THE STATE OF SOUTH CAROLINA
In The Supreme Court

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



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Case No. 2016-CP-40-3102

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

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**MOTION FOR CERTIFICATION
TO SOUTH CAROLINA SUPREME COURT
AND MOTION TO EXPEDITE APPEAL**

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The Appellant-Respondent Richland County hereby moves in accordance with Rule 204(b), SCACR, for certification of this case for the immediate review by the South Carolina Supreme Court. In addition, the County moves the Court, pursuant to Rule 240, SCACR, to expedite the appeal for the reasons addressed below.

## BACKGROUND

This lawsuit arises out of an attempt by the Respondents-Appellants South Carolina Department of Revenue (SCDOR) and its former Director, Rick Reames, III,[1] to exercise unprecedented state control over a political subdivision's use and expenditure of county tax revenues. 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 Richland County under certain statutes and local ordinances. The issues in this lawsuit should be reviewed by the Supreme Court expeditiously as explained in this motion because they not only will cause significant adverse effects for Richland County, but they will also apply specifically to several other counties that

[1] Rick Reames, III has resigned from his position as SCDOR Director. His replacement has been named but not yet confirmed by the Senate. Richland County will move for substitution once the new director is confirmed by the Senate.

are not parties to this lawsuit, and more generally apply to SCDOR's purported authority over *any* county's ability to spend sales and use tax revenue.

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.[2] This statute was passed under the auspices of S.C. Const. art. VIII and S.C. Code Ann. § 4-9-30, which is the general law that

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[2] 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.

proscribes the powers and authorities of South Carolina counties under Home Rule.

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").[3] 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.[4]

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. After the conclusion of the *Letts* case, the Penny 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).

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

[4] 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.

The Transportation Penny Program will be in operation for up to a 22 year period. Currently, there are 650 transportation related projects that were identified in Appendix A to and approved as part of the Penny Tax Ordinance.[5] Since 2013, the Transportation Penny Program has completed a total of 104 projects -- namely 45 resurfacing projects, 31 dirt road paving, 12 pedestrian improvements, 3 bikeways, 9 sidewalks, 1 greenway, and 3 intersections. In addition, it has provided approximately $13.7 million annually to fund the CMRTA.

On April 15, 2015, the SCDOR Director informed Richland County that it intended to initiate a "review" of Richland's Transportation Penny Program. The County fully cooperated with the review and was provided with the results via letter dated December 3, 2015. The letter cited various administrative expenditures paid for by the Penny Tax that SCDOR opined were outside of those authorized by S.C. Code Ann. § 4-37-30.

With regard to the administrative expenditures paid for by the Penny Tax, Richland County and SCDOR exchanged numerous letters and met on several occasions attempting to resolve SCDOR's contention that no administrative costs can be paid from the Penny Tax, all despite specific language in the referendum

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[5] The Penny Tax Ordinance approved three types of transportation related projects: (1) improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements; (2) continued operation of mass transit services provided by Central Midlands Regional Transit Authority (CMRTA) including implementation of near-, mid- and long-term services improvements; and (3) improvements to pedestrian sidewalks, bike paths, intersections and greenways. The 650 projects do not include funding to CMRTA and its projects.

and the Ordinance, as well as the preamble language cited above, allowing for administrative expenditures to be paid by the Penny Tax. SCDOR increased its demands with each letter; however, one consistent demand was that Richland County adopt Internal Revenue Code § 263A as a standard for determining eligible expenditures to be funded with the Penny Tax. Although Richland County was very open to making reasonable changes to its Transportation Penny Program, it held firm that IRC § 263A was not an appropriate standard for this purpose. Throughout this discussion, Richland County repeatedly challenged SCDOR's statutory and constitutional authority to withhold the Penny Tax Revenue from the County and to direct the County as to how to spend the Penny Tax Revenue.

By letter dated April 27, 2016, SCDOR informed Richland County that it intended to withhold the Penny Tax Revenues unless Richland acceded to its demands. On May 20, 2016, Richland County responded by filing a Complaint seeking the issuance of a declaratory judgment, a writ of mandamus and a permanent injunction against SCDOR 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." 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." 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. With its Complaint, the County also filed a Petition for Writ of Mandamus and Motion for Temporary Injunction.

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." 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." 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." 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."

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." *See*, 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." *See*, 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 the June 30, 2016 Order 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*." *See*, 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." *See*, 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.

*See*, Amended Complaint, p. 20.

Richland County thereupon filed a timely appeal to the Court of Appeals. SCDOR and its Director have also filed a cross-appeal. The County filed its Initial Brief on October 17, 2016. SCDOR and Reames have yet to file their Initial Appellant's Brief or their Initial Respondent's Brief.[6]

## MOTION FOR CERTIFICATION

Rule 204(b), SCACR, provides that "[i]n any case which is pending before the Court of Appeals, the Supreme Court may ... on motion of any party to the case ... certify the case for review by the Supreme Court before it has been determined by the Court of Appeals." Rule 204(b), SCACR, further provides that "[c]ertification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." *See*, Rule 204(b), SCACR.

[6] To date, SCDOR and Reames have been granted extensions through January 20, 2017, for the filing of their Initial Appellant's Brief. Upon information and belief, no extension has been granted for the filing of the Initial Respondent's Brief.

This appeal is appropriate under the standard set out in Rule 204(b) because of the significant public impact and major importance that this case has. Richland County refers the Court to its Initial Brief filed with the Court of Appeals for a detailed discussion of this case, the order on appeal, and the vast implications this litigation has. In particular, Richland County cites this Court to three issues of significant public impact and/or major importance.

First, the August 2, 2016 Amended Order held that standing can be conferred upon a state agency under the "public importance" exception and/or "special interest" standing absent express statutory authority. Conferring standing upon a state agency based upon the public importance exception is an issue of first impression in this State. The lower court found that SCDOR and its Director had standing under the public importance exception and special interest standing in SCDOR's attempt to oversee and even direct how Penny Tax Revenues may or may not be expended by a county. Richland County contends that the grant of standing to SCDOR under the circumstances presented provides unprecedented and dangerous levels of power to a state agency, violates principles of Home Rule, violates the separation of powers doctrine, and even usurps the authority of the South Carolina Attorney General. These are critical issues of major importance with significant repercussions not only for the litigants in this case but for local governments throughout the State (even those that have not enacted a sales tax

pursuant to the Transportation Act) and potentially even other state agencies which receive tax revenues collected by SCDOR.

