THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-3102

Richland County, South Carolina,..... Appellant-Respondent,

Central Midlands Regional Transit Authority, ... Plaintiff-Intervenor,

v.

The South Carolina Department of Revenue and
Rick Reames, III, in his official
capacity as its Director ..... Respondents-Appellants,

v.

Richland PDT, a joint venture consisting of
M.B. Kahn Construction Co., Inc., ICA Engineering, Inc.,
and Brownstone Construction Group, LLC,
as a unit and Individually, ... Third-Party Defendants.

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err as a matter of law in concluding that the South Carolina Department of Revenue and its Director have standing to pursue their Motion for Injunction or Alternatively for Appointment of a Receiver as well as their counterclaims seeking declaratory, injunctive and monetary relief against Richland County?

A. Did the Circuit Court err as a matter of law in concluding that a state agency may rely on the public importance exception to standing requirements, particularly where such reliance provides unprecedented power to a state agency, violates principles of Home Rule and the separation of powers doctrine, and usurps the authority of the South Carolina Attorney General?

B. Did the Circuit Court err as a matter of law in concluding that the South Carolina Department of Revenue and its Director have a "special interest" in Richland County's use and expenditure of the Penny Tax revenues sufficient to confer standing upon them, particularly where no such statutory authority was conferred on them by the General Assembly?

C. Did the Circuit Court err as a matter of law in concluding that the South Carolina Department of Revenue and its Director have standing to assert counterclaims simply because they were sued and have a right to defend themselves?

II. Did the Circuit Court err in denying Richland County's Motion for Temporary Injunction because irreparable harm remains after the issuance of a writ of mandamus?

STATEMENT OF THE CASE

This lawsuit arises out of an attempt by the Respondents-Appellants South Carolina Department of Revenue (SCDOR) and its Director, Rick Reames, III, to exercise unprecedented control over a political subdivision's expenditure of tax revenues collected by SCDOR. Based upon events leading to this litigation and the positions taken as part of this litigation, SCDOR and its Director seek to "oversee" and/or even direct how tax revenues may or may not be expended by the Appellant-Respondent Richland County under certain statutes and local ordinances.

By way of background, in 1995, the South Carolina General Assembly enacted Chapter 37 of Title 4 of the South Carolina Code of Laws which is entitled "Optional Methods for Financing Transportation Facilities" (hereinafter referred to as the "Transportation Act"). *See*, 1995 Act No. 52. Section 1 of the Transportation Act sets forth a preamble to the Act with legislative findings that state as follows:

> In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4–9–30, and Section 6–21–10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities including,

but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1.[1]

On July 18, 2012, the Richland County Council enacted Ordinance Number 039-12HR for the purpose of levying a one percent sales and use tax pursuant to S.C. Code Ann. § 4-37-30 of the Transportation Act (hereinafter referred to as the "Penny Tax").[2] The Penny Tax Ordinance provided for a referendum to be held on November 6, 2012. The Ordinance also provided for the County's implementation of the Penny Tax upon approval by the electorate. On November 6, 2012, the voters of Richland County approved the referendum.[3]

Following approval of the referendum, Richland County began establishing the framework for the implementation of the Transportation Penny Program to be paid for by the sales and use tax collected pursuant to the referendum. The Penny

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[1] The title to 1995 Act No. 52 states that the Transportation Act was intended "to authorize counties to establish optional methods for the financing of transportation facilities including the acquisition, construction, equipment, and operation of highways, roads, streets, bridges, and other transportation-related projects." *See*, 1995 Act No. 52. The list of transportation-related projects was expanded in 2000. The title to 2000 Act No. 368 states that the amendment was "to provide that the proceeds of the tax may be used for mass transit systems and greenbelt projects." *See*, 2000 Act No. 368.

[2] Richland County Council chose not to adopt a transportation authority as permitted by the Transportation Act.

[3] The results of the referendum were challenged to the Richland County Board of Elections and Voter Registration, which denied the protest. An appeal was filed to the State Board of Canvassers, which affirmed the decision of the County Board. Thereafter, in *Letts v. Richland County*, Appellate Case No. 2012-213679, the petitioner sought a writ of certiorari to review the decision of the State Board. On March 21, 2013, the South Carolina Supreme Court unanimously denied the petition for writ of certiorari. (Supreme Court Order).

Tax was levied and collected by SCDOR for Richland County effective May 1, 2013. From May 1, 2013 to March 2016, SCDOR remitted the Richland County Penny Tax revenue allocation to the South Carolina State Treasurer as required by S.C. Code Ann. §4-37-30(15).

The chronology of events leading to this action began in April 2015, when the SCDOR Director informed the Richland County Administrator that SCDOR intended to initiate a "review" of the "Richland County Transportation Sales Tax" passed by referendum in November 2012. (Complaint, Ex. A). The Director advised that "this review is to ensure public accountability and transparency regarding the collection *and expenditure of revenue* generated by the tax." (Complaint, Ex. A). (Emphasis added). The Director claimed that this "review" was "[p]ursuant to our statutory and regulatory authority," but no specific citations granting such authority were provided. (Complaint, Ex. A).

Thereafter, on December 3, 2015, the Director sent a letter stating that "Council has misappropriated a significant amount of Penny revenue and is scheduled to spend millions of additional dollars over the next several years for expenditures falling outside the parameters of the transportation tax laws." (Complaint, Ex. B). The Director instructed the County "to take action to correct these expenses prospectively and by reimbursement for previously paid amounts." (Complaint, Ex. B). This letter took the position that administrative expenses

associated with the Penny Tax Program could not be paid from the Penny Tax revenues.

On February 24, 2016, SCDOR sent an additional letter to the County reiterating its position that administrative expenses could not be paid with the Penny Tax revenues and that such revenues could only be used for capital projects. SCDOR attached its "Report on Sales and Use Tax for Transportation Facilities in Richland County." This Report contained SCDOR's instructions to the County as to how the Penny Tax revenues must be spent and allocated. (Complaint, Ex. E).

By letter dated April 1, 2016, SCDOR made additional demands to the County and increased its list of "required" action items to twelve, including requiring the County to use Internal Revenue Code (IRC) § 263 and § 263A in determining whether Penny Tax revenues could be used to fund any expenses incurred in connection with the Transportation Penny Program. (Complaint, Ex. F). The April 1, 2016 letter stated:

> Simply put, there should be no money expended out of the Penny Tax Fund for costs other than those costs that are considered capital costs of a specific transportation-related project. It is important to realize that the IRC § 263 and IRC § 263A standards are to be used to determine when an expenditure of Penny Tax Funds is appropriate. No matter what accounting method/system for reporting purposes is used, the expenditure of funds must adhere to these spending guidelines.

(Complaint, Ex. F). SCDOR closed that letter by stating: "We believe that these changes will bring the County's Penny Tax Program into compliance with state law

and potentially serve as a *template for the administration of funds of other counties to follow*." (Complaint, Ex. F). (Emphasis added).

