THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2015-001175

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

v.

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

BRIEF OF PETITIONERS

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Petitioners challenged the constitutionality of the Respondents' expenditure of public funds for private purposes. The Circuit Court and the Court of Appeals ruled against Petitioners. They petitioned for rehearing, but the Court of Appeals denied the petition April 29, 2015. They petitioned for a writ of certiorari, and this Court granted the petition September 3, 2015.

QUESTIONS PRESENTED

1. **When the Department of Transportation expended public funds to assist a private citizen in his dispute with the developer of a private, gated community, did the courts below err in failing to rule that the expenditure violated the South Carolina Constitution, Article X, Sections 5 and 11?**

2. **When a private citizen in a dispute with the developer of a private, gated community asked the Department of Transportation for professional engineering assistance, did the courts below err in ruling that the request for assistance came from a municipality?**

3. **Did the Court of Appeals err in ruling that the findings of the Chief Internal Auditor, employed by the Commission of the Department of Transportation, were admissions of the Respondent Department of Transportation, and therefore that there was no reason for judicial guidance?**

4. **Did the courts below err in refusing to grant public importance standing to the Petitioners?**

5. **Did the courts below err in refusing to grant Petitioner Sloan taxpayer standing?**

6. **Did the courts below err in adopting a *de minimis* exception to taxpayer standing?**

7. **Did the courts below err in refusing to apply any of multiple exceptions to the doctrine of mootness?**

STATEMENT OF THE CASE

The South Carolina Department of Transportation ("SCDOT") expended public funds to inspect and report on three privately owned bridges in a private, gated community, and not on the SCDOT system. Petitioners sought declaratory judgment that this expenditure violated the S.C. Constitution's prohibitions of expending public funds for private purposes and pledging the full faith and credit of the State for the benefit of private individuals, associations, or corporations. S.C. Const. Art. X, §§ 5, 11 (Rev. 2009).

The Circuit Court ruled that the DOT was legitimately assisting a municipality (App. pp. 7-10), denied standing to both Petitioners (App. pp. 5-6), ruled that the matters were moot, and that no exception to the doctrine of mootness applied. Petitioners claimed standing based on the public importance of the issue and also asserted that Mr. Sloan possessed taxpayer standing. Furthermore, Petitioners argued that these acts and expenditures were capable of repetition yet evading review, that the public importance of these issues served as an exception to the doctrine of mootness, and that a decision in this case would have important collateral consequences. The Circuit Court granted Summary Judgment for the Respondents[1] on all issues (App. pp. 10-11).

Petitioners appealed to the Court of Appeals. The Court of Appeals affirmed the judgment of the Circuit Court. Throughout the opinion, the Court of Appeals repeatedly stated that the Respondents had admitted that their conduct was wrongful, and/or unconstitutional. Petitioners petitioned the Court of Appeals for rehearing, based upon four grounds: (1) the Court of Appeals mistakenly believed that Respondents admitted that their conduct was wrongful; (2) Respondents have not admitted any wrongdoing; (3)

[1] Respondent Walsh, Deputy Secretary of Engineering resigned his office April 17, 2013

taxpayer standing is distinct and should be considered separately from public importance standing; and (4) the request for inspection of privately owned bridges came not from the City of Aiken, but from a private citizen.

The Court of Appeals denied the petition for rehearing without substantive comment. Petitioner petitioned this Court for a writ of certiorari, and this Court granted the writ September 3, 2015.

STATEMENT OF FACTS

On July 13, 2011, Reggie Ebner, a resident of Woodside Plantation, a private gated community in Aiken, S.C., sent an email to the Deputy Secretary for Engineering for the SCDOT requesting SCDOT's assistance in a disagreement and potential legal dispute between Ebner and the developers of Woodside Plantation (App. pp. 35-52). Ebner claimed to be an engineer licensed in Texas. Ebner's July 13 email alleged three engineering or construction flaws: (1) the replacement of design-specified metal culverts with wooden bridges; (2) the road failure over the sewer pipe; and (3) defects in a concrete bridge, all of which might require costly repairs by the HOA (App. pp. 39-52).

Ebner had earlier written to the City of Aiken asking, "What government entity is the Woodside Property Owners Association responsible to for the well being of its citizens?" (App. p. 39). City officials had replied to Ebner that the HOA was "responsible to its shareholders, not a governmental entity" (App. p. 40).

Ebner also sent questions to his State Representative about these issues. He wanted answers that "could be used in future legal proceedings" (App. p. 42). He asked, "What government agency is responsible for design approval, construction inspection, safety requirements and final approval for bridges located in South Carolina?" (App. p. 42). The

Representative told Ebner that the "bridges in question are NOT on the state system," and "the Department [of Transportation] is not responsible for maintaining these structures" (App. p. 43).