As further proof of the wide-ranging impact of this litigation beyond the current litigants and the immediate controversy presented herein, the Court is referred to the Amicus Curiae Brief submitted by the South Carolina Association of Counties opposing the grant of standing to SCDOR. As stated in that brief, "[m]ost troubling to the Association and its member counties is the fact that [SCDOR] 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.'" *See*, Amicus Curiae Brief, p. 4.

The importance of the issues presented by the appeal and cross-appeal is further demonstrated by SCDOR's attempt to oversee and direct the expenditure of Penny Tax Revenues by its recent promulgation of Proposed Regulation 117-338 which mandates that counties adopt IRC § 263A (or an alternative standard to be approved by SCDOR) as a standard for determining eligible expenditures to be funded with the Penny Tax Revenues. On November 29, 2016, the Administrative Law Court issued its Public Hearing Report pursuant to S.C. Code Ann. §§ 1-23-110 and 1-23-111 to address the "need and reasonableness" of the Proposed Regulation 117-338. In that Public Hearing Report, the Administrative Law Court included the following determinations and recommendations:

> While there may be a need to assure taxpayers that counties have a reasonable standard for determining eligible costs, it is not clear DOR, in carrying out its ministerial duties to collect and remit the Transportation Tax to the South Carolina Treasurer, has the authority to create such a requirement or to expand the statute to limit eligible costs to capitalized (or capitalizable) costs. The Transportation Act gives authority to a county to administer and operate the Transportation Tax and to use the Transportation Tax funds exclusively for the purpose stated in a county ordinance. The authority of the Department to audit a county's expenditure of the Transportation Tax and to dictate the permissible uses of the tax is not found in either S.C. Code Ann. §§ 4-37-30 or 12-4-320 (2014).
>
> * * * * *
>
> In essence, the Department is attempting to create for itself a similar oversight authority, but without the necessary statutory authority to do so. The Department's authority derives from the Legislature's mandate to promulgate regulations "necessary to implement this section." S.C. Code Ann. § 4-37-30(A)(17). However, that mandate is limited to the ministerial duties to collect and remit the Transportation Tax to the South Carolina Treasurer. Allowing the Department to have oversight over the counties' spending of the Transportation Tax without specific legislative authority would use a regulation to expand the statute.

*See*, ALC Public Hearing Report, pp. 11-12.[7] Ultimately, the Administrative Law Court concluded that SCDOR "has not met its burden in proving the need and reasonableness of the proposed regulation 117-338." *See*, ALC Public Hearing Report, p. 16.

[7] A copy of the ALC Public Hearing Report is submitted herewith as an exhibit.

Significantly, the Administrative Law Court concluded that SCDOR lacked a statutory basis to exercise the "oversight authority" that it claimed and did not have any apparent legal basis to audit a county's expenditure of Penny Tax Revenues or to dictate the permissible uses of those revenues particularly in light of the preamble language contained in Section 1 of 1995 Act. No. 52. This directly contradicts Judge Cooper's conclusions of law in his Amended Order that SCDOR does have some degree of such authority. Thus, there is a current split of opinion on this legal issue.[8]

In sum, SCDOR's attempt to promulgate a regulation to achieve the same result as what has been attempted by way of this litigation, and the Administrative Law Court's determination that the authority to do so is lacking, further highlight the importance of this litigation and the issues presented on appeal for immediate consideration by the Supreme Court. Moreover, this appeal presents constitutional issues which by law must be decided by the Supreme Court, including whether the actions taken by SCDOR and its Director violate Home Rule as established by S.C. Const. art. VIII. Finally, Richland County's request for certification of this appeal is also supported by the reasons discussed below in favor of expediting this appeal.

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[8] Further, pursuant to S.C. Code Ann. § 1-23-111, SCDOR can still submit the proposed regulation to the General Assembly despite the Public Hearing Report issued by the Administrative Law Court. There has been no indication from SCDOR that it will not at some time attempt to promulgate such a regulation. A final resolution of SCDOR's authority to promulgate regulations based on the "oversight authority" it claims is, therefore, an issue of significant importance.

Unless this Court certifies this appeal, it is highly probable that the financing issues facing the County will jeopardize the Penny Transportation Program that the voters approved in 2012, and will detrimentally impact the needs of Richland County citizens for transportation-related improvements and services including those provided by the CMRTA.

## MOTION TO EXPEDITE APPEAL

The Appellant-Respondent Richland County is further requesting that the Court expedite a decision in this appeal including the remainder of the briefing schedule and the scheduling of oral argument as soon as practicable after the filing of final briefs. The importance of the issues in this appeal to not just Richland County but to all local governments, state agencies, SCDOR itself, and the citizens of South Carolina has been outlined in the Motion to Certify. The conflict in legal opinion as to SCDOR's scope of authority, the potential assertion of such authority over all local governments and state agencies, and the possible waste of judicial and legislative resources are reasons alone to expedite this appeal. Richland County, however, has an individualized and important need for an expeditious determination by this Court.

In addition to the need for these issues of major importance to be addressed expeditiously by this Court, Richland County is facing significant financing issues

if this appeal continues through the normal, non-expedited process. Specifically, S.C. Code Ann. § 4-15-30 provides in pertinent part:

> (A) The authorities of a county may issue general obligation bonds of the county to defray the cost of any authorized purpose and for any amount not exceeding its applicable constitutional debt limit, if:
>
> (1) the election required by this chapter as a condition precedent to the issuance of bonds is favorable; and
>
> (2) the bonds are issued within five years following the holding of the election.

S.C. Code Ann. § 4-15-30(A). Thus, general obligation bonds must be issued within five years of the date of the referendum. The referendum occurred on November 6, 2012, and as a result, the bonds would need to be issued by November 5, 2017. However, S.C. Code Ann. § 4-15-30(C) provides for the tolling of the five-year period "while litigation contesting the validity of the election is pending." S.C. Code Ann. § 4-15-30(C). The validity of the referendum was challenged in the case of *Letts v. Richland County*, Appellate Case No. 2012-213679, which ended on March 21, 2013, when the Supreme Court unanimously denied the petition for writ of certiorari. Therefore, with the benefit of the tolling provision, Richland County has until March 20, 2018 to issue the general obligation bonds.