Then, on April 27, 2016, the SCDOR Director advised the County that "the Department must take action to enforce the state's tax laws and will immediately cease allocations of revenue to the Richland County Transportation Penny Tax fund until such time as Council brings the program into compliance." (Complaint, Ex. G). The Director further wrote that "the Department has a responsibility under the law to monitor Penny Tax collections, and absent further action, the Department's monthly allocation and the resulting July distribution of Penny Tax funds will be zero." (Complaint, Ex. G). In effect, SCDOR stated its intent to withhold the Penny Tax revenues it had collected from sales in Richland County.

By letter dated May 4, 2016, the Chairman of Richland County Council responded to threats made by SCDOR. The Chairman explained that the County "follow[s] the standards required by the Government Accounting Standards Board (GASB), which is a uniform standard applied to all local governments." (Complaint, Ex. H). The Chairman further wrote that "[i]f we were to abide by your requests, we would be forced to pay administrative costs from the County's General Fund, which would require us to raise taxes. We cannot impose that kind of burden on our citizens." (Complaint, Ex. H). The Chairman also expressed concern over the threatened withholding of Penny Tax revenues: "We must also defend the County's credit rating, its contractual obligations and the jobs created by

the Program. If you refuse to allocate to us the Penny collected in our County, then you put all of these things in great peril." (Complaint, Ex. H). Finally, the Chairman addressed the specific concerns with The COMET bus system which is largely funded by Penny Tax revenues. (Complaint, Ex. H).

By letter dated May 19, 2016, SCDOR responded to a letter from the Central Midlands Regional Transportation Authority's (CMRTA) letter inquiring whether SCDOR intended to restrict the flow of Penny Tax revenues for operation of The COMET bus system. SCDOR wrote: "It is not the Department's intent, however, to restrict the use of Penny Tax funds for operation of The COMET bus system" and if the "Penny Tax fund allocations are still halted at the time of the normal July 2016 distribution, the Department will issue to Richland County the 29% of the revenue specified for [The] COMET bus system operations." (Complaint, Ex. I). Yet, after suit was filed, SCDOR appeared to change its position and indicated that Penny Tax revenue could not be used for operation of a mass-transit system such as The COMET consistent with its position that the revenues may only be used for capital costs.

On May 20, 2016, Richland County filed a Complaint seeking the issuance of a declaratory judgment, a writ of mandamus and a permanent injunction against SCDOT and its Director, who is sued in his official capacity. The County sought a declaratory judgment declaring that "Richland County is not subject to Defendants' directives, demands, or orders on any matter related to Richland County's spending

of Penny Tax Revenues." (Complaint, p. 37). Similarly, the County sought an injunction prohibiting "Defendants from issuing directives, demands, or orders on any matter related to Richland County's spending of Penny Tax Revenues." (Complaint, p. 37). Finally, the County sought a writ of mandamus "directing the Defendants to remit to the Treasurer collected Penny Tax Revenues for sales and use tax transactions within Richland County, including the July 2016 allocation and remittance due and all future allocations and remittances." (Complaint, p. 37). With its Complaint, the County also filed a Petition for Writ of Mandamus and Motion for Temporary Injunction. (Petition).

Thereafter, on June 20, 2016, SCDOR and its Director filed an Answer which included counterclaims seeking declaratory, injunctive and monetary relief. The counterclaims include claims for civil conspiracy, "civil fraud," and constructive fraud wherein SCDOR and its Director seek monetary relief on behalf of "the taxpayers of Richland County." (Answer). SCDOR and its Director also seek an injunction which prohibits the County "from making any further payments, expenditures, contracts or other obligations of Penny Tax Funds unless and until the Plaintiff adopts and implements IRC 263/263A or some other acceptable uniform standard to govern its spending and adopt other appropriate safeguards to ensure that expenditures of Penny Tax Funds qualify as capital costs under the Act and therefore are a proper use of Penny Tax dollars." (Answer, p. 33). Finally, SCDOR and its Director seek declaratory relief including a ruling that Richland

County Ordinance Number 039-12HR is void to the extent that the Ordinance allows for the expenditure of Penny Tax revenues for other than "capital costs" or what the SCDOR describes as "County operations beyond those necessary for the acquisition and/or construction of transportation related facilities." (Answer, ¶¶ 113, 124-125). Similarly, SCDOR and its Director seek a declaration that "any expenditures of Penny Tax Funds by the Plaintiff that cannot be 'capitalized' as a capital cost of an approved project to build or construct 'highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation related projects' are illegal and beyond the scope of the Act." (Answer, ¶ 125).

A hearing was held on June 28, 2016, before Circuit Court Judge G. Thomas Cooper, Jr. on the County's Petition for Writ of Mandamus and/or Motion for Temporary Injunction. Judge Cooper also heard SCDOR and its Director's Motion for Injunction or Alternatively for Appointment of a Receiver. As described in the Amended Order, that motion "is based on [SCDOR's] interpretation of the Transportation Act to only authorize Plaintiff to expend Penny Tax Revenues on capital costs. SCDOR and the Director assert that because Richland County's expenditures include expenditures for administrative costs (non-capital costs), Defendants are statutorily and equitably authorized to withhold the Penny Tax Revenue." (Amended Order, p. 2).

Judge Cooper issued an Order on June 30, 2016, wherein he granted the County's Petition for Writ of Mandamus and directed the SCDOR Director "to remit the 2016 second quarter Penny Tax Revenues to the Treasurer." (Order, p. 20). That Order denied the County's Motion for Temporary Injunction and denied SCDOR's Motion for Injunction or Alternatively for Appointment of a Receiver.

The parties each filed Motions to Alter or Amend pursuant to Rule 59(e), SCRCP. Without holding a subsequent hearing, Judge Cooper adjudicated the Rule 59(e) motions by issuing an Amended Order filed August 2, 2016.

With his Amended Order, Judge Cooper extended the writ of mandamus to require the SCDOR Director "to allocate and remit all Penny Tax Revenues collected within Richland County, including the July 2016 allocation and remittance due for the second quarter of 2016 and *all future allocations and remittances*." (Amended Order, p. 20). (Emphasis in original). Judge Cooper denied the County's Motion for Temporary Injunction "because the County is unable to sufficiently show it will suffer irreparable harm in light of the Court's decision above granting Plaintiff's Petition for Writ of Mandamus." (Amended Order, p. 17). Judge Cooper also included the following conclusions of law in the Amended Order:

> 5. SCDOR and the Director have a level of statutory authority to oversee Richland County's use of the Penny Tax Revenues.

6. SCDOR and the Director have a "special interest" in the County's use of the Penny Tax Revenues sufficient to confer standing upon Defendants for the purpose of presenting the claims in its Defense and Counterclaims.

7. SCDOR and the Director have standing based on the public importance exception for the limited purpose of the resolution of the unique issues concerning Richland County raised by this case.

(Amended Complaint, p. 20).

Richland County thereupon filed a timely appeal to this Court. SCDOR and its Director have also filed a cross-appeal.

