THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE

Appellate Case No. 2016-001839

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

Central Midlands Regional Transit Authority ..... Intervenor/Respondent

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, Inc.,
ICA Engineering, Inc., and Brownstone Construction Group, LLC.,
as a unit and Individually, ... Third-Party Defendants

AMICUS CURIAE BRIEF OF THE SOUTH CAROLINA ASSOCIATION OF COUNTIES

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INTERESTS OF *AMICUS CURIAE*

The South Carolina Association of Counties (Association) represents the interests of each of South Carolina's forty-six counties. The South Carolina General Assembly granted the counties the authority to impose, pursuant to Act 52 of 1995, a one-cent sales and use tax (transportation tax) to finance transportation related projects approved by county voters. The South Carolina Department of Revenue (SCDOR) is now seeking to define and regulate the types of individual items within a transportation "project" that may be funded with transportation tax revenue absent statutory authority from the legislature to take such action. The SCDOR has indicated that the actions it has taken against Richland County in this litigation will be imposed upon other counties, all of whom are members of the Association, which have or will in the future impose a similar tax.

STATEMENT OF ISSUES ON APPEAL

The Appellant-Respondent (Richland County) has raised a number of Issues on Appeal as provided in their Initial Brief of October 17, 2016. This Amicus of the Association will be limited to issues of "Public Importance" and "Special Interest" standing by an Executive Branch agency to sue County Government, which can be restated as follows:

I. **THE CIRCUIT COURT ERRED IN GRANTING AN EXECUTIVE BRANCH CABINET AGENCY STANDING UNDER THE PUBLIC IMPORTANCE EXCEPTION.**

II. THE CIRCUIT COURT ERRED IN GRANTING AN EXECUTIVE BRANCH CABINET AGENCY SPECIAL INTEREST STANDING.

The fact that the Association did not comment on all issues should not be inferred to mean anything less than complete support for Richland County in this litigation. The Association made the conscious decision to concentrate on the issues that best describes the areas of greatest concern to the membership of this Association.

STATEMENT OF THE CASE

The Association adopts and incorporates by reference the Statement of the Case of the Appellant-Respondent as outlined in their Initial Brief of October 17, 2016.

STATEMENT OF FACTS

The Association adopts and incorporates by reference the Statement of Facts of the Appellant-Respondent as outlined in their Initial Brief of October 17, 2016.

BACKGROUND

In an effort to finance the cost of building local infrastructure at county level the South Carolina General Assembly enacted Chapter 37 of Title 4 of the S.C. Code of Laws which is entitled "Optional Methods for Financing Transportation Facilities." (The Transportation Tax) *See*, 1995 Act No. 52 (the Act). Section 1 of the Act sets forth the legislative findings as follows:

> Section 1. 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.

(Emphasis added) The legislative findings make clear the General Assembly's intention to grant the counties the authority to enact ordinances, after a referendum, to create a mechanism to finance transportation projects. Act 52 also provides two basic mandates upon the SCDOR. S.C. Code of Laws Section 4-37-30(8), directs that the SCDOR collects and administers the taxes imposed under the Act. S.C. Code of Laws Section 4-37-30(15) mandates that SCDOR provide the counties with data related to the collection and distribution of tax revenue. S.C. Code of Laws Section 4-37-30(17) authorizes the SCDOR the limited power to enact regulations to implement the provisions of the Act.

Richland County voters approved a transportation tax program in November 2012. Several other counties, including Beaufort, Berkeley,

Charleston, Dorchester, have also used the Transportation Tax to finance transportation related construction projects. Projects financed using Transportation Tax revenue must be specifically included in the referendum language approved by the voters. *See,* S.C. Code of Laws, Section 4-37-30(A)(3).

