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STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT NO.: 2019-CP-26-01732 APPELLATE NO.: 2019-____
City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, Plaintiff, vs. Horry County, Defendant.	**HORRY COUNTY'S MOTION TO STAY OR SUPERSEDEAS DURING PENDENCY OF APPEAL**

Horry County, pursuant to Rule 241(c), SCACR, and Rule 62(c), SCRCP, moves to stay the injunction[1] preventing the County from collecting the 1.5 percent Hospitality Fee while the County's appeal is pending.

Introduction

When the Court granted the City's motion for preliminary injunction, the Court required the County to stop collecting the Hospitality Fee that the County had been collecting for over twenty-two years. Granting the City this drastic remedy upset the *status quo ante* that had been in effect for over two decades, in a case that the City admits presents a novel legal question. Equally as troublesome, the Court entered the

[1] The Court imposed the injunction on Horry County in its Orders dated June 21, 2019 and July 10, 2019, and the County appealed from the circuit court's Orders on July 11, 2019.

injunction without requiring the City to provide any security for the injunction if it is reversed on appeal.

The County sought immediate appellate review of the injunction, filing a notice of appeal on July 11, 2019. The County's notice of appeal does not automatically stay the injunction. This Court, however, has the power to stay the injunction while the appeal is pending. And the Court should do so to prevent irreparable harm to the County and to avoid a miscarriage of justice.

Factual Background

The County adopted the Hospitality Fee.

In March 1996, voters in Horry County rejected a referendum to adopt a local option sales tax to finance a proposed comprehensive road plan. Shortly after this vote, Governor David Beasley directed the chairman of the Department of Transportation to form a committee to propose a plan for the short-term and long-term transportation needs in the County. That committee issued its report, known as the RIDE Report, in September 1996.

To implement the recommendations in the RIDE Report, the County adopted a uniform service charge, known as the Hospitality Fee, on October 15, 1996. As relevant here, the Hospitality Fee imposed a 1.5 percent fee on lodging, admissions to places of amusement, and prepared food and beverage throughout the County, in both incorporated and unincorporated areas beginning on January 1, 1997.

In addition to adopting the Hospitality Fee, Ordinance 105-96 provided that the funds from this 1.5 percent fee would "be used to implement a comprehensive

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road plan adopted by the County in concert with the municipalities of the County." This ordinance also stated that the Hospitality Fee would expire after twenty years—on January 1, 2017.

Around the time the County was considering Ordinance 105-96, multiple municipalities—including the City—adopted resolutions supporting the Hospitality Fee. These ordinances "urge[d]" the County to adopt the Hospitality Fee.

Along with these municipalities, other governmental entities adopted similar resolutions. Both the Horry County Board of Education and the South Carolina Department of Transportation also expressed support for the County's plan to implement the RIDE Report.

The County amended Ordinance 105-96.

Over the next two decades, the County amended Ordinance 105-96 on multiple occasions, three of which are relevant here.[2]

As initially enacted, Ordinance 105-96 contained a sunset provision, providing that the Hospitality Fee would expire on January 1, 2017. All three relevant amendments to Ordinance 105-96 extended the sunset provision beyond January 1, 2017. *First*, in April 2004, the County enacted Ordinance 11-04, which "extended [the Hospitality Fee] for an additional period not to exceed five (5) years," until January 1, 2022. *Second*, in 2016, the County enacted Ordinance 93-16, which reaffirmed the

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[2] Some amendments have changed the amount of the Hospitality Fee collected in unincorporated areas and added a fee on rental cars, but those changes are not pertinent to the City's challenge to the Hospitality Fee.

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five-year extension of the Hospitality Fee from Ordinance 11-04. *Third*, in 2017, the County removed the sunset provision from the Hospitality Fee altogether.

The City never voiced any objection to any of the three amendments to the sunset provision of the Hospitality Fee when they were adopted. The City said nothing when the County extended the sunset provision of the Hospitality Fee for the first time in 2004. The City said nothing when the County further extended the sunset provision in 2016, and the City again said nothing when the County eliminated the sunset provision completely in 2017. Ultimately, on March 20, 2019, with the filing of this lawsuit, the City alleged the County did not have the authority to extend the sunset provision of the Hospitality Fee without its consent, even though the County had done so on three occasions, years earlier.[3]

Not long after the last of the three amendments to the Hospitality Fee, the County adopted two resolutions declaring its intention for how part of the 1.5 percent part of the Hospitality Fee would be used: construction of I-73. The County pledged up to $18 million annually (and then even more money, depending on the growth of that revenue) to build this new interstate. Other revenue from the Hospitality Fee would be used as permitted by S.C. Code §§ 6-1-530 and 6-1-730.