ARGUMENTS

I. The Circuit Court erred as a matter of law in concluding that the South Carolina Department of Revenue and its Director have standing to pursue their Motion for Injunction or Alternatively for Appointment of a Receiver as well as their counterclaims seeking declaratory, injunctive and monetary relief against Richland County.

The Circuit Court determined that SCDOR and its Director have standing to pursue their Motion for Injunction or Alternatively for Appointment of a Receiver as well as their counterclaims seeking declaratory, injunctive and monetary relief against the County "on behalf of the taxpayers of Richland County" for violation of the Transportation Act. Circuit Court Judge G. Thomas Cooper, Jr. found standing under two principal theories.[4] First, he ruled as a matter of law that SCDOR and its Director have standing under the "public importance" exception to the general standing requirements. (Amended Complaint, p. 20). Moreover, he applied the "special interest" test from *Camp v. Board of Public Works*, 238 S.C. 461, 120 S.E.2d 681 (1961), which addresses standing in a dispute between two governmental entities. He then determined as a matter of law that SCDOR and its Director "have a level of statutory authority to oversee the County's use of Penny

[4] As discussed below, in his Amended Complaint, Judge Cooper added what appears to be a third basis for standing where he states: "It is axiomatic that when sued a defendant has standing to fully defend itself and, if necessary, file Counterclaims to accomplish that purpose." (Amended Order, p. 14).

Tax Revenues" which thereby is "sufficient to confer standing upon Defendants for the purpose of presenting the claims in its Defense and Counterclaims." (Amended Order, p. 20).

Judge Cooper's rulings on the threshold issue of standing for SCDOR and its Director were in error for two principal reasons. First, the concept of "public importance" standing does not apply to an executive branch agency like SCDOR because it provides unprecedented power to a state agency, violates principles of Home Rule and the separation of powers doctrine, and usurps the authority of the South Carolina Attorney General. Second, to the extent that a state agency may have standing under the *Camp* "special interest" test, SCDOR has failed to establish such a "special interest" as a matter of law. Each of these issues will be addressed in turn.

A. Public Importance Standing

It is well settled that "[s]tanding to sue is a fundamental requirement in instituting an action." *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 366 (2013). In this case, SCDOR and its Director must have standing to assert its counterclaims for declaratory, injunctive and monetary relief.[5] Under

[5] *See, City of Columbia v. Town of Irmo*, 308 S.C. 490, 419 S.E.2d 231 (1992); *Babb v. Rothrock*, 303 S.C. 462, 401 S.E.2d 418 (1991) (cases explaining that a counterclaimant must establish standing to assert a counterclaim).

South Carolina law, "[s]tanding 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, 339 (2008).

Judge Cooper did not find that any statute confers standing on SCDOR and its Director. Likewise, Judge Cooper did not confer standing through the rubric of constitutional standing, which requires as one of its "core requirements" that the party suffered a "concrete and particularized injury." *Bodman*, 742 S.E.2d at 366. In fact, Judge Cooper concluded that "[t]he method in which the Penny Tax Revenues are spent is a matter so important to the citizens of Richland County" and "will impact the taxpayers of Richland County," but he did not describe any specific impact or injury suffered by SCDOR and its Director. (Amended Order, p. 15).

Nonetheless, Judge Cooper did confer standing on SCDOR and its Director under the public importance exception to general standing requirements, a rule that the Supreme Court has recently acknowledged "has been the subject of much confusion and misapplication." *Bodman*, 742 S.E.2d at 366. The Supreme Court has explained that "standing is not inflexible." *Id.* Thus, "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* The Supreme Court in recent years has "tempered the application of the public importance exception somewhat," and in doing so, the Court has "reminded the bench and bar that 'whether an issue of

public importance exists necessitates a cautious balancing of the competing interests presented.'" *Bodman*, 742 S.E.2d at 367, *citing ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 341 (2008).

The issue of the application of the public importance exception to confer standing on a state agency appears to present a novel issue of law that has not been previously addressed by either appellate court. The existing case law, in fact, focuses on "citizens." In *Carnival Corp. v. Historic Ansonborough Neighborhood Asso.*, 407 S.C. 67, 753 S.E.2d 846 (2014), the Supreme Court addressed the "competing policy concerns" that underlie the application of the public importance exception as follows:

> Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

753 S.E.2d at 853. Particular focus should be placed on the use of the term "citizens." The key to the public importance exception is that standing be conferred on "citizens." *See also*, *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338, 349 (Ct. App. 2003) ("Allowing *interested citizens* a right of action in our judicial system when issues are of significant public importance ensures this accountability and the concomitant integrity of government action"). (Emphasis added). There is, however, no case where the Supreme Court has addressed the

applicability of the public importance exception to a state agency much less expressly conferred standing on a state agency under that rule to police or oversee the conduct of another governmental entity.[6]

As will be discussed further below, there are special standing rules that have historically applied to governmental entities, but those require more than a state agency's assertion of an issue of public importance. Instead, standing for governmental entities requires a "special interest" in the subject matter or statutory standing where the power of enforcement was expressly conferred by statute. This is a critical distinction. Richland County submits that the public importance exception should never be utilized to confer standing – and hence the power of judicial review – on a governmental entity absent express statutory authority or a "special interest" in the subject matter of the dispute.

The non-applicability of the public importance exception to a state agency was an issue specifically raised to Judge Cooper who relegated his discussion to a mere footnote. In addressing this issue, he writes: "After a review of South Carolina case law establishing the public interest exception, this Court could not find any evidence of such a limitation." (Amended Order, p. 14). However, it is axiomatic that the appellate courts' silence on an issue does not mean the issue

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[6] Unlike a "citizen," SCDOR is limited by the statutory authority conferred upon it by the General Assembly. "As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with

does not exist or is not meritorious. As Chief Judge Alex Sanders so aptly stated, "appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 409 S.E.2d 811, 817 (Ct. App. 1991). In effect, the reasoning expressed in the footnote is suspect: the absence of case law addressing such a limitation is no basis to summarily reject the existence of the limitation. Indeed, a review of case law discussing the development of the public importance exception does not reflect any case brought by a state agency and *certainly* no case where a state agency sought to obtain "relief" on behalf the taxpayers of a local governmental entity.

The County presents a valid issue of significant concern for which the merits should be closely considered. This Court is asked to further examine the parameters of the public importance exception and whether it should be applied in favor of conferring standing on a governmental entity to police another governmental entity – *particularly where that authority is not conferred by statute* and where there is no "special interest" that implicates the ability of that entity to perform its statutorily mandated functions. This is precisely the "balancing of competing policy concerns" that the Supreme Court has directed courts to apply rather than relying on a "rigid formula." Indeed, the Supreme Court has stressed that "the very nature of the public importance exception to general standing

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which it is charged." *Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13, 14 (1991).

requirements resists a formulaic approach" and that "each case must turn on the 'competing policy concerns.'" *Bodman*, 742 S.E.2d at 367.

