THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

Case No. 2019-CP-26-01732

City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, ... Respondents,

v.

Horry County, ... Appellant.

REPLY IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS

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Horry County, pursuant to Rules 240(f) and 241(c), SCACR, submits this Reply in Support of its Petition for Writ of Supersedeas.

INTRODUCTION

After the circuit court enjoined the County from collecting the Hospitality Fee that had been in place for more than two decades and left unsecured more than $15 million in annual revenue from the Hospitality Fee, the County appealed and petitioned for a writ of supersedeas to stay the injunction pending the appeal. That Petition is grounded in black-letter law. For example, the Petition relied on Rule 65(c), which expressly exempts only "the State or an officer or agency thereof" from the requirement to provide security for an injunction. Rule 65(c), SCRCP. The Petition also pointed to our Supreme Court's repeated instruction that an injunction may be entered "*only* if necessary to preserve the status quo ante." *Hook Point, LLC v. Branch Banking & Tr. Co.*, 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012) (emphasis added). And the Petition observed that no constitutional or statutory provision explicitly requires the City's consent for the County to adopt or extend the Hospitality Fee, while one statute—S.C. Code § 6-1-330(A)—specifically permits the County to do so.

Rather than engage solely with these legal arguments, the City's Return to the Petition resorts to name-calling and adjectives to (mis)characterize the County's position and wrongly accuse the County of misconduct. The County, instead of stooping to that level and allowing this appeal to devolve into a metaphorical mudslinging contest, seeks in its Reply to dial down the rhetoric and focus on the legal issues raised by the Petition.

Before diving into that analysis, it is worth noting what the Petition is and what it is not. The Petition seeks immediate relief from the injunction because of defects in that injunction that are unlikely to be cured by a decision on the merits. The Petition is not an attempt to argue the merits fully. The time for that will come later. For now, the question before this Court is whether the injunction should stay in place while the appeal is pending.

It should not. The City casts the County's Petition as focused "primarily" on "procedural arguments," seemingly trying to minimize the circuit court's errors in imposing the injunction. Return 2. No matter how the circuit court's errors are characterized, the errors are not minor. They represent significant departures from the law. The circuit court did not require the City to provide adequate security for the injunction as required by Rule 65(c), and the circuit court ignored the law that injunctions should be issued "only" to preserve the *status quo ante*. If the injunction is not stayed immediately, these errors cannot be fixed by a decision on the merits alone.

ARGUMENT

I. The Court can and should consider the Petition.

The Court can quickly dispose of the City's brief arguments that the Court should not even consider the Petition.

First, the fact that the County initially sought relief from the circuit court does not undermine the need for the writ, as the City asserts. *See* Return 1. Rule 241(d) sets forth the procedure that must be followed to obtain supersedeas relief. That rule states that "[e]xcept where *extraordinary circumstances* make it impracticable, an

application for an order lifting the automatic stay or for supersedeas *must first be made to the lower court* or administrative tribunal which entered the order or decision on appeal." Rule 241(d)(1), SCACR (emphasis added).

Rule 241(d) places the petitioner between a proverbial rock and a hard place. The petitioner can either follow the mandatory language in Rule 241(d) and present his petition to the court that entered the injunction or he can take his petition straight to the appellate court, claiming "extraordinary circumstances" exist. The problem with the second option is no case law defines or interprets the phrase "extraordinary circumstances." Clearly, under the plain language of this rule, the prudent course is to go first to the court that entered the injunction before asking the appellate court for supersedeas relief. That is what the County did here.

Had the County come directly to this Court claiming "extraordinary circumstances," the City would have almost certainly argued that the County should have gone to the circuit court first because the circumstances were not extraordinary. That the County went first to the circuit court demonstrates simply that the County followed the mandatory procedures set forth in Rule 241, nothing more.

Second, the County cited the correct standard of review a court must employ in determining whether to grant supersedeas relief. *See* Return 10–11. The City contends the appropriate standard is set forth in Rule 241(d)(4)(C) which states that the petition shall contain "a showing that an application for [supersedeas relief] was made to the lower court . . . and was unjustifiably denied." Rule 241(d)(4)(C), SCACR.