In support of its motion, Richland County presents the affidavit of R. Michael Gallagher, who is a Director with Compass Municipal Advisors, LLC, which is the financial advisory firm for the County. *See*, Gallagher Aff., ¶ 1. Mr. Gallagher addresses in his affidavit the time constraints that Richland County is encountering with the sunset date for the issuance of the general obligation bonds and the necessity for this litigation to be concluded to allow for those bonds to be timely issued. Mr. Gallagher attests as follows:

> The County's financing plan for the roads and greenway portion of the Penny projects has, since its inception, always included the issuance of referendum-approved general obligation bonds. I understand that the legal authority of the County to issue the general obligation bonds approved in the November 2012 referendum will end in March 2018. From my experience in South Carolina, the issuance of referendum-approved general obligation bonds by a County requires a minimum of 60 to 90 days, which allows for three readings of an ordinance, public hearing, preparation of an official statement, obtaining ratings from Standard & Poor's and Moody's Investors Service, publication of a notice of sale, conducting the sale and closing the transaction. In my opinion unless this litigation is successfully concluded on behalf of the County by December 2017, the County will not be able to issue any of the general obligation bonds approved in the referendum.

*See*, Gallagher Aff., ¶ 5.

In addition, Mr. Gallagher addresses the negative impact that the unavailability of bond proceeds is already having on Richland County's ability to meet the current timetable for its construction program. He attests as follows:

> The most recent pro forma prepared for the County based upon data supplied by the County in October 2016 includes the issuance of $100,000,000 in general obligation bonds in July 2017. Without the availability of those bond proceeds, the County's current construction program will see a negative cash flow by October 2017. If bond proceeds are not available by July 2017 or soon thereafter, the County's financing plan will be dramatically impaired. Construction will have to be paced to meet current cash flows, which can cause significant delays in projects.

*See*, Gallagher Aff., ¶ 6.

Finally, Mr. Gallagher addresses the uncertainties in the bond market and the fact that continued delay resulting from this litigation will very well cost Richland County taxpayers substantially if interest rates continue to rise. *See*, Gallagher Aff., ¶ 7. Mr. Gallagher also addresses the need for flexibility as a "counter balance to risks of rising interest rates." *See*, Gallagher Aff., ¶ 8. He thus opines:

> If the County's sunset date to issue the referendum-approved general obligation bonds is March 2018, it will in the best interests of the County and its taxpayers to have challenges resolved as soon as possible so that the County will have sufficient time to plan the date of its bond sale. If there is sufficient time before the sunset date, the County would have the ability to withdraw a sale and reschedule it if the market appears unfavorable. Without sufficient time to manage its sale of the bonds, the County could be a victim of negative market forces.

*See*, Gallagher Aff., ¶ 8.

In sum, a final resolution of this case needs to be expedited in order to allow Richland County sufficient time to issue the referendum-approved general

obligation bonds by the sunset date and to grant the County the flexibility to obtain the most favorable interest rate and market conditions. SCDOR and its Director will suffer no harm or prejudice from expediting the appeal process from this point forward. They have had sufficient time to develop, brief and present their positions although they have not done so. The continued delay in the process only serves to jeopardize and thwart the Penny Transportation Program that the voters approved in 2012 and to provide for the financing of that program at the most advantageous market rates.

## CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Richland County respectfully requests that the Supreme Court certify this case for immediate review and that the appeal process, including the remainder of the briefing schedule, the scheduling of oral argument and a decision by the Court be expedited. The Supreme Court's certifying this case and scheduling argument as soon as practicable will ensure that these issues of major importance are expeditiously addressed and will not cause unnecessary harm to the County's Penny Transportation Program and to the County's taxpayers who voted for and benefit from the program.

Respectfully submitted,

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*Counsel for Appellant-Respondent*
*Richland County*

Columbia, South Carolina

January 20, 2017

# *Exhibit*

**STATE OF SOUTH CAROLINA**
**ADMINISTRATIVE LAW COURT**

| | | |
|---|---|---|
| South Carolina Department of Revenue,<br><br>Proponent,<br><br>vs.<br><br>In Re: Proposed Regulation 117-338 | ) | Docket No.: 16-ALJ-17-0270-RH<br><br>**PUBLIC HEARING REPORT OF THE ADMINISTRATIVE LAW JUDGE** |

This matter is before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to S.C. Code Ann. §§ 1-23-110 and 1-23-111 (2005 and Supp. 2016). A public hearing was held October 25, 2016, at the ALC in Columbia, South Carolina, to determine the "need and reasonableness" of the proposed new regulation: S.C. Code Ann. Regs. 117-338.

At the public hearing, the South Carolina Department of Revenue ("DOR" or "Department") and interested persons were given the opportunity to present written materials and oral testimony, all of which were incorporated into the Record of the hearing.

The following Proponents of the proposed regulation participated in the public hearing:
**Milton Kimpson**, General Counsel for Litigation, DOR
**Elisabeth Shields,** Counsel for Litigation, DOR
**John P. McCormack**, Policy Manager, DOR
**Ryan A. Johnson**, Associate Professor of Accounting, Wofford College

The following Opponents of the proposed regulation participated in the public hearing:
**Larry C. Smith,** Richland County Attorney
**Malane S. Pike**, Attorney for Richland County
**Andrew F. Lindermann**, Attorney for Richland County
**Elizabeth Van Doren Gray**, Counsel for Central Midlands Regional Transit Authority ("CMRTA")
**Richard A. Pomp**, Tax Law Professor, University of Connecticut School of Law
**Charles Talbert, III**, Certified Public Accountant, Partner, Webster Rogers

**Charles R. Statler, Jr.**, Certified Public Accountant, Managing Partner, Derrick Stubbs and Stith
**Robert A. Schneider**, Executive Director, CMRTA

The following Proponent filed a comment with DOR but did not attend the public hearing:
**Willie Horton McAbee, III**, no identifying information provided