In effect, Judge Cooper has concluded that SCDOR and its Director may assert public importance standing to police the actions of the elected officials of a county in their expenditure of tax revenues despite the constraints imposed by Home Rule on such state agency "oversight." Richland County submits that the application of this broad pronouncement of standing would equally confer on any other state agency the same regulatory authority without a statutory basis, which would lead to tremendous abuse of power, or at a minimum, the threat of such abuse.

To illustrate the fallacy of this application of the public importance exception, Richland County queries whether another state agency, for instance the Department of Corrections or the Department of Mental Health, would have similar authority to establish standing to bring this claim "for the taxpayers of Richland County"? How about another local governmental entity – could Lexington County have public importance standing to assert the very claims made by SCDOR here in order to protect the taxpayers of Richland County? The answer should be fairly obvious. However, that is the logical extension of the novel issue of law that is presented here.

The same concerns would arise in other contexts. In the recent case of *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124

(2016), the plaintiff had standing under the public importance exception to challenge a proviso in the 2015-16 Appropriations Act addressing the appointment authority for the Secretary of Transportation. Could that suit have similarly been brought by SCDOR or its Director? Again, the answer is fairly obvious – no. A state agency and the director of a state agency – such as SCDOR and its Director (in his official capacity) -- are not the functional equivalent of a "citizen" and should not be treated as having the standing of a citizen.[7]

So, this case asks then what parameters should exist on the application of the public importance exception to a state agency or the director of a state agency. Richland County submits that the parameters have already been established but simply not applied by the lower court in this case. A state agency and its director should not have authority to assert standing under the public importance exception to the general standing requirements. Instead, the standing of a state agency and its director should be limited to circumstances where standing is conferred either by statute[8] or where the agency and director can establish a "special interest" under

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[7] "Official capacity suits ... genuinely represent only another way of pleading an action against an entity of which the officer is an agent." *Kentucky v. Graham*, 473 U.S. 159 (1985).

[8] Neither the lower court nor SCDOR and its Director have identified a statute that expressly confers upon SCDOR the right to sue a political subdivision such as Richland County on its own behalf or, as here, on behalf of the taxpayers of Richland County. *See*, *Youngblood v. South Carolina Department of Social Services*, 402 S.C. 311, 741 S.E.2d 515, 518 (2013) ("[s]tatutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation").

the test articulated in *Camp v. Board of Public Works*, 238 S.C. 461, 120 S.E.2d 681 (1961), which is a corollary of statutory standing.

Importantly, this limitation on the public importance exception, as urged by the County, is necessary for two primary reasons: (1) to prevent a grant of unprecedented power to a state agency in contravention of Home Rule and the separation of powers doctrine; and (2) to prevent the usurpation of the authority of the South Carolina Attorney General.

1. Contravention of Home Rule and Separation of Powers

In 1972, Article VIII of the South Carolina Constitution "was completely revised for the purpose of accomplishing home rule, thus granting renewed autonomy to local government." *Williams v. Town of Hilton Head Island*, 311 S.C. 417, 429 S.E.2d 802, 803-804 (1993). Article VIII, § 7 of the Constitution provides:

> The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided.

S.C. Const., art VIII, § 7. Moreover, Article VIII, § 17 provides:

> The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

S.C. Const., art VIII, § 17. The Supreme Court has observed that the adoption of the Home Rule Amendments was intended to grant home rule "to the counties and that county government should function in the county seats rather than at the State Capitol. If the counties are to remain units of government, the power to function must exist at the county level. Quite obviously, the framers of Article VIII had this in mind." *Knight v. Salisbury*, 262 S.C. 565, 206 S.E. 2d 875, 877 (1974).

In accordance with the Home Rule Amendments, the General Assembly adopted the Home Rule Act. S.C. Code Ann. § 4-9-25 of that Act provides:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. § 4-9-25. Moreover, S.C. Code Ann. § 4-9-30 sets forth "enumerated powers which shall be exercised by the respective governing bodies" of the counties, including those relevant to this litigation such as "mak[ing] appropriations for functions and operations of the county" as provided in S.C. Code Ann. § 4-9-30(5), and "provid[ing] for an accounting and reporting system

whereby funds are received, safely kept, allocated and disbursed" as provided in S.C. Code Ann. § 4-9-30(8).

Thus, using the mandatory language "shall," the General Assembly granted the specific powers at issue in this litigation to the counties, not to SCDOR and its Director. Importantly, this includes the provision of an accounting system, which is the specific power that SCDOR interferes with in requiring the County to adopt an accounting standard based on Internal Revenue Code §§ 263 and 263A. In sum, the actions for which SCDOR and its Director are seeking public importance standing are in direct contravention of Home Rule, and that must be factored into the "balancing of competing interests" that a court must analyze in determining whether public importance standing should be applied.

Similarly, a court should consider the impact of the separation of powers doctrine in that same analysis. Article I, § 8 of the South Carolina Constitution provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

See, S.C. Const., art. I, § 8. However, for the courts to confer standing on SCDOR and its Director under the public importance exception violates the separation of powers doctrine because "[t]he exclusive power to make laws and provide for their

enforcement is vested in the General Assembly, subject only to those restrictions expressly set forth in the Constitution." *South Carolina Jurisprudence*, "Constitutional Law," § 12. As discussed below in more detail, the General Assembly has not granted any enforcement authority on SCDOR and its Director with respect to the use and expenditure of Penny Tax revenues. Yet, where the courts confer such authority on SCDOR and its Director by means of public importance standing, that contravenes the separation of powers doctrine and intrudes upon the authority held by the legislative branch alone.

In sum, where the court confers standing on SCDOR and its Director under the rubric of public importance standing, that contravenes the constitutional mandate of separation of powers as well as principles of Home Rule, all of which should be closely scrutinized in the "balancing of competing interests" that a court undertakes in determining whether public importance standing should be applied.

2. Usurpation of Attorney General's Authority

Similarly, a court should consider whether conferring public importance standing on a state agency will intrude upon enforcement powers already granted by the General Assembly to another governmental authority, such as the South Carolina Attorney General. The Attorney General, who is a publicly elected constitutional officer of the State (unlike the SCDOR Director), typically has standing to bring suit to protect the "public interest" even in instances where the challenged conduct is by a local government. In *State ex rel. Condon*, 339 S.C. 8,

528 S.E. 408 (2000), the Supreme Court explained that "[a] quo warranto action is rooted in the common law writ designed to test whether a person exercising power is legally entitled to do so. It is an ancient prerogative right through which the State acts to protect itself and the good of the public generally, and may be used to test the legality of exercise of powers by municipal corporations." 528 S.E.2d at 411. The Supreme Court further explained that "[t]he attorney general may bring quo warranto actions in the name of the State." *Id.* The Court specifically recognized that "the State, provided it is acting in the public interest, has standing to bring a quo warranto action." *Id.*

In *State ex rel. Condon* and subsequent cases, the Supreme Court has allowed the use of a quo warranto action in cases where there is a challenge to an annexation by a municipality. In fact, in *St. Andrews Public Service Dist. v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E.2d 647 (2002), the Supreme Court *declined to allow a public service district* to bring an annexation challenge. The Court, in fact, overruled prior authority and held that "the only non-statutory party which may challenge a municipal annexation is the State, through a quo warranto action. In our view, the better policy is to limit 'outsider' annexation challenges to those brought by the State 'acting in the public interest.'" 564 S.E.2d at 648. This is exactly what SCDOR attempts here -- to usurp any authority that the Attorney General has been expressly conferred by statute.