Our appellate courts have not explained what the phrase "unjustifiably denied" means. *See* Rule 241(d)(4)(C), SCACR.

In its Petition, the County cited the correct standard of review when it cited *Kuhn v. Electric Manufacturing & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912), which explained a writ should be issued to avoid "an irreparable injury or the miscarriage of justice." Although *Kuhn* is a decision from one Justice, it is the exact standard that the full court held applies in *Andrews v. Sumter Commercial & Real Estate Co.*, 87 S.C. 301, 69 S.E. 604, 606 (1910). Therefore, when the County articulated the standard of review in accord with *Kuhn* and *Andrews*, the County cited the correct standard this Court must employ in ruling on the Petition.

Third, Rule 241(c)(2), SCACR, merely requires that an appellate court "consider" whether a writ is necessary to preserve its jurisdiction. *See* Return 11, 14. It is not an element that a petitioner must prove to obtain a writ.

Fourth, the City mistakenly invokes Rule 241(d)(1)(C). *See* Return 14. No such rule exists, so the County could not have violated it.

II. The injunction violates Rule 65(c).

A. The City is not exempt from the security requirement.

The City maintains that it is exempt from Rule 65(c)'s security requirement because "the State" is exempt and the City is a political subdivision of the State. Its logic is that the State is exempt because it can "raise revenue through taxation" to pay any damages, which the City can do too. Return 25–26.

Although it does not come out and say it directly, the City is asking the Court to ignore the plain language of Rule 65(c) and to instead divine some underlying purpose that would implicitly exempt the City through a novel interpretation of the Rule. Of course, the Court cannot do that. Courts must follow the plain language of a rule. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *see also Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."). "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003).

That is the case here. The plain language of Rule 65(c) is unambiguous: Only the State, its agencies, and its officers are exempt from the security requirement. The language plainly does not exempt political subdivisions from the security requirements of Rule 65(c), and the Court should not and cannot ignore this plain language. The City therefore must provide security for the injunction.

B. The belatedly imposed security is not adequate.

The City must provide sufficient security for "the payment of such costs and damages as may be incurred or suffered by" the County if the injunction "is found to have been wrongfully enjoined or restrained." Rule 65(c), SCRCP. The County never argued Rule 65(c) necessitates a "dollar-for-dollar security bond," Return 15, but the rule does require that the security be sufficient to compensate the County for the

damages sustained while the injunction is in place. The security required by the circuit court is insufficient, as the injunction is unsecured in excess of $15 million annually.

The City offers a plethora of reasons why leaving that much unsecured is acceptable, but none is compelling. *See* Return 26–28. *First*, if the County segregates funds from its Hospitality Fee, that protects all municipalities because the revenue will have been collected countywide. The City collects its revenue only within its borders, so escrowing that money will not cover all of the revenue the County has been enjoined from collecting. *See* Petition 11–12 (providing the breakdown for the amount of this shortfall).

Second, the County has pointed to an abuse of discretion in the circuit court's injunction: the injunction is unsecured in excess of $15 million annually. Leaving $15 or even $15,000 unsecured in a case this size is one thing. But leaving eight figures unsecured is something else entirely. Wherever the line between $15,000 and $15 million can be a question for another day. All that matters here is that the circuit court's injunction leaves more than $15 million annually unsecured, and thus, the security is not adequate to do what it is required to do pursuant to Rule 65(c)—pay for the damages suffered by the County if the injunction is reversed on appeal.

Third, the County never said the security (however belatedly imposed) was nominal. But being more than nominal is not equivalent to being sufficient. Rule 65(c) and the case law interpreting it require sufficient security to cover the damages the County will sustain if the injunction is reversed on appeal. With $15 million in annual revenue unsecured, the security is insufficient.

