THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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S.C. SUPREME COURT

Case No. 2016-CP-40-3102
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 Co., Inc., ICA Engineering, Inc., and Brownstone Construction Group, LLC, as a unit and individually, ... Third-Party Defendants.

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. Did the Circuit Court Err in Holding SCDOR and its Director Have Standing to Pursue the Counterclaims?

II. Did the Circuit Court Err in Denying the County's Request for Temporary Injunctive Relief?

COUNTER-STATEMENT OF THE CASE

On May 20, 2016, Richland County sued the SCDOR and its director, Rick Reames, III (the "Director"). The County sought a declaratory judgment that SCDOR and the Director did not have authority to withhold revenues under the County's "Penny Tax" Program. The County also sought a writ of mandamus directing the SCDOR to remit the Penny Tax revenues to the State Treasurer for transfer to the County, injunctive relief preventing the SCDOR from ordering or directing the County how to spend the revenues under the Penny Tax Program, and an award of fees and costs. (Complaint)

On June 20, 2016, the SCDOR and the Director filed an answer, counterclaim, and a third-party complaint against Richland PDT. The SCDOR sought court assistance to address alleged problems discovered during an audit of the County's Penny Tax Program. SCDOR also challenged the County's ordinance to the extent the ordinance permitted expenditures not authorized under Title 12 of the South Carolina Code. The SCDOR also sought an accounting and disgorgement from the County and PDT, and further requested that the circuit court enter an injunction prohibiting further expenditures as well as the appointment of a receiver to ensure lawful operation of the Penny Tax Program while the matter was pending. On June 21, 2016, the SCDOR filed a separate motion for injunctive relief or, alternatively, the appointment of a receiver.

On June 23, 2016, the County filed a memorandum in support of its petition. The County contended the SCDOR and the Director had no authority to refuse to remit quarterly tax revenues to the County Treasurer or to withhold the remittance of the Penny Tax Revenues. The County also sought an order prohibiting the SCDOR "from issuing directives,

demands, or orders on any matter related to Richland County's and Council's spending of the Penny Tax Revenues."

On June 23, 2016, the SCDOR and the Director filed a memorandum in opposition to the County's request for declaratory judgment, writ of mandamus and injunctive relief. On June 24, 2016, the SCDOR filed a memorandum in support of its claims for injunctive relief or the appointment of a receiver, and the County filed a memorandum in opposition to the SCDOR's motions. The County also moved to strike portions of affidavits the SCDOR filed with its motion for injunctive relief. Chief Administrative Judge Alison Lee entered an order on June 24, 2016, designating the matter as complex and assigning the case to Judge G. Thomas Cooper.

On June 28, 2016, the circuit court held a hearing on all pending motions. The court issued an order on June 30, 2016 in which it:

A. Granted the County's petition for writ of mandamus directing the SCDOR and the Director to remit the Penny Tax Revenues for the quarter ending June 2016 to the State Treasurer;

B. Ruled the SCDOR and the Director had standing to assert their motions, counterclaims and third-party claims based upon "a level of statutory authority to oversee the County's use of the Penny Tax Revenues";

C. Ruled the SCDOR and the Director had standing based on the "public importance" doctrine;

D. Denied the County's motion for temporary injunction;

E. Denied the SCDOR's motion for injunctive relief;

F. Denied the SCDOR's motion for appointment of a receiver on the ground that the SCDOR has no authority to petition for appointment of a receiver and the request was untimely.

On July 11, 2016, the parties filed cross-motions for the court to alter or amend its order. On July 15, 2016, the court granted the County's motion to strike portions of the affidavits in question, ruling the affidavits contained legal conclusions or were not based on personal knowledge. That same date the court entered an order permitting Central Midlands Regional Transit Authority (CMRTA) to intervene with the consent of all parties. On July 20, 2016, the County moved to dismiss the counterclaims and third-party claims brought by the SCDOR and the Director.

On August 2, 2016, the circuit court entered an order granting in part the motions for reconsideration filed by each party and amended its final order accordingly. On August 16, 2016, the court entered an order granting the third-party defendants' motion to dismiss the SCDOR's third-party complaint. On August 17, 2016, the court entered an order denying the County's motion to dismiss the SCDOR's counterclaims.

On September 2, 2016, the County served a Notice of Appeal and on September 13, 2016, the County served an amended Notice of Appeal. On September 14, 2016, the SCDOR and the Director served notice of a cross-appeal.

On November 15, 2016, the Court of Appeals granted CMRTA's motion to be included as a party in the appeal. On March 22, 2017, this Court certified the matter pursuant to Rule 204, SCACR, and granted expedited review.

FACTS

STANDARD OF REVIEW

"Actions for injunctive relief are equitable in nature." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). The appellate court reviews equitable issues *de novo*. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 777 S.E.2d 176 (2015); *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d (2014) (upon review of an action in equity, the appellate court may make factual findings based on its own view of the preponderance of the evidence).

Furthermore, determining the proper interpretation of a statute is a question of law, and the appellate court also reviews questions of law *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." *Lambries*; *Sloan*.

Therefore, this Court's standard of appellate review in this matter is the broadest available.