The SCDOR collected tax revenues, remitted them the State Treasurer and provided revenue data to the counties as they were required to do by statute. The agency did not appear to question expenditures of transportation tax revenue in any county prior to 2015. Beginning in April 2015, the SCDOR announced that they intended to initiate a "review" of Richland County's transportation tax program. The agency claimed the review was [p]ursuant to our statutory and regulatory authority." (Complaint, Ex. A). The County was advised that the review was to "ensure public accountability and transparency regarding the collection and expenditure of revenue generated by the tax." (Complaint, Ex. A). The SCDOR eventually made a series of demands upon the county which have been outlined in great detail by the Appellant in their Initial Brief of October 17, 2016. Most troubling to the Association and its member counties is the fact that the agency stated at the time that they hoped the demands placed upon Richland County would "potentially serve as a template for the administration of funds of counties to follow." (Complaint, Ex. F).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING AN EXECUTIVE BRANCH CABINET AGENCY STANDING UNDER THE PUBLIC IMPORTANCE EXCEPTION.

It is well established under South Carolina law 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). SCDOR, as a cabinet level agency under the Executive Branch of State Government, must have standing to sue, by way of legal counterclaim, a South Carolina county for declaratory and injunctive relief, as well as monetary damages.[1]

South Carolina law provides three ways a party may properly establish standing. A party maybe granted standing where the challenged action is one of utmost "public importance." Otherwise, the party must establish statutory or constitutional standing. See *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337,339 (2008). In the instant case, the circuit court granted SCDOR standing to bring its counterclaim against Richland County by way of the "public importance" exception. The Supreme Court has acknowledged that public importance standing "has in the subject of much confusion and misapplication." *Bodman*, 742 S.E.2d at 366. The Court has recently "tempered the application of the public importance exception" and "reminded the bench and bar that 'whether an issue of public importance exists necessitates a cautious balancing of the competing interests presented." *Bodman* at 367 (citing *ATC South, Inc.*) In his

[1] *See, City of Columbia v. Town of Irmo*, 308 S.C. 490, 419 S.E.2d 231 (1992). In this case the Court held that the Town did not have standing to bring a counterclaim seeking a declaratory judgement finding the City's prior annexation of land illegal.

concurring opinion to *Bodman,* Justice Pleicones wrote of the common misapplication of the "public importance" exception and offered a simple test to better determine its correct application. There he wrote: "Public importance standing should be invoked only where the challenge cannot be otherwise raised, and should not be used to evade the application of other well-established standards." *Bodman* at 371.

In this case the circuit court erred in granting a public importance exception to SCDOR. The challenged actions of Richland County's expenditure of lawfully imposed transportation tax revenue can be (and have been) challenged by individual taxpayers in Richland County. Additionally, the S.C. Attorney General on behalf of the State could bring a separate challenge if the expenditures violated the Transportation Act, or other state law. Therefore, this is **not** an action that cannot be otherwise raised.[2]

In addition, the Association argues that the circuit court erred in extending the "public importance" exception to a government entity, because they are not "citizens" in the eyes of the law. The key to the public importance exception is that standing be conferred, first and foremost, upon citizens. In *Carnival Corp. v. Historic Ansonborough Neighborhood Assoc.*, 407 S.C. 67, 753 S.E.2d 846 (2014), the S.C. Supreme Court addressed the public policy underlying the application of the public importance exception. There the court held:

> **Citizens** must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be

[2] The Attorney General by statute must represent the State in criminal and civil cases where the State is a party or interested. See S.C. Code of Laws Section 1-7-40. Further, S.C. Code of Laws Section 12-54-17 directs the Attorney General to bring actions "in the name of the State, to recover taxes, penalties, and interest due under this title."

> 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.

(emphasis added)

The application of the public importance exception to confer standing on an executive branch state agency has never been considered by an appellate court in South Carolina. An executive branch agency such as the SCDOR is not a citizen. The SCDOR is an administrative agency created by the General Assembly and therefor is conferred only with those powers specifically granted to it by the legislature. See, *Hampton v. Haley*, 403 S.C. 395, 743 S.E.2d 258 (2013).