Fourth, this Court can of course consider the expanded injunction from the July 10 order that will go into effect on August 10 that applies to all of the municipalities in the County. Not taking this aspect of the injunction into account now would be a waste of judicial resources, as the parties would be back here in a matter of days raising this very issue.

It is worth pausing here to consider the July 10 order a little further. That order held the injunction would apply to the other municipalities in the County. Unprompted by either party, it also held that the countywide injunction would not take effect until a month later on August 10. (App. 18–19.) Part of obtaining a preliminary injunction is a showing of irreparable harm. *See Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). That the circuit court would allow the County to continue collecting the Hospitality Fee for a month in these other municipalities before the injunction takes effect shows that any supposed harm is not irreparable. *Cf. Nichol v DePuy Spine, Inc.*, No. 2014-CP-23-4895, 2013 WL 10573017, at *2 (S.C. Com. Pl. Feb. 13, 2013) (Hill, J.) (observing that a preliminary injunction is typically necessary in "urgent situations where irreversible damage will result unless the challenged action is immediately halted"). Therefore, the injunction should have never been entered in the first place.

Fifth, the City's attempt to circle back to its "we can raise taxes" argument is unavailing. No case in this State has ever held that a political subdivision can raise taxes in lieu of providing the security required by Rule 65(c).

As a fallback to all of these arguments, the City notes that more security is now in place than required by the circuit court's July 17 order, (App. 21), as North Myrtle Beach, Conway, and Surfside Beach have adopted (or, the City says, intend to adopt) resolutions escrowing revenue from their new local accommodations and hospitality taxes, *see* Return 28–29. This argument, however, has multiple shortcomings. For one, neither North Myrtle Beach, Conway, nor Surfside Beach are required to escrow this money by court order, so nothing is stopping them from repealing those ordinances (or simply not adopting them at all) the day after the Court rules on the Petition. For another, even the City acknowledges that this new security still leaves the injunction unsecured in the amount of approximately $8 million annually. Although $8 million is less than $15 million, it still is an unacceptably (and unnecessarily) large amount for which no security exists on an annual basis.

On a more fundamental level, this argument about new security raises the question of why North Myrtle Beach, Conway, and Surfside Beach are escrowing this revenue at all. They are not parties to this litigation, so they are not subject to the jurisdiction of this Court or to the jurisdiction of the circuit court on remand. North Myrtle Beach, Conway, and Surfside Beach cannot be required to pay any damages stemming from the injunction, if it is determined to be wrongfully entered. That burden is squarely and solely on Myrtle Beach. Thus, these three municipalities' attempt to escrow revenue appears to be a litigation tactic designed to avoid having the injunction reversed for failing to comply with Rule 65(c).

As yet another fallback argument, the City insists that this Court may require the City to post a $28 million bond, citing a Rule of Civil Procedure, not an Appellate Court Rule. *See* Return 30. Even if the City is correct that this Court may do so, such a bond (which would cover only one year's worth of damages to the County) would not correct the other flaws with the injunction, so it would not make the writ unnecessary, nor would it save the injunction from being reversed.

III. The injunction violates the Supreme Court's repeated holdings on preliminary injunctions serving only to preserve the *status quo ante.*

Time and again, the Supreme Court has held that the "only" reason to grant a preliminary injunction is to preserve the *status quo ante*. *See, e.g., Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 768 (2018); *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010).

The City never expressly acknowledges this binding case law. *See* Return 30–35. Unsurprisingly so. The injunction changes the *status quo ante*, whether that is viewed as one that had existed for more than twenty-two years (from when the Hospitality Fee initially took effect) or more than two years (from after the original sunset date passed). Either way, the *status quo ante* changed: The County was able to collect the Hospitality Fee, but now it is not. And that violates clear Supreme Court precedent.

As an aside here, consider how the City attempted to reframe the time period from over twenty-two years to a little over two years. *See* Return 2 n.1. The City notes that its lawsuit "was brought *just* two years and almost three months" after the original sunset date of the Hospitality Fee. Return 2 n.1 (emphasis added). If the City were

suffering some irreparable harm from the County continuing to collect the Hospitality Fee after the original sunset date passed (as it must have been to obtain a preliminary injunction, *see Scratch Golf Co.*, 361 S.C. at 121, 603 S.E.2d at 908), then the City's delay of "two years and almost three months" is inexplicable. And, again, it is another reason why the injunction should have never been issued in the first place.

