STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CASE NO.: 2022-CP-10-05123
)	
Board of Field Officers of the Fourth)	
Brigade, Mark Calhoun, F. Preston Wilson,)	
and Andrew Pickens Calhoun,)	
)	
Petitioners,)	
)	
v.)	
)	
Members of City Council of The City of)	**ORDER**
Charleston, South Carolina, Caroline Parker,)	
Kevin Shealy, Jason Sakran, Robert M.)	
Mitchell, Karl L. Brady, Jr., Stephen)	
Bowden, Peter Shahid, Jr., Michael S.)	
Seekings, Perry K. Waring, William Dudley)	
Gregorie, and Ross A. Appel, and The City)	
Of Charleston, South Carolina, The)	
Honorable Alan Wilson, Attorney General)	
For the State of South Carolina, the)	
Honorable John Tecklenburg, Mayor of the)	
City of Charleston, South Carolina,)	
)	
Respondents.)	
)	

This matter came before the Court on September 6, 2023, on the City of Charleston Respondents' Motion to Dismiss. Present for the hearing were Petitioners' counsel, Bill Connor and Rob Varnado, as well as counsel for the City of Charleston Respondents, Armand Derfner, Jonathan Altman, Will Cook, Julia Copeland, and Katie Monoc. Memoranda were filed and incorporated into the record, and oral arguments were heard. After careful consideration of filings, submissions by the parties, oral argument, and the applicable law which governs this dispute, the Court hereby GRANTS IN PART the City of Charleston Respondents' Motion to Dismiss.

RELEVANT BACKGROUND

In the late 19th century, a private group known as the Ladies' Calhoun Monument Association erected a statute of former Vice President and U.S. Senator John C. Calhoun on a portion of Marion Square in the City of Charleston. The statue depicted Calhoun seated and included the numbers 1782 and 1850 (his birth and death dates) and the words "TRUTH JUSTICE AND THE CONSTITUTION." In 1898, having achieved its goal and preparing to disband, the Association presented the Monument to the City of Charleston, which thereafter maintained it in its Marion Square location for many years.

In 2020, the City of Charleston removed the statue after City Council voted to do so. Several members of the general public – three individuals and a fraternal organization – asked this Court to order the City to restore the statue. They allege in three causes of action that its removal violated the South Carolina Heritage Act as well as state charitable trust law, and that they as members of the general public are entitled to be the enforcers of the law. A Fourth Cause of Action relates to an agreement about the ultimate disposition of the statue.

The City and its officials (collectively, the City of Charleston Respondents) moved to dismiss the Petition. As set forth below, the Court GRANTS the Respondents' motion and dismisses all counts of the Petition as to the moving parties.

LEGAL STANDARD FOR MOTION TO DISMISS

In considering a motion to dismiss a complaint for failure to state a cause of action, the Court must base its ruling solely on the allegations set forth in the Complaint. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010). If the facts and inferences drawn from the facts alleged in the Complaint, viewed in the light most favorable to the

Plaintiff, would entitle the Plaintiff to relief on any theory, then the Court must deny the motion. *Id.*

This case does not turn on any disputed facts but instead involves interpretation of South Carolina statutes, specifically, the Heritage Act, the Trust Code, and the Declaratory Judgment Act. Therefore, this case as to movants is ripe for resolution on Respondents' Motion to Dismiss. *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Off.*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001) (citing *Evans v. State,* 344 S.C. 60, 543 S.E.2d 547 (2001)).

I. PETITIONERS ARE NOT ENTITLED TO RELIEF UNDER THE HERITAGE ACT BECAUSE THE LAW CREATES NO PRIVATE RIGHT OF ACTION.

The Heritage Act provides for the "Protection of certain monuments and memorials" as follows:

> (A) No Revolutionary War, War of 1812, Mexican War, War Between the States, Spanish-American War, World War I, World War II, Korean War, Vietnam War, Persian Gulf War, Native American, or African-American History monuments or memorials erected on public property of the State or any of its political subdivisions may be relocated, removed, disturbed, or altered. No street, bridge, structure, park, preserve, reserve, or other public area of the State or any of its political subdivisions dedicated in memory of or named for any historic figure or historic event may be renamed or rededicated. No person may prevent the public body responsible for the monument or memorial from taking proper measures and exercising proper means for the protection, preservation, and care of these monuments, memorials, or nameplates.

S.C. Code Ann. § 10-1-165(A).

It contains no "private right of action," *i.e.,* no language authorizing a private citizen to bring an enforcement lawsuit.

It is fundamental law in South Carolina that when the General Assembly enacts a statute, especially one governing the conduct of government or public entities, private citizens are not

authorized to bring enforcement lawsuits unless the statute itself provides for such private lawsuits.