The Association argues that granting a public importance exception to SCDOR as a cabinet agency under the Executive Branch would evade counties' constitutionally and legislatively granted "home rule" by giving the agency unprecedented and improper authority to regulate the budgetary and legislative powers of county governments statewide. The idea of using the "public importance" exception would send state government agencies down a slippery slope that would open the flood gates of litigation to every government agency unhappy with the budgetary decisions of other state and local government entities. Possession of this exception would in effect give the government agency the authority to manage, regulate and penalize actions taken by political subdivisions given "home rule" authority by the General Assembly. Public importance exceptions should be granted to a state agency only where there is **no other recourse** to challenge the action.

II. THE CIRCUIT COURT ERRED IN GRANTING AN EXECUTIVE BRANCH CABINET AGENCY SPECIAL INTEREST STANDING.

In addition to finding the SCDOR met the "public importance" exception to general standing rules; the circuit court found that the agency had a "special interest" in the administration of the transportation tax program. (Amended Order p. 14) The Association argues that the circuit court erred in finding the agency had a special interest. The Supreme Court has previously held that "[a]ssuming under some circumstances one public agency may attack the action of another, the complaining agency must show that it has some *special interest from which it is charged with responsibility that may be adversely affected by the action attacked.*" *Camp v. Board of Public Works*, 238 S.C. 461, 120 S.E.2d 681 (1961). When evaluating whether an executive branch agency has a "special interest" that would confer standing the focus is on the agency's statutory authority. "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.* In *Camp*, the court held that the suing agency – the Cherokee County Soil Conservation District (District) - lacked a special interest in order to sue Cherokee County to challenge a permit to discharge sewage into a creek. The court found that the District possessed no statutory authority over pollution control, and it was statutorily tasked only with the limited role of soil conservation and erosion control. *Id.*

The SCDOR lacks a special interest in challenging the expenditure of transportation tax revenue in the same manner that the District lacked a special

interest in water pollution in *Camp.* In the enactment of Act 52 of 1995, the General Assembly provided that counties may expend transportation tax revenue for specific transportation related projects provided for on a ballot referendum approved by a majority of county voters. The types of transportation projects that can be included in the referendum are provided for by the Act. Act 52 provides no specific statutory authority to SCDOR to regulate how a county spends the transportation tax revenues, or how it administers its transportation program. SCDOR's role pursuant to the Act 52 is purely ministerial. Primarily, SCDOR insures the proper administration and collection of the transportation tax revenue on behalf of the county. S.C. Code of Laws Section 4-37-30(8) provides that "[t]he 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." Once collected, S.C. Code Section 4-37-30(15) mandates that the SCDOR remit the transportation tax funds to the South Carolina Treasurer. The Treasurer is then mandated to distribute the funds on a quarterly basis to the county. There is no statutory provision in Act 52 that grants the SCDOR the authority to regulate the expenditure of the transportation funds once they have been remitted to the State Treasurer or the County. In addition, nothing in Act 52 allows the SCDOR to refuse to remit funds to the State Treasurer lawfully paid by taxpayers and collected by SCDOR. As part of the agency's efforts to regulate the Counties' expenditure of transportation tax revenue SCDOR published proposed regulation 117-338. The proposed regulation would mandate any county imposing the transportation tax adopt Internal Revenue Code Section 263 and 263(A), or

similar Code provision. I.R.C. Sections 263 & 263(A) are deductibility provisions of the federal income tax. These provisions have no application to the counties since they neither pay federal income taxes, nor are required to adopt any part of the I.R.C. The General Assembly, when they enacted county "Home Rule" gave counties the legislative authority to adopt "an accounting and reporting system whereby funds are received, safely kept, allocated and disbursed." See S.C. Code of Laws Section 4-9-30(8). After a public hearing Administrative Law Judge H.W. Funderburk held that proposed regulation was neither needed nor reasonable. In his order, Judge Funderburk directly questioned whether SCDOR "in carrying out its ministerial duties to collect and remit the Transportation Tax to the South Carolina Treasurer, has the authority...to expand the statute to limit costs." *In Re: Proposed Regulation 117-338*, Docket No: 16-ALJ-17-0270-RH. (Nov. 29, 2016).[3]

The SCDOR's entire attempt to regulate and limit expenditure of Transportation tax revenue is similarly unreasonable. Lacking a "special interest" in the expenditure of transportation tax funds, the actions of the SCDOR should be viewed by this court as a clear violation of the constitutional separation of powers doctrine. The S.C. Constitution in Article 1, Section 8 provides: "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." Various acts of the General Assembly grant Counties both specific (S.C.