This analysis is also consistent with the Supreme Court's discussion of the Attorney General's authority in *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002). By statutory authority, specifically S.C. Code Ann. § 1-7-40, the Attorney General must "appear for the State in the Supreme Court and the Court of Appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested." S.C. Code Ann. § 1-7-40. In addition, as the Supreme Court explained, "[a]s the chief law officer of the State, [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such *power* and *authority as public interests may from time to time require,* and may institute, conduct and maintain all such suits and *proceedings* as *he deems* necessary for *the enforcement of the laws of the State,* the *preservation of order,* and the *protection* of *public rights.*" 562 S.E.2d at 627. (Emphasis in original).[9]

This is also consistent with the case of *State v. County of Florence*, 406 S.C. 169, 749 S.E.2d 516 (2013), where the declaratory judgment action challenging a proposed tax referendum was brought by both the State (through the Attorney

[9] Similarly, S.C. Code Ann. § 1-7-710 provides in mandatory terms that "[i]n all cases wherein the right of the State may be involved," it is the Attorney General whose role it is "to defend the right of the State." S.C. Code Ann. § 1-7-710.

General) and by SCDOR. If SCDOR had the authority to bring that action itself, it would have had no need to have the Attorney General join that action.[10]

In sum, it is the Attorney General that has the authority to sue a political subdivision by way of a quo warranto action or potentially a declaratory judgment action where he can show that he is "acting in the public interest." However, SCDOR and its Director do not enjoy similar authority – even under the guise of public importance standing. Therefore, this Court is urged to reject any notion that a state agency and its director may be conferred standing under the public importance exception, particularly given the obvious opportunity for government abuse and overreach and where such standing is already conferred by statute on the Attorney General, an elected official who is directly accountable to the electorate for his conduct.[11]

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[10] In fact, Chapter 54 of Title 12 gives the authority specifically to the Attorney General to bring an action "in the name of the State, to recover taxes, penalties, and interest due under this title." S.C. Code Ann. § 12-54-17.

[11] It should further be noted that certain issues raised in this litigation by SCDOR and its Director may also be raised by a citizen either through the application of taxpayer standing or public importance standing, should those apply. There is currently pending litigation brought by the South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr. against Richland County, specifically Civil Action Number 2016-CP-40-7825. This also reflects that there is a proper method for interested citizens of Richland County to raise issues or claims regarding the expenditure of the Penny Tax revenues. However, SCDOR and its Director should not be conferred standing – in place of the interested citizens – to assert those issues or claims.

B. "Special Interest" Standing

In addition to applying public importance standing, Judge Cooper also applies, in fairly summary fashion, the "special interest" test articulated in *Camp v. Board of Public Works*, 238 S.C. 461, 120 S.E.2d 681 (1961), which as mentioned above is a corollary of statutory standing. In that respect, Judge Cooper concluded that "SCDOR and the Director have a 'special interest' in the County's use of the Penny Tax Revenues sufficient to confer standing upon Defendants for the limited purpose of presenting the claims in its Defense and Counterclaims." (Amended Order, p. 14) However, he erred in his determination that certain statutory provisions create in SCDOR and its Director a "special interest" that confers standing under the prevailing law and circumstances.

In *Camp*, the Supreme Court held that "[a]ssuming under some circumstances one public agency may attack the action of another, the complaining agency must at least show that it has *some special interest from which it is charged with responsibility that may be adversely affected by the action attacked.*" *Camp*, 120 S.E.2d at 685. (Emphasis added). As a result, in evaluating the existence of a "special interest" that would confer standing, the Supreme Court focused on the suing agency's statutory authority. Indeed, the Court specifically recognized that "an administrative agency has only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers

expressly granted." *Id.* Ultimately, in *Camp*, the Supreme Court found that the suing agency had no statutory power and therefore no standing to sue another governmental entity. The Court found that the suing agency – the Cherokee County Soil Conservation District – was not provided with "any jurisdiction over pollution of streams or other waters of the State" by reference to the Soil Conservation Act, which was the controlling statutory authority. *Id.* The suing agency was "concerned only with the conservation of the soil resources of the State and the control and preservation of soil erosion" but was "charged with no responsibility with reference to the pollution of streams." *Id.* Hence, as the Supreme Court determined, "[t]he discharge of sewage into Beaverdam Creek does not affect flood control or soil conservation in any manner." *Id.* In the end, given that analysis, the Supreme Court found a "lack of standing on the part of [the suing agency] to attack the action of the [defending governmental entity] in the classification of Beaverdam Creek or to challenge the validity of the permit granted to the Board of Public Works." *Id.*

The same analysis under the rubric of *Camp* is applicable in the present case. SCDOR and its Director do not have a "special interest," as contemplated in *Camp*, because they do not have any statutory authority over how Richland County spends the Penny Tax revenues or how it administers the Richland County Penny Tax Program. The responsibilities SCDOR and its Director are charged with under the Penny Tax Program are purely ministerial duties as correctly determined by Judge

Cooper -- namely to remit the Penny Tax revenues to the Treasurer and to administer the levy and collection of the Penny Tax revenues. Neither SCDOR's statutory responsibilities under the Transportation Act nor its general duties in Title 12 are adversely affected by the County's expenditures of Penny Tax revenues and administration of the Penny Tax Program.

Nonetheless, Judge Cooper in his standing analysis concluded that "SCDOR and the Director have a level of statutory authority to oversee the County's use of the Penny Tax Revenues." (Amended Order, p. 14).[12] The statutory provisions relied on by Judge Cooper to confer "standing upon Defendants for the limited purpose of presenting the claims in its Defense and Counterclaims" are S.C. Code Ann. §§ 12-4-10, 12-4-310, 12-36-2660 and 4-37-30(8). (Amended Order, p. 14.) The reliance on these statutes to confer "special interest" standing is in error.

The fundamental question is whether the General Assembly intended to grant SCDOR the power to enforce the spending limitations in the Transportation Act or Richland County Ordinance Number 039-12HR. As the Supreme Court

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[12] Neither SCDOR nor Judge Cooper has articulated exactly how SCDOR is required to "oversee" the Richland County Penny Tax Program. In its plain and ordinary meaning, "oversee" means "to watch and direct (an activity, a group of workers, etc.) in order to be sure that a job is done correctly." http://www.merriam-webster.com/dictionary/oversee (last visited October 2016). Judge Cooper's Amended Order states: "I find that the Transportation Act was adopted by the General Assembly in furtherance of Home Rule to give counties the authority to adopt an alternate funding source to pay the cost associated with transportation-related projects." (Amended Order, p. 9). Thus, consistent with the earlier discussion of Home Rule, any interpretation of these statutes authorizing SCDOR and its Director to "watch and direct" how Richland County administers the Penny Tax Program constitutes a violation of Home Rule.

emphasized in *Camp*, the suing agency -- here SCDOR -- cannot have any power absent legislative intent to grant that power. To answer this question, one must first consider the nature of administrative agencies generally, and then review the statutes pertaining to SCDOR.