Furthermore, pursuant to SCALC Rule 47(H), the Record of this hearing remained open for five (5) days for interested persons to submit their positions in writing. During that time period, the ALC received statements from the following Proponents:
**Kenneth Breivik**, Chairman, South Carolina Small Business Regulatory Review Committee[1]

During the period the Record remained open, the ALC received statements from the following Opponents[2]:
**Stephen Suggs**, Deputy Director, South Carolina Appleseed Legal Justice Center
**Dori Tempio**, no identifying information provided
**Laquanda Porchea**, Lead Independent Living Specialist
**Kimberly A. Tissot**, Executive Director, Able South Carolina
**Robbie Kopp**, Director of Advocacy & Community Access, Able South Carolina
**J. Mac Bennett**, President and CEO, United Way of the Midlands
**John H. Lumpkin**, no identifying information provided
**William C. Boyd**, Haynesworth Sinkler Boyd
**Michael Brenan**, no identifying information provided
**Peter Brews**, Dean, Moore School of Business, University of South Carolina
**Donny Burkett**, Certified Public Accountant, Burkett Burkett Burkett
**Lee Bussell**, Chairman and CEO, Chernoff Newman
**Elizabeth Dinndorf**, President, Columbia College
**John W. Folsom**, President and CEO, Colliers International

[1] The letter was dated October 14, 2016; however, it was received with Department's post-hearing submission on October 31, 2016.
[2] The Court received statements from opponents after October 31, 2016, the deadline to submit, and therefore, the statements were not considered and are not part of the Record. The statements were from:
**Abby K. Cobb**, LISW, Lead Social Worker, Richland School District Two
**Gloria B. Warner**, MHA, Chief Administrative Officer, Eau Claire Cooperative Health Center

**Chuck Garnett**, President, NBSC

**Alan Kahn**, President, Kahn Development

**Lou Kennedy**, President and CEO, Nephron Pharmaceuticals Corporation

**Mickey E. Layden**, President, LCK Construction Services

**Robert Lyles**, Chairman, Stevens and Wilkinson of South Carolina

**William McElveen, Jr.**, Adams and Reese LLP

**David S. Pankau**, no identifying information provided

**Harris Pastides**, President, University of South Carolina

**Ronald Rhames**, President, Midlands Technical College

**Charles T. Speth, II**, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

**Thomas E. Suggs**, President and CEO, Keenan & Suggs Insurance

## FINDINGS

Based upon the statements, testimony, exhibits, written comments, and applicable law, I find and conclude the following:

### General Findings

The Notice of Drafting of the proposed regulation was published in the State Register on May 27, 2016. The Department filed an Agency Transmittal Form with the ALC on August 5, 2016. The Notice of Proposed Regulation was published in the State Register on August 26, 2016. On October 17, 2016, the Department forwarded a request for a public hearing filed by several interested persons and associations comprising more than twenty-five (25) members. A public hearing to allow the Department's presentation and public comment was conducted on October 25, 2016, pursuant to S.C. Code Ann. § 1-23-111, at which time this Court received oral testimony, exhibits, and written comments from DOR and interested persons.

This proposed regulation concerns the Optional Methods for Financing Transportation Facilities, S.C. Code Ann. §§ 4-37-10, et seq. (Supp. 2016) ("Transportation Act"). The Transportation Act was enacted to allow counties to choose from optional means for financing transportation expenditures. Pursuant to S.C. Code Ann. § 4-37-30(A), "the governing body of a county may impose by ordinance a sales and use tax in an amount not to exceed one percent...for a specific period of time to collect a limited amount of money." ("Transportation Tax").

S.C. Code Ann. § 4-37-10 Editor's Note containing Section 1 of 1995 Act No. 52 (Findings) reads:

> 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.

Several counties have used the Transportation Tax, including Beaufort, Berkeley, Charleston, and Dorchester. DOR did not look into how those counties have administered the Transportation Tax or whether any accounting or spending problems have arisen. The Department also did not correspond with these counties to determine what accounting methods are being or were used. The impetus for developing this regulation was largely in response to Richland County's Transportation Tax. DOR developed this regulation over the course of a few months.

**Proposed Regulation**

The proposed regulation, S.C. Code Ann. Regs. 117-338 reads:

> 117-338. Local Transportation Sales and Use Tax – Eligible Costs.
>
> Chapter 37, Title 4, provides that the governing body of a county may impose by ordinance a local transportation sales and use tax in an amount not to exceed one percent to finance the costs of highways, roads, streets, bridges, and other transportation-related projects. The Department of Revenue administers and collects the local transportation sales and use tax and is authorized to promulgate regulations.
>
> The purpose of this regulation is to ensure that counties adopting the local transportation sales and use tax under Chapter 37, Title 4, adopt a reasonable standard for determining eligible costs that may be paid from the revenue derived from the local transportation sales and use tax.
>
> 117-338.1. Adoption of Standard for Determining Eligible Costs by County Imposing Local Transportation Sales and Use Tax.
>
> In order to ensure that proceeds of the local transportation sales and use tax are used solely for transportation-related projects authorized under Chapter 37, Title 4, a county imposing the tax shall adopt a reasonable standard to be applied in determining eligible costs that may be paid from the revenue derived from the local transportation sales and use tax.

117-338.2. Safe Harbor Standard.

The Department has determined that a standard that defines eligible costs as those costs that would be capitalized into a specific transportation-related project under the principles of Section 263A of the Internal Revenue Code is an acceptable standard. Section 263A generally requires that taxpayers that produce real or tangible personal property capitalize direct material costs, direct labor costs, and indirect costs that are properly allocable to the produced property, including the allocable portion of most indirect costs that benefit the assets produced. The term produce includes construct, build, install, manufacture, develop or improve.

Under this standard, eligible costs are direct costs and indirect costs properly allocable to a specific project. If a project involves the construction of a capital asset, all direct construction costs for materials and labor are eligible costs. In addition, operating costs relating to any equipment used to produce the capital asset are eligible costs. Furthermore, the allocable portion of costs related to personnel directly involved in the planning, supervision, or construction of the project, including vacation pay, payroll taxes, and benefits, are eligible costs. Eligible indirect costs may also include costs for pension, benefits, purchasing, handling, storage, rent, insurance, engineering and design, and repairs and maintenance on equipment used in the project.