Instead of engaging an engineer licensed in South Carolina, Ebner attempted to pressure the SCDOT to inspect and report on the wooden bridges, even though they are on private property in a gated community. Ebner requested, "If SCDOT approval and quality control of the wooden bridges cannot be established, request roads be installed as designed with culverts" (App. p. 37). He further requested, "If SCDOT has approved the installation and quality control of the wooden bridges, request is to verify installation meets SCDOT bridge specifications and safety requirements." (App. p. 37).

As to a concrete bridge in Woodside Plantation, Ebner requested, "SCDOT will need to determine if concrete bridge can be certified for use. If concrete bridge is certified, verify safety requirements for use and construction of bridge approaches are to specification." (App. p. 38). He further requested, "Once your review is complete, I propose a meeting to discuss the findings and any corrections that need to be made with the appropriate parties." (App. p. 38).

In summary, Ebner was asking the State to pay for the inspection, evaluation, and expert opinion regarding these privately owned bridges. If the evaluation indicated a problem, he planned to use legal or political pressure to require the developer to replace the wooden bridges with metal culverts and to repair the concrete bridge and its approaches (App. pp. 37-38). He was asking the SCDOT to be his expert witness.

Ebner's Representative and Senator passed along his request to the SCDOT, and they appeared to endorse his request for the publicly financed inspection and report. These

two legislators appeared to mistakenly believe that school buses passed over these bridges. However, Sloan's Affidavit and the bus routes published on the official school district website demonstrate that no school bus traversed the bridges (App. pp. 32, 111-120).

After the SCDOT completed its bridge inspection and made its report to Ebner and the legislators, the DOT Commissioners' Chief Internal Auditor ("Auditor") investigated the propriety of SCDOT's actions in using public funds to inspect private bridges, not in the SCDOT's system. The Auditor is employed by Commissioners of the DOT (not the Department). That Commission does not govern the Respondent DOT, nor is it a constituent of the DOT. The two are separate organizations.

The Auditor issued an Aiken Bridge Inspection Investigation Report ("Auditor's Report") dated October 12, 2011. (App. pp. 172-175). The Auditor stated, "These bridges were **not on the state's system**. Inspection staff also had to **create fake bridge ID numbers** because the bridges were off system" (App. p. 173) (emphasis added).

The Auditor confirmed with SCDOT's Chief Legal Counsel "that SCDOT has no obligation to inspect bridges on private property." (App. p. 173). The Auditor interviewed various SCDOT personnel under the Chief Engineer for operations. SCDOT employees had warned Chief Engineer for Operations that the inspection of these off-system bridges violated established policy. "Without any reservation, **all personnel were certain the activity was wrong**, stated that they **expressed reluctance to their supervisor**, and knew it would later resurface because it was **against established policy**" (App. p. 173) (emphasis added). Nevertheless, the SCDOT official had ordered the investigation to proceed. The report concludes that the SCDOT decided to go forward with the inspection because someone thought that school buses used the roads (App. p. 174). The Auditor determined

that "no bus driver or citizen had complained to the school district about the bridges" (App. p. 174).

The Auditor determined that the request for inspection "came from a city councilman but **not from the City of Aiken.**" (App. p. 174) (emphasis added). Furthermore, the Auditor found that "[Ebner] is a resident of Woodside Plantation." (App. p. 174).

The Auditor further determined that the SCDOT did not seek its own legal department's clarification on the issue. (App. p. 174). The Auditor found that contrary to its long-standing policy, SCDOT provided an engineering inspection and report to Ebner, without any cost or fee whatsoever. (App. pp. 173-175).

Finally, the Auditor stated, "There is also the possibility that SCDOT could be called as an expert witness for the plaintiff without any compensation if the property owners Association decides to sue the developer of the private gated community." (App. pp. 174-175).

ARGUMENT

When South Carolina roads are crumbling, the DOT should not spend taxpayer dollars to serve as an unpaid expert in a private dispute.

I. THE COURTS BELOW ERRED IN FAILING TO RULE THAT RESPONDENTS VIOLATED S.C. CONSTITUTION, ARTICLE X, §§ 5 AND 11 BY EXPENDING PUBLIC FUNDS FOR "PRIVATE PURPOSES" AND TO "BENEFIT PRIVATE PARTIES."

This case involves substantial constitutional issues. The South Carolina Constitution Article X, § 5 states that any tax "shall distinctly state the public purpose" and requires that taxes (public funds) be spent for those public purposes. S.C. Constitution, Article X, § 11 provides:

> (t)he credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or private education institution except as permitted by Section 3, Article XI of this Constitution.

