STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, Plaintiff, vs. Horry County, Defendant.	)	CIVIL ACTION NO. 2019-CP-26-01732 **NOTICE OF MOTION AND SECOND MOTION TO LIFT STAY**

TO: DEFENDANT HORRY COUNTY, by and through its Attorneys: Henrietta U. Golding, Esquire, James K. Gilliam, Esquire, Adam R. Artigliere, Esquire, and Wm. Grayson Lambert, Esquire, all of Burr Forman McNair:

YOU WILL PLEASE TAKE NOTICE that Plaintiff City of Myrtle Beach ("City"), on behalf of itself and a class of similarly situated plaintiffs, will move for an order lifting the stay entered by this Court on July 18, 2019, to bring before the Court two discrete matters: (1) a Motion to Amend and Supplement Class Complaint, attached hereto and incorporated herein by reference as Exhibit "1" to (a) clarify and add additional grounds supporting the City's challenge to the validity of the Hospitality Fee imposed by Ordinance 105-96 and (b) to include factual matter supporting the City's causes of action that arises out of events and occurrences that took place subsequent to the filing of the original complaint herein; and (2) the County's Motion for Judgment on the Pleadings so as to enable the City to later request certification of a class. The City will, if one is deemed necessary by the Court,[1] seek a hearing on the within motion before the Honorable William H. Seals, Jr. at the Horry County Courthouse, Conway, South Carolina, or such other location as the Court may set, ten days after the date of this motion or as soon

[1] *See* Supreme Court Order 2015-09-10-01, paragraph 6 (committing to the discretion of this Court whether to conduct oral arguments on non-dispositive motions).

thereafter as a hearing is scheduled by the Court. In support thereof, the City submits this combined motion and supporting memorandum under Supreme Court Order 2015-09-10-01, paragraph 1.

BACKGROUND

On November 15, 2019, the authorized representatives of the parties in this matter executed a settlement agreement in principle that was reached over the course of three full days and more than forty hours of formal mediation conducted by the Court's appointed mediator, Karl Folkens, Esquire, along with countless other hours of negotiations and exchanges (conducted through the mediator) in the intervening periods. This settlement agreement in principle provided, *inter alia*, for the joint funding of (i) the proposed Interstate Highway 73 project in Horry County and (ii) certain modifications (including elevation changes to address chronic flooding) to S.C. Highway 22 in Horry County, same to be provided by Horry County ("County") and the municipalities situated within Horry County in which the County's 1.5% Hospitality Fee is collected.[2] On November 19, 2019, notwithstanding the fact that this settlement agreement in principle had been reached only four days prior, the County Council in a public meeting voted to cancel the financial participation agreement between the County and the South Carolina Department of Transportation ("SCDOT") for the I-73 project within Horry County.[3] A stated reason for this cancellation was the County Council's contrived frustration

[2] Nothing herein constitutes the divulgence of confidential mediation communications. Given the nature of the named parties to this litigation, as well as other municipal bodies within Horry County that are a part of the proposed class of plaintiffs, any settlement agreement in principle reached by the representatives of the parties was required to be presented and recommended to the respective governing bodies of the parties for public consideration, comment, and vote, all of which occurred. The within recitation reflects the public comments made and documents disclosed during the course of those public debates and votes.

[3] The minutes of this County Council meeting are attached hereto and incorporated herein by reference as Exhibit "2." County Council had been briefed on this litigation in executive

over the fact that other governmental entities, including the municipalities in Horry County, were unwilling to support funding of the I-73 project.

The County Council's November 19 action proved prescient, if not pretextual. During a public meeting held on December 16, 2019, to vote on the settlement agreement in principle reached by the parties' authorized representatives in mediation, various members of the County Council chastised the City for bringing the instant action, deriding it as "total BS," "bogus," a "sham," a "scam," and "a scare tactic."[4] One County Council member stated that he "would highly recommend" that "anybody in the City of Myrtle Beach that started this and voted for it . . . pack up and get out of Horry County because this was about as much BS as anybody could even digest." Ex. C at 4. He also believed that if the City prevails in this case, "Horry County ought to put tag readers and anybody that lives there, you will pay your fair share through a tax action" for projects funded by the County's (unlawful) Hospitality Fee. *Id.* These condemnable remarks were interspersed with a series of falsehoods regarding the City's lawsuit created, spread, and fostered by a number of County Council members.

Given this unfortunate posturing and political theater, it is wholly unsurprising that County Council did not approve the settlement agreement in principle recommended by the County's authorized representatives (see Rule 6(b)(2), SCADR) and approved at public meetings held by the governing bodies of the City, the City of North Myrtle Beach, the Town of Surfside

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session before moving and voting to cancel the SCDOT contract. The proceedings before the County Council may also be viewed in a video which is posted on the County's website at https://horrycounty.granicus.com/MediaPlayer.php?view_id=3&clip_id=1660.

[4] The minutes of this County Council meeting are attached hereto and incorporated herein by reference as Exhibit "3," and these references can be found at pages 4, 7, and 11. A video of the full proceedings of County Council on December 16 can be viewed at, https://horrycounty.granicus.com/MediaPlayer.php?view_id=3&clip_id=1680.

Beach, the Town of Atlantic Beach, and the Town of Aynor.[5] The publicly-stated grounds for rejecting the agreement were nothing more than a ruse to mask the lack of support on County Council for the I-73 project in Horry County for which the County claims it had collected the extant fund of Hospitality Fee revenues.