This principle has been forcefully stated many times:

> [Q]uestions of whether the legislature intended to create a private cause of action should be resolved by the language of the statute. 'When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party.' Generally, 'a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing civil liability.'

Kubic v. MERSCORP Holdings, Inc., 416 S.C. 161, 168, 785 S.E.2d 595, 599 (2016) (internal citations omitted).

The rule was repeated by our Court of Appeals in 2021 in *Ballard v. Newberry County*:

> Critically, nothing in the Public Records Act grants any interested party, however well-intentioned, the right to enforce the act by bringing a civil action.
>
> We agree with the circuit court that there is also no implied civil right to enforce these statutes. A bellwether case on implied causes of action is *Whitworth v. Fast Fare Markets of South Carolina, Inc.*, which explains "the general rule [] that a statute which does not purport to establish a civil liability, but merely makes [a] provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985) (quoting 73 Am. Jur. 2d, *Statutes* § 432 (1974)). A private right of action will "be implied only if the legislation was enacted for the special benefit of a private party." *Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245, 248 (2007).

Ballard v. Newberry Cty., 432 S.C. at 531, 854 S.E.2d at 850-51.

The Court went on:

> No one appears to dispute that the Public Records Act was not enacted for anyone's particular benefit. There is also a virtually unbroken string of precedents refusing to recognize implied rights of action in statutes that—like the Public Records Act—describe the government's basic structure and operation.

This paragraph ended with a footnote listing no fewer than nine cases as authority:

> *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 785 S.E.2d 595 (2016); *Marion*, 373 S.C. 390, 645 S.E.2d 245; *Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 602 S.E.2d 51 (2004); *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 426

> S.E.2d 304 (1993); *Citizens for Lee Cty., Inc. v. Lee Cty.*, 308 S.C. 23, 416 S.E.2d 641 (1992); *Dorman v. Aiken Commc'ns, Inc.*, 303 S.C. 63, 398 S.E.2d 687 (1990); *Whitworth*, 289 S.C. 418, 338 S.E.2d 155; *Patterson v. I.H. Servs., Inc.*, 295 S.C. 300, 368 S.E.2d 215 (Ct. App. 1988); *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986).

432 S.C. at 531 n.1, 854 S.E.2d at 851 n.1. The rule against implying a private right of action in a statute was stated again recently in *Denson v. National Cas. Co.,* 439 S.C. 142, 886 S.E.2d 228 (2023).

In the case of the Heritage Act, it is clear how disruptive a private cause of action could be. There are thousands of monuments and memorials of every kind throughout the state, some of which are covered by the Heritage Act, but others of which are not. To allow any person or organization, no matter how well-intentioned, to sue the State or any city, county, school district or even an individual school, could (and would) wreak havoc and disrupt the orderly functioning of government and the carrying out of the public's business.

As noted in *Kubic v. MERSCORP*, the right to bring a private suit under a statute is even more restricted than the question of general standing in non-statutory cases because, in statutory cases, the legislature has written law that leaves no room for a court to disagree. *See Kubic v. MERSCORP Holdings, Inc.,* 416 S.C. at 167 n.2, 785 S.E.2d at 598 (2016).

Dismissing this case against the City of Charleston Respondents does not mean there is no remedy to enforce the Heritage Act. The Attorney General is empowered generally to enforce the Constitution and laws of South Carolina. He has taken an active role in matters involving the Heritage Act, issuing many Attorney General's Opinions for guidance to public officials and participating in lawsuits involving the Heritage Act. *E.g., Pinckney v. Peeler,* 434 S.C. 272, 277, 862 S.E.2d 906, 909 (2021). For all these reasons, Petitioners have no right to bring this action against the City of Charleston Respondents.

While the court's holding that there is no private right of action makes it unnecessary to decide whether removal of the statue violated the Act, the court notes that the first sentence of the Act (which prohibits removal or relocation) applies to war memorials, which the Calhoun statute is not; and the second sentence (which applies to streets, bridges, parks, structures, etc. named after persons (i.e. "Calhoun Street")) prohibits only renaming or rededication, which has not happened here. The Court also notes that when the statue was removed in 2020, the Attorney General issued an opinion that the City's action did not violate the Act.

II. PETITIONERS HAVE NO STANDING BASED ON CHARITABLE TRUST LAW.

Petitioners assert that the gift of the Calhoun monument from the Ladies' Calhoun Monument Association to the City created a charitable trust. Even assuming that the allegations of the Petition are sufficient to allege a charitable trust, Petitioners are not eligible to sue to enforce it.