Id. Article X, § 11 proscribes the expenditure of public funds "for the primary benefit of private parties." *State ex rel McLeod v. Riley* 276 S.C. 323, 329, 278 S.E. 2d 612, 615 (1981), *overruled on other grounds* by *WDW Prop. v. City of Sumter*, 342 S.C. 6, 535 S.E.2d 631 (2000). This Court ruled that "all legislative action must serve a public rather than a private purpose." *Id.,* 276 S.C. at 328, 278 S.E. 2d at 615.

In the case at bar, the three inspections were **not legislative** actions, but **executive** actions, which served a private rather than a public purpose. These expenditures did not further an improvement to the public as a whole, but rather functioned to benefit an individual, or at best, a private homeowners' association in a gated community. They contravened the Constitutional principles that require that expenditures serve a public purpose. To the knowledge of the Petitioners, several Attorney General Opinions have

addressed this issue, but this Court has not ruled on the constitutionality of executive actions and expenditures that serve a private rather than a public purpose.

II. THE COURTS BELOW ERRED IN RULING THAT THE SCDOT WAS LEGITIMATELY ASSISTING A MUNICIPALITY.

Both the Auditor's Report and the Ebner correspondence demonstrated that the City of Aiken was not involved in Ebner's request, but the Circuit Court agreed with the Respondents' unsubstantiated claims:

> The Department's position is that the **city's investigation of the bridges** was a legitimate exercise of a municipality's delegated police power to insure the health, safety, and welfare of persons within its boundaries as well as its power to abate public nuisances; and that **SCDOT is authorized to assist local governments** in these activities within areas of its expertise under its primary enabling statute. S.C. Code Ann., § 57-3-110(7) (Rev. 2006).

(App. pp. 3-4) (emphasis added). The Circuit Court also expressed his reluctance to "insert [. . .] itself into routine decisions of the State Highway Engineer as to when and where to provide **assistance to local governments**" (App. p. 6) (emphasis added)). The Circuit Court seemed to adopt the Department's assertion that "it has no interest in using its inspectors to inspect private bridges outside the occasional event that **another governmental agency** may request its assistance in doing so for a legitimate public purpose" (App. p. 6) (emphasis added). Similarly, the Circuit Court stated, "the inspection of the bridges was legitimately **within the City's police power** and the decision by Walsh to assist it was well within the Department's enumerated powers **to assist other governmental entities** in areas of its expertise" (App. p. 6) (emphasis added). Accordingly, the Circuit Court ruled,

> Through the forgoing statute, the legislature has conferred discretion upon the Department as to when it will **assist local governments**. . . . Here, the Department properly responded to **a request from City of Aiken officials**

> and representatives for assistance in an area of the Department's expertise. **The City had authority to make the request** and the Department had authority to respond to it.

(App. p. 10) (emphasis added).

The flaw in the Circuit Court's analysis is that **the City of Aiken did not request the assistance of the Department of Transportation**. The Auditor noted, "The City of Aiken does not maintain or own the roads in Woodside Plantation," but they are "private property." (App. p. 174). One man, Ebner, who happened to serve on Aiken City Council, requested the help of the Department, for a personal dispute he had with the developer of Woodside Plantation. The City of Aiken did not endorse Ebner's request. The City of Aiken had specifically declined to help Ebner. Ebner admitted this to his Representative on September 6, 2010:

> **The City has advised me in writing they are not responsible for bridges** since they do not have an approved inspector; however they have allowed three wooden bridges and one concrete bridge to be installed in Woodside. It appears that the Developer got the Woodside Property Owners Association to agree to install the wooden bridges.

(App. p. 42) (emphasis added).

The City of Aiken had no ownership interest in the roads and bridges inside the Woodside Plantation (App. p. 40). The Auditor noted, "The City of Aiken does not maintain or own the roads in Woodside Plantation," but they are "private property." (App. p. 174). As demonstrated above, the City of Aiken had, in effect, washed its hands of the dispute between Ebner and the developers of Woodside Plantation. ("The city of Aiken does not have any authority to review the actions taken by this Corporation unless there is a violation of city ordinance or state statute that the city is authorized to enforce.") (App. p. 40). The City did not want to get involved in this dispute. It told Ebner that the dispute was a private one between the homeowners and the developers of Woodside Plantation.

("Typically, a nonprofit corporation is responsible to its shareholders, not to a governmental entity.") (App. p. 40). The bridge inspections and reports Ebner requested were not for a public purpose. They were to create evidence for a private dispute ("Please advise what is the proper procedure to get technical answers to these questions that could be used in future legal proceedings?") (App. p. 40).

The Auditor noted that the SCDOT had created an ethical conflict for its employees in asking them to deviate from State law. (App. p. 173). SCDOT employees warned the Chief Engineer for Operations, "that it was wrong to inspect privately owned bridges." (App. p. 173). The Auditor's Report noted that 23 CFR 650 requires SCDOT to "inspect all highway bridges located on public roads" and "defines a public road as any road or street under the jurisdiction and **maintained by a public authority and open to the public**" (App. p. 173) (emphasis added). The Auditor confirmed that the SCDOT "did not seek any legal clarification" on this matter. (App. p. 174). The inspection was assisting an individual, and the Circuit Court erred in ruling that the SCDOT was assisting a municipality.