The "model" for administrative agencies is to enforce laws by investigation, hearing upon notice, and administrative decision after providing an opportunity to be heard, with that decision being subject to judicial review. *See e.g.*, S.C. Const. Art. I, § 22. This "model" comes into existence under statutes that do the following: (1) create the agency; (2) give the agency power over some matter; (3) establish enforcement procedures to be followed by the agency, (4) grant the agency power to make a decision on the matter under those procedures; and (5) grant the right to judicial review of that decision. The enforcement and decision making procedures are established in one of two ways: (1) a statute setting forth specific procedures for a specific agency or (2) use of the general procedures set forth in the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310 *et seq.* The fundamental reason for this is to remove the enforcement of administrative matters from the circuit court in the first instance, place them in the executive branch (including the Administrative Law Court) under procedures that are faster and simpler than formal judicial proceedings but nevertheless comport with due process, and then afford any aggrieved party the right to judicial review.

SCDOR fits squarely into this "model" with respect to enforcing the tax laws as part of its overriding duty and power to collect taxes. Statutory law creates SCDOR and bestows upon it, under certain circumstances, the power to "administer and enforce" the tax laws. Statutes create the enforcement procedures to be used by SCDOR in enforcing the tax laws, but in regard to sales taxes, the procedures pertain to collecting taxes or establishing tax liability. After SCDOR makes its enforcement decisions as authorized by statute, review may be sought in the Administrative Law Court and ultimately to the judiciary.

As Judge Cooper acknowledged, this litigation and particularly the positions taken by SCDOR and its Director do not fit within the definition of a "contested case" under the Administrative Procedures Act. (Amended Order, p. 13). This raises a very telling question: Why would the General Assembly set forth its intent with respect to SCDOR's tax enforcement powers so clearly and precisely, taking full advantage of the benefits afforded by an administrative decision process, and yet not do so with respect to any SCDOR power to enforce spending limitations set forth in the Transportation Act, the County's ordinance, or any other taxing statutes, and thereby leave SCDOR burdened with enforcement through the far more cumbersome and time-consuming process of circuit court actions?

The answer is simple. The General Assembly never intended to create this bizarre dichotomy of enforcement, because it never intended to grant SCDOR the power to enforce any spending limitations in any tax laws. Had it so intended, it

would have stated this intent clearly and precisely, and it would have empowered SCDOR to use the administrative process to do so, in the same manner as it did with SCDOR's taxation enforcement powers.[13]

As a review of the statutory provisions relied upon by Judge Cooper to find a sufficient "level of statutory authority" to confer standing demonstrates, nothing in the statutes gives SCDOR and its Director the authority to regulate or enforce the County's actions under the Transportation Act, the scope of the Ordinance, or the implementation of the Ordinance.

1. S.C. Code Ann. § 12-4-10

S.C. Code Ann. § 12-4-10 states, in pertinent part, as follows: "[t]he South Carolina Department of Revenue is created to administer and enforce the revenue laws of this State ... and other laws specifically assigned to it." S.C. Code Ann. § 12-4-10. This section is simply the General Assembly's general explanation of the purpose of the agency.[14] It is up to the General Assembly to give SCDOR and the

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[13] As noted in *City of Myrtle Beach v. Tourism Expenditure Review Committee*, 407 S.C. 298, 755 S.E.2d 425 (2014), the General Assembly specifically created a Tourism Expenditure Review Committee (TERC) and statutorily gave it the same type of express powers over counties' use of the Accommodations Tax that SCDOR now claims it has over the Transportation Penny Tax and all spending limitations -- but without the express statutory authority given to TERC. The *City of North Myrtle Beach* case simply cannot be reconciled with SCDOR's assertion of authority in this matter. Simply put, why would the General Assembly feel the need to create TERC's oversight authority if SCDOR already had it?

[14] The Supreme Court has recognized that "statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. Such statutes create no duty of care towards individual members of the general public." *Arthurs v. Aiken County*, 346 S.C. 97, 551 S.E.2d 579, 582 (2001).

Director specific authority to "administer and enforce" the revenue laws. A review of Title 12 demonstrates that the statutory powers and duties the General Assembly gives to SCDOR vary from one specific tax to another (for example, note the difference in authority given to SCDOR in property tax matters as opposed to sales tax matters) and are specifically enumerated within statutes regarding each type of tax. The mere statutory creation of an agency is not an affirmative grant of authority to oversee the actions of a local political subdivision, including in this instance, Richland County's operation of its Penny Tax Program.

Taken to its logical extreme, if SCDOR has authority over the expenditure of tax revenue by Richland County simply because of S.C. Code Ann. § 12-4-10, then SCDOR has the authority to "oversee" or "direct" any agency or branch of government of the State or political subdivision of the State receiving tax revenues as to how those funds are spent or not spent. This is an absurd result. *See, Lancaster County Barr Association v. South Carolina Commission on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371, 373 (2008) ("[i]n construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature"). Thus, Judge Cooper's reliance on S.C. Code Ann. § 12-4-10 to grant standing to SCDOR and its Director based on their "level of statutory authority to oversee the County's use of the Penny Tax Revenues" is in error.

2. S.C. Code Ann. § 12-4-310

In his Amended Order, Judge Cooper also cites to S.C. Code Ann. § 12-4-310 as providing SCDOR with "broad authority to facilitate tax administration, regulation and enforcement." (Amended Order, p. 14). S.C. Code Ann. § 12-4-310 establishes the "mandated powers and duties" the General Assembly conferred upon SCDOR, but none of the provisions contained therein grant SCDOR the authority to oversee the expenditure or use of tax revenues once remitted to a state agency or political subdivision. In fact, the three subsections that actually reference counties create a duty for SCDOR to provide tax-related data to the counties and do not give SCDOR any general oversight of counties' expenditures or operations.

SCDOR and its Director have previously cited to S.C. Code Ann. § 12-4-310(9), which states in pertinent part: "The department shall exercise and perform other powers and duties as granted to it or imposed upon it by law." S.C. Code Ann. § 12-4-310(9). This provision simply means that the General Assembly may grant additional powers and duties for the Department to exercise in specific legislation. This provision does not provide for the general oversight of the expenditure or use of tax revenues once remitted to a state agency or political subdivision. In short, Judge Cooper's reliance on S.C. Code Ann. § 12-4-310 to grant standing to SCDOR and its Director based on their "level of statutory authority to oversee the County's use of the Penny Tax Revenues" is in error.

