

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

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S.C. Supreme Court

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.

REPLY BRIEF OF PETITIONERS

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Petitioners, South Carolina Public Interest Foundation and Edward D. Sloan, Jr., submit this Reply Brief in support of their argument that the Circuit Court and Court of Appeals erred in failing to rule that the Department of Transportation's inspection of privately owned, privately built bridges on private property, in a private gated community, at public expense violated South Carolina Constitution Article X, §§ 5 and 11. The Court of Appeals mistakenly believed that the Respondents had admitted their conduct to be unlawful. The wrongful and illegal expenditure of public funds by a state agency is a matter of great public importance and supports the granting of public importance standing to the Petitioners.

I. THE AUDITOR'S FINDINGS DEMONSTRATE THE UNCONSTITUTIONALITY OF THE INSPECTION.

Petitioners challenged the constitutionality of the Respondents' expenditure of public funds for private purposes. Petitioners contend that the inspections 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.

The DOT Commissioners' Chief Internal Auditor ("Auditor") investigated the propriety of SCDOT's actions in using public funds to inspect private bridges, which were not in the SCDOT's system. The Auditor issued an Aiken Bridge Inspection Investigation Report ("Auditor's Report") dated October 12, 2011. (App. pp. 172-175). 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). The Auditor found that SCDOT provided an engineering inspection and report to Ebner. (App. pp. 173-175). Respondents "disagree" with the Auditor's report (Respondents' Brief, pp. 3, 6). Respondents further contend that the Auditor's conclusions were "incorrect" (*id.*).

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. The Constitution forbids the expenditure of public funds for private purposes.

Respondents contend that South Carolina law allows the Department of Transportation to:

(7) instruct, **assist**, and cooperate with the agencies, 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(7) (emphasis added). This statutorily authorized assistance to municipalities is limited to **public** roads and bridges. The statute cannot alter the Constitutional provisions forbidding the expenditure of public money for private purposes.

Neither a municipality nor the Department has responsibility for privately owned bridges and roads in a private, gated community. In this instance, there was a dispute between a private citizen and a developer of a private, gated community, and the city properly declined to interject itself into it. The DOT, however, spent its time and expended public funds in this private dispute over the design and construction of private bridges.

If the City had made the request to the Respondents, that request would have been just as improper and unconstitutional, and in that instance the Respondents should have replied, as the City of Aiken **did**: that the matter was a private dispute between Ebner and the developer of Woodside Plantation and there was no role for the government in that dispute. Spending public money in this private dispute was unconstitutional, **regardless of the identity of the requester**.

Despite the unconstitutional expenditure in this instance, Respondents contend that they have no need of judicial guidance on the subject. Respondents admit that the bridges inspected in this matter were not a part of the federal bridge inspection program that required state Department of Transportation to inspect “publicly owned bridges” (Respondents’ Brief, pp. 3-4). Respondents object to the term “fake bridge ID numbers” (*id.*, p. 3) from the Auditor’s report as “unnecessarily pejorative” (*id.*), but they do not contend that it is inaccurate or identify any inaccuracy. The Auditor properly found the public inspections of private bridges to be **wrongful**. It remains for this Court to declare them **unconstitutional**.

II. RESPONDENTS WRONGFULLY CONTEND THAT THEY SHOULD HAVE “DISCRETION” TO SPEND PUBLIC FUNDS TO INSPECT PRIVATE BRIDGES.

The Respondents now admit (in theory) “that it may not use its public resources to improve private land” (*id.*).

Respondents also admit that the Court of Appeals relied on the Auditor’s report (*id.*). The Court of Appeals mistakenly believed that the Respondents had adopted the findings of the Auditor; that’s why the Court of Appeals ruled that there was no need of judicial guidance.

Respondents suggest that, “the only relevant evidence on this issue is what Mr. Walsh knew when he made his decision” (*id.*, p. 4). Respondents contend that it is plausible that “the State Highway engineer [believed] he was assisting the city” (*id.*, p. 5). Respondents suggest that the standard is whether the State Highway Engineer abused his discretion. Respondents appear to contend that the State Highway Engineer has “discretion” to violate the Constitution. Respondents argue that the Constitution requires only that an agent of the State “believe” that a municipality is requesting the State’s assistance (*id.*).

Respondents further suggest that the State Highway Engineer's decision to inspect these privately owned bridges was a legitimate "administrative decision" to which the Court must give deference (*id.*). Respondents contend, "This Court should defer to Mr. Walsh even if it would have made a different decision" (*id.*, p. 6). This contention is absurd and dangerous. Deference to an administrative official does not tie this Court's hands in this matter, nor does it require this Court to reflexively approve Mr. Walsh's unconstitutional conduct. Rather this conduct requires this Court to judge the constitutionality of the engineer's actions.

As stated above, the Department of Transportation has power to assist municipalities, when requested, with streets, highways, and bridges; but both a requesting municipality and the Department are limited, by the Constitution, to spend public funds for the benefit of **public** streets, highways, and bridges. S.C. Code Ann. § 57-3-110(7).