In addition to being wrongful, the conduct was **unconstitutional**. The inspection of privately owned bridges in a private, gated community was an unconstitutional expenditure of public funds for private purposes whether the request came from a representative of the City of Aiken, or from a private party seeking assistance in his private lawsuit against the privately-owned developer. If the City had made the request, it would have been an improper and unconstitutional request, to which the Respondents should have replied, as did the City of Aiken itself, that the matter was a private dispute between Ebner

and the developer of Woodside Plantation. Spending public money in this private dispute was unconstitutional, **regardless of the identity of the requester**.

III. THE COURT OF APPEALS MISTAKENLY BELIEVED THAT RESPONDENTS ADMITTED THAT THEIR CONDUCT WAS WRONGFUL.

Throughout the opinion, the Court of Appeals repeatedly stated that the Respondents had admitted that their conduct was wrongful, and unconstitutional.

A. The Court of Appeals Mistakenly Believed That the Auditor Was an Agent of the Department.

The Court of Appeals mistakenly believed that the findings of the Office of the Chief Internal Auditor were the same as admissions of the Respondent, the Department of Transportation. However, the Office of the Chief Internal Auditor is not an official of the Department of Transportation, and Respondents never agreed with the findings of the Auditor.

First, the Auditor works for the Commission of the SCDOT, a separate entity, which is not the governing body of the SCDOT. The statute establishing the Office of the Chief Internal Auditor clarifies that the Auditor works for the Commission, and not the Department. S.C. Code Ann. § 57-1-360. Respondents admitted: "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." Brief of Respondent, p. 8. In many ways, the Chief Internal Auditor is adversarial to, and a watchdog over, the Respondent Department of Transportation.

Although the Chief Internal Auditor issued a report finding that the inspection of the bridges was unlawful and improper, Respondents never accepted those opinions of the

Auditor. Instead, throughout this litigation, the Department has maintained that the inspections of privately owned bridges were a proper and lawful exercise of its discretion.

B. The Court of Appeals Made Several Rulings Based upon the Misapprehension That the Opinion of the Auditor Was the Opinion of the Department.

The Court of Appeals' misunderstanding of the relationship between the Auditor and the Department, and the conflicting opinions of the Auditor and the Department constrained its ruling and opinion and directed the Court to reach numerous improper conclusions. Because the Court of Appeals believed that the Respondents had admitted the wrongdoing, it denied the Appellants public importance standing (Slip Opinion, p. 3); taxpayer standing (Slip Opinion, p. 4); the first exception to the doctrine of mootness, capable of repetition yet evading review (Slip Opinion, p. 6); the second exception to the doctrine of mootness, public importance (Slip Opinion, p. 6); and the third exception to the doctrine of mootness, that the decision will affect future events or have collateral consequences (Slip Opinion, p. 6). In short, because the Court of Appeals wrongly believed that the findings of the Auditor were admissions of the Department, they found nothing for a court to decide.

On the contrary, Respondents have consistently maintained that their inspection of private bridges at public expense was perfectly legitimate and lawful. (App. p. 126). They argued, "[T]he decision by Walsh to assist [the City] was well within the Department's enumerated powers to assist other governmental entities in areas of its expertise." (App. p. 129). They concluded, "Here, the Department properly responded to a request from City of Aiken officials and representatives for assistance in an area of the Department's expertise. The City had authority to make the request and **the department had authority to respond to it**" (App. p. 131) (emphasis added). However, it was **not the City**

investigating the bridges or requesting assistance. (App. pp. 35-52). Respondents have never admitted that their conduct was unconstitutional. The record is clear: the request did not come from the City of Aiken. At a minimum, the Circuit Court record presents a genuine issue of material fact, and precludes summary judgment.

IV. THE CIRCUIT COURT ERRED IN FAILING TO GRANT PETITIONERS PUBLIC IMPORTANCE STANDING.

The Court of Appeals decision conflicts with prior decisions of this Court granting public importance standing in similar circumstances. This Court has repeatedly recognized, developed, and expanded jurisprudence of public importance standing and the standing of a South Carolinian to challenge unconstitutional actions by State officers. *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997). The Circuit Court erred in failing to follow this long line of cases affording public importance standing on similar issues.

The courts of this State have ruled that the manner in which public funds are spent is of "immense public importance."

> The **expenditure of public funds** pursuant to a competitive bidding statute is of **immense public importance**. Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to **maintain the**

> **<u>public's trust and confidence in governmental management of public funds</u>**.