At that meeting, in response to questions by members of County Council, the County's attorneys advised the County Council that "clarification" and "direction" were needed as to whether the City's claims have the potential to invalidate the Hospitality Fee as a whole, i.e., both within and without the incorporated areas of Horry County. *See* Ex. C at 13. Certain actions of the County Council since the filing of the complaint bear directly on the questions it posed on December 16 and warrant amendment and supplementation of the complaint. Through this motion, the City asks this Court to lift the stay pending appeal entered on July 18, 2019, so it can bring a motion to amend and supplement its complaint to provide the clarification sought by County Council and to add those additional factual bases and grounds supporting the City's request for the Court to invalidate the Hospitality Fee.

ARGUMENT

On June 21, this Court issued an order granting the City an injunction against the County to enjoin the County's collection of its 1.5% uniform service charge on accommodations, prepared food and beverage, and admissions (Hospitality Fee) within Horry County municipalities. On July 10, 2019, this Court issued its order denying the County's motion for reconsideration of the June 21 order and reiterating that the injunction applied within the limits of all municipalities situated within the County. The County appealed these orders, and this

[5] The City of Conway and City of Loris did not vote on the settlement agreement in principle. However, it was structured to provide the exact same relief for the class and the exact same benefit to the County even if these cities declined to participate.

Court, at the request of the County, entered its July 18 order staying further proceedings in this case, except for the mediation which resulted in the January 25, 2020, declaration of an impasse by the Mediator notwithstanding his considerable efforts and the good faith efforts of the City.[6] The appeal currently is pending before the South Carolina Supreme Court, but the matters the City seeks to bring before this Court do not depend on the outcome of that appeal.

Specifically, the City seeks to have the current stay lifted so that it may present to this Court a motion for leave to file an Amended and Supplemental Complaint which rests on different and further bases and relief than in the City's original Complaint. The bases for supplementing the complaint under Rule 15(d), SCRCP, are that (1) the County now has cancelled its contract with the SCDOT to provide local funding for the proposed Interstate Highway 73 project in Horry County (which has been the County's asserted primary basis for contending that it may continue to impose the Hospitality Fee under Ordinance 105-96),[7] and (2) rejected the settlement agreement in principle that would have provided this funding, thus rendering the Hospitality Fee invalid as uniform service charge under South Carolina law for this additional reason because it is not intended to fund a specific improvement or project. *See, e.g.*, *Brown v. Horry Cty.*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992) ("A service charge is

[6] This Court, by Order dated August 16, 2019, previously lifted the stay it imposed to allow the City to file evidence of a surety bond it had obtained.

[7] *See, e.g.*, Final Brief of Appellant, November 11, 2019, Appellate Case No. 2019-001134, at 6, copy attached hereto and incorporated herein by reference as Exhibit "4" (in which the County states to the Supreme Court in its statement of the case that "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 piece 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 building this new interstate"); *see also id.* at pp. 19-21 (discussing and describing the funding of I-73 as a justification for the imposition of the County's uniform service charge under the challenged County ordinance imposing the Hospitality Fee); *cf.* Rule 208(b)(1)(C), SCACR ("[a]ny matters stated or alleged in appellant's statement shall be binding on appellant").

imposed on the theory that the portion of the community which is required to pay it receives some special benefit as a result of the improvement made with the proceeds of the charge"); *see also C.R. Campbell Const. Co. v. City of Charleston*, 325 S.C. 235, ___, 481 S.E.2d 427, 438 (1997) ("Under *Brown*, a fee is valid as a uniform service charge if (1) the revenue generated is used to the benefit of the payers, even if the general public also benefits (2) the revenue generated is used only for the specific improvement contemplated (3) the revenue generated by the fee does not exceed the cost of the improvement and (4) the fee is uniformly imposed on all the payers.") (emphasis supplied). The basis for amending the complaint under Rule 15(a), SCRCP, is that the City has recently learned that the County failed to give Ordinance No. 105-96 the required three readings. *See* S.C. Code Ann. § 4-9-120 ("With the exception of emergency ordinances, all ordinances shall be read at three public meetings of council on three separate days ...."). Accordingly, all fee collections under the ordinance have been and would continue to be improper.

The County's Motion for Judgment on the Pleadings, which already has been briefed by the parties, likewise raises issues separate and apart from those pending before the Supreme Court. These matters will all need to be addressed regardless of how the Supreme Court rules. Given the County's rejection of the settlement agreement in principle and accompanying public statements, the time has come to resume litigating this case.

The City therefore respectfully requests that this Court lift the July 18 stay to allow the City to file a Motion for Leave to Amend and Supplement Complaint and thereby allow the City to pursue the additional grounds as will be sought therein if this Court grants leave, and hear the County's Motion for Judgment on the Pleadings. The determination of whether to issue a stay is within the discretion of this Court. *See City of Spartanburg v. Belk's Dep't Store*, 199 S.C. 458,

20 S.E.2d 157 (1942). Thus, the determination of whether to lift a stay issued is also within the discretion of this Court. The Court should exercise its discretion and lift the stay to allow the City to pursue this additional relief.

Pursuant to Rule 11(a), SCRCP, the undersigned hereby certifies that consultation with opposing counsel regarding the substance of this motion would serve no useful purpose.

Respectfully submitted,

s/ Chad N. Johnston
John M.S. Hoefer, SC Bar # 2549
Chad N. Johnston, SC Bar # 73752
R. Walker Humphrey, II, SC Bar # 79426
Willoughby & Hoefer, P.A.
930 Richland Street
Columbia, South Carolina 29202
jhoefer@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com
whumphrey@willoughbyhoefer.com
(803) 252-3300 (office)
(803) 256-8062 (facsimile)

Attorneys for Plaintiff City of Myrtle Beach and All Others Similarly Situated

Columbia, South Carolina
January 28, 2020