Under Section 263A, indirect costs for marketing, selling, advertising, and distribution are generally not required to be capitalized. Notwithstanding the foregoing, certain reasonable costs incurred for the dissemination of information to the public, community outreach, and public relations are eligible costs, provided that such costs are related to a specific transportation-related project and are consistent with the purpose stated in the county's imposition ordinance and Chapter 37, Title 4.

117-338.3. Alternative Standard.

In lieu of the standard set forth in subsection 117-338.2 of this regulation, a county may request the use of an alternative standard for Department approval. The alternative standard must be justifiable, reflect the public purpose stated in the imposition ordinance and Chapter 37, Title 4, and be reasonable in the type and amount of eligible costs.

The cost eligibility standard under 117-338.2 of this regulation is applicable unless and until the Department approves an alternative standard submitted by the county. Once approved, the county and Department shall publish the standard on their public websites. The approved alternative standard shall be available for prospective use only.
If the county disagrees with the Department's denial of the county's alternative standard, the county may appeal the denial.

117-338.4. Ineligible Costs.

Ineligible costs include, but are not limited to, costs incurred for training, establishment or support of programs to benefit constituents or persons that are not directly related to a specific transportation-related project, or excessive amounts not based on a competitive bidding arrangement.

Effective Date: This regulation applies to all contracts and agreements entered into on or after July 1, 2018, for any transportation-related project authorized under Chapter 37, Title 4.

**Regulation 117-338.1**

The Department asserts that its authority to issue this regulation arises under S.C. Code Ann. § 4-37-30(A)(17), which allows the Department to "promulgate regulations necessary to implement this section." Pursuant to S.C. Code Ann. § 4-37-30(A)(8), the Transportation Tax "must be administered and collected by the Department of Revenue in the same manner that other sales and use taxes are collected." The Department argues that its power to "administer and collect" along with its authorization to "promulgate regulations to implement this section," gives DOR the authority to issue this regulation. Under S.C. Code Ann. § 4-37-30(A)(5), the Transportation Tax terminates when the Department finds that sufficient revenues have been raised to provide for the costs of the projects. DOR's position is that its authority extends beyond the duty to monitor the amounts collected and allows the Department to audit a county's expenditures.

Opponents argue that DOR has the power to administer and collect the Transportation Tax but, significantly, does not have authority beyond its normal power to enforce payment of sales and use tax. Therefore, the Department does not have the authority to audit a county's spending of its Transportation Tax revenue or to dictate how a county spends its revenue. Opponents further argue that if the Department had authority over the expenditures of the Transportation Tax revenue by a county, the Department could have authority over all governmental entities to determine whether a county's or agency's spending is acceptable to the Department. Opponents posit that DOR's exercise of such a sweeping power would be an absurd result not intended by the Legislature.

**Regulation 117-338.2**

The Department argues that its use of IRC § 263A is appropriate as the default standard for a county to use to determine costs that can be paid from Transportation Tax revenues ("eligible

costs"). DOR believes these costs are limited to capital costs. Ryan Johnson, an Associate Professor of Accounting at Wofford College, testified as an expert in accounting that the Department's use of IRC § 263A was a reasonable method to distinguish capitalized costs from expenses. The Department's position is that even though IRC § 263A is an income tax standard, it could be used to determine which costs can be paid. Professor Johnson also believed that the imposition of the IRC § 263A standard would not be burdensome on counties with a Transportation Tax. The Department additionally claims that the delayed start date of the regulation allows counties adequate time to determine how the IRC § 263A standard should be applied and used.

Opponents argue that that the use of IRC § 263A is improper because expenditures are not limited to capital costs, but allow for administrative and/or operating costs of projects. Opponents point to the preamble of the Transportation Act which states that counties are authorized to finance "the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation related projects..." 1995 Act No. 52 Section 1 (Findings) (emphasis added). In addition, Opponents contend that the implementation plan of this subpart of the proposed regulation is deficient.

**Regulation 117-338.3**

The Department believes that the statutory authority for this subsection is S.C. Code Ann. § 4-37-30 and DOR's role in administering this tax. The Department believes that the process by which a county can propose a different standard than IRC § 263A is proper. The Department notes that although the proposed regulation does not include any timelines, "a sufficient review of a county standard should be able to be completed within forty-five (45) days of submission to the Department." If the Department rejects a county's proposal, that decision would be viewed as a "division decision." A county would then have ninety (90) days from the date of the division decision to file a written protest with DOR. Should the protest not be resolved, the Department would issue a Department Determination. A Department Determination must be issued within nine months of the date of the written protest. Then, after a Department Determination is issued, a county can file an appeal to the ALC.

Opponents again argue that DOR lacks authority to promulgate this portion of the proposed regulation. Opponents also state that this proposed regulation is deficient in that it fails to provide

criteria to be used in determining an alternative standard. Additionally, Opponents claim that DOR's internal appeal procedure does not contemplate this process, and that this type of case would not be appealable to the ALC because it does not meet the definition of a contested case as provided in S.C. Code Ann. § 1-23-505(3) (Supp. 2016).

**Regulation 117-338.4**

The Department argues that the authority for this subsection is the entire Transportation Act, specifically S.C. Code Ann. § 4-37-30(A)(1)(c), which, DOR argues, provides that Transportation Tax funds can only be used for capital assets. The Department believes that the items listed as ineligible expenses in this subpart are reasonable. As mentioned above, it is the Department's position that the Transportation Tax is to be used exclusively for capital costs, and cannot be used for other costs such as those for training, operating, and administering projects.

Opponents again argue that DOR is without statutory authority to implement a list of ineligible costs. Opponents also argue that this subpart violates the Home Rule of S.C. Const. art. VIII. Finally, Opponents claim that this subpart is not consistent with S.C. Code Ann. § 4-37-30(A)(15), in that the enabling statute contemplates that the revenues and interest earnings can be used for the purposes stated in the imposition ordinance.