3. S.C. Code Ann. §§ 4-37-30(A)(8) and 12-36-2660

In his Amended Order, Judge Cooper also includes reference to the Transportation Act and specifically S.C. Code Ann. § 4-37-30(A)(8), which provides: "The tax levied pursuant to this section must be *administered and collected* by the Department of Revenue in the same manner that other sales and use taxes are collected." S.C. Code Ann. § 4-37-30(A)(8). (Emphasis added). The key language is "administered and collected"; there is no mention of any enforcement or "oversight" authority granted to SCDOT. Quite simply, it is a gross overreach for SCDOR to claim enforcement or oversight authority over the expenditure or use of Penny Tax revenues based on S.C. Code Ann. § 4-37-30(A)(8).

Nonetheless, Judge Cooper proceeds to reference S.C. Code Ann. § 12-36-2660 as providing "SCDOR's authority for tax administration, regulation, and enforcement as it relates to sales and use taxes." (Amended Order, p. 14). S.C. Code Ann. § 12-36-2660 simply states: "The Department of Revenue shall administer and enforce the provisions of this chapter." S.C. Code Ann. § 12-36-2660. The chapter referenced is Chapter 36 which is the South Carolina Sales and Use Tax Act. *See*, S.C. Code Ann. § 12-36-5. However, there is no provision in Chapter 36 that even remotely gives SCDOR the power to "oversee" or "direct" a political subdivision receiving sales and use tax revenues as to how to spend or not spend such funds.

Instead, the only "enforcement" authority granted to SCDOR is provided in Chapter 54 of Title 12, which is titled "Uniform Method of Collection and Enforcement of Taxes Levied and Assessed by South Carolina Department of Revenue." With regard to the Transportation Act, this is made clear by the reference to Chapter 54 made in S.C. Code Ann. § 4-37-30(A)(9), which provides in part as follows: "The tax authorized by this section ... applies to the gross proceeds of sales in the applicable jurisdiction which are subject to the tax imposed by Chapter 36 of Title 12 and *the enforcement provisions of Chapter 54 of Title 12*." S.C. Code Ann. § 4-37-30(A)(9). (Emphasis added). Thus, it is clear that while the Penny Tax is subject to the enforcement provisions of Chapter 54 of Title 12, those enforcement provisions relate exclusively to the levy and collection of the tax – *not to the use or expenditure of the tax revenues once remitted by SCDOR*.[15] Importantly, nowhere in the Transportation Act and specifically S.C. Code Ann. § 4-37-30 does it state that SCDOR has the authority to enforce the provisions of the Act. SCDOR's authority is limited to the administration and collection of the Penny Tax "in the same manner that other sales and use taxes are collected." S.C. Code Ann. § 4-37-30(A)(8). SCDOR and its Director have no authority to oversee the expenditure of "other sales and use taxes" as are collected.

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[15] Additionally, as noted earlier, the standing to bring suit under Title 12 is actually granted to the Attorney General – not to SCDOR or its Director. It is the Attorney General who is authorized to bring an action "in the name of the State, to recover taxes, penalties, and interest due under this title." S.C. Code Ann. § 12-54-17.

The same is true with the Penny Tax. There is simply no authority granted to SCDOR and its Director to oversee Richland County's use of the Penny Tax revenues as Judge Cooper has erroneously concluded.

In sum, Judge Cooper erred in his application of "special interest" standing per the *Camp* decision. As the Supreme Court explained in *Camp*, "the complaining agency must at least show that it has some special interest from which it is charged with responsibility that may be adversely by the action attacked." *Camp*, 120 S.E.2d at 685. A review of the limited statutory responsibility given to SCDOR under the Transportation Act, as addressed above, shows that SCDOR and its Director do not have the requisite "special interest" to confer standing to pursue their claims for declaratory, injunctive and monetary relief as sought in this litigation. Contrary to Judge Cooper's conclusion, SCDOR and its Director do not have "a level of statutory authority" to "oversee" or "direct" Richland County's use and expenditure of Penny Tax revenues. Consequently, there is an insufficient basis for the court to have conferred "special interest" standing on SCDOR and its Director.

As previously mentioned, the "special interest" standing as articulated in *Camp* is a corollary of statutory standing. The Supreme Court has explained that "[s]tatutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. South Carolina Department of Social*

Services, 402 S.C. 311, 741 S.E.2d 515, 518 (2013). Thus, the typical analysis of statutory standing requires the suing party to identify a specific statutory provision conferring a right to sue. *See generally*, *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012); *Carnival Corp. v. Historic Ansonborough Neighborhood Asso.*, 407 S.C. 67, 753 S.E.2d 846 (2014). In the case at bar, SCDOR and its Director have not cited any statutory provision granting SCDOR the right to sue a political subdivision such as Richland County on its own behalf or, as here, on behalf of the taxpayers of Richland County. And, in short, there is no such provision.

It is also noteworthy to point out that the General Assembly has conferred express statutory standing to SCDOR to file certain types of actions in circuit court. *See e.g.*, S.C. Code Ann. § 12-16-1200 (SCDOR "may apply to any justice of the Supreme Court or circuit judge for a mandamus to compel obedience to the summons"); S.C. Code Ann. § 12-16-1190 (SCDOR "may apply to any circuit judge of the State for an attachment against him for contempt"). Importantly, the fact that the General Assembly has expressly conferred standing on SCDOR for some matters means that the General Assembly did not intend to confer standing on SCDOR for anything not expressly stated. *See*, *State v. Burton*, 301 S.C. 305, 391 S.E.2d 583, 584 (1990); *Pennsylvania National Mut. Cas. Ins. Co. v. Montgomery*, 282 S.C. 546, 554, 320 S.E.2d 458, 463 (Ct. App. 1984) (holding that, by mentioning certain specific things in a statute, the legislature has intentionally omitted other things of the same nature – "expressio unius est

exclusio alterius"). Thus, the absence of a statute that confers standing on SCDOR to enforce the provisions of the Transportation Act is significant.[16]

C. Standing Based on Right of Defendant to Defend Itself

In his Amended Order, Judge Cooper also states: "It is axiomatic that when sued a defendant has standing to fully defend itself and, if necessary, file Counterclaims to accomplish that purpose." (Amended Order, p. 14).[17] No authority is provided for that proposition of law, and frankly, no support has been found. South Carolina cases hold that a defendant asserting a counterclaim must establish standing to pursue that counterclaim. It is not simply sufficient to claim standing based on the fact that the defendant has been sued and has the right to defend the action. *See*, *City of Columbia v. Town of Irmo*, 308 S.C. 490, 419 S.E.2d 231 (1992); *Babb v. Rothrock*, 303 S.C. 462, 401 S.E.2d 418 (1991). In short, Judge Cooper erred in concluding that SCDOR and its Director enjoy

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[16] There are many examples of statutes where the General Assembly has conferred express statutory standing to state agencies to file certain types of actions in circuit court. *See e.g.*, S.C. Code Ann. § 59-150-410 (State Ethics Commission and Attorney General "have standing" to enforce lottery law provisions); S.C. Code Ann. § 24-21-1170 (Interstate Commission); S.C. Code Ann. §§ 38-27-60, 38-27-310; 38-27-910; 38-27-920 (various express grants of standing to Director of Department of Insurance); S.C. Code Ann. Ann. §§ 27-29-110(c), -112, -120 (South Carolina Real Estate Commission); S.C. Code Ann. § 34-36-60 (Department of Consumer Affairs); S.C. Code Ann. § 35-1-602 (Securities Commission); S.C. Code Ann. § 1-6-50 (State Inspector General); S.C. Code Ann. § 39-11-170 (Commissioner of Agriculture); S.C. Code Ann. § 46-49-40 (Department of Agriculture); and S.C. Code Ann. § 48-29-50 (Forestry Commission).

