” Section 11-1-111 et seq., provides in Section 11-1-112:

“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.”
 4. The Procurement Code of the Town of Hilton Head Island “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. It shall apply to every expenditure of public funds irrespective of their source.” Section 11-1-113.
 5. The parties agree that Defendant entered into an agreement in November 2015, entitled “Contract for Professional Services,” with the Hilton Head Island-Bluffton Chamber of Commerce (hereinafter “Chamber”) to apparently formalize the arrangement whereby the Chamber serves as the Town’s DMO¹.
 6. Attached to Plaintiff’s Complaint and hereto is the November 2015 agreement subject of this action.
 7. No material facts to the Court’s determination in this matter are in dispute.
 8. The record in this action shows that the subject contract is one for services, as defined by Defendant’s procurement code. Specifically, if not by the document’s title “Contract

¹ “DMO” is a defined term under S.C. Code Ann. § 4-12-20(a). A “designated marketing organization (DMO)” is tasked with managing the expenditures of the thirty percent special fund of tax revenue as described in S.C. Code Ann. Section 6-4-10(3).

- for Professional Services” (emphasis added), the terms of this contract establish several core and secondary responsibilities the Chamber must provide Defendant as services rendered. Consequently, this contract is one for services that Defendant was lawfully obligated to subject to its procurement code before entering it.
9. The record in this action shows that Defendant violated its procurement code when it failed to subject this agreement to it before ratification.
 10. The record in this action shows that there is no genuine issue as to any material fact as to Plaintiff’s claim in this action, that Plaintiff is entitled to judgment in his favor and that Plaintiff is entitled to denial of Defendant’s motion for summary judgment.
 11. Plaintiff intends to submit additional authority prior to this motion hearing.
 12. This motion is also based upon all applicable statutory law, case law, common law, and the record in this action.

Pursuant to Rule 11, SCRCP, there is no duty of consultation prior to this motion, as this is a motion for summary judgment. However, the undersigned and counsel for Defendant have discussed and agreed to have both motions for summary judgment heard at the upcoming scheduled hearing date.

Respectfully submitted,

/s/ Taylor Smith
Taylor M. Smith IV (SC No. 101584)
HARRISON, RADEKER & SMITH, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
taylor@harrisonfirm.com (email)
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
January 31, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT	)	CASE NUMBER 2016-CP-07-2483
)	
PETER MICHAEL BUONAIUTO, SR.,)	
INDIVIDUALLY, AND ON BEHALF)	
OF ALL OTHERS SIMILARLY SITUATED,)	
)	
Plaintiff,	)	NOTICE OF MOTION AND
	)	MOTION FOR SUMMARY
vs.	)	JUDGMENT
)	
THE TOWN OF HILTON HEAD ISLAND,)	
SOUTH CAROLINA,)	
)	
Defendant.)	

TO: PETER MICHAEL BUONAIUTO, SR., AND TAYLOR M. SMITH, IV, COUNSEL TO PETER MICHAEL BUONAIUTO, SR.:

Please take notice that The Town of Hilton Head Island, South Carolina (hereinafter, the “Town”), by and through its undersigned counsel, shall move before the Hon. Marvin H. Dukes, III, at the Beaufort County Court House, 102 Ribaut Road, Beaufort, South Carolina, on the 10th day following the service hereof, at 10:00 o'clock, A. M., or at such other time and place as set by the Court, for an Order granting Summary Judgment in its favor and against Peter Michael Buonaiuto, Sr.

This motion is made under the authority of Rule 56, SCRPC, on the grounds that there is no genuine issue as to any material fact and the Town is entitled to judgment as a matter of law.

This Motion is based the pleadings, the affidavits of William G. Miles, Stephen G. Riley and John M. Troyer served herewith, discovery responses, and all other law as is then and there applicable.

COMPLAINT OF PETER MICHAEL BUONAIUTO, SR.

In his Complaint, Peter Michael Buonaiuto, Sr., alleges the following material facts:

1. The Town is a political subdivision of the State of South Carolina.
2. The Town is the recipient of certain “Accommodations Tax” revenue that is levied and collected by the State of South Carolina, which is credited to the Town, and which must be distributed by the Town as required by S. C. Code Ann. § 6-4-10(3)(Supp. 2019), which reads, in 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.¹

The fund described in S. C. Code Ann. § 6-4-10(3)(Supp. 2019), is colloquially known as the “thirty per cent fund.”

3. Under the direction of S. C. Code Ann. § 11-35-10, et seq. (Supp. 2019), the Town is required to adopt a procurement code.
4. The Town has adopted a procurement code, codified as § 11-1-111., et seq., *Municipal Code of The Town of Hilton Head Island, South Carolina*, 1983.
5. The procurement code adopted by the Town applies to contracts for the procurement of supplies, services and construction made by the Town.
6. In November of 2015, the Town entered into a contract with the Hilton Head Island-Bluffton Chamber of Commerce, Inc., related to the designation of the Hilton Head Island-

¹ The distribution of “Accommodations Tax” money to the Town by the State of South Carolina is under the authority of 12-36-2630(3)(Supp. 2019).

Bluffton Chamber of Commerce, Inc., as the recipient of the “thirty per cent fund.”²

7. The Town did not publicly bid the November 2015, contract between the Town and the Hilton Head Island-Bluffton Chamber of Commerce, Inc.

Based on these allegations, Peter Michael Buonaiuto, Sr., alleged a single cause of action, seeking a declaratory judgment that The Town of Hilton Head Island, South Carolina, acted in violation of §1-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island*, 1983.

ANSWER OF THE TOWN

In its Answer, the Town denied the material allegations of th Complaint of Peter Michael Buonaiuto, Sr., and asserted other affirmative defenses not relevant to this Motion.

SUMMARY JUDGMENT STANDARD

Under Rule 56, SCRPC, 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.³

Under Rule 56, SCRPC, 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.⁴ The purpose of summary

² The Contract is dated as of December 1, 2015.

³ *Café Associates Limited v. Gengross*, 305 S.C. 6, 406 S.E.2d 162 (1991)

⁴ *Redwend Limited Partnership v. Edwards*, 354 S.C. 58, 581 S.E.2d 496 (Ct.App., 2003)

judgment is to expedite the disposition of cases that do not require the services of a fact-finder.⁵ 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.⁶ 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), SCRCPP, states a party may not rest upon the mere allegations or denials of his pleadings.⁷

APPLICABLE LAW RELATING TO STATUTORY INTERPRETATION

In South Carolina, where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.⁸ In interpreting a statute, words must be given their plain and ordinary meaning with resort to subtle or forced construction to limit or expand the statute’s operation.⁹ Words in a statute must be construed in context, and their meaning may be ascertained by reference to words associated with them in the statute.¹⁰

⁵ *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

⁶ *P.P.G. Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App., 1988).

⁷ *Hoard ex rel. Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010).

⁸ *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

⁹ *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007); *Paschal v. State Election Commission*, 317 S.C. 434, 454 S.E.2d 890 (1995).