**IRC § 263A**

The purpose of IRC § 263A is to determine when a taxpayer can expense a cost and when a taxpayer must capitalize a cost, in order to prevent a taxpayer from recognizing in the current period all of its expenditures as current expenses. There is no discernable use of IRC § 263A for a state or county. Nothing was presented to this Court to substantiate that IRC § 263A has been used for this method of government accounting. Professor Pomp, an expert in the area of state and federal taxation, noted that the interpretation and application of IRC § 263A would be a significant burden on counties, as additional tax accountants and tax lawyers would be needed. Although the ALC does not entirely agree with Professor Pomp, the Court is convinced that this interpretation and application of IRC § 263A proposed by the Department would create costs for any county implementing a Transportation Tax.

## CMRTA

CMRTA is the governmental agency that operates the bus system providing public transportation in the Midlands of South Carolina. The number of trips on CMRTA in the past year was 2,500,000. CMRTA is funded in substantial part by the Richland County Transportation Tax. CMRTA provides transit access to low-income individuals and persons with disabilities. Many riders on CMRTA work at Fort Jackson, the University of South Carolina, and a number of hospitals and other health care facilities. Without the Richland County Transportation Tax, CMRTA would have to significantly cut back on routes and other services, or possibly cease existence.[3]

## CONCLUSIONS OF LAW

A regulation is an "agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." S.C. Code Ann. § 1-23-10(4) (Supp. 2016). An agency is implicitly authorized to interpret, clarify, and explain statutes "by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *Heyward v. S.C. Tax Comm'n*, 240 S.C. 347, 355, 126 S.E.2d 15, 19–20 (1962). An administrative regulation is valid if reasonably related to the purpose of the enabling legislation. *Hunter & Walden Co. v. S.C. State Licensing Bd. for Contractors*, 272 S.C. 211, 213, 251 S.E.2d 186, 186 (1978). "[A] regulation cannot alter or add to a statute..." *Cole v. S.C. Elec. & Gas, Inc.*, 362 S.C. 445, 455, 608 S.E.2d 859, 864 (2005). The Department bears the burden to show the need for and reasonableness of S.C. Code Ann. Regs. 177-338. *See* S.C. Code Ann. § 1-23-111; *see also* SCALC Rule 47.

Regulations in South Carolina must be promulgated according to the mandates of the Administrative Procedures Act. Pursuant to S.C. Code Ann. § 1-23-111(A):

> The agency shall submit into the record the jurisdictional documents, including the statement of need and reasonableness as determined by the agency based on an analysis of the factors listed in Section 1-23-115(c)(1) through (11), except items (4) through (8), and any written exhibits in support of the proposed regulation. The agency may also submit oral evidences. Interested persons may present written or oral evidence. The presiding official shall allow questioning of agency representatives or witnesses, or of interested persons making oral statements, in

[3] The Department attempted to add an amendment to its proposed regulation, 117-338.5, at the regulatory hearing. The amendment would have carved out an exception for CMRTA that would be contrary to DOR's justification for the parts of the regulation under consideration here. The amendment to the proposed regulation was withdrawn at the regulatory hearing and is not part of the Record.

order to explain the purpose or intended operation of the proposed regulation, or a suggested modification, or for other purposes if material to the evaluation or formulation of the proposed regulation. The presiding official may limit repetitive or immaterial statements or questions. At the request of the presiding official or the agency, a transcript of the hearing must be prepared.

Under S.C. Code Ann. § 1-23-111(B):

> The presiding official shall issue a written report which shall include findings as to the need and reasonableness of the proposed regulation based on an analysis of the factors listed in Section 1-23-115(c)(1) through (11), except items (4) through (8), and other factors as the presiding official identifies and may include suggested modifications to the proposed regulations in the case of a finding of lack of need or reasonableness.

S.C. Code Ann. § 1-23-115(C) (2005 and Supp. 2016), reads, in pertinent part:

> The preliminary and final assessment reports required by this section must disclose the effects of the proposed regulation on the public health and environmental welfare of the community and State and the effects of the economic activities arising out of the proposed regulation. Both the preliminary and final reports required by this section may include:
>
> (1) a description of the regulation, the purpose of the regulation, the legal authority for the regulation, and the plan for implementing the regulation;
>
> (2) a determination of the need for and reasonableness of the regulation as determined by the agency based on an analysis of the factors listed in this subsection and the expected benefit of the regulation;
>
> (3) a determination of the costs and benefits associated with the regulation and an explanation of why the regulation is considered to be the most cost-effective, efficient, and feasible means for allocating public and private resources and for achieving the stated purpose;
>
> * * *
>
> (9) the uncertainties associated with the estimation of particular benefits and burdens and the difficulties involved in the comparison of qualitatively and quantitatively dissimilar benefits and burdens. A determination of the need for the regulation shall consider qualitative and quantitative benefits and burdens;
>
> (10) the effect of the regulation on the environment and public health;
>
> (11) the detrimental effect on the environment and public health if the regulation is not implemented. An assessment report must not consider benefits or burdens on out-of-state political bodies or businesses. The assessment of benefits and burdens which cannot be precisely quantified may be expressed in qualitative terms. This subsection must not be interpreted to require numerically precise cost-benefit

analysis. At no time is an agency required to include items (4) through (8) in a preliminary assessment report or statement of the need and reasonableness; however, these items may be included in the final assessment report prepared by the office.

Pursuant to S.C. Code Ann. § 1-23-111(C), if the ALC concludes that the need for or reasonableness of the proposed regulation has not been met, the DOR must elect to:

(a) modify the proposed regulation by including the suggested modifications of the presiding official;

(b) not modify the proposed regulation in accordance with the presiding official's suggested modifications in which case the agency shall submit to the General Assembly, along with the promulgated regulation submitted for legislative review, a copy of the presiding official's written report; or

(c) terminate the promulgation process for the proposed regulation by publication of a notice in the State Register and the termination is effective upon publication of the notice.

## DETERMINATION AND RECOMMENDATIONS

The purpose of proposed regulation 117-338 is to restrict spending of Transportation Tax revenues to capital costs only. DOR, in its proposed regulation, would require counties that impose a Transportation Tax to adopt a reasonable standard to determine eligible costs, or to use its default standard based on IRC § 263A. Therefore, the proposed regulation 117-338 would accomplish two goals: first, it requires that counties "adopting the local transportation sales and use tax under Chapter 37, Title 4, adopt a reasonable standard for determining eligible costs that may be paid from the revenue derived"; second, it provides that an acceptable standard is one "that defines eligible costs as those costs that would be capitalized into a specific transportation-related project under the principles of §263A of the [U.S.] Internal Revenue Code"; it further defines ineligible costs to include "costs incurred for training, establishment or support of programs to benefit constituents or persons that are not directly related to a specific transportation-related project, or excessive amounts not based on a competitive bidding arrangement."