THE SCDOR

The General Assembly created the SCDOR "to administer and enforce the revenue laws of this State; administer and enforce licensing laws and regulations relating to alcoholic liquors, beer and wine and assess penalties for violations thereof; and other laws specifically assigned to it." S.C. Code Ann. § 12-4-10 (2014). The SCDOR has broad authority to facilitate tax administration, regulation, and enforcement. S.C. Code Ann. § 12-4-310 (2014), *et seq.* The SCDOR also has authority for tax administration, regulation, and enforcement as it relates to sales and use taxes. S.C. Code Ann. § 12-36-2660 (2014) ("[t]he Department of Revenue shall administer and enforce the provisions of this chapter [Chapter 36].").

THE TRANSPORTATION OR "PENNY TAX" ACT

In 1995, the General Assembly passed Act No. 52 creating Chapter 37 of Title 4 of the Code. S.C. Code Ann. § 4-37-10 (Supp. 2016), *et seq.* The new chapter provided for "Optional Methods for Financing Transportation Facilities." Pursuant to the Act, South Carolina counties may choose "to finance all of the cost of highways, roads, streets, bridges, and other transportation-related projects and elect[] to create an authority for that purpose...." S.C. Code Ann. § 4-37-10 (A), (C). Counties are "empowered to impose by ordinance a sales and use tax in an amount not to exceed one percent within its jurisdiction for a single project or for multiple projects and for a specific period of time to collect a limited amount of money." S.C. Code Ann. § 4-37-30(A). The Act is referred to as the "Transportation Act" or the "Penny Tax Act."

The Act provides that the "tax levied pursuant to this section must be administered and collected by the SCDOR in the same manner that other sales and use taxes are

collected." S.C. Code Ann. § 4-37-30 (A)(8). The Act also provides the SCDOR with authority to terminate the sales and use tax (the Penny Tax) if, prior to the end of the maximum time allotted for the tax, the SCDOR "determines that the tax has raised revenues sufficient to provide the greater of either the cost of the project or projects as approved in the referendum or the cost to amortize all debts related to the approved projects." S.C. Code Ann. § 4-37-30 (A)(5)(b).

THE COUNTY ORDINANCE

On July 18, 2012, Richland County enacted Ordinance No. 039-12HR (County Ordinance) which provided for the imposition of a one-percent sales and use tax pursuant to the Penny Tax Act upon approval by voter referendum. The Ordinance scheduled the referendum for November 6, 2012. The proceeds of the one-percent sales and use tax were to be used in accordance with the statutory restrictions imposed by the General Assembly as outlined in the Act.

The voters approved the referendum in November 2012 and the Penny Tax became effective in Richland County on May 1, 2013. The County's Penny Tax is authorized to run for twenty-two (22) years and is expected to raise over one billion ($1,000,000,000) dollars for use as specified under the Act.

ADDITIONAL FACTS

The SCDOR began collecting the Penny Tax revenues on May 1, 2013 and remitted the County's Penny Tax allocation to the State Treasurer pursuant to § 4-37-30 (A)(15). Under the Code, the State Treasurer then distributed the revenues with interest earned after accounting for refunds made and for the SCDOR's costs in administering the tax. *Id.*

In April 2015, the Director informed the County's Administrator that SCDOR intended to initiate a "review" of the County's Penny Tax Program. After conducting this review, the Director sent a letter to the County on December 3, 2015 requesting the County "correct" its actions "prospectively and by reimbursement for previously paid amounts" from the Penny Tax. (Memo., Exh. B). The Director stated certain administrative and various other expenses purportedly associated with the Penny Tax Program could not be paid from the Penny Tax Revenues.

The Director's letter set out the results of the SCDOR's review and outlined "three general areas of concern": (1) questions of "potential public corruption and fraud" with regard to County's procurement of the PDT (which the SCDOR referred to law enforcement); (2) evidence of criminal behavior associated with the Penny Tax Program (referred to the SCDOR's Criminal Investigative Division); and (3) concerns with the expenditure of Penny Tax funds for purposes outside of the enabling statute, such as the set-up and operation of the Small and Local Business Enterprise Program (SLBE) and ill-defined public relations contracts. The Director's letter itemized those expenditures that were outside the Transportation Act and the County Ordinance. Only the third area of concern (improper expenditures) was before the circuit court in this matter. (Amended Order, p. 4, n. 2).

In January 2016, the SCDOR's personnel met with the County's Transportation Director, Rob Perry, and the County's attorney, Larry Smith. (VanStory Affidavit, ¶ 5). The SCDOR explained the potential use of IRS Code 26 U.S.C. §§ 263 and 263A as a guide to help the County determine which costs could appropriately be paid using Penny Tax

revenues. (VanStory Affidavit, ¶ 8).

On February 24, 2016, the SCDOR sent a letter to the County, reiterating the SCDOR's position that certain administrative and various other expenses could not be paid with the Penny Tax revenues and that the Penny Tax revenues could only be used for capital projects. The SCDOR attached its "Report on Sales and Use Tax for Transportation Facilities in Richland County." The Report contained instructions from the SCDOR and the Director to the County as to how the Penny Tax revenues must be spent and allocated. On April 1, 2016, the SCDOR provided the County a list of twelve action items, including a recommendation that the County use IRC §§ 263 and 263(A) under the Penny Tax Program.