Sloan v. School District of Greenville County, 342 S.C. 515, 524, 537 S.E.2d 299, 303 (2000) (emphasis added). If the **<u>statutes</u>** that require competitive sealed bidding in the expenditure of taxpayer funds are matters of great public importance, **<u>Constitutional provisions</u>** forbidding the expenditure of public funds for private purposes are matters of even greater public importance.

The Court of Appeals expanded on this analysis in *Sloan v. Greenville County.*

> **<u>There is a keen public interest in the stewardship of public funds</u>** and a strong need to provide guidance for future procurement decisions. Our inability to provide any effective relief in this case should not be a barrier to the courts consideration of this question of exceptional public interest.

Id. 356 S.C. 531, 554, 590 S.E.2d 338, 350 (2003) (emphasis added). The "keen public input interest in the stewardship of public funds" is even greater in the Constitutional prohibitions of expenditures of public funds for private purposes, because the substance, the private purpose is prohibited, not just the method of the selection of source. The Circuit Court erred in failing to grant the Petitioners standing because of the great public importance of ensuring that the State does not violate the constitutional prohibitions that govern its expenditures.

This Court granted public importance standing to the plaintiffs in *Sloan v. Dept. of Transportation,* the *Ravenel Bridge* case.

> Under the public importance exception, standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance." *Baird v. Charleston Cty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). This Court has never held that there must be no other potential plaintiffs with a greater interest in the case or some other nexus, as the respondents now argue.

Id., 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005). The standard for public importance

standing includes (1) a need for future guidance on the subject matter, and (2) a benefit to all the citizens of the State or local government whose actions are challenged. *Freemantle v. Preston,* 398 S.C. 186, 197, 728 S.E.2d 40 (2012). Similarly, the issue in this case is one of great public importance and requires future guidance, as Petitioners could find no South Carolina case law directly on point, addressing an agency's spending public funds for private purposes.

In this case, the SCDOT has violated the S.C. Constitution's prohibition against expending public funds for private purposes. Although the lower-level employees acknowledged the illegality of their actions, the SCDOT officials provided professional engineering services, at State expense, to a private individual seeking to support his private legal claims (App. pp. 173-175). The citizens of this State have a strong public interest in ensuring that State government obeys the South Carolina Constitution.

V. THE CIRCUIT COURT ERRED IN FAILING TO ACKNOWLEDGE SLOAN'S TAXPAYER STANDING.

The Court of Appeals decision conflicts with prior decisions of this Court finding taxpayer standing. South Carolina courts have long recognized the right of a taxpayer to bring an action to contest an illegal government expenditure of taxpayer funds. Taxpayers possess established and expansive standing to bring such actions and request such judicial relief.

Taxpayers are a distinct subset of residents. In *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993), taxpayers sued the Treasurer, Commissioners and Executive Director of the South Carolina Highways and Public Transportation Commission. The Treasurer was diverting funds raised by a gasoline tax to another purpose, and this Court ruled that the taxpayers had sufficient interest, by virtue of having **paid the gasoline tax**,

to possess **standing** to contest the diversion. The Court acknowledged that a plaintiff ordinarily must allege damage to himself different from that sustained by the public generally, but also noted the exception to the rule: an unlawful diversion of public funds. This Court recounted this long-standing right in *Myers v. Patterson*:

> As a general rule, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. *Shillito v. City of Spartanburg,* 214 S.C. 11, 51 S.E.2d 95 (1948). An exception to this rule exists when the act sought to be enjoined is an unlawful diversion of public funds, such as the **expenditure of public funds** under an alleged **unconstitutional** statute. *Id.* at 22, 51 S.E.2d at 97. In such cases, a **taxpayer** who may be compelled to pay the assessment, or **who has contributed** to the sum jeopardized, is considered to have **sufficient interest to enjoin the illegal act**. *Id. See also Kirk v. Clark,* 191 S.C. 205, 4 S.E.2d 13 (1939) (the principle is firmly settled in this State that **a taxpayer may maintain an action in equity**, on behalf of himself and all other taxpayers, **to restrain public officers from paying out public money for purposes unauthorized by law**). Because the plaintiffs have alleged that the **challenged expenditure of tax revenues violates the constitution**, we find that they have **standing** to bring this action and turn to the merits of their claim that the Legislature lacks authority to divert SHIMS tax revenue to a use different from that for which they were levied.

Id. 315 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (emphasis added).

This Court also acknowledged this right of taxpayer standing in *Sloan v. Department of Transportation*, the *Ladson Road* case.

> Generally, "a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained." *Sloan v. Wilkins,* 362 S.C. 430, 436, 608 S.E.2d 579, 582-83 (2005). **Nonetheless, "[a] taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina,"** *Sloan v. School Dist. of Greenville County,* 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct.App.2000), and **indeed has been repeatedly recognized as to Sloan himself**. *See, e.g., id.; Sloan v. Department of Transp.,* 365 S.C. at 304, 618 S.E.2d at 878-79; *Greenville County I,* 356 S.C. at 548, 590 S.E.2d at 347.