While there may be a need to assure taxpayers that counties have a reasonable standard for determining eligible costs, it is not clear DOR, in carrying out its ministerial duties to collect and remit the Transportation Tax to the South Carolina Treasurer, has the authority to create such a requirement or to expand the statute to limit eligible costs to capitalized (or capitalizable) costs.

The Transportation Act gives authority to a county to administer and operate the Transportation Tax and to use the Transportation Tax funds exclusively for the purpose stated in a county ordinance. The authority of the Department to audit a county's expenditure of the Transportation Tax and to dictate the permissible uses of the tax is not found in either S.C. Code Ann. §§ 4-37-30 or 12-4-320 (2014).

It is instructive that the Legislature did not create an oversight body to ensure that counties comply with the requirements and restrictions of the Transportation Act. *See City of Myrtle Beach v. Tourism Expenditure Review Comm.*, 407 S.C. 298, 299, 755 S.E.2d 425, 425 (2014), *reh'g denied* (Apr. 4, 2014). In the South Carolina Accommodations Tax Act, a statewide oversight body, the Tourism Expenditure Review Committee, was established and given authority over "all questionable tourism-related expenditures and to that end, all reports filed pursuant to Section 6-4-25(D)(3) must be forwarded to the committee for review to determine if they are in compliance with this chapter." S.C. Code Ann. § 6-4-35(B)(1)(a) (2004 and Supp. 2016).

In essence, the Department is attempting to create for itself a similar oversight authority, but without the necessary statutory authority to do so. The Department's authority derives from the Legislature's mandate to promulgate regulations "necessary to implement this section." S.C. Code Ann. § 4-37-30(A)(17). However, that mandate is limited to the ministerial duties to collect and remit the Transportation Tax to the South Carolina Treasurer. Allowing the Department to have oversight over the counties' spending of the Transportation Tax without specific legislative authority would use a regulation to expand the statute.

The enabling act for this tax, S.C. Code Ann. § 4-37-30(A), does not contain a specific statutory provision limiting the eligible costs to capitalized costs. The lone reference to "capital costs" in the statute appears in S.C. Code Ann. § 4-37-30(A)(1)(c), which requires the county ordinance to specify "the estimated capital cost of the project to be funded in whole or in part from the proceeds of the tax and the principal amount of bonds to be supported by the tax." Thus, there are two different amounts that have to be disclosed and explained to taxpayers: the capital cost and the total principal amount to be obtained and repaid by the Transportation Tax. The proposed regulation would limit the tax revenues to the lesser amount while not allowing the entire bonded amount "supported by the tax" to be paid as an eligible cost.

Since S.C. Code Ann. § 4-37-30(A)(1)(c) contains the only reference to "capital costs" in the Transportation Act, DOR's dependence on this subparagraph must be carefully considered. However, this subparagraph refers to estimated capital costs as part of the disclosures required to be included in the ordinance presented to voters. Furthermore, DOR believes that "administrative" costs are only included in operating costs.[4] However, operating costs can fall into two categories: operations/administrative costs connected with the creation of a capital asset—here a transportation project—or operations/administrative costs associated with the ongoing use of a capital asset or transportation project. Furthermore, maintenance costs can also be divided into capital improvements and expensed repairs. For example, IRC § 263A differentiates "Repairs/Maintenance – Production" from "Repairs – Not Production." While this distinction may be useful for a business taxpayer, it is an unnecessary classification for a government entity repairing, maintaining, or enhancing an ongoing transportation project. However, it is necessary for the government entity to distinguish project expenditures, whatever they might be called, from non-project (or pre-existing) transportation costs.

The plan for implementation of the regulation and its internal time frames are also problematic. First, the proposed regulation is unclear as to when the default safe harbor of IRC § 263A would take effect if a county failed to submit anything to DOR to either affirm the use of IRC § 263A or propose a different standard. Also, the time frame and mechanisms of how a county would suggest a differing standard is unclear. The proposed regulation allows for a county to appeal the Department's denial of its suggested standard; however, the procedure for that appeal has not been determined. The issue of this Court's jurisdiction remains uncertain given the definition of a contested case. *See* S.C. Code Ann. § 1-23-505(3) (defining a contested case as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.") Further, the period for an appeal of this nature from the first submission of a proposed standard is time consuming, and could lead to a situation in which the Transportation Tax is being collected but there is no standard in place to ascertain that the funds

[4] Operating costs are only mentioned in S.C. Code Ann. § 4-37-30(B).

are being properly spent. The Department has not considered how the potential appeal delay (more than thirteen months) for such decisions would impact project costs. This is especially true given that bid estimates might have to be altered given the potential delay that could occur because of the lengthy appeal process.

The Department claims that the proposed regulation is the most cost-effective, efficient, and feasible means for allocating public and private resources and for achieving the stated purpose. The Department's position centers on the degree of flexibility that is allowed, specifically that a county can either use the safe harbor standard of IRC § 263A or choose its own standard. In the Notice of Proposed Regulation, published in the State Register on August 26, 2016, the Department stated that "[p]romulgation of this regulation will not have an impact on state or local political subdivisions expenditures."

However, this regulation will have an impact on expenditures for the state as well as counties. First, counties who participate in the Transportation Tax will have to conform to either the default standard of IRC § 263A or develop their own standard. Determining what costs would qualify for payment by Transportation Tax revenue would increase a county's expenditures or use of resources. The development and submission of accounting figures in accord with IRC § 263A will also increase the costs for counties. Additionally, the oversight sought by DOR will require an increase in state expenditures. The Department will need to have employees to review the counties' submissions of accounting figures to ascertain that they comply with either the default standard of IRC § 263A or another standard developed by the county. In addition, the development, review, and appeal of an alternative cost eligibility standard would also have an impact on both state and county expenditures. Also, additional costs for pre-standard planning must occur, to delineate the ordinance for the referendum. The Department should thoroughly conduct a cost-benefit analysis of this proposed regulation.