On April 27, 2016, the SCDOR informed the County that unless it complied with the recommendations from the SCDOR and the Director regarding Penny Tax revenue spending, the SCDOR's monthly allocation of the County's Penny Tax revenues and the July 2016 tax distribution would be zero, that is, the SCDOR would withhold the Penny Tax revenues collected from Richland County sales. The SCDOR claimed Penny Tax revenues could only be spent for capital projects, and that it was concerned that monies had been, and could be, misappropriated or misspent. Subsequent correspondence from the County indicated a desire to explore the SCDOR's concerns regarding expenditures. (Complaint, Exh. C, D).

The County filed suit on May 20, 2016, challenging the SCDOR's authority to regulate County practices with regard to the expenditure of Penny Tax revenues and seeking to force the SCDOR to resume allocations of tax revenues and remittance to the State Treasurer. The County sought a writ of mandamus as well as injunctive relief. The SCDOR counterclaimed for injunctive relief and the appointment of a receiver. The County

challenged the SCDOR's standing to seek relief.

Following a hearing, the circuit court entered an order: (1) granting the County's writ of mandamus; (2) finding the SCDOR and the Director had standing to assert their defenses and counterclaims; (3) denying the County's motion for temporary injunction; (4) denying the SCDOR's motion for an injunction; and (5) denying the SCDOR's request for the appointment of a receiver. Following cross-motions for reconsideration the circuit court entered an amended order adhering to, but clarifying, the prior mandates.

The County appealed that portion of the order finding the SCDOR and the Director had standing and denying the County's motion for injunctive relief. The SCDOR served a cross-appeal of the court's grant of the writ of mandamus and injunctive relief to the County.

This brief responds to the County's appeal.

ARGUMENTS

The County contends the circuit court should not have concluded the SCDOR and the Director have standing to pursue injunctive relief, the appointment of a receiver, and other relief. The County also asserts the court should have granted the County's motion for temporary injunction because, even after the court issued the writ of mandamus, the County still suffers "irreparable harm." The Court should affirm the circuit court's rulings on these issues.

I. THE CIRCUIT COURT CORRECTLY HELD THE SCDOR HAS STANDING

The County contends the circuit court erred in ruling the SCDOR has standing to pursue injunctive relief, the appointment of a receiver, and other relief. The Court should reject these arguments and affirm.

The circuit court found standing on three separate grounds. First, the court held any defendant has standing to defend itself when sued, and that includes the ability to raise counterclaims "to accomplish that purpose." (Amended Order, p. 14). Next, the court held the SCDOR and the Director have standing based upon various provisions of the South Carolina Code. (Amended Order, p. 14). Finally, the court found the SCDOR and the Director have standing to assert their claims based upon the "public importance" doctrine (Amended Order, pp. 14-15), which is equitable in nature.

The SCDOR's analysis addresses each issue in the order the circuit court ruled upon them.

(A) GENERAL STANDING TO FULLY DEFEND

The circuit court first ruled, "It is axiomatic that when sued, a defendant has standing to fully defend itself and, if necessary, file Counterclaims to accomplish that purpose." (Amended Order, p. 14). The County challenges this ruling as lacking any basis in law. (App. Br. pp. 39-40). This Court should affirm.

The County believes "South Carolina cases hold that a defendant asserting a counterclaim must establish standing to pursue that counterclaim." (App. Br. p. 39). The County cites to two cases: *City of Columbia v. Town of Irmo*, 308 S.C. 490, 419 S.E.2d 231 (1992) and *Babb v. Rothrock*, 303 S.C. 462, 401 S.E.2d 418 (1991). Neither of these cases stand for such a broad pronouncement.

In *Town of Irmo*, the City of Columbia sued the Town of Irmo and its Town Council seeking declaratory and injunctive relief. Columbia alleged Irmo unlawfully annexed property within Columbia's corporate limits by virtue of Columbia's prior annexation of the same property. Irmo answered, denying Columbia validly annexed the property, and counterclaimed for a declaratory judgment that Columbia's prior annexation was illegal. The circuit court dismissed the counterclaim and Irmo appealed. This Court affirmed, stating:

> In substance, the counterclaim *raises the same claims* Irmo asserted as a party plaintiff in *Quinn v. City of Columbia*, 303 S.C. 405, 401 S.E.2d 165 (1991). In that case, we held Irmo has no standing to bring an action challenging Columbia's annexation. *For the same reasons, Irmo has no standing to bring the counterclaim in this suit.* Accordingly, the Circuit Court properly granted the motion to dismiss the counterclaim.
>
> We emphasize that the only issue presented and decided in this appeal is the question of Irmo's standing to assert the counterclaim. Our opinion should not, of course, be construed to express any view on the merits of the City of Columbia's suit, which is still to be heard and decided by the Circuit

Court.

City of Columbia v. Town of Irmo, at 491, 419 S.E.2d at 231 (emphasis added). Thus, the Court decided the matter based on *res judicata* rather than a broad pronouncement about standing to assert counterclaims in general.

Subsequent judicial decision further illustrates *Columbia v. Irmo*'s narrowness. As the prior block quote indicates, the case prominently relied on *Quinn v. City of Columbia*. This Court overruled *Quinn* in *St. Andrews Public Service Dist. v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E.2d 647 (2002).