Respondents contend that they **did not perform work on private property** in inspecting these privately owned bridges (*id.*, p. 9). How they can make such a contention is far from clear. This contention ignores the evidence and the findings of the Auditor, but this is the issue that requires this Court's guidance: *did the inspection of these privately owned bridges violate the Constitution?*

Respondents contend that they are entitled to the "presumption that public officers had properly discharged the duties of their office" (*id.*, p. 10). Such a presumption is completely unwarranted, and certainly overcome by these facts. The request was an unconstitutional effort to prompt the DOT to spend public money on private property, for the benefit of a private party (free engineering inspection and opinion for use in private legal matter) (App. pp. 173-175). 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).

III. THIS COURT SHOULD GRANT PETITIONERS STANDING TO CONTEST THE UNCONSTITUTIONAL AND ULTRA VIRES EXPENDITURE AND TO PROVIDE A RULING FOR FUTURE GUIDANCE.

South Carolina Constitution Art. X, §§ 5, 11, prohibit spending public funds for private purposes and prohibit pledging the full faith and credit of the State for the benefit of private individuals, associations, or corporations. Accordingly, Respondents’ provision of an engineering inspection and report to Ebner violated the South Carolina Constitution.

Respondents argue that the Department’s chief counsel “is well aware of the Constitution’s restrictions in this respect;” hence they argue that they are not in need of any guidance. (Resp. Brief, pp. 6-7). This contention ignores the unpleasant facts of this case. First, the Respondents did **not consult** with their chief counsel on this issue. (App. p. 174). The Auditor did consult. He confirmed with SCDOT’s Chief Legal Counsel “that SCDOT has no obligation to inspect bridges on private property.” (App. p. 173). The SCDOT provided an engineering inspection and report to Ebner. (App. pp. 173-175).

Respondents consulted neither their policies nor their legal counsel before providing this service to Ebner. Accordingly, the Respondents’ pointing to a policy that is not observed, and Respondents’ chief counsel’s knowledge of what the Constitution requires failed to prevent and fails to justify the violation under the circumstances of this case.

Second, there has been no judicial opinion applying these Constitutional prohibitions to expenditures by persons in the executive branch, only in the legislative branch. A guiding opinion of this Court would provide a great public benefit in ruling that *ultra vires* expenditures for private purposes are unconstitutional. Such a ruling would have an educational and salutary effect on acts

by all state and municipal government agents and employees. A declaratory judgment proclaiming a constitutional violation and awarding the payment of attorneys' fees would motivate beneficial training and safeguards to reduce these violations and *ultra vires* expenditures.

This Court possesses discretion to grant standing and continued justiciability after an *ultra vires* expenditure or unconstitutional action to matters of public importance and manifest urgency. *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *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. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (2000); *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993); *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); and *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948). There has been no guiding judicial opinion on the issue of an unconstitutional expenditure of public funds for private purposes in South Carolina jurisprudence, and the facts of this case demonstrate the need for one.

CONCLUSION

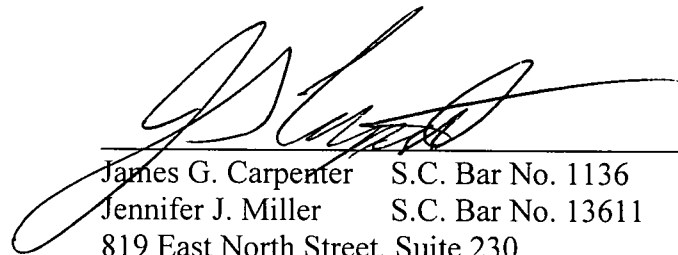
The inspection and report of these three privately built, privately owned bridges on private property in a private, gated community did not serve a public purpose, Respondents do not possess discretion to make such unconstitutional expenditures, and these inspections at public expense violated South Carolina Constitution Article X, §§ 5 and 11. Petitioners are entitled to declaratory judgment that the conduct was unconstitutional.

WHEREFORE, Petitioners pray the Court to:

1. reverse the judgment of the Circuit Court, and the Court of Appeals,
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.



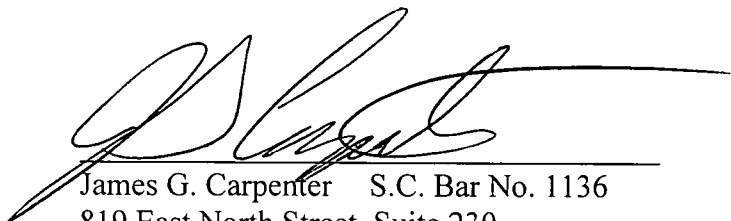
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CERTIFICATE OF SERVICE

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

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Respectfully submitted,
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A handwritten signature in black ink, appearing to read 'J. Carpenter', is written over a horizontal line. The signature is fluid and cursive.

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