Back to the *status quo ante* issue. Implicitly recognizing what our Supreme Court has said, the City contends that the *status quo ante* is actually the "last uncontested status" between the parties. Return 32. As an initial matter, that is not the law in this State. *See Cty. Council of Charleston v. Felkel*, 244 S.C. 480, 483–84, 137 S.E.2d 577, 578 (1964) (explaining that the "sole object of a temporary injunction is to preserve the subject of controversy in the condition which it is *at the time of the Order*" (emphasis added)).

But even if it were, the City would still be wrong. The last uncontested status was not January 1, 2017. *See* Return 33. On that date, the County believed that it was able to continue collecting the Hospitality Fee, based on the extension and ultimate removal of the sunset date. (*See* App. 174, 183, 710). The City, on the other hand, thought that the Hospitality Fee had expired and could not be collected. (At least theoretically the City thought that, under its theory of the case. It has never explained why, if it did hold this view on January 1, 2017, it waited those "two years and almost three months" to file suit.) Thus, on January 1, 2017, the parties contested the issue at the core of this case.

The last date on which the parties agreed about the status of the Hospitality Fee was the previous day, on December 31, 2016—the day before the original sunset date. On that date, everyone agreed that the County could collect the Hospitality Fee. Thus, the "last uncontested status" to preserve with an injunction here is the County collecting the Hospitality Fee. So even under the City's incorrect view of the law, the injunction is still improper.

Unable to defend the injunction in the face of the Supreme Court's holdings about preserving the *status quote ante* being the "only" reason to issue a preliminary injunction, the City reaches back to old cases about municipal officials wrongly diverting public funds as justification for the injunction in this case. *See* Return 31–32 (citing *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)). Those decisions are much narrower than the City needs them to be to prevail here. They are about the "diversion of public funds," not about the imposition of a fee itself. *E.g.*, *Shillito*, 214 S.C. at 22, 51 S.E.2d at 99. Moreover, given the Supreme Court's recent jurisprudence on taxpayer standing, it is not clear that the cases on which the City relies are even still good law. *See Bodman v. State*, 403 S.C. 60, 742 S.E.2d 366 (2013); *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012); *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 669 S.E.2d 337 (2008). The City's reliance on cases like *Shillito* and *Kirk* therefore does not help it avoid the Supreme Court's holding that a preliminary injunction may be issued "only" to preserve the *status quo ante*.

IV. The City's consent was not required for the County to adopt or extend the Hospitality Fee.

Although this Petition is not the time for briefing the merits fully, the City spent much of its Return focused on the question of whether its consent was required to adopt or extend the Hospitality Fee. Thus, the County offers a more detailed analysis of the flaws in the circuit court's conclusion that the City's consent was required than might otherwise be necessary at this stage.

A. The critical question here is whether the County has the power to impose the Hospitality Fee.

As a starting point, the City's argument does not frame the issue correctly. Substantively, the issue is whether the County has the *power* to collect the Hospitality Fee, which is a uniform service charge, without the City's consent. The power to impose a uniform service charge* or to tax is solely vested in the General Assembly. *See Crow v. McAlpine*, 277 S.C. 240, 243, 285 S.E.2d 355, 357 (1981) ("The people of this State, in their sovereign capacity have, by the Constitution, entrusted the taxing power to the General Assembly . . . ."). The General Assembly *may* delegate that power to counties and municipalities. S.C. Const. art. X, § 6. The specific question here is whether the General Assembly has empowered the County to collect the Hospitality Fee, and if the

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* The Supreme Court has distinguished uniform service charges from ordinary taxes in *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992). At the same time, the Supreme Court has also recognized that, in a more general sense, any revenue-raising measure enacted by the government is a tax. *See Columbia Gaslight Co. v. Mobley*, 139 S.C. 107, 137 S.E. 211, 212 (1927); *see also Hosp. Ass'n of S.C., Inc. v. Cty. of Charleston*, 320 S.C. 219, 231, 464 S.E.2d 113, 121 (1995) (Finney, J., dissenting).