* * *

> Likewise, in this case, **Sloan has standing because he has alleged** a misuse of the statutory emergency procurement provision and therefore **an unlawful expenditure by public officials**.

Id., 379 S.C. 160, 169-171, 666 S.E.2d 236, 241 (2008) (emphasis added).

The most extensive discussion of this issue is by the Court of Appeals in *Sloan v. School District of Greenville County,* 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), a decision which this Court discussed at some length in *Sloan v. Department of Transportation* (*Ladson Road*).

> We find *Sloan v. School Dist. of Greenville County* is particularly instructive on this issue. In that case, the School District procured construction contracts in February 1998 for three middle schools pursuant to its own procurement code's emergency exception to the competitive sealed bid procedure. The District justified the need for the emergency procurement because it wanted the construction of the schools completed before school started in August 1999. **The Court of Appeals found Sloan had standing**, stating as follows: "the public interest involved is the prevention of the **unlawful expenditure** of money raised by taxation. **Public policy demands** a system of checks and balances whereby taxpayers can hold public officials accountable for their acts. **Taxpayers must have some mechanism of enforcing the law.**" *Id.* at 523, 537 S.E.2d at 303 (citation, quotation marks, and alteration omitted).

Id., 379 S.C. 160, 170, 666 S.E.2d 236, 241 (2008) (emphasis added).

Just as the taxpayers in *Myers v. Patterson* possessed standing to sue the South Carolina Highways and Public Transportation Commission because they had contributed to the sum at issue, so also in the case at bar, Mr. Sloan has contributed, as a taxpayer to the jeopardized sum. The Court of Appeals in *Sloan v. School District*, and this Court in *Sloan v. Department of Transportation* granted Sloan taxpayer standing because "taxpayers must have some mechanism of enforcing the law." Accordingly, this Court should rule that Mr. Sloan possessed taxpayer standing as a "mechanism of enforcing the law." *Id.*

VI. THE CIRCUIT COURT ERRED IN ADOPTING A *DE MINIMIS* RULE FOR TAXPAYER STANDING.

The Circuit Court's new *de minimis* rule conflicts with prior decisions of this Court. The Circuit Court ruled that a taxpayer possesses no standing if his individual interest is *de minimis* (App. p. 5). The Circuit Court failed to cite any authority supporting a *de minimis* rule. Furthermore, such a rule is contrary to South Carolina case law granting standing to taxpayers to challenge illegal expenditures, such as *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948) in which the taxpayer had contributed a mere $6.28, and *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985), in which the issue was a few hundred dollars of travel expenses divided among all the taxpayers of the City of Greenwood. In *Brown v. Wingard*, although the amount of taxpayer funds was small, the Court held that taxpayers "have an interest in seeing that city officials disburse funds in a lawful manner." *Id.* at 480, 330 S.E.2d at 302.

In *Myers v. Patterson*, as in the case at bar, the taxpayers had contributed to the fund at issue by paying gasoline taxes. In these cases, the Courts could have, **but refrained from**, adopting or acknowledging a *de minimis* rule. The "unlawful diversion of public funds" creates "an exception to the rule" that generally requires Petitioners "to allege and prove damage to themselves different in character from that sustained by the public generally." *Myers v. Patterson,* 315 S.C. 248, 433 S.E.2d 841 (1993).

Similarly, in *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95, 99 (1948), the Court ruled, "An apparent exception to this rule exists when the act sought to be enjoined is an unlawful diversion of public funds." *Id.* at 99. The Court then ruled that a citizen should also be granted standing "to contest the expenditure of public funds under an alleged unconstitutional statute." *Id.* A long line of opinions addressing this issue have never

applied the *de minimis* rule to taxpayer standing. *Mauldin v. City Council*, 33 S.C. 1, 11 S.E. 434 (1890); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939); *Brown v. Wingard*, *Sloan v. School Dist. of Greenville Cty.*

As a practical matter, in every taxpayer action, the individual taxpayer by definition will possess only a very small personal financial interest in the portion of the illegal expenditure by any public body. Accordingly, the Circuit Court's rule that a *de minimis* interest in any expenditure effectively disqualifies any taxpayer from bringing a taxpayer action and will effectively **eliminate all taxpayer actions** except those brought by the absolute wealthiest of our citizens.

Chief Justice Toal warned against such a result in her dissent in *Newman v. Richland County Historic Preservation Commission.*

> If citizens were barred from bringing all lawsuits that concern governmental action, then there would be no opportunity to remedy governmental abuse. . . . A moderate balance is achieved by granting citizens standing when they bring actions alleging *ultra vires* acts by a governmental agency, while denying citizens standing to challenge discretionary actions.

