

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY

L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2012-213599

Case No. 2012-CP-40-1560

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South Carolina Public Interest Foundation and Edward D. Sloan, individually, and on behalf of all others similarly situated, Plaintiffs,

Of whom Edward Sloan is the Appellant,

v.

South Carolina Department of Transportation, and John V. Walsh, Deputy Secretary of Transportation for Engineering, Defendants,

Of whom South Carolina Department of Transportation is the Respondent.

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Initial Brief of Respondent

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MAY 21 2013

S.C. SUPREME COURT

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**SC Court of Appeals**

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## STATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court correctly found that plaintiffs lacked standing to prosecute their suit and that his case is moot?
2. Whether the State Highway Engineer's decision to provide assistance to the City of Aiken at its request was a proper exercise of his duties?
3. Whether the actions of the State Highway Engineer herein were for a legitimate public purpose and not for the benefit of a private party?

## STATEMENT OF THE CASE

Plaintiffs sued under the Uniform Declaratory Judgments Act, S.C. Code Ann. §§15-53-10, *et seq.*, for a determination that the Department's and defendant John V. Walsh's ("Walsh") actions in dispatching a three-man bridge inspection crew to inspect and report on the condition of three privately-owned bridges in the Woodside Plantation subdivision in Aiken at the request of a city councilman was contrary to certain provisions of the South Carolina Constitution requiring that public funds be spent only for public purposes and that the full faith and credit of the State not be pledged for the benefit of a private individual, company, association, or corporation.<sup>1</sup>

The parties submitted the matter to the Circuit Court for Richland County on cross-motions for summary judgment. The motions were heard on September 19, 2012, before the Honorable L. Casey Manning. Judge Manning issued a written order on November 21, 2012, denying plaintiff's motion and granting defendant's and dismissing the complaint. R.p. \_\_\_ (Order) The court found that the plaintiffs did not have standing as a taxpayer because they did not suffer in any definite way that differed from the public

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<sup>1</sup> S.C. Code Ann., Const. art. X, §§5, 11 (Rev. 2009).

generally. Further, the court held that the matter was moot in that the actions complained of had been completed and an order of the court would have no effect in reversing them. The court further found that the exceptions to lack of constitutional standing and mootness—that the matter was of such public importance that resolution is necessary for future guidance or that the acts were capable of repetition but generally will evade review—were not present. On the merits, the court found that inspection of bridges is within the city’s general police power to insure the health, safety, and general welfare of its citizens as well as under its power to abate public nuisances. The Department was within its authority in assisting the city pursuant to its general enabling statute allowing it to assist “bodies politic” in the State areas of its particularized expertise. S.C. Code Ann. §57-3-110(7) (Rev. 2006).

Appellant served his notice of appeal on December 7, 2012.

### **STATEMENT OF FACTS**

We will not set forth an independent statement of facts but adopt those found by the trial court in its Order as the only relevant facts needed to decide this case.

In response to appellant’s statement of facts, we first object to the statement that the inspection staff had to “create fake bridge ID numbers” as unnecessarily pejorative. SCDOT’s bridge inspection forms are designed for use by its inspectors in completing their functions under the federal bridge inspection program. That program, included in the federal-aid-to-highways acts, 23 U.S.C. §131, 23 C.F.R. Part 650, Subpart C (2011), requires state departments of transportation to conduct periodic inspections of all publicly-owned bridges in the state regardless of whether or not they are on the state

system.<sup>2</sup> In order to use the computerized form, a bridge number must first be entered. Because the bridges at issue were not part of the program, numbers had to be created.

We will respond to appellant's facts regarding the "chief internal auditor" in our responses to his arguments regarding that issue below. We note here, however, that, with regard to the statement that the Department's engineer could be called as an expert witness in a lawsuit without compensation, neither the auditor nor appellant explained how an individual may be forced to give expert testimony in court without his consent. Appellant's Brief, page 6.

