

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM RICHLAND COUNTY

L. Casey Manning, Circuit Court Judge

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JUN 15 2015

S.C. Supreme Court

Appellate Case No. 2015-001175

Case No. 2012-CP-40-1560

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 Petitioner,

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.

Return to Petition for Certiorari

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Respondent respectfully submits this brief in opposition to the Petition for Certiorari.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Whether the courts below correctly denied Petitioner constitutional and public importance standing where Petitioner failed to assert facts indicating any ongoing practice by the Department to use its resources to benefit private land?
2. Whether the courts below correctly decided that the issues herein are moot?
3. Whether the trial court correctly determined that the State Highway Engineer's decision to provide assistance to the City of Aiken at its request was a proper exercise of his duties?

COUNTER-STATEMENT OF THE CASE

An Aiken City Councilman, Reggie Ebner, became concerned that the bridges within the Woodside Plantation subdivision, being wooden, were unsafe and posed a potential hazard to the public. R.p. 134-36. Ebner was a resident of Woodside Plantation and presumably represented that district on City Council. His email to John V. Walsh ("Walsh"), SCDOT's Deputy Secretary for Engineering, requesting the Department's assistance was forwarded to Walsh by State Representative Tom Young, who represented the district that contained the subdivision. Id. Senator Greg Ryberg, who also represents the area, communicated his support for the request. The City code contained no specifications for bridges but referred to State specifications for roads, nor did the city retain a standing bridge inspector or department for that purpose. Therefore, councilman Ebner, through the State representatives sought the help of SCDOT. Id.

Thereafter, Walsh dispatched a three-man bridge inspection crew based in Orangeburg to inspect the bridges and issue a report that Walsh subsequently forwarded to Ebner, Young, and Ryberg. R.p. 53-122. The cost to the Department, representing the inspectors' time, has been estimated at \$1,400. R.p. 132-33.

Petitioners 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 Walsh's actions were 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. An order is needed, according to Petitioner, to "provide guidance to all agencies and departments of State government," and "inform SCDOT and other State agency decisions regarding the expenditure of public funds for private purposes." Petition for Certiorari, p. 23.

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, by 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. 2-10. 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 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).

Petitioners served their Notice of Appeal on December 7, 2012, and the Court of Appeals affirmed the Circuit Court in a published opinion dated March 4, 2015. (Opinion No. 5299.) Although it relied in part on a certain auditor’s report with which we disagree, the essence of the Court of Appeals’ opinion is that a declaratory judgment repeating and reiterating the Constitution’s prohibition against using the State’s full faith and credit to benefit a private individual or entity is not needed in that SCDOT agrees that it may not use its public resources to improve private land nor does it inspect private bridges at the request of the owner thereof. R.p. 132-33.

ARGUMENT

I. The actions of the City and the Department were not *ultra vires* their authority and did not violate the Constitution.

In their previous submissions to the courts herein, Petitioners argued that the private beneficiary of the bridge inspections was the owner of the bridges, the Woodside Plantation Homeowners Association. We had argued in response that Councilman Ebner had requested the inspections, not the Association, and that the Association was the entity being inspected. It was thus difficult to conclude that the Association was “benefitted”

where it could potentially be ordered to expend money to rebuild the bridges to abate a public nuisance. Petitioners' argument appears now to have migrated to Councilman Ebner as the private beneficiary under their theory that Ebner was planning a private lawsuit against the Association and was seeking the Department's help as an expert witness. However, the request was contained in an email where he clearly identified himself as "City of Aiken Councilman for District 4." R.p. 136. The request was supported by the State Representative and the State Senator for the area. This is certainly sufficient color of authority for the State Highway Engineer to believe he was assisting a City under the statutory powers and duties conferred on the Department of Transportation to:

(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.

There are 278 municipalities and 46 counties in the State, each of which have governing bodies and officers. The single State Highway Engineer cannot be expected to research the actual authority of each individual claiming to represent a government body. Moreover, the courts should not be in the business of reviewing each discretionary decision of that official. Absent a clear abuse of discretion, the courts should defer to those decisions. Gamble v. Williamsburg Co. Sch. Dist., 305 S.C. 288, 290, 408 S.E.2d 217, 218 (1991).