Babb v. Rothrock is similarly unhelpful due to the subject matter of that case – corporate derivative claims brought by individual shareholders on their own behalf. Babb, an individual shareholder, sued three other shareholders for contribution towards corporate debt Babb had satisfied – Babb sought contribution based upon personal guarantees of the debt given by the other shareholders. The defendants brought counterclaims asserting Babb misappropriated assets of the defunct corporation. The master in equity ordered contribution but permitted the defendants a setoff based upon amounts the master found Babb had misappropriated. On appeal, this Court addressed only the setoff issue, stating:

> Babb contends that the defendants lack standing to assert their counterclaim for misappropriation of corporate property. We agree. It is firmly established by our decisions that individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation.

Id., at 464, 401 S.E.2d at 419 (citations omitted). *Babb* is an expression of the general rules governing how to pursue individual versus derivative claims against a corporation. The case does not stand for the broad proposition the County asserts in its brief.

Even so, the circuit court did *not* hold the SCDOR and the Director "enjoy standing to pursue their counterclaims simply on the basis that they were sued by the County for a writ of mandamus and injunctive relief," as the County posits. (App. Br. pp. 39-40). Rather, the court stated "a defendant has standing to *fully defend* itself and, *if necessary*, file Counterclaims *to accomplish that purpose*." (Amended Order, p. 14) (emphasis added). The "purpose" to be accomplished was the SCDOR's and the Director's ability to fully defend themselves against the County's suit in which the County sought mandamus, injunctive relief aimed at future action, and attorney fees. The counterclaims for an injunction against misuse of the Penny Tax and for the appointment of a receiver assisted the SCDOR and the Director in defending against the extreme relief the County pursued. If the SCDOR prevailed in those counterclaims, the circuit court would not have issued the mandamus requiring the SCDOR and the Director to remit the 2016 revenues "*and all future allocations and remittances*." (Amended Order, p. 20) (emphasis by the court).

The Court should affirm the circuit court's ruling that the SCDOR and the Director have standing to assert their Counterclaims in order to fully defend themselves in the County's action for the extreme and unusual relief of mandamus and an injunction.

(B) STANDING GROUNDED IN STATUTORY AUTHORITY

Under the discussion of "Public Importance Standing" in the County's brief, the County claims the trial court "did not find that any statute confers standing on SCDOR and its Director." (App. Br. p. 14). This misstates the circuit court's order.

The second basis for the circuit court's holding regarding standing was grounded in

various portions of the Code.[1] The circuit court stated:

> Additionally, SCDOR and the Director have a level of *statutory authority* to oversee the County's use of the Penny Tax Revenues. S.C. Code Ann. § 12-4-10 charges SCDOR with the right and duty to administer and enforce the revenue laws of this State. Furthermore, pursuant to S.C. Code Ann. § 12-4-310, SCDOR has broad authority to facilitate tax administration, regulation, and enforcement. The Transportation Act, in S.C. Code Ann. § 4-37-30(8), specifically provides that the "tax levied pursuant to this section must be administered and collected by the Department of Revenue in the same manner that other sales and use taxes are collected." SCDOR's authority for tax administration, regulation, and enforcement as it relates to sales and use taxes is provided for by S.C. Code Ann. § 12-36-2660, which states that the "Department of Revenue shall administer and enforce the provisions of this chapter [Chapter 36]." *Given this level of statutory authority*, SCDOR and the Director have a "special interest" in the County's use of the Penny Tax Revenues sufficient *to confer standing* upon Defendants[] for the limited purpose of presenting the claims in its Defense and Counterclaims.

(Amended Order, p. 14) (emphasis added). The circuit court included a finding in its mandate to reflect these conclusions. (Amended Order, p. 19-20, ¶¶ 5, 6).

The County contends the circuit court's ruling over-reads the statutes. (App. Br. pp. 32-39). The County relies primarily upon *Camp v. Board of Public Works*, 238 S.C. 461, 120 S.E.2d 681 (1961) and the County's own construction of the statutes the circuit court cited. The County also isolates each code section and contends none of them, read alone, provide the SCDOR or the Director any "special interest" in the County's use of the Penny Tax so as to confer standing to assert the counterclaims. (App. Br. pp. 27-39). The County's arguments should not be persuasive.

To begin with, *Camp* is not as broad a pronouncement as the County claims. In *Camp*, the supervisors of the Cherokee County Soil Conservation District brought an action

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[1] SCDOR also asserted various equitable theories in support of its position, *e.g.*, fiduciary duty, receivership and public trust.

to have declared null and void a permit the South Carolina Water Pollution Control Authority (the Authority) issued to the Board of Public Works (BPW) of the City of Gaffney for the enlargement of the sewerage disposal plant on Beaverdam Creek in Cherokee County, and to enjoin the BPW from proceeding under said permit. The Supreme Court stated:

> We are not called upon in this case to determine whether one State agency may bring an action against another State agency for a declaratory judgment as to their respective powers with reference to any matter in dispute between them. (Citation omitted). This is not such a case. Respondents are seeking to set aside a permit granted to the Board of Public Works to enlarge its plant on Beaverdam Creek and to enjoin the Board from proceeding under said permit.
>
> Assuming under some circumstances one public agency may attack the action of another, the complaining agency must at least show that it has some special interest from which it is charged with responsibility that may be adversely affected by the action attacked. This we do not think respondents have done.
>
> We have only recently held that an administrative agency has 'only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted.' *Black River Electric Cooperative, Inc. v. Public Service Commission*, [238 S.C. 282, 292], 120 S.E.2d 6, 11 [(1961)]. *Nowhere in the Soil Conservation Act are respondents given any jurisdiction over pollution of streams or other waters of the State*. Their classification and the regulation of the purity and quality of the water have been committed solely to the Authority, a division of the State Health Department. Respondents are concerned only with the conservation of the soil resources of the State and the control and prevention of soil erosion. *They are charged with no responsibility with reference to the pollution of streams*. The discharge of sewage into Beaverdam Creek does not affect flood control or soil conservation in any manner. So far as the record discloses, the soil conservation district is not a taxpayer and owns no lands which would be affected by the permit granted to the Board of Public Works. It is true that respondents may 'sue and be sued in the name of the district' but this has reference to some matter pertaining to their functions.
>
> For lack of standing on the part of respondents to attack the action of the Authority in the classification of Beaverdam Creek or to challenge the validity of the permit granted to the Board of Public Works, the order of the

Court below is reversed and the proceedings dismissed.

Camp, at 469-470, 120 S.E.2d at 685. Thus, it was the Soil Conservation Authority's lack of *any* authority or responsibility with regard to classification of a waterway that undermined its standing to challenge the validity of the actions of the Authority in issuing a permit to the Board with regard to a waterway. In sum, the plaintiff in that case had authority over dirt, not water, and the permit concerned water, not dirt. That is the substance of *Camp*'s holding.

Interestingly, *Camp* cited no authority for its statement that "the complaining agency must at least show that it has some special interest from which it is charged with responsibility that may be adversely affected by the action attacked." Furthermore, *Camp* has never been cited by *any* South Carolina case for *any* reason since its publication in 1961.

Even so, as the circuit court found, the SCDOR and the Director have demonstrated a "special interest" conferred by several statutes, the very interest that was lacking in *Camp*. As noted above, the General Assembly created the SCDOR "to administer and enforce the revenue laws of this State; administer and enforce licensing laws and regulations relating to alcoholic liquors, beer and wine and assess penalties for violations thereof; and other laws specifically assigned to it." S.C. Code Ann. § 12-4-10 (2014). The SCDOR also has broad authority to facilitate tax administration, regulation, and enforcement, S.C. Code Ann. § 12-4-310 (2014), *et seq.*, and authority for tax administration, regulation, and enforcement as it relates to sales and use taxes. S.C. Code Ann. § 12-36-2660 (2014) ("[t]he Department of Revenue shall administer and enforce the provisions of this chapter [Chapter 36]."). These statutes grant the SCDOR and the Director a "special interest" supporting their standing to pursue the counterclaims against the County.

Furthermore, the circuit court also noted "when a public officer receives money for the public use, he is [a] *trustee* to receive such monies and to pay them to the public official or function for whom or which they were intended." (Order, p. 10, citing *Sumter County v. Hurst*, 189 S.C. 316, 319, 1 S.E.2d 242, 244 (1939)) (emphasis added). In a strict sense, a "trustee" is one who holds the legal title to property for the benefit of another. *Cf. State ex rel. Lee v. Sartorius*, 130 S.W.2d 547, 549 (Mo. 1939); *Taylor v. Davis*, 110 U.S. 330, 335 (1884) ("A trustee may be defined generally as a person in whom some estate interest or power in or affecting property is vested for the benefit of another."). In a broad sense, the term is sometimes applied to anyone standing in a fiduciary or confidential relation to another, such as agent, attorney, bailee etc. *Lee v. Sartorius*. Thus, while the SCDOR agrees that it owes the duties set forth in Section 4-37-30(A)(8), the circuit court correctly noted those duties render SCDOR a "trustee" of the funds collected from the taxpayers, and along with that status comes an obligation to act responsibly with regard to those funds.

The circuit court's ruling is correct and is faithful to *Camp*'s holding. This Court should affirm.

(C) STANDING BASED UPON PUBLIC IMPORTANCE

Finally, the circuit court stated "[f]urthermore, SCDOR and the Director have standing based on the public importance exception." (Amended Order, pp. 14-15). The court reviewed relevant law on the "public importance" basis for standing and held:

> In this case, the public interest involved is the prevention of the unlawful expenditure of money raised by taxation. The method in which the Penny Tax Revenues are spent is a matter so important to the citizens of

> Richland County that it is inextricably connected to the need for court resolution for future guidance. As discussed above, the resolution of this issue will not only impact the taxpayers of Richland County, but counties throughout the State with [their] own penny tax programs. Thus, the County's spending of the Penny Tax Revenues *is of sufficient public importance to confer standing* upon SCDOR and the Director for the limited purpose of the resolution of the unique issues concerning Richland County raised by this case.

(Amended Order, p. 15) (emphasis added). The court included a finding in its mandate to reflect these conclusions. (Amended Order, p. 20, ¶ 7). The circuit court rejected the County's argument that the "public importance" basis for standing applies only to private individuals and not to state agencies and officials, finding a review of South Carolina case law demonstrated no "evidence of such a limitation." (Amended Order, p. 14, n. 4). This Court should affirm those rulings.