[17] This language was not in Judge Cooper's original Order filed June 30, 2016.

standing to pursue their counterclaims simply on the basis that they were sued by the County for a writ of mandamus and injunctive relief.

II. The Circuit Court erred in denying Richland County's Motion for Temporary Injunction because irreparable harm remains after the issuance of a writ of mandamus.

In his Amended Order, Judge Cooper denied Richland County's Motion for Temporary Injunction "because the County is unable to sufficiently show it will suffer irreparable harm in light of the Court's decision above granting Plaintiff's Petition for a Writ of Mandamus." (Amended Order, p. 17). Judge Cooper explained that his Amended Order "requires the Director to direct the Department to remit and allocate to the Treasurer the Penny Tax Revenues collected within Richland County as it routinely has since the Ordinance became effective." (Amended Order, p. 17). Judge Cooper, however, erred in ultimately concluding that "it is not necessary for the Court to further enjoin Defendants from taking actions to harm the County." (Amended Order, p. 17).

The purpose of the writ of mandamus was only to compel SCDOR and its Director to carry out their ministerial duty to remit the Penny Tax revenues to the Treasurer. However, the writ of mandamus as issued does not prohibit SCDOR and its Director from issuing directives, demands, or orders to Richland County, including but not limited to, the demand that the County adopt and implement

"IRC 263/263A as a standard, some other acceptable uniform standard, and/or other appropriate safeguards to ensure that expenditures of Penny Tax Funds qualify as allowable costs under the Act and therefore, are a proper use of Penny Tax dollars." (Amended Order, p. 17).[18] Moreover, the writ of mandamus does not prohibit SCDOR and its Director from interfering with the County's implementation and operation of its Penny Tax Program through its challenge to certain expenditures and the use of the Penny Tax revenues.

While the issuance of the writ of mandamus has addressed certain harms that were to result from the threatened retention by SCDOR and its Director of the Penny Tax revenues, it does not resolve all harms. There is remaining harm that may only be addressed through the issuance of a temporary injunction. Specifically, as long as SCDOR and its Director continue to assert any authority over the County's use and expenditure of Penny Tax revenues, there remains a real threat to the County's bond rating and ability to borrow by at its current credit rating.

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[18] Specifically, as noted at ¶¶ 57, 59-66 and Exhibit F to the Complaint, SCDOR has issued Proposed Regulation 117-338 seeking to mandatorily impose Internal Revenue Code § 263A as a requirement for the County's use of the Penny Tax revenues. This is exactly one of the types of interference that should be enjoined. In response to the Proposed Regulation, the County, and other local governments in the State, must make objections in Administrative Law Court proceedings, make arguments against promulgation before the General Assembly, and make substantial contingency planning for budgets that could be significantly affected by such an unprecedented action by a state agency.

David Adams, who is the Richland County Treasurer, testified by affidavit of "a variety of negative effects on this County" including: (1) seriously affecting the County's relationship with lending institutions (including those that issue bonds) and would constitute a "black eye" on the County's credit rating; and (2) increasing the rates at which the County refinances debt or borrows money in the future. (Adams Affidavit). Likewise, in his affidavit, Daniel Driggers, who is the Chief Financial Officer of the County, described "severe negative impact on the finances of the County," including putting the County's credibility with creditors and rating agencies at risk, resulting in higher interest cost for the Transportation Program and other County general obligation debt. (Driggers Affidavit).

It is well settled that "[t]he purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it." *Compton v. South Carolina Department of Corrections*, 392 S.C. 361, 709 S.E.2d 639, 642 (2011). The party requesting the preliminary injunction must both allege facts sufficient to state a cause of action for an injunction and demonstrate the relief is reasonably needed to preserve the parties' rights during litigation. *Id.* Thus, the party seeking a preliminary injunction must establish "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E.2d 905, 908 (2004).

As discussed above, the County has shown that irreparable harm continues to exist in spite of the issuance of the writ of mandamus. The County has also demonstrated a substantial likelihood of success on the merits. As Judge Cooper recognized, "SCDOR and the Director simply disagree with the County as to how the funds can be expended under the Transportation Act." (Amended Order, p.10). However, as discussed at length above in the analysis of "special interest" standing, SCDOR and its Director lack the statutory authority to oversee or direct the County in its expenditure and use of the Penny Tax revenues. Furthermore, such interference by SCDOR is a clear violation of Home Rule as preserved by Article VIII of the South Carolina Constitution. Finally, in concluding that "[t]here is no other legal remedy for the County than mandamus," Judge Cooper has already found that there is an inadequate remedy at law. (Amended Order, p. 13).

In sum, the writ of mandamus that was issued by Judge Cooper remedied certain of the harms facing Richland County, but not all of them. The County has shown that irreparable harm remains with respect to its bond rating and ability to borrow, and only the issuance of an injunction can remedy that harm.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Richland County respectfully requests that this Court reverse in part the Amended Order of Circuit Court Judge G. Thomas Cooper, Jr., filed August 2, 2016, and direct on remand that the Circuit Court enter an injunction in favor of Richland County thereby enjoining or otherwise prohibiting the Respondents-Appellants from issuing directives, demands, or orders on any matter related to Richland County's use and expenditure of the Penny Tax revenues. In addition, Richland County requests that the Court rule that the Respondents-Appellants lack standing to pursue any declaratory, injunctive and monetary relief against the County.

Respectfully submitted,

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October 17, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-3102

Richland County, South Carolina,..... Appellant-Respondent,

Central Midlands Regional Transit Authority, ... Plaintiff-Intervenor,

v.

The South Carolina Department of Revenue and
Rick Reames, III, in his official
capacity as its Director ..... Respondents-Appellants,

v.

Richland PDT, a joint venture consisting of
M.B. Kahn Construction Co., Inc., ICA Engineering, Inc.,
and Brownstone Construction Group, LLC,
as a unit and Individually, ... Third-Party Defendants.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant-Respondent Richland County, does hereby certify that service of the **Initial Appellant's Brief of Appellant-Respondent** and the **Appellant-Respondent's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses

clearly indicated on said envelopes this the 17th day of October 2016:

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October 17, 2016

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Richland County, South Carolina v. The South Carolina Department of Revenue and Rick Reames, III, in his official capacity as its Director
Civil Action Number: 2016-CP-40-3102
Our File Number: 314.10001

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Appellant's Brief of Appellant-Respondent** and the **Appellant-Respondent's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Benjamin E. Nicholson, V, Esquire *(w/ Enclosures)*
M. Elizabeth Crum, Esquire *(w/ Enclosures)*
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