Finally, Petitioners cite the auditor's report referencing the Code of Federal Regulations governing the federal bridge inspection program in which SCDOT

participates. The fact that such participation requires the Department to inspect all public bridges in the State does not mean the inspection here was outside its authority. The City had authority to make the request under its delegated powers over roads and bridges and to abate public nuisances. S.C. Code Ann. §5-7-30 (Rev. 2004). The Department had authority to assist it under the above-cited enabling act section.

In section III. of the Petition, Petitioners challenge the Court of Appeals' reliance on the report of the Chief Internal Auditor. It is true that we disagree with the conclusions of that report with respect to the incident in question. The auditor is not a lawyer and his conclusions concerning the legality of the actions herein are incorrect. However, the point is that the Department does not provide services to private landowners at public expense. The Department has a Chief Counsel who is well aware of the Constitution's restrictions in this respect. With regard specifically to bridge inspections, this was the import of Mr. Walsh's affidavit to the Circuit Court that the only other incident in ten years to his knowledge was an inspection of the bridge to Fripp Island which local authorities had requested that the Department take into its system for future maintenance. R.p. 133. Petitioners have not shown nor attempted to show any examples or ongoing practice of the Department's misuse of its resources that would justify a court's admonition, guidance, or instruction.

II. The courts below correctly held that Petitioners lack standing.

Petitioners cite and discuss 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 their own past cases where they were successful in causing the appellate courts to hear their 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 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.

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, as mentioned above, Petitioners have 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.

The facts of this case differ from those cited by Petitioners in support of standing. In those cases the plaintiffs and the defendant disagreed with respect to the interpretation of the statutes involved, e.g., whether competitive bidding was required on a school construction contract or whether emergency procurement could be pursued to demolish the bridges replaced by the Ravenel Bridge. Here, Respondent agrees that the Constitution prohibits it from working on private property and does not do so. It disagrees that that is what it did here.

III. No exceptions to the doctrine of mootness exist.

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. 53-122. No court decision can now reverse it. 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.

Petitioners claim the Department's actions are capable of repetition but generally will evade review. Their argument in this respect rests on this bare assertion with nothing more. While it is true, as Petitioner 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. Petitioners have pointed out no past occurrences nor shown any inclination of the Department 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.”) The Court should affirm the refusal of the Circuit Court and Court of Appeals to do so.

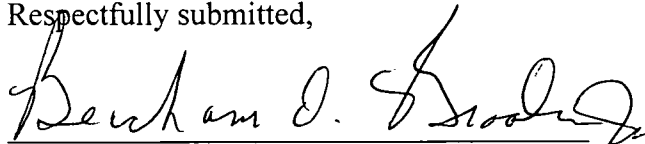
The third exception to mootness is that the decision of the trial court will affect future events or have collateral consequences for the parties. We believe Petitioners’ statement of this exception in truncated form misinterprets its meaning. The exception is intended to allow courts to rule on preliminary matters such as land titles so that further litigation on larger issues may proceed, e.g. title clearing opinions that would allow divorce settlements to occur or facilitate business dissolutions. See, generally, 5 AM.JUR.2D *Appellate Review* § 649 (1995). Under Petitioners’ interpretation, this exception would be redundant of the future guidance exception already covered. 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.

CONCLUSION

The Circuit Court correctly found the action taken by the Department was a legitimate exercise of its 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. Petitioners, as strangers to the events involved lack standing to seek the relief they demand. The case is non-justiciable for that reason and because it is moot. No exceptions to standing and mootness have been shown. The Court should let the Order of the Circuit Court stand.

Respectfully submitted,



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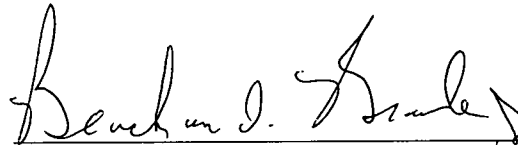
Appellate Case No. 2012-213599

Case No. 2012-CP-40-1560

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the South Carolina Public Interest Foundation and Edward D. Sloan, Jr., Petitioners, with the **Return to Petition for Certiorari** by U.S. Mail, postage prepaid, this 12th day of June, 2015, as follows:

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