1. PUBLIC IMPORTANCE STANDING IS NOT LIMITED TO PRIVATE INDIVIDUALS

The County contends the "public importance" basis for standing applies only to "citizens," and does not apply to state agencies. (App. Br. Pp. 15, 19-20). The County concedes "the application of the public importance exception to confer standing on a state agency appears to present a novel issue of law that has not been previously addressed by either appellate court," but adds the "existing case law, in fact, focuses on 'citizens.'" (App. Br. p. 15). The County then posits a "parade of horribles," contending the circuit court's conclusion "would equally confer on any other state agency the same regulatory authority without a statutory basis, which would lead to tremendous abuse of power, or at a minimum, the threat of such abuse." (App. Br. pp. 18-19). The County claims the trial court's ruling grants "unprecedented power to a state agency in contravention of Home Rule and the

separation of powers doctrine" and results in "the usurpation of the authority of the South Carolina Attorney General." (App. Br. p. 20). The Court should not be persuaded by these arguments.

First, the County's arguments are based upon false premises. This Court has never limited the "public importance" basis for standing to private individuals, nor should it. The circuit court noted:

> The County argues the public interest exception applies only to private individuals and not to state agencies and officials based upon the court's holding in *Sloan v. Greenville Cnty.*, 356 S.C. 531, 548-549, 590 S.E.2d 338, 347 [(Ct. App. 2003)]. After a review of South Carolina case law establishing the public interest exceptions, this Court could not find any evidence of such a limitation.

(Amended Order, p. 14, n. 2). The circuit court correctly rejected the County's argument.

In *Sloan*, the Court of Appeals noted "[s]tanding may be conferred upon a party 'when an issue is of such public importance as to require its resolution for future guidance.'" *Sloan* at 548, 590 S.E.2d at 347. Although the case involved an individual seeking standing to challenge the taxing authorities, the case did not limit the "public importance" exception to private individuals. In fact, "[the key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). *See also Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014) ("the public importance exception is concerned with whether a case is of such public importance that the requirement of standing should be

waived."). The circuit court's holding furthers this purpose: Granting standing to a State agency is effectively granting standing *to the public*.

Courts apply this doctrine where resolution is needed for future guidance regardless of whether the parties are a private individual as suggested by the County. *See Charleston County Parents for Public Schools, Inc. v. Moseley*, 343 S.C. 509, 541 S.E.2d 533 (2001) (in original jurisdiction action this Court held Petitioners Charleston County Parents for Public Schools had "public importance" standing); *SC Public Interest Foundation v. South Carolina Dept. of Transp.*, 412 S.C. 18, 770 S.E.2d 399 (Ct. App. 2015) (analyzing whether the South Carolina Public Interest Foundation could assert standing under the "public importance" exception but concluding the organization could not since the there is no "future guidance" to be provided by the court). In fact, the Court of Appeals implied the doctrine would have been available to a governmental entity challenging an agency's actions if the entity would have raised and argued the point. *See Town of Arcadia Lakes v. South Carolina Dept. of Health and Environmental Control*, 404 S.C. 515, 528 n. 11, 745 S.E.2d 385, 392 n. 11 (Ct. App. 2013) (in affirming the ALC's determination that Appellants, including the Town of Arcadia Lakes lacked standing, the Court of Appeals noted "[t]he ALC did not consider whether the 'public importance' exception could confer standing on any of the Appellants, and Appellants have not raised this exception in their brief.").

Other states are in accord. *City of Snoqualmie v. King County Executive Dow Constantine*, 386 P.3d 279 (Wa. 2016) (finding City of Snoqualmie had standing to challenge tax statute); *Board of County Com'rs of County of Bryan v. Oklahoma Dept. of Corrections*, 362 P.3d 241 (Ok. 2015) (noting "the traditional standing requirements are eased in matters

of 'great public importance' and those involving 'competing policy considerations'" in holding Board of County Commissioners had standing to challenge state statute on constitutional grounds); *Town of Harrison Bd. of Educ. v. Netchert*, 106 A.3d 1273 (N.J. Super. 2014) (finding Town Board of Education had standing under "public importance" exception); *City of Grantsville v. Redevelopment Agency of Tooele City*, 233 P.3d 461, 467 (Utah 2010) (holding City had "alternative standing because the redevelopment of the Base Property is a matter of public importance and [the City was] an appropriate party to raise the claim that the Interlocal Agreement has been breached").

The "public importance" exception is available to any party, including a governmental entity, so long as the party meets the requirement that the question should be resolved for future guidance. This Court should reject the County's invitation to limit the "public importance" exception to private individual plaintiffs.

The other false premise of the County's assertion is its claim the SCDOR and the Director acted "without a statutory basis." As the circuit court held, the SCDOR and the Director have special interests conferred by several code sections discussed in Part I(B) of this Brief. These statutes provide a "statutory basis" upon which to permit standing for the SCDOR and the Director.

There will be no landslide of state agencies suing other agencies. This case involves a specific state agency, the SCDOR, that is statutorily charged with several duties related to taxes (the very duties the County asserted were ministerial in support of its claim for a mandamus). Those duties include tax regulation, administration and enforcing various rules governing tax revenues, including sales and use taxes like the Penny Tax. The circuit court's

order is limited – the order could not honestly serve as the vehicle from which "any state agency" may claim "the same regulatory authority" to meddle in the affairs of other state or local agencies.

The Court should affirm the trial court's determination that the "public importance" exception to the general rules of standing is not limited to private individual plaintiffs.

2. HOME RULE

The County contends "the actions for which SCDOR and its Director are seeking public importance standing are in direct contravention of Home Rule" and a court must take this fact into account when "balancing of competing interests...in determining whether public importance standing should be applied." (App. Br. p. 22).