General Assembly did, whether the General Assembly required the consent of the municipalities within the County for the County to collect the Hospitality Fee.

The framework for answering this question is set forth in *S.C. State Ports Authority v. Jasper County*, 368 S.C. 388, 629 S.E.2d 624 (2006). Pursuant to this framework, there is a two-step inquiry to determine whether a county ordinance is valid. First, a county must have the *authority* to enact the ordinance. *Id.*, at 395, 629 S.E.2d at 627. Second, if the county did have that authority, the ordinance must not *conflict* with the Constitution or State law. *Id.*

1. The County is authorized to collect the Hospitality Fee.

On the first step, the County is *authorized* to collect the Hospitality Fee. The general power to impose a uniform service charge is granted to the County by the General Assembly. *See* S.C. Code § 4-9-30(5)(a) (giving counties the power "to assess . . . uniform service charges . . . and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works").

Specifically on the Hospitality Fee, the County is also authorized to collect it pursuant to S.C. Code § 6-1-330(A). The statute provides:

> A local governing body, by ordinance approved by a positive majority, *is authorized to charge and collect a service or user fee* . . . . A fee adopted or imposed by a local governing body *prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.*

Id. § 6-1-330(A) (emphasis added).

Section 6-1-330(A) "authorizes" local governing bodies to collect a service or user fee. Additionally, this statute provides that those fees adopted prior to December 31, 1996 remain "in force and effect until repealed by the enacting local governing body." *Id.*

The General Assembly's use of this particular date in § 6-1-330(A) cannot be ignored. There were only two governing bodies that imposed such fees prior to December 31, 1996: The County and the City of Charleston. (*See* App. 91–95); City of Charleston Ord. No. 1993-450, § 1. Therefore, the General Assembly necessarily could have had only these two fees in mind when it enacted § 6-1-330(A).

The County adopted the Hospitality Fee with the enactment of Ordinance 105-96 on October 15, 1996. Thus, pursuant to § 6-1-330(A), the County had the authority to adopt and collect the Hospitality Fee. Moreover, pursuant to that same section, the County can continue collecting the Hospitality Fee until it is repealed by County Council.

The statutory provisions granting the County the authority to collect the Hospitality Fee do not require the County to obtain the consent from the municipalities. This language is found nowhere in § 4-9-30(5)(a) or § 6-1-330(A). Indeed, were the City correct, § 6-1-330(A) would read very differently—something like the Hospitality Fee remains in effect only "until that fee automatically terminates when municipal consent expires."

2. Collecting the Hospitality Fee does not conflict with the Constitution or any State statute.

The only inquiry left is whether Ordinance 105-96 *conflicts* with the Constitution or State law. According to the City, "South Carolina law prohibits the imposition of a uniform service charge by county ordinance within municipal limits unless the municipality has agreed and consents, or the General Assembly expressly provides otherwise." Return 15–16. The City makes that assertion without any direct citation.

Instead, the City proceeds to list eight different provisions that supposedly support the City's position that its consent was required. *See* Return 16–18; (*see also* App. 6–7). But none of these provisions expressly supports the City's assertion or the circuit court's conclusion. Thus, the City (like the circuit court) tries to read a consent requirement into these provisions. This approach is akin to the often-criticized "penumbra" rational of decisions like *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See, e.g.*, *State v. Forrester*, 343 S.C. 637, 644 n.2, 541 S.E.2d 837, 840 n.2 (2001) ("This [penumbra] analysis has engendered much controversy over the years among constitutional scholars and the Court itself."). As the Court made clear in *Forrester*, South Carolina has not embraced such an amorphous style of interpreting the law.