[3] The lawsuit was filed only about one month after the County paid off the State Infrastructure Bank loans referenced in Ordinance 11-04. The County used the Hospitality Fee revenue from 2017 through early 2019 to pay off these loans—money that the City now asserts the County should not have been collecting, despite the fact that the City claims it consented to the road projects paid for by those loans.

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The City adopted local accommodations and hospitality fees.

In March 2019, just prior to filing this lawsuit, the City adopted two new fees. The City adopted a 3 percent local accommodations fee, the maximum amount a county and a municipality may cumulatively collect under § 6-1-540. The City also adopted a 2 percent hospitality fee, again the maximum a county and a municipality may cumulatively collect under § 6-1-740.

Less than two weeks later, the City sued the County, claiming the County could not extend the sunset provision of the Hospitality Fee without its consent. As the backbone for its position, the City alleged its consent (as well as the consent of other municipalities in the County) was necessary for the County to collect the Hospitality Fee. The City takes this position, even though it cites to no legal proposition using the word "consent." The City claims it provided its consent to the County's enactment of the Hospitality Fee, when the City adopted its resolution "urg[ing]" the County to adopt the Hospitality Fee. The City argues that its consent to the Hospitality Fee expired with the initial sunset of the Hospitality Fee, which, pursuant to Ordinance 105-96, was on January 1, 2017.

The circuit court enjoins the County's Hospitality Fee.

After it filed its proposed class complaint, the City moved for a preliminary injunction, as did the County. The parties filed multiple briefs and dozens of exhibits. At the circuit court's direction, they also each submitted a confidential memorandum to the court ahead of the hearing on the preliminary injunction motions.

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The court heard the motions on June 14, 2019. Later that day, the Court informed the parties via email that it would grant the City's motion and deny the County's. The circuit court entered its order on June 21. The County moved to reconsider on June 25.

While the motion to reconsider was pending, the City moved to hold the County in contempt. The City claimed the County was violating the injunction by continuing to collect the Hospitality Fee in municipalities other than the City.[4]

The circuit court denied both the motion to reconsider and the motion to hold the County in contempt. In denying both motions, the circuit court clarified that the injunction applied to Atlantic Beach, Aynor, Conway, Loris, North Myrtle Beach, and Surfside Beach. The order is set to take effect in those municipalities on August 10, 2019.

The County appealed the injunction order pursuant to S.C. Code § 14-3-330(4) on July 11, 2019. In addition to asking this Court to stay the injunction while the appeal is pending, the County is also asking the circuit court to stay the entire case, given that an appellate court's decision might effectively resolve the litigation.

Legal Standard

An order granting an injunction is not automatically stayed by noticing an appeal. Rule 241(b)(8), SCACR; *see also* Rule 62(a), SCRCP. Nevertheless, a "party

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[4] Other motions remain pending, but none of those are essential to deciding the legal issues on this appeal. These motions include the County's motion for leave to amend its counterclaims, the City's motion to dismiss the counterclaims, the County's motion for judgment on the pleadings regarding the class action allegations, and the County Treasurer's motion to intervene.

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may move for an order imposing a supersedeas" to stay an injunction pending an appeal. Rule 241(c), SCACR; *see also* Rule 62(c), SCRCP. Unless "extraordinary circumstances make it impracticable," this relief should be sought first from the court that entered the injunction. Rule 241(d)(1), SCACR.

To supersede an injunction pending an appeal, the party seeking to stay the injunction must clearly show that allowing the injunction to take effect would cause "an irreparable injury *or* the miscarriage of justice." *Kuhn v. Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912) (emphasis added).

Argument

I. The County faces an irreparable injury and a miscarriage of justice from the lack of security.

Sometimes, a circuit court's decision to grant a preliminary injunction is reversed. *See, e.g.*, *Atwood Agency v. Black*, 374 S.C. 68, 646 S.E.2d 882 (2007); *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E.2d 905 (2004). To protect a party who was wrongly enjoined, Rule 65(c) requires a security from the party who obtains the injunction, unless that party is the State or an officer or agency of the State. The rule states that "no restraining order or temporary injunction *shall issue except upon the giving of security by the applicant*, in such sums as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65(c), SCRCP (emphasis added).

The Court has enjoined the County from collecting tens of millions of dollars annually by preventing it from collecting the Hospitality Fee. The Court has done so

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without requiring the City to post any security. Despite the County's extensive arguments on this issue, the Court has not provided any legal reason for deviating from the security requirements of Rule 65(c). In its most recent order, the Court stated it "believes that a bond as required by Rule 65 is not necessary and/or required for these parties." July 10, 2019 Order, at 2.