[3] Judge Funderburk's order recommended the SCDOR reconsider the regulation in light of the agency's authority to promulgate regulations limited to those that aid in its enumerated duties pursuant to the Act.

Code of Laws 4-9-30) and general power (S.C. Code of Laws Section 4-9-25) to make laws governing themselves; and the SCDOR was created as an administrative agency within the executive branch of state government to administer tax laws. It has long been recognized that administrative agencies are limited in their discretion in executing the laws of the state. Our Supreme Court has previously held that "non-legislative bodies may make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking is an intrusion upon the legislative power." *State v. Moorer*, 152 S.C. 455, 479, 150 S.E.2d 269, 277 (1929). In the instant case the General Assembly in enacting Act 52 granted the counties the authority to impose and expend transportation tax revenues on specific transportation related projects. The authority to expend transportation tax revenue was specifically enacted in furtherance of the Counties specific powers to tax provided in S.C. Code Section 4-9-30. In addition, Act 52 specifically provides for the types of transportation projects that could be financed.[4] Subsection B to S.C. Code of Laws Section 4-37-30 clearly shows that the General Assembly intended projects financed by the transportation tax be flexible to best meet the needs of the individual county imposing the tax. The Act states:

> This item (B) is intended to provide an additional and alternative method, subject to a referendum, for the provision of and financing for highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities to the end that these transportation-related projects may be undertaken in such manner

[4] Costs eligible for funding include " 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." 1995 Act 52, Section 1.

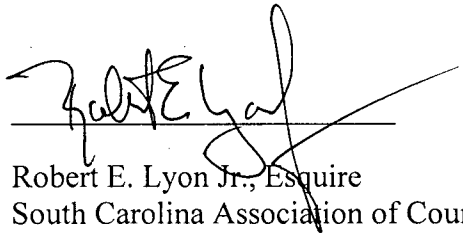
> as may best be calculated to expedite relief of hazardous and congested traffic conditions on the highways in the State."

The Act contains no language giving SCDOR authority to interpret or limit project expenditures. Where there is no statutory authority given to the SCDOR to interpret and limit the definition of approved project expenditures provided for pursuant to S.C. Code 4-37-30(A), such regulation should have been viewed by the circuit c ourt as an intrusion upon the power of both the General Assembly and the Counties. Therefore, the circuit court erred in conferring "special interest" standing on SCDOR concerning their counterclaims against the County.

CONCLUSION

The circuit court erred in granting the SCDOR a "public interest" exception to standing and "special interest" standing to sue Richland County to regulate the expenditure of transportation tax revenue. Such regulation would violate the Home Rule authority of the county, as well as the legislative provisions of 1995 Act 52. The Association asks this Court to reverse the lower court's grant of standing to SCDOR in regards to their counterclaims against Richland County.

Respectfully Submitted,



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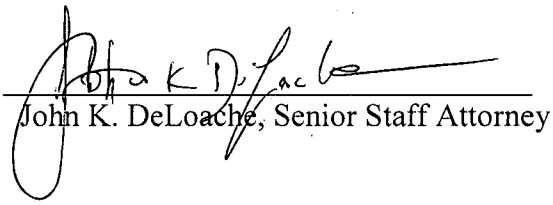
December 13, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the South Carolina Association of Counties' *Amicus Curiae* Brief was mailed this 13th day of December, 2016 via United States Postal Service, First Class Postage Prepaid, to the following counsel of record:



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