¹⁰ *S.C. Energy Users Committee v. S.C. Pub. Serv. Commission*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010).

ARGUMENT

Peter Michael Buonaiuto, Sr.'s claim fails, as a matter of law, because neither the distribution of the “thirty per cent fund” in compliance with the requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), nor the Town’s agreement with the Hilton Head Island-Bluffton Chamber of Commerce, Inc., are “procurement” as defined in §1-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island*, 1983.¹¹

By its express terms, §1-1-111, *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.

In this case, the Hilton Head Island-Bluffton Chamber of Commerce, Inc., has been appointed as the recipient of the fund that is described in S. C. Code Ann. §6-4-10(3)(Supp. 2019). The duties of the Town and the duties of the recipient of the fund are set out in S. C. Code Ann. § 6-4-10(3)(Supp. 2019), as follows:

(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. If no organization exists, the municipality or county shall create an organization with the same membership standard in Section 6-4-25. To be eligible for

¹¹ S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and , §1-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island*, 1983, are unambiguous. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. In interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. *See: Centex International, Inc. v. S. Carolina Department of Revenue*, 406 S.C. 132, 750 S.E.2d 65 (2013)(internal citations omitted).

selection the organization must be organized as a nonprofit organization and shall demonstrate to the municipality or county that it has an existing, ongoing tourism promotion program or that it can develop an effective tourism promotion program. Immediately upon an allocation to the special fund, a municipality or county shall distribute the tourism promotion funds to the organizations selected or created to receive them. Before the beginning of each fiscal year, an organization receiving funds from the accommodations tax from a municipality or county shall submit for approval a budget of planned expenditures. At the end of each fiscal year, an organization receiving funds shall render an accounting of the expenditure to the municipality or county which distributed them. Fees allocated pursuant to this subsection must not be used to pledge as security for bonds and to retire bonds. Also, fees allocated pursuant to this subsection 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, and not used to pledge as security for bonds and to retire bonds. (Emphasis added)

The language of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), restricts the use of the funds, and the restricted uses do not include the delivery of any supplies, services or construction to the Town.¹² By the plain language of the statute, on receipt of accommodations tax funds, the 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.¹³

The Hilton Head Island-Bluffton Chamber of Commerce, Inc., does not deliver any supplies, services or construction to The Town of Hilton Head Island, South Carolina, under

¹² See: S. C. Code Ann. 6-4-10(3)(Supp. 2019); Affidavit of William G. Miles, paragraph 8; Affidavit of Stephen G. Riley, paragraph 4, 9; and, Affidavit of John M. Troyer, paragraph 7.

¹³ Although the December 1, 2015, Contract 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, 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. 2019).

the terms of the December 1, 2015, contract.¹⁴ There is no evidence in the record that any “supplies, services or construction” are supplied to the Town by the Hilton Head Island-Bluffton Chamber of Commerce, Inc.,

Because the plain language of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), 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.

The selection of the organization to manage the fund is not the procurement 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 the organizations selected or created to receive them.”

In this case, the Town’s procurement code, by its plain language, applies only to “expenditure of public funds” for the “procurement of supplies, services and construction” by the Town.”¹⁵ S. C. Code Ann. § 6-4-10(3)(Supp. 2019), by its plain language, excludes the use of the “thirty per cent fund,” for anything other than “. . . advertising and promotion of tourism to develop and increase tourist attendance through the generation

¹⁴ See: Affidavit of William G. Miles, paragraph 14; Affidavit of Stephen G. Riley, paragraph 12; and, Affidavit of John M. Troyer, paragraph 9.

¹⁵ See: §1-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island*, 1983.

of publicity.”

Because S. C. Code Ann. § 6-4-10(3)(Supp. 2019), restricts the use of the “thirty per cent fund,” any other use of the “thirty per cent fund,” including the delivery of any “supplies, services or construction” to the Town would violate the plain language of the statute.¹⁶

CONCLUSION

Because:

1. the only evidence in the record is that The Hilton Head Island-Bluffton Chamber of Commerce, Inc., does not deliver any supplies, services or construction to The Town of Hilton Head Island, South Carolina, under the terms of the December 1, 2015, Contract; and,
- 2) under the plain text of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), utilization of the “thirty per cent fund” for anything other than: “ advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity” is prohibited,

the claim of Peter Michael Buonaiuto, Sr., fails as a matter of law. The Town of Hilton Head Island, South Carolina, is entitled to summary judgment on the Complaint of Peter Michael Buonaiuto, Sr., under the authority of Rule 56, SCRPC.

¹⁶ In addition to the 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.

COLTRANE & WILKINS, LLC

By: s/ Curtis L. Coltrane
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 9th day of September, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT	)	CASE NUMBER: 2016-CP-07-2483
)	
PETER MICHAEL BUONAIUTO, SR.,)	
INDIVIDUALLY, AND ON BEHALF)	
OF ALL OTHERS SIMILARLY SITUATED,)	
)	
Plaintiff,)	
	)	AFFIDAVIT OF
vs.	)	JOHN M. TROYER
)	
THE TOWN OF HILTON HEAD ISLAND,)	
SOUTH CAROLINA,)	
)	
Defendant.)	

Personally appeared before me, John M. Troyer, who, being duly sworn, states as follows:

1. I am the Director of Finance for The Town of Hilton Head Island, South Carolina.
2. The Town of Hilton Head Island, South Carolina, receives “Local Accommodations Tax” funds, which are levied by the State of South Carolina under the authority of S. C. Code Ann. § 12-36-2630(3)(Supp. 2019), each year.
3. A portion of the Local Accommodations Tax funds that the Town receives each year, is immediately distributed to the organization selected by the Town under the requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), which reads:

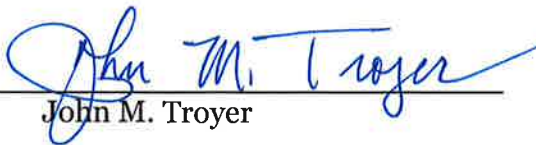
(3) Thirty percent of the balance must be allocated to a special fund and used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity. To manage and direct the expenditure of these tourism promotion funds, the municipality or county 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. If no organization exists, the municipality or county shall create an organization with the same membership standard in Section 6-4-25. To be eligible for selection the organization must be organized as a nonprofit organization and

S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and in § 4-12-10 and in § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina* (1983), the Hilton Head Island-Bluffton Chamber of Commerce, Inc., must use the fund “only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity.”

8. On or about December 1, 2015, The Town of Hilton Head Island, South Carolina, and the Hilton Head Island-Bluffton Chamber of Commerce, Inc., entered into an agreement for the purpose of ensuring that the Hilton Head Island-Bluffton Chamber of Commerce, Inc., met compliance and operating standards required under S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and § 4-12-10 and § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina* (1983).


9. Under the December 1, 2015, Agreement, the Hilton Head Island-Bluffton Chamber of Commerce, Inc., is required to deliver information to The Town of Hilton Head Island, South Carolina, to demonstrate compliance with the requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and § 4-12-10 and § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina* (1983), but it does not provide any services, supplies or construction to The Town of Hilton Head Island, South Carolina.