As another flaw, the City and the circuit court disregard what those provisions expressly require or prohibit. For example, the general requirement to follow the law does not provide any insight on the specific question here (obviously, everyone has to follow the law). *See* S.C. Const. art. VIII, § 7; S.C. Code § 4-9-25. The circuit court never pointed to a single municipal road that the County built or any other service

the County is providing within the City. *See* S.C. Code §§ 4-9-30(a)(5); 5-7-30. The circuit court never identified a particular joint function the City and County undertook, as any such function would presumably have required some clear agreement about the sharing of powers or duties (the adoption of the Hospitality Fee, of course, was a County decision, and the City having input on the road plan is not actually sharing a government function). *See* S.C. Const. art. VIII, § 13; S.C. Code § 4-9-41(A). The circuit court never invoked any contract between the City and County that the County was violating. *See* S.C. Code §§ 4-9-40; 5-7-60. The circuit court never cited any use of the 1.5 percent piece of the Hospitality Fee for something that is not permitted or what particular "service" was being provided that the County was not allowed to provide with the Hospitality Fee revenue. *See id.* § 6-1-530 (setting froth the permissible uses for revenue from the Hospitality Fee).

The City (and the circuit court) ignored the rules of statutory construction by relying on these other statutes. That is because when "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." *Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). Here, § 6-1-330(A) is the specific statute dealing with the County's authority to collect the Hospitality Fee. That statute does not require the County to obtain municipal consent to collect the Hospitality Fee. In fact, no statute or constitutional provision prohibits the County from collecting the Hospitality Fee without the consent of the municipalities.

Plus, the idea that municipal consent is required for a county to adopt every fee or tax within a municipality is inconsistent with Act 138 of 1997 (the very act in which the General Assembly established the current framework for local accommodations and hospitality taxes). There, the General Assembly expressly permitted counties to collect up to a certain percent of local accommodations or hospitality taxes without getting municipal consent. *See* S.C. Code §§ 6-1-520(A); 6-1-720(A).

Because the County has the *authority* to collect the Hospitality Fee without municipal consent and because the continued collection of that fee by the County without municipal consent does not *conflict* with the law, the circuit court erred in the legal analysis underlying the injunction.

One final, more philosophical (yet still practical) point on this subject: Requiring consent in this situation would be illogical and antidemocratic. Mandating municipal consent here would effectively give people who live in a city or town the option to refuse to pay any county fee, thereby unfairly casting the burden of financing county projects solely on those people who live outside a city or town.

B. The County did not need municipal consent to extend or remove the sunset provision or to change how funds from the Hospitality Fee would be used.

The County amended Ordinance 105-96 to extend and ultimately to remove the sunset provision. (*See* App. 710, 174, 183). The County also announced its plan to use funds from the Hospitality Fee to fund construction of I-73 and for the operation and maintenance of police, fire protection, emergency medical services, and

emergency preparedness operations directly related to tourism-related infrastructure, facilities, and programs. (*See* App. 195). The City contends the County could not extend the sunset provision or change the use of revenue from the Hospitality Fee without its consent.

The answer to whether the County could remove the sunset provision and change the use of the funds from the Hospitality Fee are answered by looking at the power granted to the County by the General Assembly.

1. The County has the power to change the sunset provision.

When initially adopted, the Hospitality Fee contained a sunset provision, stating that the County would stop collecting the Hospitality Fee on January 1, 2017. (App. 97). The County amended that sunset provision three times, first for up to five years, then reaffirming that the extension was for the full five years, and finally removing the sunset provision entirely. (App. 710, 174, 183).

The General Assembly empowered the County to collect the Hospitality Fee by enacting § 6-1-330(A). This statutory provision expressly provides for the duration for which the County could collect the Hospitality Fee. The statute provides that the Hospitality Fee remains "in force and effect until repealed." S.C. Code § 6-1-330(A). County Council has not repealed the Hospitality Fee. Although the initial ordinance creating the Hospitality Fee contained a sunset provision, that provision was a self-limitation imposed on the County by the County, not by the General Assembly. The General Assembly expressly empowered the County to continue collecting the

Hospitality Fee until it is repealed. Because the sunset provision was a self-imposed limitation on the County, the County was free to amend it (and even remove it).