Id. at 325 S.C. 79, 480 S.E.2d 72, 75 (1997).

South Carolina Courts have consistently granted taxpayers standing to contest illegal government expenditures. *Sloan v. School District of Greenville County*, 342 S.C. 515, 524, 537 S.E.2d 299 303-304 (S.C. App. 2000); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15 (1939); *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948); *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); and *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993).

VII. THE CIRCUIT COURT ERRED IN FAILING TO APPLY MULTIPLE EXCEPTIONS TO MOOTNESS.

The Court of Appeals decision conflicts with prior decisions of this Court applying multiple exceptions to the doctrine of mootness. The Circuit Court ruled that because the inspection was completed, and the expenditure had been made, the action was moot (App. pp. 6-7). However, South Carolina courts have recognized three exceptions to the doctrine of mootness.

> First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. *E.g., id.; Sloan v. Department of Transp.,* 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005); *Byrd v. Irmo High Sch.,* 321 S.C. 426, 468 S.E.2d 861 (1996). "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." *Curtis v. State,* 345 S.C. at 568, 549 S.E.2d at 596. 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.; accord Sloan v. Department of Transp.,* 365 S.C. at 303, 618 S.E.2d at 878.

Sloan v. Dept. of Transportation, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) ("Ladson Road").

A. This Matter Is Capable of Repetition, Yet Evading Review.

This matter falls within the first exception to the doctrine of mootness: it is capable of repetition, but evades review. The basic unlawful element was a State agency's expending taxpayer funds for private purposes for a private individual and private association. The first public notice of the unlawful expenditure was (as is always the case with such an expenditure) **after** it had been made. This scenario is capable of repetition.

The South Carolina Supreme Court applied this standard in the *Ravenel Bridge* case, which held that the manner of selection of source of procurement of the Ravenel Bridge was unlawful, being by request for proposals instead of by competitive sealed bids.

> The DOT contends this case should be dismissed as moot because the construction contracts have been awarded and fully performed. We disagree.
>
> "[A]n appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State,* 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

Sloan v. Dept. of Transportation, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005). In the *Ravenel Bridge* case, this Court ruled that use of the request for proposal process was designed to accelerate the procurement process. The Court ruled, "Clearly, this issue is capable of repetition, yet will usually evade review. Accordingly, despite mootness, we will address the merits." *Id.*

> The standard is *capable* of repetition, not *likelihood* of repetition.
>
> The party bringing the action need only show the issue raised is *capable* of repetition and **is not required to prove there is a "reasonable expectation" the issue will arise again.** *Byrd [v. Irmo High School],* 321 S.C. at 431-32, 468 S.E.2d at 864 (finding South Carolina has adopted the "lenient" approach to evading review analysis).

Sloan v. Greenville County, 356 S.C. 531, 554-555, 590 S.E.2d 338, 351 (2003) (italics in original; bold and underline added). The SCDOT and other State agencies are capable of continuing to expend public funds for private purposes and keep the public uninformed until some accidental disclosure of the expenditure, which could surface years after the expenditure and thereby evade review.

In *Sloan v. Department of Transportation* (*Ladson Road*), this Court explained its reasoning on the standard of capable of repetition, yet evading review.

> We find the issue of whether the DOT properly authorized the emergency procurement is one that is capable of repetition, yet will usually evade review.[FN6] For example, here an emergency procurement came four years into the construction project, which was then **completed within about six months.** The project was completed only a few months after Sloan filed suit and well before the parties filed motions for summary judgment.

> Therefore, the "capable of repetition but evading review" exception to mootness applies here.

Id., 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008). If the manner of selection of source in both prior *Sloan v. Department of Transportation* cases was an issue capable of repetition, yet evading review, then certainly the inspection of these private bridges, completed within a day or two, meets the standard of capable of repetition, yet evading review. This exception to the mootness doctrine should also apply here.

B. This Matter is of Great Public Importance.

This case also falls within the second exception, an issue of public importance. The analysis that supports public importance standing (addressed above) also supports a public importance exception to the doctrine of mootness.

> In our discussion of Sloan's **standing** to bring this action, this court has already found in an analogous case that the "expenditure of public funds pursuant to a competitive bidding statute is of **immense public importance**." *Sloan [v. School District]*, 342 S.C. at 524, 537 S.E.2d at 303. **The same rationale applies with respect to mootness**.

Sloan v. Greenville County, 356 S.C. 531, 554, 590 S.E.2d 338, 350 (2003) (emphasis added).