The Affiant Further Saith Naught.



John M. Troyer

Sworn to and Subscribed Before
Me on this 1st Day of August, 2019.



Notary Public for South Carolina
My Commission Expires: 5/21/2023



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT	)	CASE NUMBER 2016-CP-07-2483
)	
PETER MICHAEL BUONAIUTO, SR.,)	
INDIVIDUALLY, AND ON BEHALF)	
OF ALL OTHERS SIMILARLY SITUATED,)	
)	
Plaintiff,)	
)	
vs.	)	AFFIDAVIT OF
	)	WILLIAM G. MILES
)	
THE TOWN OF HILTON HEAD ISLAND,)	
SOUTH CAROLINA,)	
)	
Defendant.)	

Personally appeared before me, William G. Miles, who, being duly sworn, states:

1. I am the President and Chief Operating Officer of the Hilton Head Island-Bluffton Chamber of Commerce, Inc. In my role as President and Chief Operating Officer of the Hilton Head Island-Bluffton Chamber of Commerce, Inc., I oversee all operations and departments of Hilton Head Island-Bluffton Chamber of Commerce, Inc.
2. In my role as the President and Chief Operating Officer of the Hilton Head Island-Bluffton Chamber of Commerce, Inc., I am familiar with the allocation of the taxes remitted to the Town of Hilton Head Island, South Carolina, under S. C. Code Ann. § 12-36-2630(3)(Supp. 2019). I am also familiar with the fact that those funds must be allocated to a special fund and then must be distributed to an organization to be used for the promotion of tourism as required under S. C. Code Ann. § 6-4-10(3)(Supp. 2019). The requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), are mirrored in § 4-12-10 and § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina* (1983).
3. The organization receiving the special fund under S. C. Code Ann. § 6-4-

10(3)(Supp.2019), must use the fund “only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity.”

4. Since 1986, the Hilton Head Island-Bluffton Chamber of Commerce, Inc. (and its predecessor, the Hilton Head Island Chamber of Commerce, Inc.) has been designated by The Town of Hilton Head Island, South Carolina, as the organization that receives, manages and directs the special fund described in S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and in § 4-12-10 and in § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina* (1983).

5. The Hilton Head Island Chamber of Commerce, Inc., now known as the Hilton Head Island-Bluffton Chamber of Commerce, Inc., qualifies to be appointed as the organization because it is organized as a nonprofit organization and has had, at all times that it has been designated as the organization to receive the special fund required by S. C. Code Ann. § 6-4-10(3)(Supp. 2019), an ongoing tourism promotion program.

6. As the organization receiving the special fund described in S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and in § 4-12-10 and in § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina* (1983), the Hilton Head Island-Bluffton Chamber of Commerce, Inc., is required to make reports to The Town of Hilton Head Island, South Carolina, as follows: “Before the beginning of each fiscal year, an organization receiving funds from the accommodations tax from a municipality or county shall submit for approval a budget of planned expenditures. At the end of each fiscal year, an organization receiving funds shall render an accounting of the expenditure to the municipality or county which distributed them.”

7. Under the plain terms of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), the Hilton Head

Island-Bluffton Chamber of Commerce, Inc., as the organization receiving the special fund described in S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and in § 4-10-10 and in § 4-10-12, *Code of the Town of Hilton Head Island, South Carolina (1983)*, must use the same “only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity.” The plain terms of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), prohibit the Hilton Head Island-Bluffton Chamber of Commerce, Inc., from using any part of the fund to provide supplies, services or construction to The Town of Hilton Head Island, South Carolina.

8. As the organization receiving the special fund established under S. C. Code Ann. § 6-4-10(3)(Supp. 2019), the Hilton Head Island-Bluffton Chamber of Commerce, Inc., does not provide any supplies, services or construction to The Town of Hilton Head Island, South Carolina. Rather, the Hilton Head Island-Bluffton Chamber of Commerce, Inc., must, and does, use the fund “only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity.”

12. At all times, the Hilton Head Island-Bluffton Chamber of Commerce, Inc., has complied with the obligations imposed on it by S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and in § 4-12-10 and in § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina (1983)*.

13. On or about December 1, 2015, The Town of Hilton Head Island, South Carolina, and the Hilton Head Island-Bluffton Chamber of Commerce, Inc., entered into an agreement for the purpose of ensuring that the Hilton Head Island-Bluffton Chamber of Commerce, Inc., met compliance and operating standards required under S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and § 4-12-10 and § 4-12-20, *Code of the Town of Hilton Head Island,*

South Carolina (1983).

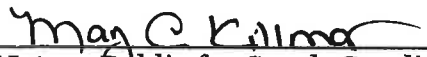
14. Under the December 1, 2015, Agreement, the Hilton Head Island-Bluffton Chamber of Commerce, Inc., is required to deliver information to The Town of Hilton Head Island, South Carolina, to demonstrate compliance with the requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and § 4-12-10 and § 4-12-20, Code of the Town of Hilton Head Island, South Carolina (1983), but it does not provide any services, supplies or construction to The Town of Hilton Head Island, South Carolina.

The Affiant Further Saith Naught.



William G. Miles

Sworn to and Subscribed Before
Me on this 1st Day of August, 2019.



Notary Public for South Carolina
My Commission Expires: _____

MARY C. KILLMAR
Notary Public-State of South Carolina
My Commission Expires
September 29, 2027

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT	)	CASE NUMBER 2016-CP-07-2483
)	
PETER MICHAEL BUONAIUTO, SR.,)	
INDIVIDUALLY, AND ON BEHALF)	
OF ALL OTHERS SIMILARLY SITUATED,)	
)	
Plaintiff,)	
)	
vs.	)	AFFIDAVIT OF
	)	STEPHEN G. RILEY
)	
THE TOWN OF HILTON HEAD ISLAND,)	
SOUTH CAROLINA,)	
)	
Defendant.)	

Personally appeared before me, Stephen G. Riley, who, being duly sworn, states:

1. I am the Town Manager for The Town of Hilton Head Island, South Carolina, and have served as Town Manager for The Town of Hilton Head Island, South Carolina, since 1994. In my role as the Town Manager, I oversee all operations and departments of The Town of Hilton Head Island, South Carolina.
2. In my role as the Town Manager for The Town of Hilton Head Island, South Carolina, I am familiar with the receipt and allocation of the taxes remitted to the Town under S. C. Code Ann. § 12-36-2630(3)(Supp. 2019), and, which must allocated to a special fund and then distributed to an organization to be used for the promotion of tourism as required under S. C. Code Ann. § 6-4-10(3)(Supp. 2019),
3. In my role as the Town Manager for The Town of Hilton Head Island, South Carolina, I am familiar with § 1-1-111, *et seq.*, *Code of The Town of Hilton Head Island, South Carolina* (1983), governing procurement by The Town of Hilton Head Island, South Carolina.