Respectfully, the circuit court does not have the discretion to decide whether a bond is necessary. Rule 65(c) requires it, and to issue an injunction without requiring security, is to ignore the plain language of Rule 65(c). *See Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) ("If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.").

The City is not exempt from the bond requirements of Rule 65(c). Rule 65(c) exempts the State, State officers, and State agencies from the bond requirement. The City has never—and for good reason—described itself as a State officer, who is a natural person, *see* S.C. Const. art. VI, or as a State agency, which is an "executive or regulatory body" of the State, *see S.C. Pub. Interest Found. v. Courson*, 420 S.C. 120, 124, 801 S.E.2d 185, 187 (Ct. App. 2017).

Thus, the only way the City could be exempt from the security requirement of Rule 65(c) would be if it fell within the first exemption and was "the State." Quite obviously, the City is not the State of South Carolina. As the City observed at the hearing on the motion to reconsider, the City, as a political subdivision, may not exist "independent" of the State. *Hibernian Soc. v. Thomas*, 282 S.C. 465, 472, 319 S.E.2d

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339, 343 (Ct. App. 1984). While dependent entities, political subdivisions are still distinct entities. And they are not necessarily entitled to the same legal protections as the State. *Cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (explaining that cities cannot claim a state's sovereign immunity under the Eleventh Amendment).

Had the drafters of Rule 65(c) wanted to exclude political subdivisions from the security requirement, they could have easily done so by adding "political subdivisions" to the list of the State, its agencies, and its officers. But the drafters did not do that, and the Court must apply the rule as adopted.

The Court's failure to adhere to the plain language of Rule 65(c) and to require security for the injunction leaves the County facing irreparable harm and a miscarriage of justice. With the injunction in place, the County will stop collecting tens of millions of dollars in revenue within the municipalities on an annual basis. That is, by virtually any measure, a substantial amount of money.

If the appellate court reverses the injunction, the County will be entitled to recover the revenue that it was prohibited from collecting while the injunction was in place. No one knows what the City (or any other municipality) may have done by that time with the revenue it (or they) had collected while the injunction was in place. The County should not be forced to hope that the municipalities will have money to pay damages, nor should it have to wait for the municipalities to impose new taxes to raise that money (assuming the municipalities could indeed raise the money in new taxes to pay damages). That is the reason for the security requirement of Rule 65(c),

and the Court's refusal to require the City to post security for the injunction leaves the County facing irreparable harm and a miscarriage of justice.

When money cannot be recouped and is lost forever, there is irreparable harm. *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) ("If expenditures cannot be recouped, the resulting loss may be irreparable."). Given the amount of money involved here and the unknowns regarding what may happen to the money the County would have collected had the injunction not been issued, this is a case in which the loss of money is irreparable. Furthermore, by ignoring the plain language of Rule 65(c), the injunction, as issued, has resulted in a miscarriage of justice, leaving the County with no certain means of being made whole, should an appellate court reverse the injunction.

The Court can ensure the County does not suffer irreparable harm and a miscarriage of justice by staying the injunction while the appeal is pending.

II. The injunction should be stayed to preserve the *status quo ante* while the appellate courts resolve the novel questions raised in this case.

Failing to follow established law is the ultimate miscarriage of justice. Unfortunately, that is what has happened here, as the injunction upends the *status quo ante* while this litigation is pending.

Our appellate courts have repeatedly instructed that a "preliminary injunction should issue *only* if necessary to preserve the status quo ante." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010) (emphasis added); *see also Allegro, Inc. v. Scully*, 400 S.C. 33, 45, 733 S.E.2d 114, 121

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(Ct. App. 2012); *Hook Point, LLC v. Branch Banking & Tr. Co.*, 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012).

The injunction here does not protect the *status quo ante*. The injunction upsets it. Here, the injunction requires the County to stop collecting a fee that it has been collecting for over twenty-two years. In other words, the injunction changes the *status quo ante* and puts a new fee-collection regime in place, as the City began collecting its fees on July 1, 2019 and the County had to stop collecting the Hospitality Fee. Our appellate courts have reversed injunctions that "do the opposite" of preserving the *status quo ante*. *Consol. Tires, Inc. v. Hamlett*, No. 2011-UP-308, 2011 WL 11734681, at *1 (S.C. Ct. App. June 17, 2011).[5] Further, our appellate courts have observed time and time again that the only purpose for granting a temporary injunction is to preserve the *status quo ante*. *See*, *e.g.*, *Cty. Council of Charleston v. Felkel*, 244 S.C. 480, 483–84, 137 S.E.2d 577, 578 (1964) ("The sole object of a temporary injunction is to preserve the subject of the controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during the litigation ….").