Home Rule is not a license to ignore tax law. And although the County raised this issue in its complaint (Complaint, p. 17, ¶ 66; p. 21, ¶ 84; p. 23, ¶ 95; pp. 28-29, ¶¶ 130-136), in its memoranda (County's Memorandum in Support of County's Petition, pp. 2, 3, 4, 18, 27-30; County's Memorandum in Opposition to SCDOR Petition, pp. 4, 7), and briefly in its Rule 59, SCRCP, motion (Motion, p. 8, n. 4; p. 14, n. 9), the only mention of "Home Rule" in the circuit court's order was the following statement: "I find that the Transportation Act was adopted by the General Assembly in furtherance of Home Rule to give counties the authority to adopt an alternative funding source to pay the cost associated with transportation-related projects." (Amended Order, p. 9). The circuit court did not address any argument as to whether the court's finding that the SCDOR and the Director had duties grounded in the Code violated the Home Rule Amendments or the Home Rule Act.

Even so, there is nothing about the Home Rule Amendments to the Constitution or the Home Rule Act that precludes the SCDOR or the Director from pursuing the counterclaims under the "public importance" exception to standing.

The County argues that Home Rule grants "the specific powers at issue in this litigation to the counties, not to SCDOR and its Director" and "must be factored into the 'balancing of competing interests' that a court must analyze in determining whether public importance standing should be applied." (App. Br. p. 22). The Court should reject this argument.

As the circuit court pointed out and as discussed throughout this brief, the General Assembly tasked the SCDOR with duties regarding tax administration, regulation, and enforcement. S.C. Code Ann. §§ 12-4-10, 12-4-310, *et seq.* and 12-36-2660. It is true that the General Assembly created the Home Rule Act to restore autonomy to local governments. *Williams v. Town of Hilton Head Island*, S.C., 311 S.C. 417, 429 S.E.2d 802 (1993). However, there is nothing in either the Constitution or the Home Rule Act indicating an intent to abrogate duties assigned specifically to the SCDOR in Title 12. There is also nothing indicating Home Rule's adoption precludes permitting the SCDOR and the Director to pursue the counterclaims under the "public importance" exception to standing requirements.

Home Rule does not protect or authorize a County's actions that violate a general state law. The Court should reject the County's contention that the adoption of the Home Rule Amendments and the Home Rule Act removed the duties and authority of the SCDOR and the Director over issues involving local sales and use taxes, including the Penny Tax.

3. SEPARATION OF POWERS

The County asserts "the Attorney General has the authority to sue a political subdivision by way of quo warranto action or potentially declaratory judgment action where he can show he is 'acting in the public interest'" (App. Br. p. 26) so that permitting SCDOR and the Director to pursue these matters under the "public importance" exception would "intrude upon enforcement powers" the legislature has already granted to the Attorney General. (App. Br. p. 23). The Court should not be persuaded by this argument that is thick with irony: The County obviously lacks standing to argue about the Attorney General's authority.

First, this argument did not appear until the County's motion pursuant to Rules 52 and 59, SCRCP, to alter or amend the judgment. (County's Motion, pp. 4-6; p. 14, n. 9). The issue is, therefore, not preserved for this Court's review. *See, e.g., Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (holding Court of Appeals erred in considering City's argument where circuit court correctly declined to reach issue "because it was improperly raised for the first time in the Rule 59(e) motion."); *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993) (a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial).

Second, contrary to the County's argument, the circuit court's finding that the SCDOR and the Director could raise these issues under the "public importance" exception does not "intrude upon enforcement powers already granted by the General Assembly to another governmental authority, such as the South Carolina Attorney General." (App. Br. pp. 23-26). Even if the Attorney General has standing to pursue matters to protect the "public

interest" whether by "quo warranto action" or otherwise, the absence of the Attorney General in this matter does not speak to the SCDOR's statutory authority as found by the trial court.

In fact, the County points out the SCDOR and the Attorney General both brought an action regarding a proposed tax referendum in *State v. County of Florence*, 406 S.C. 169, 749 S.E.2d 516 (2013), and this establishes the Attorney General *must* be the proper party to pursue these matters. (App. Br. pp. 25-26). This argument divines too much from that decision. There is no discussion in that case as to whether either the SCDOR or the Attorney General were the appropriate parties to bring that action. In fact, this Court noted that "DOR is the agency charged with administering and collecting the tax" explaining why the SCDOR was bringing suit. *Id.*, at 171 n. 1, 749 S.E.2d at 517. If the SCDOR lacked standing, it stands to reason the Court would have mentioned that in its decision. It did not.

Also, just because a citizen may raise issues (and has, as the County points out, App. Br. p. 26, n. 11), it does not follow that the SCDOR and the Director are therefore precluded from pursuing an action in support of their statutory duties regarding sales and use taxes, including the Penny Tax. Standing is *not* a zero-sum game.

The Court should affirm the circuit court's finding that the SCDOR and the Director may pursue counterclaims under the "public importance" exception to standing.