4. The organization receiving the special fund under S. C. Code Ann. § 6-4-10(3)(Supp.2019), must use the fund “only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity.” The requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), also appear in § 4-12-10 and § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina* (1983).

5. The organization receiving the special fund under S. C. Code Ann. § 6-4-10(309supp. 2019), is required to make reports to the county or municipality distributing the special fund as follows: “Before the beginning of each fiscal year, an organization receiving funds from the accommodations tax from a municipality or county shall submit for approval a budget of planned expenditures. At the end of each fiscal year, an organization receiving funds shall render an accounting of the expenditure to the municipality or county which distributed them.”

6. The Hilton Head Island Chamber of Commerce, Inc., now known as the Hilton Head Island-Bluffton Chamber of Commerce, Inc., has been, and is currently, designated as the organization to receive the special fund required by S. C. Code Ann. § 12-36-2630(3)(Supp. 2019). The Hilton Head Island Chamber of Commerce, Inc., now known as the Hilton Head Island-Bluffton Chamber of Commerce, Inc., qualifies to be appointed as the organization because it is organized as a nonprofit organization and has had, at all times that it has been designated as the organization to receive the special fund required by S. C. Code Ann. § 6-4-10(3)(Supp. 2019), an ongoing tourism promotion program.

7. § 1-1-111, *et seq.*, *Code of The Town of Hilton Head Island, South Carolina* (1983), is known as the “Procurement Code of the Town of Hilton Head Island.”

8. The Procurement Code of the Town of Hilton Head Island governs public purchasing

by The Town of Hilton Head Island, South Carolina, and applies to all contracts for the procurement of supplies, services and construction by The Town of Hilton Head Island, South Carolina.

9. Under the plain terms of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), the organization receiving the funds must use the same “only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity.” The plain terms of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), prohibits the organization from using any part of the fund to provide supplies, services or construction to the county or municipality distributing the fund.

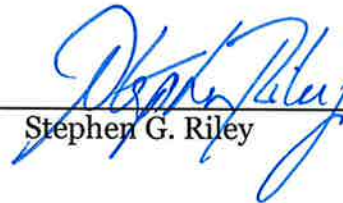
10. The Town of Hilton Head Island, South Carolina, has no discretion in the establishment of the special fund required under S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and The Town of Hilton Head Island, South Carolina, must distribute the entire fund to an organization the meets the requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2019).

11. As the organization receiving the special fund established under S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and in § 4-12-10 and in § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina* (1983), the Hilton Head Island-Bluffton Chamber of Commerce, Inc., does not provide any supplies, services or construction to The Town of Hilton Head Island, South Carolina. Rather, the Hilton Head Island-Bluffton Chamber of Commerce, Inc., must, and does, use the fund “only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity.”

12. On or about December 1, 2015, The Town of Hilton Head Island, South Carolina, and the Hilton Head Island-Bluffton Chamber of Commerce, Inc., entered into an agreement for the purpose of ensuring that the Hilton Head Island-Bluffton Chamber of Commerce,

Inc., met compliance and operating standards. Under the agreement, the Hilton Head Island-Bluffton Chamber of Commerce, Inc., is required to deliver information to The Town of Hilton Head Island, South Carolina, to demonstrate compliance with the requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), and in § 4-12-10 and in § 4-12-20, *Code of the Town of Hilton Head Island, South Carolina* (1983).

The Affiant Further Saith Naught.



Stephen G. Riley

Sworn to and Subscribed Before
Me on this 5th Day of July~~August~~, 2019.



Notary Public for South Carolina
My Commission Expires: 5/21/2023



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-07-2483

Peter Michael Buonaiuto, Sr.,
individually, and on behalf of all others
similarly situated,

Plaintiff,

vs.

The Town of Hilton Head Island,

Defendant.

**PLAINTIFF'S MEMORANDUM OF
LAW IN SUPPORT OF HIS MOTION
FOR SUMMARY JUDGMENT**

The Plaintiff hereby submits this memorandum in support of his motion for summary judgment and in opposition to the Defendant's motion for summary judgment. Plaintiff's motion should be granted, and Defendant's motion should be denied.

SUMMARY JUDGMENT STANDARD

Under South Carolina law, "summary judgment may be rendered only when 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 judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

The contract at issue is one for services

The record in this action shows that the contract attached to Plaintiff's motion for summary judgment is one for services, as defined by Defendant's procurement code. Specifically, if not by the document's title "Contract for Professional Services" (emphasis added), the terms of this contract establish several core and secondary responsibilities the Chamber must provide Defendant

as services rendered. The Parties have agreed to hear this motion on cross motions for summary judgment. Consequently, the Court's examination of that attached exhibit and its legal determination of whether it is a contract for services are the two principal tasks before the Court determine which party's motion should be granted. Plaintiff believes the Court's examination will yield an understanding it is one for services and it will grant summary judgment in Plaintiff's favor and deny Defendant's motion.

The "Procurement Code of the Town of Hilton Head Island," Section 11-1-111 et seq., provides in Section 11-1-112: "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." The Procurement Code "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. It shall apply to every expenditure of public funds irrespective of their source." Section 11-1-113. Defendant's Procurement Code defines "services" as follows in Section 11-35-310:

(29) 'Services' means the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or services as defined in Section 11-35-310(1)(d).

Although neither "contract for services" nor "services contract" are defined terms under Defendant's Procurement Code, Plaintiff thinks the above language may be instructive in understanding what binding authority exists to explain the type of contract that is at issue. The

contract at issue specifies certain duties the Hilton Head Island-Bluffton Chamber of Commerce (hereinafter the “Chamber”) will have to perform under its terms.

The contract’s first whereas provides the chief duty of serving as the destination marketing organization for Defendant, as defined by Title 6 of the State Code of Laws:

WHEREAS, accommodations tax is a state and local tax that is levied on the lodging industry and South Carolina Code Section 6-4-10(3) requires thirty percent of the state received accommodation tax be awarded to a nonprofit corporation and allocated to a special fund used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity ("Promotional Fund").

Contract at 1.

Defendant contends that since the Contract does not involve the delivery of any supplies, services, or construction to HHI and the use of the 30% fund in Title 6 is restricted to the advertising and promotion of tourism (which, according to Defendant, are also not supplies, services, or construction), it is not obligated to comply with Defendant’s Procurement Code. Plaintiff disagrees with Defendant’s characterization that the duties imposed by the contract or statute on the Chamber are not services, as a plain understanding of the term “service” would include both the management and direction “the expenditure of the Promotional Fund” and the submittal of “a budget of planned expenditures for the Promotional Fund and a marketing plan” as is required by both the statute and the contract.

The South Carolina Consolidated Procurement Code (hereinafter “the Code”) defines “contract” as “all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, information technology, or construction,” and “services” as “the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This

term includes consultant services other than architectural, engineering, land surveying, construction management, and related services.” S.C. Code Ann. § 11-35-310(8) and (31).