The City has argued that the "true" *status quo ante* is the "last uncontested status" between the litigants. Accepting the City's formulation as the law in this State, the result is still the same: The *status quo ante* should permit the County to

[5] This opinion is admittedly unpublished, so it has no precedential value. *See* Rule 268(d), SCACR. Nevertheless, it demonstrates how appellate courts have approached injunctions that do not preserve the *status quo ante*, even if this particular decision is not binding on a future court.

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continue collecting the Hospitality Fee while this appeal is resolved. That is because the last moment when the City and the County agreed on the status of the Hospitality Fee was December 31, 2016—the day before the Hospitality Fee was set to expire, based on the original sunset provision in Ordinance 105-96. On that date, both the City and the County agreed that the County could collect the Hospitality Fee.

Ever since the next day (January 1, 2017),[6] the City and County have disagreed about whether the County could collect the Hospitality Fee. Indeed, that disagreement is the very reason this litigation exists.

The issue in this case requires particularly careful consideration. As the City acknowledged, *see* Reply Mem. in Supp. Of Mot. for Prelim. Inj. 16 n.11, no appellate court has addressed the central question raised in this lawsuit: whether a municipality's consent is required for a county to extend a fee imposed before Act 138 took effect. Rather than have the City and County both move forward with brand new fee-collection plans that might be in effect for only a limited time while this case is on appeal, the more reasoned approach is to stay the injunction while the appellate courts consider the appeal. Then, if the City wins, the injunction can go into effect. On the other hand, if the County prevails, no one will have wasted (any more) time, energy, or money on stopping and starting to collect any fees.

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6 This assumes, of course, that the City actually always believed that the County could not extend the Hospitality Fee. Given that the City did not bring this lawsuit until March 2019, the City actually does not appear to have developed its current position on the County extending the Hospitality Fee until well after January 1, 2017.

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All of this can be achieved without harm to the City. *Cf.* Rule 241(d)(3), SCACR (providing that the grant of a supersedeas may be conditioned on a bond or other undertaking that the court "may deem appropriate"). During the pendency of the appeal, the County can be required to put the 1.5 percent collected within the municipalities in a segregated account. If the City prevails in this litigation, then that money may be transferred to those municipalities that have enacted ordinances to collect local accommodations and hospitality fees, which will put them in the same position as if they had been collecting new fees since the injunction was originally set to take effect.

III. The injunction should be stayed because the law plainly does not require the City's consent for County to enact the Hospitality Fee.

If the injunction is allowed to stand, there will be a miscarriage of justice because the law plainly does not require the City's consent for the County to collect the Hospitality Fee.

The City generically refers to the State Constitution, to the Home Rule Doctrine, and to Title 4 of the South Carolina Code of Laws in support of its argument that its consent is necessary for the County to collect the Hospitality Fee. *See* June 14, 2019 Hr'g Tr. pp. 3, 7. The circuit court has accepted the City's arguments at face value, without looking behind the curtain. To be clear, the position advanced by the City and accepted by the Court is found nowhere in the State Constitution, nowhere in the Home Rule Doctrine (which refers to the relationship between the State and local governments, *see Cty. of Florence v. W. Florence Fire Dist.*, 422 S.C. 316, 321, 811 S.E.2d 770, 773 (2018)), and nowhere in Title 4 of the South Carolina Code of

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Laws. One has to do nothing more than look at the Court's order granting the preliminary injunction, which was prepared by the City. Nowhere in that order does the Court cite one legal authority for the proposition that the "consent" of a city is necessary for an ordinance enacted by a county. The City's theory in this case is a novel one. In more candid moments, the City has admitted the same. *See* Transcript of Record from June 14, 2019, p. 8; Reply Mem. in Supp. Of Mot. for Prelim. Inj. 16 n.11.

To attempt to bolster its position, the City has argued that the County's initial Ordinance (105-96) adopting the Hospitality Fee and the City's resolution urging the County to do so evidences that the City's consent is required. Again, nowhere do these documents say what the City argues.

The Court has ignored the plain language of the relevant legal authority and the enactments of the County and City in issuing the injunction. Because the Court has done so, the injunction, enjoining the County from collecting the Hospitality Fee that it has collected for over twenty years, is a miscarriage of justice and cannot stand.

Conclusion

The Court should stay in the injunction while the appeal is pending.

Respectfully submitted:

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