### **Argument**

#### **I. The trial court correctly found that the plaintiff's lacked standing to prosecute their suit and that his case is moot.**

Appellant cites and discusses a large number of cases on the issue of standing of a party to invoke judicial power to review acts of government officials including many of his own past cases where he was successful in causing the appellate courts to hear his claims. Standing is decided on the facts of each case. The cases stand for the same judicial rules regarding the grant of standing which the trial court correctly summarized in its order.

Standing may be acquired: (1) by statute; (2) through the rubric of "constitutional standing;" or (3) under the "public importance" exception. ATC South, Inc. v. Charleston County, 380 S.C. 191, 669 S.E.2d 337 (2008). Appellant asserts constitutional standing. Constitutional standing is "an essential and unchanging part of

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<sup>2</sup> Congress enforces the federal highway acts under the spending clause to avoid the 10<sup>th</sup> amendment. South Dakota v. Dole, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). There is no requirement that South Carolina comply with the act and create a bridge inspection program, only that it be penalized by withdrawal of federal matching funds for failure to do so.

the case or controversy requirement of Article III.” ATC, supra, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed2d 351 (1992). To have standing, one must generally have a personal stake in the subject matter of the lawsuit, *i.e.*, one must be a *real party in interest*. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). Additionally, a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom. Such imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public. Baird, supra, citing Citizens of Lee County, Inc. v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992). A taxpayer lacks constitutional standing when he “suffers in some *indefinite* way in common with people *generally*.” Freemantle v. Preston, 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012) citing ATC South, 380 S.C. at 198, 669 S.E.2d at 341 quoting Frothingham v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) (emphasis added); see, also, Bodman v. State of S.C. and SCDOR, (Shearouse Adv. Sh., May 8, 2013). Here, as the trial court correctly noted, the plaintiff, Mr. Sloan, is a resident of Greenville. The events at issue took place in Aiken. He never asserted that he had ever used the bridges in question nor that he is a member of the Woodside Plantation HOA. Thus, his only interest in the matter is as a payer of the 16 cents per gallon gas that went to pay the inspectors’ wages. The trial court was correct that this interest was not concrete and particularized to the extent that it would justify the court in inserting itself into routine discretionary decisions by the State Highway Engineer.<sup>3</sup>

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<sup>3</sup> Mr. Walsh’s official statutory title is Deputy Secretary for Engineering. We use the traditional title for that post of State Highway Engineer because we think it is more descriptive.

Nevertheless, an exception to the general standing rule has often been recognized where an issue is of such public importance that its resolution is required for future guidance. Baird, supra; Freemantle, supra. Here, appellant has cited no past instance where the State Highway Engineer used public funds to improve private property. The lack of resources to maintain SCDOT bridges has been well reported. He would have no interest in spending the scarce resources available on non-SCDOT bridges. As Mr. Walsh stated in his affidavit to the trial court, in only one instance in his memory did the Department conduct an inspection of a non-government-owned bridge. That was the bridge to Fripp Island. The Department conducted the inspection per a request as here from local authorities who had requested that the Department take the bridge into its System. R.p. \_\_\_ (Walsh affidavit). Future guidance from the Court is not needed where appellant has shown no ongoing constitutional violations by respondent that need correcting.

Regarding taxpayer standing, appellant is correct that a taxpayer, on that basis alone, may sue to enjoin an unconstitutional expenditure of public funds. However, that is not the case here. The General Assembly has imposed a sixteen cents per gallon tax on gasoline and diesel fuel. S.C. Code Ann. §12-28-310 (Supp. 2012). A portion of the revenues raised by that user fee are turned over to the Department of Transportation for the “purposes of that department.” S.C. Code Ann. §12-28-2720 (Supp. 2012). The purposes of the Department (its powers and duties) include:

(7) instruct, assist, and cooperate with the agencies and departments, and bodies politic, and legally constituted agencies of the State in street, highway, traffic, and mass transit matters when requested to do so, and, if requested by such government authorities, supervise or furnish engineering supervision for the construction and improvement of roads

and bridges, provided such duties do not impair the attention to be given the highways in the state highway system;

S.C. Code Ann. § 57-3-110 (Rev. 2006). Here, the State Highway Engineer, decided that a minimal amount of the Department's resources be used to assist the city in a bridge engineering matter under the above subsection. It was not a constitutional diversion of public funds nor *ultra vires*. Rather, it is specifically authorized by subsection (7) above.