A South Carolina Attorney General Opinion specifically cites one of the statutes at issue here (S.C. Code Ann. § 6-4-10 (2004)) and states:

[I]nasmuch as the accommodation tax funds funneled by Georgetown County to organizations for tourism promotion are public funds, those organizations in receipt of such funds should follow established county procurement procedures in expending such funds. However . . . local governments are afforded latitude in establishing their own individual procurement ordinances and procedures.

S.C. Att’y Gen. Op., 2005 WL 1609298 at *4 (June 1, 2005).

This language from the state Attorney General may not be particularly helpful for the proposition that that the contract at issue does or doesn’t involve services, it goes to show a “strong public policy” in favor of following procurement procedure, and a general instruction that “a public body must conform to procurement laws and regulations in the absence of specific exemptions or conditions.” *Id.* at *3 (citing S.C. Att’y Gen. Op. (June 9, 1995)). Additionally, it contradicts part of the Defendant’s argument that:

Because . . . under the plain text of S.C. Cod Ann. § 6-4-10(3)(Supp. 2019), utilization of the ‘thirty per cent fund’ for anything other than: ‘advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity’ is prohibited, the claim of [the plaintiff] fails as a matter of law.

Finally, our Court of Appeals has considered a local procurement in a similar context and found that although, the entity, a school district, was not subject to the code’s requirements as it was not a party the contract at issue, a services contract can include the mere requirement of

spending public funds as the Chamber is charged to do under the subject contract. “Thus, generally speaking, the School District’s procurement code would apply to contracts the School District enters into with financial advisors, bond attorneys, and other similar parties, provided that the contracts require the School District to spend public funds.” Colleton County Taxpayers Ass’n v. School Dist. Of Colleton County, 371 S.C. 224, 240, 638 S.E.2d 685, 693 (2006).

CONCLUSION

The Defendant is not entitled to summary judgment in its favor in this case, but the Plaintiff is in entitled to prevail it on his motion. The record has established that Defendant violated its procurement code when it failed to subject the contract at issue to it. Accordingly, there is no issue of material fact so the Court can decide the contract is one for services, as a matter of law. The Defendant’s motion for summary judgment should be denied and Plaintiff’s motion for summary judgment should be granted.

Respectfully submitted,

/s/ Taylor Smith
Taylor M. Smith IV (SC No. 101584)
HARRISON, RADEKER & SMITH, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
taylor@harrisonfirm.com (email)
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
February 7, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT	)	CASE NUMBER 2016-CP-07-2483
PETER MICHAEL BUONAIUTO, SR.,)	
INDIVIDUALLY, AND ON BEHALF)	
OF ALL OTHERS SIMILARLY SITUATED,)	
)	
Plaintiff,)	
	)	MEMORANDUM
vs.)	
)	
THE TOWN OF HILTON HEAD ISLAND,)	
SOUTH CAROLINA,)	
)	
Defendant.)	

The Town of Hilton Head Island, South Carolina, files its Memorandum in Reply to the Motion for Summary Judgment filed on behalf of Peter Michael Buonaiuto, Sr., on January 31, 2020, and the Memorandum filed on February 7, 2020.¹

In his Motion for Summary Judgment and Memorandum, Peter Michael Buonaiuto, Sr., argues that the title of the December 1, 2015, Contract between The Town of Hilton Head Island, South Carolina, and The Hilton Head Island-Bluffton Chamber of Commerce, Inc., is determinative of the contract’s 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.² The title given to a contract and the descriptive terms used in

¹ The arguments made herein are in addition to those set out in the text of the September 10, 2019, Motion for Summary Judgment filed on behalf of The Town of Hilton Head Island, South Carolina.

² *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 South Carolina 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.

it are not controlling. Rather, the text of the contract and what it actually calls for is what is controlling.³

As a matter of law, the title of the contract, which is “Contract for Professional Services,” does not determine the meaning of the contract, and the title neither limits nor expands what the contract actually does.⁴

The text of the December 1, 2015, contract 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, 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. 2019).⁵

Further, the affidavits of William G. Miles, Stephen G. Riley and John Troyer show that the Hilton Head Island-Bluffton Chamber of Commerce, Inc., does not deliver any

³ *Thompson v. Ford Motor Co.*, 200 S.C. 393, 21 S.E.2d 34, 47 (1942), in which the South Carolina 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.

⁴ *See Also: In re Carolina Utilities Supply Company, Inc.*, 118 B.R. 412, 415 (Bankr. D.S.C. 1990),

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.

⁵ S. C. Code Ann. § 6-4-10(3)(Supp. 2019), reads, in relevant part:

Before the beginning of each fiscal year, an organization receiving funds from the accommodations tax from a municipality or county shall submit for approval a budget of planned expenditures. At the end of each fiscal year, an organization receiving funds shall render an accounting of the expenditure to the municipality or county which distributed them.

supplies, services or construction to The Town of Hilton Head Island, South Carolina, under the terms of the December 1, 2015, Contract. Each witness states that the December 1, 2015, Contract requires the Hilton Head Island-Bluffton Chamber of Commerce, Inc., to demonstrate its compliance with the reporting requirements of S. C. Code Ann. 6-4-10(3)(Supp. 2019).⁶

In his Motion for Summary Judgment and Memorandum, Peter Michael Buonaiuto, Sr., also argues that the Procurement Code of The Town of Hilton Head Island, South Carolina [§1-1-111, *et seq.*, *Municipal Code of the Town of Hilton Head Island*, 1983], is applicable to the December 1, 2015, Contract between The Town of Hilton Head Island, South Carolina and The Hilton Head Island-Bluffton Chamber of Commerce, Inc.

In the case of *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*,⁷ the South Carolina Supreme Court considered whether or not any statute other than the accommodations tax statute had any application to the distribution and expenditure of accommodations tax funds.⁸ In that case, *DomainsNewMedia.com, LLC*, argued that the receipt of accommodations tax funds by 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 [S. C. Code Ann. § 30-4-10, *et seq.* (Supp. 2019)].

⁶ See: Affidavit of William G. Miles, paragraph 8; Affidavit of Stephen G. Riley, paragraph 9; and, Affidavit of John M. Troyer, paragraph 7.

⁷ *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).

⁸ This argument is in addition to the arguments presented in the September 10, 2019, Motion for Summary Judgment, and above, which demonstrate that the December 15, 2015, Contract is not one for “procurement” as defined in §1-1-111, *et seq.*, *The Municipal Code of the Town of Hilton Head Island*, 1983.

The South Carolina Supreme Court held otherwise, ruling that the receipt and use of accommodations tax funds 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.⁹ In this case, Peter Michael Buonaiuto, Sr., has not alleged that there has been any violation of the accommodations tax statute.

The argument made by Peter Michael Buonaiuto, Sr., in this case is indistinguishable from the argument made in *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, *supra*. The receipt, distribution and expenditure of accommodations tax funds is governed by the accommodations tax statutes, which are specific. The procurement code of The Town of Hilton Head Island, South Carolina, is a general ordinance governing purchasing by the Town is a general ordinance. Under *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, *supra*., the procurement code has no application to the receipt, distribution and expenditure of accommodations tax funds.