II. THE CIRCUIT COURT CORRECTLY DENIED THE COUNTY'S MOTION FOR TEMPORARY INJUNCTIVE RELIEF

The County asserts the circuit court should have granted the County's Motion for Temporary Injunction because the mandamus the court issued "does not prohibit the SCDOR and its Director from issuing directives, demands, or orders to Richland County, including

but not limited to, the demand that the County adopt and implement" a uniform standard or safeguard to ensure proper use of the Penny Tax revenues. (App. Br. pp. 40-41). The County also contends the mandamus does not prohibit the SCDOR and the Director "from interfering with the County's implementation and operation of its Penny Tax Program through its challenge to certain expenditures and the use of the Penny Tax revenues." (App. Br. p. 41). The County contends "irreparable harm continues to exist in spite of the issuance of the writ of mandamus." (App. Br. p. 43). The Court should not be persuaded by these arguments.

The circuit court noted that courts will restrain governmental agency actions "when they are clearly outside [] statutory powers, inconsistent with legislative intent, or if it can be shown that the pending action of the agency is *ultra vires* or without authority." (Amended Order, p. 15, citing 42 Am. Jur. 2d *Injunctions* § 158). The court added, "[i]njunctions against government agencies will be granted when the request ... seeks to enjoin an agency from executing a law in an unlawful manner or from executing an illegal measure." (Amended Order, pp. 15-16, citing 42 Am. Jur.2d *Injunctions* § 159). This is the general rule, and it is followed in South Carolina. *See Headdon v. State Highway Dept.*, 197 S.C. 118, 123, 14 S.E.2d 586, 588 (1941) ("in order to receive the aid of a Court of equity to enjoin a public corporation or department of government in the performance of actions or duties provided by statute, there must be allegations or showing that the public department or corporation has exercised its power in an arbitrary, oppressive or capricious manner.").

Next, the circuit court stated:

> Injunctive relief is available against agency actions when they will result in irreparable injury or an extraordinary irreparable harm. However, an injunction will not be granted when the complainant has an adequate remedy

> at law. As a general matter, a plaintiff seeking to enjoin a governmental agency must demonstrate that it has no access to the ordinary remedy of monetary relief.

(Order, p. 16, citing 42 Am. Jur.2d *Injunctions* § 157. Lastly, the court observed "[t]o obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). (Order, p. 16).

The circuit court observed the County was seeking a declaration that the County "is not subject to Defendants' directives, demands, or orders on any matter related to Richland County's spending of the Penny Tax Revenues." (Amended Order, p. 16). The Court also noted the County sought to "enjoin or otherwise prohibit Defendants from issuing directives, demands, or orders on any matter related to Richland County's spending of the Penny Tax Revenues." (Amended Order, p. 16). The circuit court held:

> [The County's] Motion for Temporary Injunction is denied because the County is unable to sufficiently show it will suffer irreparable harm in light of the Court's decision above granting [the County's] Petition for Writ of Mandamus. This Order requires the Director to direct the Department to remit and allocate to the Treasurer the Penny Tax Revenues collected within Richland County as it routinely has since the Ordinance became effective. Therefore, it is not necessary for the Court to further enjoin [the SCDOR and the Director] from taking actions to harm the County, and [the County's[2]] Motion for Temporary Injunction is denied.

(Amended Order, p. 17). Thus, the court focused on the rules set forth in *Denman* to deny the County's request. This Court should affirm these rulings.

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[2] The order actually says "Defendant[']s Motion for Temporary Injunction is denied." This must be a scrivener's error since the court was discussing "Plaintiff's" motion and the next portion of the order deals with "Defendants'" motion.

To begin with, the SCDOR and the Director have cross-appealed the court's grant of mandamus and its denial of the SCDOR's and the Director's request for injunctive relief against the County. (Cross-Appellant's Brief). This Court should reverse those rulings and declare the argument the County makes in this brief to be moot.

Second, whether to grant this relief was within the circuit court's discretion, and this Court will not reverse that decision unless it is clearly erroneous. *Compton v. South Carolina Dept. of Corrections*, 392 S.C. 361, 709 S.E.2d 639 (2011). The County has not carried this difficult burden on appeal. The County seeks a broad and all-encompassing order preventing the SCDOR and the Director from carrying out any duties the General Assembly assigned to them under Title 12, and essentially seeks full autonomy from any scrutiny related to the County's own administration of sales and use taxes, including the Penny Tax. There is no authority supporting such an extreme view, and this view does not support upending the circuit court's decision as clearly erroneous.

Third, a preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law. *Poynter Invs., Inc. v. Century Builders of Piedmont*, Inc., 387 S.C. 583, 694 S.E.2d 15159 (2010). The circuit court here entered an order of mandamus directing the SCDOR and the Director to remit all taxes collected and to be collected under the Penny Tax. Although SCDOR and the Director have challenged that order, if it is upheld on appeal then the County will be unable to show a temporary injunction was necessary to preserve the status quo ante, that the County will suffer "irreparable harm," or that it lacks an adequate

remedy at law. Through mandamus, the County was already awarded the relief it seeks.

The Court should affirm the circuit court's discretionary decision to deny the County's request for a preliminary injunction.

CONCLUSION

For the reasons stated the Court should affirm the circuit court's determination that the SCDOR and the Director have standing to pursue the counterclaims they asserted in this matter. The Court should also affirm the circuit court's discretionary decision denying the County's request for a temporary injunctive relief.

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March24, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-3102

RECEIVED

MAR 24 2017

S.C. SUPREME COURT

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

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

v.

The South Carolina Department of Revenue,
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.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel with a copy of the *Initial Brief of Respondent of Respondents-Appellants* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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