A related doctrine to standing is that of mootness. A court will not pass on moot and academic questions or make an adjudication where there is no actual controversy. Sloan v. S.C. Dep't. of Transportation, 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008). The bridge inspections herein occurred and were completed in a single afternoon and Mr. Walsh's report back to the local officials followed shortly thereafter. R.p. \_\_\_\_ (inspection and Walsh letter) There are three exceptions to the mootness doctrine. First, if the issue is capable of repetition but generally will evade review, the appellate court can take review. Id. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Id. Third, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. Id.

Appellant claims the Department's actions are capable of repetition but generally will evade review. His argument in this respect rests on this bare assertion with nothing more. While it is true, as appellant states, that a litigant need not prove that there is a "reasonable expectation" that a government officer will act in the future in an unconstitutional manner, something more than speculation that such an occurrence is possible should be required. As mentioned above, the State Highway Engineer has no

reason nor incentive to spend highway dollars on private property where little exists for performing his own duties with respect to the State Highway System. Appellant has pointed out no past occurrences nor shown any inclination to do so in the future. As has been held in many cases, “In the absence of any proof to the contrary, there is a presumption that public officers have properly discharged the duties of their office and have faithfully performed those duties with which they are charged. Whitmire v. Cass, 213 S.C. 230, 49 S.E.2d 1 (1948).

Regarding the exception to the standing rules in matters of great public importance, the trial court was correct that this decision by the State Highway Engineer was a routine decision to assist a local government, requests he handles daily granting some and rejecting others. The General Assembly has conferred this discretion on him and the Department. Courts are not particularly suited to make engineering decisions of this nature. See, e.g., Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981) (Judicial discretion in a non-judicial field should not be substituted for that of the appropriate administrative agency. “Any other interpretation of the contested language would eviscerate the judgment and expertise of the Coastal Council.”)

Regarding the third exception to mootness—that the decision of the trial court will affect future events or have collateral consequences for the parties—neither element is present here. As the trial court noted, other public bodies do not have bridge inspection crews. This Court’s decision cannot have collateral consequences between the parties hereto because the single issue in this case was decided by the circuit court on cross-motions for summary judgment by agreement between the parties. The Department and

Mr. Sloan do not have a general relationship with each other regarding bridge inspections.

**II. The State Highway Engineer's decision to provide assistance in the case was a proper exercise of his duties.**

Appellant, on the basis of his own research and that of the SCDOT Commission's Chief Internal Auditor, delves deeply into the internal politics of the Aiken city government and concludes, for the merits of his case, that the request for assistance with the bridges did not come from the City of Aiken but from a disgruntled city councilman with a vendetta against the Woodside Plantation homeowners' association. This research, concluding that Mr. Ebner and other members of the city government did not like each other very much, may be interesting to him and the auditor but is irrelevant to the issues herein. The only relevant question is whether Mr. Walsh, upon receipt of a reasonable request from a city councilman forwarded him by a State representative and endorsed by the State senator for the district believed at the time that the request was from the city. Mr. Ebner could have been (and might be) chairman of the streets and roads subcommittee or the like. There are 278 incorporated municipalities in South Carolina, 46 counties, and an incredible number of other "political subdivisions." Each has its own forms of government and lines of authority. No State official can be expected to know the authority of each public official that makes a request of him. An inquiry by a city councilman, a State representative, and a senator, is certainly sufficient color of authority under which to act.