As a matter of law, under the language of *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, there is no basis to conclude that the The Town of Hilton Head Island, South Carolina, Procurement Code [§1-1-111, *et seq.*,

⁹ Specifically, 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.

Municipal Code of the Town of Hilton Head Island, 1983] has any application to the December 15, 2015, Contract.¹⁰

CONCLUSION

Because:

- (1) the only evidence in the record is that The Hilton Head Island-Bluffton Chamber of Commerce, Inc., does not deliver any supplies, services or construction to The Town of Hilton Head Island, South Carolina, under the terms of the December 1, 2015, Contract; and,
- (2) under the plain text of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), the delivery of supplies, services or construction using accommodations tax funds would be prohibited; and,
- (3) the South Carolina Supreme Court has ruled that the receipt, distribution and expenditure of accommodations tax funds is governed by the specific accommodations tax statutes, and not general statutes, such as the procurement code,

the claim of Peter Michael Buonaiuto, Sr., fails as a matter of law, and the Town of Hilton Head Island, South Carolina, is entitled to summary judgment on the Complaint of Peter Michael Buonaiuto, Sr., under Rule 56, SCRPC.

¹⁰ In his memorandum, Peter Michael Buonaiuto, Sr., relies on an opinion of the South Carolina Attorney General [June 1, 2005, John M. Tolar, Esq., 2005 WL 1609298 (S.C.A.G.)]. This opinion addresses a different question from that presented by this case. In the June 1, 2005, Opinion, the Attorney General opined that recipients of ATAX funds are required to comply with a local government's procurement code in the recipient's expenditure of the funds. That is not the question presented by Peter Michael Buonaiuto, Sr., in this case, nor does our research reveal that this opinion has been cited by any appellate court in South Carolina. The Attorney General's opinion is also contrary to the ruling of the South Carolina Supreme Court in *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, supra*.

Respectfully submitted:

COLTRANE & WILKINS, LLC

By: s/ Curtis L. Coltrane
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 9th day of February, 2020.

THE TOWN OF HILTON HEAD ISLAND
REGULAR TOWN COUNCIL MEETING

Date: Tuesday, November 17, 2015

Time: 4:00 P.M.

Present from Town Council: David Bennett, *Mayor* Bill Harkins, *Mayor Pro Tem*; Marc Grant, Tom Lennox, Kim Likins, John McCann, Lee Edwards, *Council Members*

Present from Town Staff: Steve Riley, *Town Manager*; Greg DeLoach, *Assistant Town Manager*; Charles Cousins, *Director of Community Development*; Scott Liggett, *Director of Public Projects & Facilities/Chief Engineer*; Brad Tadlock, *Fire Chief*; Ed Boring, *Deputy Fire Chief – Support Services*; Tom Dunn, *Emergency Management Coordinator*; Brian Hulbert, *Staff Attorney*; John Valvo, *Systems Analyst*; Vicki Pfannenschmidt, *Executive Assistant/Town Clerk*

Present from Media: Zack Murdock, *Island Packet*

1) CALL TO ORDER

Mayor Bennett called the meeting to order at 4:00 p.m.

2) PLEDGE TO THE FLAG

3) INVOCATION

4) FOIA Compliance – Public notification of this meeting has been published, posted and distributed in compliance with the Freedom of Information Act and the Town of Hilton Head Island requirements.

5) Proclamations and Commendations

a. Arbor Day

Sally Krebs, Sustainable Practices Coordinator, was present to accept the proclamation.

6) Approval of Minutes

a. Town Council Meeting, November 3, 2015

Mr. Harkins moved to approve. Mr. McCann seconded. The minutes of the November 3, 2015 regular Town Council meeting were unanimously approved by a vote of 7-0.

7) Report of the Town Manager

a. Presentation of Storm Ready Community Designation – Ron Morales, Warning Coordination Meteorologist

Mr. Morales defined the designation process noting the efforts of Mr. Dunn and staff in accomplishing the task. He presented the certificate of designation to Mayor Bennett and Tom Dunn.

b. Town Manager's Items of Interest

Mr. Riley reported on some items of interest under the subjects below.

(1) Town News

(2) Noteworthy Events

8) Reports from Members of Council

a. General Reports from Council

Mr. Harkins read a statement applauding the efforts and dedication of Betsy Jukofsky in maintaining the Xeriscape Garden and coordinating efforts towards such. He requested Council consider renaming the Garden in her honor. Mayor Bennett moved to rename the Xeriscape Garden to the Betsy Jukofsky Xeriscape Garden. Mr. McCann seconded. The motion was unanimously approved by a vote of 7-0. Mrs. Jukofsky's son, Mike, addressed Council expressing appreciation on Mrs. Jukofsky's behalf.

Mr. Lennox reported that he and Greg DeLoach attended a tour of Sun City Hilton Head. He noted the acreage, amenities of the community as well as the contribution the residents make to Hilton Head Island's economy.

Mr. Edwards reported he attended a luncheon and tour of the Port Royal Sound Foundation Maritime Center. He encouraged all to visit the facility noting the contribution it makes to the Lowcountry.

Mr. McCann complimented Mayor Bennett and Mr. Riley on the well-run Town Council Workshop held November 5 through November 7.

b. Report of the Intergovernmental Relations Committee – Bill Harkins, Chairman

Mr. Harkins stated he and Mr. Stu Rodman, Chairperson of the Beaufort County Governmental Committee will meet at a future date to discuss direction and coordination of efforts.

c. Report of the Community Services Committee – Kim Likins, Chairman

Mrs. Likins stated the Arts & Cultural Strategic Planning Committee continue to meet weekly and are formalizing their report of recommendations for Council. She added that the Personnel component of the Committee recently cancelled a meeting and it was rescheduled for November 23.

d. Report of the Public Planning Committee – Tom Lennox, Chairman

No report.

e. Report of the Public Facilities Committee – Lee Edwards, Chairman

No report.

f. Report of the Public Safety Committee - Marc Grant, Chairman

No report.

g. Report of the Finance and Administrative Committee - John McCann, Chairman

Mr. McCann advised Council the Committee continues to meet on maintenance costs for the Town and they are making great progress. He noted this is a large percent of the operating budget.

h. Report of the Circle to Circle Committee - Tom Lennox, Town Council Liaison

Mr. Lennox reported the Committee met on November 4 to review the 2020 traffic projections and mitigation alternatives. He detailed recommendations put forth from Todd Salvagin of SRS Engineering. He stated the next meeting is scheduled for December 9 at which time they will continue discussion concerning the recommendations and review submitted RFQ's.

9) Appearance by Citizens

Kemm Smith, Executive Director of the Miniature Golf Association of America; Walt Laun, Director Emeritus of the Miniature Golf Association of America; Mary Barrett, Ed Berry and Lori Berry address Council regarding Legendary Golf.