2. The County has the power to change the use of the Hospitality Fee revenue.

The County originally planned to use the revenue from the Hospitality Fee to finance the road-construction projects outlined in the RIDE Report. Now, after those projects have been completed, the County has found new, yet similar uses for that revenue. (App. 174–75, 193, 195). Most recently, in July 24, 2018, the County adopted Resolution 84-18, which provided that the funds from the Hospitality Fee would be used to fund construction of I-73 and for the operation and maintenance of police, fire protection, emergency medical services, and emergency preparedness operations directly related to tourism-related infrastructure, facilities, and programs. (App. 195).

The General Assembly has specifically placed limitations on how funds from the Hospitality Fee may be used. *See* S.C. Code § 6-1-530. Of particular note, the General Assembly has stated that the funds can be used for "highways, roads, streets, and bridges providing access to tourist destinations," as well as for "police, fire protection, emergency medical services, and emergency-preparedness operations directly attending to those facilities" when a county collects as much revenue as the County does. *Id.*

The County has never used the funds from the Hospitality Fee for an improper purpose. Initially, the County used the funds for the roads contemplated by the RIDE Report. Most recently, the County proposed to use the funds for I-73 and approved

police, fire protection, and emergency medical services. The General Assembly allows the County to use the funds from the Hospitality Fee for these purposes. *See id.* Like the sunset provision, when the County initially adopted the Hospitality Fee, it limited its use of funds from the Hospitality Fee to the road projects contemplated by the RIDE Report. Yet this too was a self-imposed limitation by the County, not by the General Assembly. The County was free to remove this limitation it placed on itself for use of the funds, as long as it used those funds only as allowed by the General Assembly. There is nothing improper about these new uses for the revenue from the Hospitality Fee. They are exactly those uses permitted by state law for hospitality and local accommodations taxes. *See id.*; *see also id.* § 6-1-730. As long as the revenue from an accommodations fee established at the time the Hospitality Fee was adopted is used only for the purposes in those statutes, that fee remains in effect and unaffected by Act 138. *See id.* § 6-1-760(B).

That the County would adopt new uses makes sense. Eventually the projects in the RIDE Report were completed, but that does not mean tourism-related needs disappeared. As the County grows, new needs emerge. Those needs, however, are similar to the needs identified in the RIDE Report. For instance, just as the RIDE Report was concerned about promoting tourism in Horry County, (App. 47, 70), the current uses of the revenue are also tourism-related and involve roads, including I-73, (App. 174–75, 195).

C. Changes to Ordinance 105-96 did not create a new Hospitality Fee.

The plain language of § 6-1-330(A) should control this case. That section empowers the County to collect the Hospitality Fee and to continue collecting it until the County repeals it. The circuit court (in a footnote (App. 7–8)) tried to get around the plain language of § 6-1-330(A) by characterizing the changes to the Hospitality Fee as the adoption of a new fee. As a new fee, the circuit court reasoned that municipal consent was required.

But extending—or even removing—the sunset provision and changing the use for revenue from the Hospitality Fee did not create a new fee. The same countywide 1.5 percent part of the Hospitality Fee that went into effect on January 1, 1997 was the same countywide 1.5 percent part of the Hospitality Fee that the County was collecting when the City filed this lawsuit. Amendments to Ordinance 105-96 did not alter anything about the substance of the Hospitality Fee and did not create a new fee.

Looking at other sunset provisions confirms this. The United States Supreme Court has not treated a change to a sunset provision as the adoption of a new law. Take for example the Voting Rights Act of 1965, one of the most significant pieces of legislation in the past century. *See* Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437. That act had certain provisions in § 4(a) and § 5 that were that were set to expire in 1970. Congress extended those provisions before they initially expired, and it extended them again in 1975, 1982, and 2006, each time before those provisions expired. *See Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 538–39 (2013) (reviewing the

history of these extensions). The Supreme Court never interpreted Congress's actions as adopting a "new" Voting Rights Act; instead, the Supreme Court viewed Congress as having merely extended the law it had originally enacted in 1965 (with whatever substantive amendments Congress might have made).