Appellant relies on the opinions of the auditor for a number of his arguments on the merits. The Court should not. The Chief Internal Auditor is appointed by the

Commission and is not an officer of the Department itself. S.C. Code Ann. §57-1-360 (Supp. 2012). He is not a lawyer; nor does he appear to be particularly well versed in the arts of reason and logic. Among the “findings” of the report, the auditor states that the federal bridge inspection program does not require inspection of private bridges nor is that activity authorized by State law. Thus, according to the auditor, the Department created an “ethical conflict” for its employees by asking them to “deviate from federal and State law.” App. \_\_\_ (auditor’s report) Because the inspections are not “required” by federal law does not mean it is *ultra vires* the Department’s authority. The Department of Transportation is a creature of the General Assembly of South Carolina which has expressly directed it to assist other levels of government where possible in areas of its expertise. S.C. Code Ann. §57-3-110(7) (Rev. 2006).

Appellant and the auditor then proceed to assign to the bridge inspectors themselves the authority to decide the law by noting that they warned the Chief Engineer for Operations that the inspections were “wrong.”<sup>4</sup> Finally, the auditor notes that SCDOT did not seek “any legal clarification” on this matter. This overlooks the fact that the auditor did not seek legal advice either. Had he asked, he would have been told that it is perfectly proper for the State Highway Engineer to respond to requests for assistance from local governments.

**III. The actions of the State Highway Engineer herein were for a legitimate public purpose and did not benefit a private party.**

In his argument in section V., appellant states the underlying grounds for his lawsuit that the inspections functioned to benefit an individual or, at best, a private

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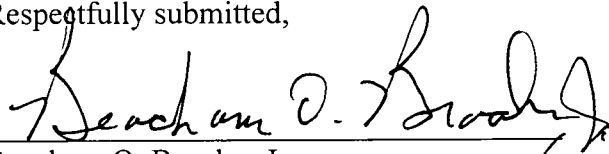
<sup>4</sup> That government employees often complain about having to work is not a revelation of any import.

homeowners' association in a gated community. However, the circuit court was correct in its Order in questioning how the State's entering private property without the consent of the owners to inspect their bridges could be interpreted as "benefitting" the homeowners' association or its members? The result of the inspection was that the bridges were sound. However, had structural deficiencies been found, the city would have been within its authority to require them to be repaired or replaced at the owners' expense. The inspections served a governmental purpose, the protection of the health, safety, and welfare of the public, a legitimate exercise of the city's police power. The Department was authorized to assist the city under its general enabling statute.

### Conclusion

The Circuit Court correctly found that appellant lacked standing to sue the Department under the facts of this case. The action taken by the Department was a legitimate exercise of the Department's delegated powers to respond to a request for assistance from a duly incorporated municipality seeking to perform legitimate duties under the police power to protect its citizens. The Order of the Circuit Court dismissing the complaint should be affirmed.

Respectfully submitted,



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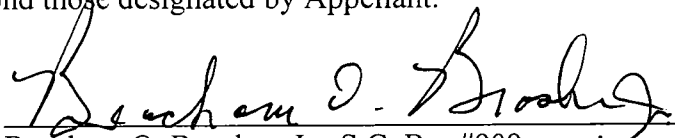
Of whom South Carolina Department of Transportation is the Respondent.

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Respondent's Designation of Matter to be Included in the Record on Appeal

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Respondent has no further designations beyond those designated by Appellant.



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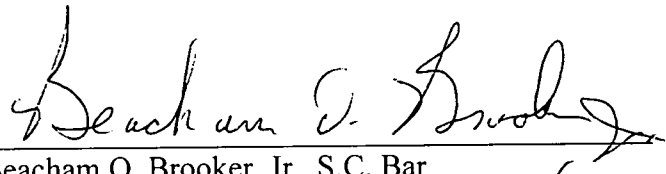
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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that he has served the South Carolina Public Interest Foundation and Edward D. Sloan, Jr., Petitioners, with the **Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal** by U.S. Mail, postage prepaid, this 20<sup>th</sup> day of May, 2013, as follows:

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