Nancy Mitchell addressed Council regarding Habitat loss. Mira Scott addressed Council regarding pesticides used in clear-cutting. She invited Council to an Art Alive Festival being held on Saturday, November 21 at her Art Gallery at Cypress Square from 12 noon to 5:00 p.m.

10) Unfinished Business

a. Second Reading of Proposed Ordinance 2015-24

Second Reading of Proposed Ordinance 2015-24 of the Town of Hilton Head, South Carolina, authorizing the execution of a deed for the conveyance of 1.288 acres of real property known as the "Proposed Fifth Street Extension" to Marriott Ownership Resorts, Inc., pursuant to the authority of S.C. Code Ann. § 5-7-40 (supp. 2011), and § 2-7-20, *Code of The Town of Hilton Head Island, South Carolina*, (1983); and providing for severability and an effective date.

Mr. Harkins moved to approve. Mr. McCann seconded. The motion was unanimously approved by a vote of 7-0.

11) New Business

a. First Reading of Proposed Ordinance 2015-22

First Reading of Proposed Ordinance 2015-22 to amend the Municipal Code of the Town of Hilton Head Island by creating Chapter 1 of Title 14, establishing regulations and requirements relating to Storm Water Management in the Town of Hilton Head Island; and providing for severability and an effective date.

Mr. Harkins moved to approve. Mr. McCann seconded. The motion was unanimously approved by a vote of 7-0.

b. Consideration of granting an exception to allow a helicopter to land at a location other than the Hilton Head Island Airport, pursuant to Sec. 7-5-20(4) of the Municipal Code

Mr. Harkins moved to approve. Mr. McCann seconded. Heather Rath explained the process and all details for the helicopter landing with Santa Claus near Coligny Plaza. Mrs. Likins noted it is a great way to honor John Curry who actually started the tradition 30 years ago. Mr. Lennox asked for confirmation that this was a Coligny Plaza sponsored event and all expenses would be incurred by Coligny Plaza. Ms. Rath confirmed such.

The motion was unanimously approved by a vote of 7-0.

c. Consideration of Public Facilities Committee Recommendation regarding Public Dedication of Main Street

Mr. Harkins moved to approve. Mr. McCann seconded. The motion was unanimously approved by a vote of 7-0.

d. Consideration of a Request from the Island Beautification Association to rename the Xeriscape Garden to the Betsy Jukofsky Xeriscape Garden

Please reference Item 8 above for the motion and approval.

e. Consideration of Adoption of a Contract for Professional Services with the Hilton Head Island-Bluffton Chamber of Commerce

Mr. Harkins moved to approve. Mr. McCann seconded. Mayor Bennett invited representatives of the Chamber to conduct a presentation. Mr. David Tigges approached the dais and spoke on behalf of the Chamber. He explained and submitted the following documents requesting they be part of the record: Scott and Company Independent Auditor's Report; J. W. Hunt and Company, LLP Independent Auditor's Report; Haddox Reid Eubank and Betts System Review Report of J. W. Hunt & Company, LLP; Haddox Reid Eubank and Betts, LLC System Review Report of Scott and Company LLC; CFE Code of Professional Standards (Adopted by the Board of Regents, September 10, 2014); CFE Code of Professional Standards Interpretation and Guidance; DMAP - Destination Marketing Accreditation Program; and a court Case from the State of South Carolina, County of Horry – Case No. 88-CP-26-1851 – Sun City Publishing Co., Inc. versus The board of Directors of the Myrtle Beach Area Chamber of Commerce. Bill Miles spoke on behalf of the Chamber and encouraged Council to approve the contract.

Mr. Harkins spoke in support of the contract detailing specifics and noting the Finance and Administrative Committee reviewed and recommended approval.

Skip Hoagland, Peter Buonaiuto, Gerard Mahieu, Jack Alderman, Bill Dugle, David Borghesi, John Shkor (submitted his letter and requested it be part of the record), unidentified resident, David Ames, Larry Meyers, Cynthia Bensch, Marty Gleason, John Joseph, Carlton Dallas, Tom Gardo, Rick Caporale all spoke regarding the contract and some provided suggested changes to the contract and some asked Council to delay approval until further review/changes were made.

Steve Birdwell, Jean Beck, Carolyn Vanagel, Andy Twisdale, Matt Green, Justin Rice, Rob Welch, Chris McCorkendale, Jay Wiendl, Jane Upshaw, Tim Friesen, Walt Nester, Greg Kelly, Ray Warco, Cary Corbitt, Warren Woodard and Mark O'Neill spoke in favor of the contract and encouraged Council to vote for approval.

All documents submitted by individuals as part of the permanent record will be attached to the approved, signed minutes.

Mrs. Likins thanked members of the Finance & Administrative Committee and read a prepared statement in support of the contract.

Mr. Edwards stated he wanted to make sure the contract was the right one and suggested going back to executive session to fine tune the contract. He stated he felt it was a good contract that could be better.

Mr. Grant spoke in favor of the Chamber and stated he just had a question for the Town attorney before he could support the contract.

Mr. Lennox reviewed the process of the Finance and Administrative Committee and stated they originally had no intent of documenting the business arrangement with just the Chamber. He noted the process was to clearly define expectations of those receiving ATAX funds. He spoke in support of the contract and recommended approval.

Mr. McCann complimented the hard work of the Committee members spoke in favor of moving forward with the contract.

Mayor Bennett noted his respect for the employees of the Chamber and the members of the Chamber Board. He stated he believed the contract is a good step forward but could be improved. Mayor Bennett said he could not support a contract that doesn't spell out the fee being paid for a service or an RFP or RFQ process inviting others to bid. He supported Mr. Edwards' suggestion to take more time to get it right.

Mr. Harkins was asked if he would like to amend his original motion. He said he wanted to keep the motion as stated. The motion was approved by a vote of 4-3. (Bennett, Edwards and Grant were opposed).

12) Executive Session

Mayor Bennett stated the need for an Executive Session for discussion of negotiations incident to the proposed sale, lease or purchase of property related to parcels on Palmetto Bay Road.

At 7:27 p.m. Mr. Edwards moved to go into Executive Session for the reasons stated by the Mayor. McCann seconded. The motion was unanimously approved by a vote of 7-0.

Mayor Bennett called the meeting back to order at 7:48 p.m. and stated there was no action taken during executive session and stated there was no business to take up as a result of Executive Session.

14) Adjournment

Mayor Bennett adjourned the meeting at 7:49 p.m.

Vicki L. Pfannenschmidt
Executive Assistant/Town Clerk

Approved: 12/01/2015

David Bennett, Mayor

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-in-Equity

Marvin H. Dukes, III

Case No. 2016-CP-07-2483

Peter Michael Buonaiuto, Sr., individually, and on behalf of all others similarly situated..... Appellant,

v.

The Town of Hilton Head Island.....Respondent.