For hundreds of years, the common law the statutes of this state have sharply restricted the persons who may invoke a court proceeding to enforce the terms of a charitable trust. The chief legal officer of a jurisdiction (typically the state Attorney General) plays that principal role, sometimes augmented by the settlor or trustee of the trust, and, rarely, by another person who can show a direct, unique interest. This rule has been stated many times, *e.g.*, "A person whose only interest is that interest held in common with other members of the public cannot compel the performance of a duty the charitable organization owes to the public" Am. Jur. 2d *Charities* § 130, at 126 (internal citations omitted).

The limitation is intended to protect trusts from needless litigation which could dissipate the assets of the charity at the unrestrained option of private citizens who might have only parochial

or personal motivations for suing the charity; at the same time, the list of those who do have standing adequately insures appropriate oversight.

The current law of South Carolina is contained in the South Carolina Trust Code, S.C. Code § 62-7-405(c): "The settlor of a charitable trust, the trustee, and the Attorney General, among others may maintain a proceeding to enforce the trust."

Petitioners argue that the words "among others" create a chain made of many links that somehow reach far enough to give them standing. Their argument is essentially that those two words open the door to broad new categories of people with standing, that one such new category is "beneficiaries" of a trust, that the "beneficiaries," of the Calhoun monument trust are "the people of South Carolina," (Pet., ¶ 67). More specifically, that since two of the petitioners (Preston Wilson and Mark Calhoun) are part of "the people of South Carolina" as residents of South Carolina, they have standing to bring this action.

The Court finds no basis for holding that S.C. Code § 62-7-405(c) was so radically transformed by the words "among others." Rather, the words are designed to promote the purpose of allowing suit by those in the named categories.[1] The words do not provide an excuse to abandon the limitation stated succinctly in our Code.

Significantly, the words "among others," only came into the South Carolina Code when our state adopted the Uniform Trust Code in 2005. The South Carolina Code contains Notes to

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[1] For example, those words could allow suit by someone who is realistically in the position of settlor or trustee but who for some technical reason or by scrivener's error was not formally designated as such. *See, e.g., Gassick, Trustee of the James A. Bellamy Trust and Personal representative of the Estate of James A. Bellamy v. University of Michigan Regents*, 330 Mich. App. 487, 948 N.E.2d 452 (2019). *See also* ALR Annot. "Who May Maintain Suit or Proceeding to Enforce or Administer Benevolent or Charitable Trust" 124 AKR 1237.

the Uniform Trust Code and Notes to the South Carolina version, for Chapter 7 of Title 62 and for Section 62-7-405. Nowhere in any of these Notes does this court find the broad interpretation that Petitioners suggest.

Before South Carolina's adoption of the Uniform Trust Code, several sections of the South Carolina Code provided for the Attorney General to bring suits to enforce charitable trusts. South Carolina Code 62-7-501 through -507 did so, and they were merged into the present South Carolina version of the Uniform Trust Code.[2]

South Carolina caselaw is in accord. The definitive statement of the law was expressed by our Supreme Court in *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005). There, in litigation over possible termination of a charitable trust, the Attorney General entered an appearance and thereafter filed an appeal opposing termination of the trust. In an opinion

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[2] The Trust Code is consistent with South Carolina's general standing doctrines. South Carolina's basic requirement (and there are others) is that the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is concrete and particularized. The injury 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." *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). Here, the Petitioners' claimed injuries do not meet this test. They allege that they "will be deprived of their enjoyment" of the Calhoun Monument and that Mark Calhoun has "an interest in preserving the historical memory of their ancestor." (Pet. ¶¶ 55, 76.) That does not meet the standing requirement under our law.

Nor does the doctrine of public importance standing provide any assistance to Petitioners. That doctrine, which has been invoked in certain rare instances by our Supreme Court, certainly would not be applied here where the statute itself restricts standing, where the Attorney General can and does exercise an active oversight role, and where the point of the Trust Code is to restrict standing (not open it wide).

upholding the Attorney General's position, the Supreme Court made clear that the Attorney General is the proper party in such a case:

> South Carolina Code Ann. § 1–7–130 (2005) provides that the "Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof and, when necessary, prosecute corporations which fail to make to the General Assembly any report or return required by law." Similarly, S.C. Code Ann. § 62–7–503 (1987) provides that the Attorney General shall, when necessary, bring an action to compel trustees to discharge duties imposed upon them by a charitable trust or comply with statutory provisions concerning the administration of charitable trusts. The Attorney General is the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts. *Furman Univ. v. McLeod,* 238 S.C. 475, 482, 120 S.E.2d 865, 868 (1961).

Epworth Children's Home v. Beasley, 365 S.C. 157, 163 n.3, 616 S.E.2d 710, 713 n.3 (2005).