As a second example, look at the General Assembly's decision to remove sunset provisions from certain state boards. *See* 1994-1995 Appropriations Act, Part II, § 117. Shortly after the General Assembly's decision, the attorney general, in a letter analyzing the impact of this legislation on the Boards of Dentistry and Opticianry, raised no problem with the General Assembly removing those sunset provisions. *See* Letter to Mark R. Elam, 1994 WL 378027 (S.C.A.G. June 29, 1994). No one would claim that a "new" Board of Dentistry or Board of Opticianry was created simply because the sunset provision was changed.

And so it is with the Hospitality Fee. The changes to Ordinance 105-96 were permissible pursuant to the power conferred upon the County by the General Assembly and do not create a new fee. S.C. Code §§ 6-1-330(A); 6-1-530; 6-1-760(B).

D. The City never consented to the Hospitality Fee.

The issue of whether the City gave its consent to the Hospitality Fee when it passed the resolution "urg[ing]" the County to adopt the Fee is irrelevant. As set forth above, this case is about power—specifically the power conferred upon the County by the General Assembly to collect the Hospitality Fee. If the General Assembly did not require the County to obtain municipal consent before collecting the Fee (which it did not), whether the City gave its consent to the Hospitality Fee in

its resolution has no legal effect. Nevertheless, because the circuit court examined this issue, the County will do so briefly.

Ordinance 105-96 was proposed and adopted by the County alone. The City had no role in that process. The City did not propose it. The City did not vote on it. Moreover, Ordinance 105-96 nowhere says that any municipality's consent is necessary, nor is it conditioned on any other entity approving of—or consenting to—it.

Also, an examination of the City's resolution reflects that it merely "urge[d]" the County to adopt the Hospitality Fee. The City did not "consent" to the Hospitality Fee. The City did not cite any provision of State law that its consent was required. All it did was "strongly and unanimously support" the RIDE Report and "urge[]" the County to adopt the Hospitality Fee. (App. 97–98).

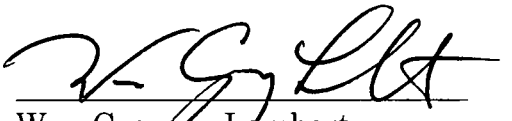
Also telling are the resolutions from the Horry County Board of Education and the South Carolina Department of Transportation. These two resolutions are similar to the municipal resolutions. (*Compare* App. 100, 105, *with* App. 97–98, 101, 102–03, 104, 106–07, 108). Like the municipalities, the Board of Education and Department of Transportation encouraged the County to implement the RIDE Report, which meant adopting the Hospitality Fee. If the municipalities were passing those resolutions to comply with some (unstated) State law, then the Board of Education and Department of Transportation would have had no reason to adopt resolutions of their own.

What explains all of these resolutions, both from the municipalities and other entities, is the political context in which the County adopted the Hospitality Fee. Earlier in 1996, voters in Horry County had rejected a local option sales tax to finance a proposed comprehensive road plan. (*See* App. 47). These resolutions demonstrated broad support for the County's plan to finance a road-construction plan with the Hospitality Fee, despite the results of the referendum. In other words, the resolutions had nothing to do with any legally required consent, but instead were a show of unanimity for addressing the County's road problems.

CONCLUSION

The County respectfully requests that this Court grant the writ in expeditious fashion and stay the injunction while the appeal is pending.

Respectfully submitted:



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

Case No. 2019-CP-26-01732

City of Myrtle Beach, For Itself and a Class of
Similarly Situated Plaintiffs, ... Respondents,

v.

Horry County, ... Appellant.

CERTIFICATE OF SERVICE

I certify that this REPLY IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS was served on counsel for the Respondent via hand delivery on August 5, 2019:

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