NOTICE OF APPEAL

Peter Michael Buonaiuto, Sr., individually, and on behalf of all others similarly situated appeals from the Beaufort County Master-in-Equity, specifically the order in this matter filed on March 23, 2020 (a copy of which is provided to the Court of Appeals with this notice) that granted summary judgment in favor of Respondent. Appellant received written notice of the entry of these orders on the date each order was filed.

April 22, 2020

Respectfully submitted,

/s/ Taylor Smith
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

Other Counsel of Record:

Curtis L. Coltrane
S.C. Bar No. 1344
Coltrane and Wilkins, LLC
Post Office Box 6808
Hilton Head Island, South Carolina 29938
(843) 785-5551
Attorney for Respondent

Sec. 4-12-10. - Authority.

- (a) This chapter is enacted pursuant to the authority of Title 6, Code of Laws, of South Carolina (Supp. 1997), including, without limitation, S.C. Code Ann. Section 6-4-10(3), which provides in part that the funds received by a municipality collecting more than fifty thousand dollars (\$50,000.00) from a local accommodations tax must be allocated with thirty (30) percent of the balance submitted to a special fund and used for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity. The municipality shall select an organization to manage and direct the expenditure of the thirty (30) percent of the special fund for tourism promotion. This designated organization must be a non-profit organization and have an existing, ongoing tourism promotion program.

(Ord. No. 98-03, § 1, 2-3-98)

Sec. 4-12-20. - Management of the special fund for tourism promotion.

- (a) The visitor and convention bureau of the Hilton Head Island chamber of commerce shall be the designated non-profit organization to manage and direct the expenditures of the thirty (30) percent special fund as designated by S.C. Code Ann. section 6-4-10(3) (Supp. 1997) for tourism promotion.
- (b) Immediately upon receipt to the special fund, the town shall distribute the tourism promotion funds to the visitor and convention bureau of the Hilton Head Island chamber of commerce.
- (c) On or by April 1 of each calendar year, the visitor and convention bureau shall submit to the town's accommodations tax advisory committee for review its proposed budget. At the end of each fiscal year, the visitor and convention bureau shall submit to the town an accounting of the expenditures.
- (d) On or by May 15 of each calendar year, the town's accommodations tax advisory committee shall submit a formal recommendation for the visitor and convention bureau's proposed budget to the town council for approval.

(Ord. No. 98-03, § 1, 2-3-98; Ord. No. 99-07, § 1, 3-16-99)

Sec. 11-1-112. - Purpose.

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.

(Ord. No. 83-7, 10-3-83)

Sec. 11-1-113. - Application.

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. It shall apply to every expenditure of public funds irrespective of their source. Nothing in this chapter shall prevent any town, department or agency from complying with the terms and conditions of any grant, gift or bequest which are otherwise consistent with law.

(Ord. No. 83-7, 10-3-83)

Sec. 11-1-121. - Definitions.

For the purpose of this chapter, the following terms shall have the meanings given to them herein:

- (1) *Architect, engineer and land surveying services*: Those professional services within the scope of the practice of architecture, professional engineering, or land surveying.
- (2) *Business*: Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
- (3) *Change order (unilateral)*: A written order signed and unilaterally issued by the town manager, directing the contractor to make changes which the "changes" clause of the contract authorizes the town manager to order without the consent of the contractor.
- (4) *Construction*: The process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings or real property.
- (5) *Contract*: All types of town agreements, regardless of what they may be called, for the procurement of supplies, services, or construction.
- (6) *Contract modification*: Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.
- (7) *Contractor*: Any person having a contract with the town.
- (8) *Cooperative purchasing*: Procurement conducted by, or on behalf of, more than one (1) public procurement unit.
- (9) *Cost-reimbursement contract*: A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this chapter, and a fee, if any.
- (10) *Data*: Recorded information, regardless of form or characteristic.

- (11) *Designee*: A duly authorized representative of a person holding a superior position.
- (12) *Employee*: An individual drawing a salary from this town, whether elected or not, and any noncompensated individual performing personal services for the town.
- (13) *Established catalogue price*: The price included in a catalogue, price list, schedule, or other form that:
 - a. Is regularly maintained by a manufacturer or contractor;
 - b. Is either published or otherwise available for inspection by customers; and
 - c. States prices at which sales are currently or were last made to a significant number of any category of buyer or buyers constituting the general buying public for the supplies or services involved.
- (14) *Excess supplies*: Any supplies other than expendable supplies having a remaining useful life but which are no longer required by the using agency in possession of the supplies.
- (15) *Expendable supplies*: All tangible supplies other than nonexpendable supplies.
- (16) *Governmental body*: Any department or agency of this town.
- (17) *Grant*: The furnishing of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.
- (18) *Invitation for bids*: All documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (19) *Nonexpendable supplies*: All tangible supplies having an original acquisition cost of over one hundred dollars (\$100.00) per unit and a probable useful life of more than one (1) year.
- (20) *Person*: Any business, individual, union, committee, club, other organization, or group of individuals.
- (21) *Procurement*: Buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
- (22) *Procurement officer*: Any person duly authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized representative acting within the limits of authority.
- (23) *Professional services*: Those professional services including, but not limited to, being within the scope of the practice of architecture, professional engineering, land surveying, auditors, consultants, legal counsel, medical services, actuary services, and lobbyists.
- (24) *Public procurement unit*: Any county, city, town, and any other subdivision of the state or public agency of any such subdivision, public authority, educational, health, or other institution, any other entity which expends public funds for procurement of supplies, services, or construction.
- (25) *Purchase description*: The words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of, the solicitation.
- (26) *Regulation*: A statement having general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy, or describing organization, procedure, or practice requirements, which has been promulgated in accordance with existing procedure.
- (27) *Request for proposals*: Same as "invitations for bids."

- (28) *Responsible bidder or offeror*: A person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- (29) *Responsive bidder*: A person who has submitted a bid which conforms in all material respects to the invitation for bids.
- (30) *Service*: The furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.
- (31) *Specifications*: Any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspection, testing, or preparing a supply, service, or construction item for delivery.
- (32) *Subcontractor*: Any person having a contract with the general contractor on any town project.
- (33) *Supplies*: All property including, but not limited to, equipment, materials, printing, insurance, information technology equipment and software packages, and leases of real property, excluding land or a permanent interest in land.
- (34) *Surplus supplies*: Any supplies other than expendable supplies no longer having any use to the town. This includes obsolete supplies, scrap materials, and nonexpendable supplies that have completed their useful life cycle.
- (35) *Town manager*: The person holding the position created in this Code as the manager of the town.
- (36) *Using agency*: Any governmental body of this town which utilizes any supplies, services, or construction procured under this chapter.

(Ord. No. 83-7, 10-3-83; Ord. No. 2007-24, § 1(Att. A), 11-20-07)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Mar 16 2021

APPEAL FROM BEAUFORT COUNTY
Master-in-Equity

SC Court of Appeals

Marvin H. Dukes, III

Case No. 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.

CERTIFICATION OF COUNSEL REGARDING MATTER
INCLUDED IN THE RECORD ON APPEAL

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

/s/ Taylor Smith
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

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