The prior case on which the *Epworth* decision relied, *Furman University v. McLeod*, is even more pointed and makes clear that others besides the Attorney General usually have no role in such a case:

> Daniel R. McLeod, as Attorney General of South Carolina, upon whom is imposed the responsibility of protecting the interests of the public in matters relating to the administration and enforcement of charitable trusts, has been named Defendant and has filed this answer herein. I find and hold that Daniel R. McLeod, as Attorney General, is the only proper and necessary party defendant to this proceeding. The language of the deeds requiring the maintenance of a school in or near Greenville creates, at most, a public trust. There are no private rights of reversion or reverter. Even if the language should be given that strict construction which the Attorney General advances it would create no private right of action in any individual citizen. The public interest is properly represented by the defendant.
>
> Under Title 1, Section 240 of the 1952 Code of Laws of South Carolina, the Attorney General of South Carolina is charged with the duty of "Enforce the due application of funds given or appropriated to public charities within the State, [and] prevent breaches of trust in the administration thereof."
>
> It is also the general law that in the matter of administering or enforcing charitable trusts, the Attorney General is the proper party to protect the interest of the members of the public at large, as distinct from those having "immediate or peculiar interests."

Id. at 482-83, 120 S.E.2d at 868. [3]

III. WRIT OF MANDAMUS AGAINST THE ATTORNEY GENERAL.

Count Two of the Petition seeks a writ of mandamus against the Attorney General. He is a named defendant but was not served and has not entered an appearance. As such, this claim is not yet ripe for dismissal at the request of Respondents and Respondents lack standing to pursue dismissal of that claim.

IV. PETITIONERS' FOURTH CAUSE OF ACTION IS A NON-JUSTICIABLE REQUEST FOR AN ADVISORY OPINION.

Finally, Petitioners seek a declaratory judgment affirming that the City has promised to give the Board of Field Officers a "right to he heard" as to the ultimate disposition of the Calhoun statute. There is no allegation that the City denies such an agreement or threatens to violate it. The few allegations all relate to speculation – not even current speculation, but speculation of the past. The Petition alleges that the City "previously threatened" to move the Calhoun statute out of state (Pet. ¶ 2) and that the City "had considered" such a move (Pet. ¶ 54). The threatened injury is likewise speculative: "If the City of Charleston in fact transfers" the statute out of state or out of the area (Pet. ¶ 55 and ¶ 56), local and state residents will lose the benefit of the statute and the state courts and Attorney General will lose jurisdiction over it.

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[3] There is one pre-Trust Code case that might at first glance seem to support expansive standing to sue; however, in fact, this case *does not* support such standing. *Grady v. City of Greenville*, 129 S.C. 89, 123 S.E. 494 (1924). That case, which upheld a city's relocation of a donated monument, had been brought by four surviving Confederate veterans. There, the court explained that it entertained the case "out of deference to the thin, and now almost vanished, 'gray line' of which these four plaintiffs are a worthy part," and emphasized that it was not rendering a decision about their standing to sue. *Id.* at 108, 123 S.E. at 501.

Words like "previously threatened," "had considered," and "if" (twice) do not allege a live, concrete dispute, do not create a justiciable case or controversy, and are not a sufficient basis for a declaratory judgment under S.C. Code § 15-53-10 *et seq.*

Rather, Petitioners seek an advisory opinion because no controversy presently exists, and their claim is not ripe for adjudication. Considerable South Carolina case law holds that a right to such relief is not conferred by the Declaratory Judgment statute, which requires a live controversy. For example, "to fall within the intended purpose and scope of the Declaratory Judgments Act, the parties must seek adjudication of a justiciable controversy." *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 373-74 (2013) (citing *Sunset Cay, LLC, v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004)). "[I]t is fundamental that the Declaratory Judgments Act does not eliminate the case-or-controversy requirement." *Id.* at 82, 742 S.E.2d at 374. As a threshold matter, "the existence of an actual controversy is essential to jurisdiction to render a declaratory judgment." *Power v. McNair,* 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970). The same case also held:

> A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.

Id. at 154, 177 S.E.2d at 553. The Court concluded: "We simply refuse to enter the field of advisory opinions." *Id. at* 154-55, 177 S.E.2d at 553.

Similarly here, and as all these cases show, Petitioners' Fourth Cause of Action fails as a matter of law.

CONCLUSION

IT IS THEREFORE ORDERED that the City of Charleston Respondents' Motion to Dismiss be, and hereby is, GRANTED IN PART on the grounds set forth herein as to all claims

against the City of Charleston Respondents.

This 4th day of January, 2024.

Jennifer B. McCoy
South Carolina Circuit Court Judge

Charleston Common Pleas

Case Caption: Board Of Field Officers Of The Fourth Brigade , plaintiff, et al VS Members Of City Council Of The City Of Charleston South Car , defendant, et al

Case Number: 2022CP1005123

Type: Order/Other

So Ordered

s/Jennifer B. McCoy #2764