In *Sloan v. Department of Transportation (Ladson Road)*, this Court analyzed the great public importance exception to the doctrine of mootness:

> This Court has noted "the limited nature of the exception for questions of 'imperative and manifest urgency.'" *Sloan v. Greenville County,* 361 S.C. 568, 571, 606 S.E.2d 464, 466 (2004) (*Greenville County II*). In *Greenville County II,* we held that **where judicial guidance exists** on the legal issue presented, **there is no imperative and manifest urgency** for an advisory opinion.
>
> **In the instant case, however, there is no case law** specifically addressing the DOT's authorization of an emergency procurement. Because this is a matter of public importance which **could occur** at any time (given the inherent unpredictability of emergencies), we find there is an urgent nature to this issue.

> Accordingly, even though the Ladson Road Project was completed in 2005, we will address the other issues raised in the case.

Id., 379 S.C. 160, 169, 666 S.E.2d 236, 240 (2008). Similarly, there is no case law on the subject of an agency spending public funds for private purposes, and this kind of expenditure "could occur at any time."

The Court made a similar ruling in the other *Sloan v. Department of Transportation* case. **"[D]espite the mootness in the present case**, we find Sloan has standing **to raise this issue**." *Id.,* 365 S.C. 299, 304-5, 618 S.E.2d 876, 879 (2005). This Court should address the issue, even though it is technically moot, as it did in the prior *Sloan v. Department of Transportation* cases.

C. This Matter May "Affect Future Events or Have Collateral Consequences."

Finally, the third exception to mootness applies. This ruling may "affect future events or have collateral consequences." This Court in *Sloan v. S.C. Department of Transportation* (*Ladson Road*), also found this third exception to the doctrine of mootness. "Moreover, a decision on the merits of this case certainly will affect future events, *to wit,* how the DOT decides to authorize emergency procurements in the future." . 379 S.C. at 169, 666 S.E.2d at 240. Likewise, this Court in the other prior *Sloan v. S.C. Department of Transportation* case ruled that its decision would affect future events. *Sloan v. S.C. Department of Transportation*, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005).

The constitutional provisions at issue prohibiting the expenditure of public funds for private purposes apply not only to the SCDOT, but also to all agencies and branches of State government. There are no cases that interpret and apply these Constitutional provisions, and this ruling will provide guidance to all agencies and departments of State government. Like the other prior decisions in both prior *Sloan v. S.C. Department of*

Transportation cases, a decision in this case will inform SCDOT and other South Carolina State agency decisions regarding the expenditure of public funds for private purposes.

CONCLUSION

The inspection and report of these three privately built, privately owned bridges on private property in a private, gated community did not serve a public purpose, and their inspection at public expense violated South Carolina Constitution Article X, §§ 5 and 11. The Circuit Court erred in ruling that the City had requested assistance from the DOT. Clearly, a private party in a private dispute requested the assistance.

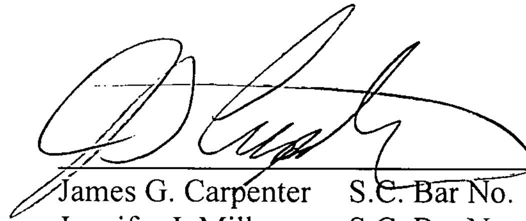
The Court of Appeals mistakenly believed that the Respondents had admitted their conduct to be unlawful, and the Court of Appeals erred in failing to rule on the unconstitutionality using public funds to inspect privately constructed, privately owned, and privately maintained bridges in a private, gated community. Respondents have not admitted their unconstitutional conduct, but rather, they have consistently maintained that their unconstitutional behavior was perfectly lawful and legitimate.

The wrongful and illegal expenditure of public funds by a state agency is a matter of great public importance, and supports Petitioners' "public importance" standing. Mr. Sloan also possesses taxpayer standing to challenge unconstitutional expenditures. All three longstanding exceptions to the doctrine of mootness apply to this case. The Court should rule on these important questions, despite the Respondents' claim of mootness. **WHEREFORE**, Petitioners pray the Court to:

1. reverse the judgment of the Circuit Court,
2. rule for the Petitioners on issues of standing and mootness, and
3. rule that Respondents' expenditure of public funds for private purposes violates South Carolina Constitution Article X, §§ 5 and 11; and

4. in the alternative to No. 3, remand for trial on the merits of the constitutional violation.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



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CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioners hereby certifies that he served a copy of the foregoing Petitioner's Brief on counsel for the Respondents by first class mail this Monday, September 14, 2015, addressed as follows:

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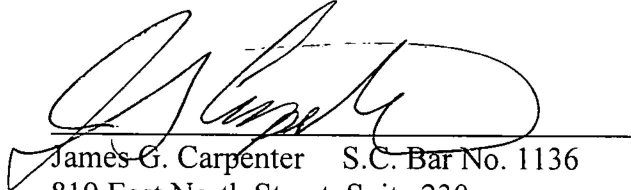

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