The Department claims, in the Notice of Proposed Regulation, that this proposed regulation would pose no effect on the environment and public health. However, if the proposed regulation is approved, county transit authorities, such as CMRTA, could not continue to operate as they do now with operating expenses substantially funded by Transportation Tax revenue. A portion of public transportation riders use the system to get to and from doctor's appointments. Additionally,

a portion of public transportation ridership are employed by hospitals and other health care facilities. Both groups would be negatively affected by a disruption of public transportation systems. The Department has not offered any evidence that failure to implement this regulation will have a negative impact on the environment or public health; however, the implementation could have a significant negative impact on the provision and use of public health services.

The Court recommends that the Department reconsider proposed regulation 117-338 in light of DOR's authority to promulgate regulations limited to those that aid in the performance of its enumerated duties: (1) administer and collect taxes, (2) remit taxes collected to the Treasurer, (3) remit unidentified Transportation Tax revenue to the Treasurer, (4) provide counties and the Treasurer with data to allow calculation of distributions of the collected revenue to the appropriate counties, (5) notify counties when taxes collected have raised sufficient revenue to provide the greater of (a) cost of project or projects, as approved by referendum, or (b) cost to amortize all debts related to the approved project, and (6) enforce the collection of Transportation Tax revenue. Also, DOR should reconsider proposed regulation 117-338 in light of S.C. Code Ann. § 4-37-10 Editor's Note containing Section 1 of 1995 Act. No. 52.

In addition, the Department should reconsider and provide details for the appeal process for a county that wishes to adopt its own cost eligibility standard.[5] The Department should lay out the process for its internal review process, including time frames for review, and inform counties how and where to seek redress should the Department ultimately deny the counties' alternative standard. This is necessary considering the amount of time the Department has proposed, approximately thirteen months, between submission of an alternative standard to a final agency decision that is appealable. The Department should study the impact this amount of time would have on cost estimating and the bidding process.

[5] Establishing an appeal process will likely require statutory amendments.

## CONCLUSION

The Department has not met its burden in proving the need and reasonableness of the proposed regulation 117-338. The Department shall consider the findings and recommendations contained herein and elect a course of action consistent with S.C. Code Ann. § 1-23-111(C).

H. W. Funderburk, Jr.
Administrative Law Judge

November 29, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
*In The Court of Appeals*

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

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Case No. 2016-CP-40-3102

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

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**AFFIDAVIT**

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PERSONALLY appeared before me, R. Michael Gallagher, who first being sworn to tell the truth, does depose and say the following:

1. My name is Robert Michael Gallagher and I am a Director with Compass Municipal Advisors, LLC ("Compass"), the financial advisory firm to Richland County, South Carolina (the "County").

2. In addition to the County, Compass currently serves as financial advisor to the following other counties in South Carolina: Berkeley, Georgetown, Hampton, Lancaster, Laurens, Marion, Marlboro, Newberry, Sumter, Union, Williamsburg and York.

3. Compass has experience with sales tax backed bonds in five of those counties and twenty school districts in South Carolina.

4. In my capacity as Financial Advisor, I am familiar with the County's financing plans in connection with the transportation penny (the "Penny"). Compass has reviewed historical data on the Penny collections and the expenditure of Penny revenue and, at the request of the County, Compass has made certain financial projections regarding the issuance of bonded indebtedness in connection with the Penny financing plans and the expenditure of the Penny to develop, administer and construct the projects as part of the referendum approved by the voters on November 6, 2012.

5. The County's financing plan for the roads and greenway portion of the Penny projects has, since its inception, always included the issuance of referendum-approved general obligation bonds. I understand that the legal authority of the County to issue the general obligation bonds approved in the November 2012 referendum will end in March 2018. From my experience in South Carolina, the issuance of referendum-approved general obligation bonds by a County requires a minimum of 60 to 90 days, which allows for three readings of an ordinance, public hearing, preparation of an official statement, obtaining ratings from Standard & Poor's and Moody's Investors Service, publication of a notice of sale, conducting the sale and closing the transaction. In my opinion unless this litigation is successfully concluded on behalf of the County by December 2017, the County will not be able to issue any of the general obligation bonds approved in the referendum.

6. The most recent pro forma prepared for the County based upon data supplied by the County in October 2016 includes the issuance of $100,000,000 in general obligation bonds in July 2017. Without the availability of those bond proceeds, the County's current construction program will see a negative cash flow by October 2017. If bond proceeds are not available by July 2017 or soon thereafter, the County's financing plan will be dramatically impaired. Construction will have to be paced to meet current cash flows, which can cause significant delays in projects.

7. Uncertainty is always part of the bond market. It is impossible to predict the rise and fall of interest rates. Looking at historical information, if the County had issued $100,000,000 in October 2016, the interest rate would have been 2.759%. If issued on January 17, 2017, the interest rate would have been 3.162%. On $100,000,000 general obligation bonds, the interest rate differential equates to $4,172,024 in present value dollars. It is very possible that this rise in interest rates will continue. It is our opinion that issuing bonds sooner rather than later will be in the best interests of the County.

8. Having flexibility is one counter balance to risks of rising interest rates. If the County's sunset date to issue the referendum-approved general obligation bonds is March 2018, it will in the best interests of the County and its taxpayers to have challenges resolved as soon as possible so that the County will have sufficient time to plan the date of its bond sale. If there is sufficient time before the sunset date, the County would have the ability to withdraw a sale and reschedule it if the market appears unfavorable. Without sufficient time to manage its sale of the bonds, the County could be a victim of negative market forces.

FURTHER DEPONENT SAYETH NOT.

R. Michael Gallagher

SWORN to before me this
18th day of January, 2017.

Notary Public for South Carolina
My Commission Expires: 6/16/2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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



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Case No. 2016-CP-40-3102

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

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## CERTIFICATE OF SERVICE

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The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant-Respondent Richland County, does hereby certify that service of the **Motion for Certification and to Expedite the Appeal** and **Affidavit of R. Michael Gallagher** in the above-captioned matter was made upon the Honorable Jenny Abbott Kitchings via hand delivery and 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 20th day of January 2017:

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

Gary Trammell

***Via U.S. Mail***
Larry Smith, Esquire
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