ORIGINAL

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2012-CP-40-1560

South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, ... Appellants,

v.

South Carolina Department of Transportation, and John V. Walsh, Deputy Secretary of Transportation for Engineering, ... Respondents.

APPELLANTS' BRIEF

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STATEMENT OF THE CASE

The South Carolina Department of Transportation ("SCDOT") spent public funds for inspecting and reporting on three privately owned bridges in a private, gated community, which were not on the SCDOT system. Appellants, the South Carolina Public Interest Foundation ("SCPIF" or "the Foundation") and Edward D. Sloan, Jr. individually and as a South Carolina taxpayer representing the taxpayers sought declaratory judgment under the Uniform Declaratory Judgment Act that this expenditure violated the S.C. Constitution's prohibitions of expending public funds for private purposes and pledging the full faith and credit of the State for the benefit of private individuals, associations, or corporations. S.C. Const. Art. X, §§ 5, 11 (Rev. 2009).

The Circuit Court ruled that the Appellants lacked standing and that the issues raised were moot (R. p. 4). Appellants asserted that Mr. Sloan possessed taxpayer standing, and that both the Foundation and Mr. Sloan possessed standing based on the public importance of ensuring that the agencies of this State act within the boundaries of their constitutional powers, particularly when spending public funds. Furthermore, Appellants argued that these acts and expenditures were capable of repetition yet evading review, and were therefore justiciable. The public importance of these matters also created an exception to the doctrine of mootness. The Court denied public importance standing to the Foundation and to Mr. Sloan, in spite of the fact that the Respondents and other agencies of the State could again spend public funds for private purposes without citizens' effective prior knowledge or review (R. p. 5). The Circuit Court ruled that Mr. Sloan lacked standing as a taxpayer (R. pp. 4-5).

Second, the Circuit Court ruled that the SCDOT was legitimately investigating the bridges under the City of Aiken's police powers and its power to abate public nuisances (R. pp. 6-9).

Third, the Circuit Court ruled that SCDOT's expenditure was not such a gross wrongdoing as to require a Court to rule on the merits (R. p. 4). Appellants contended that this expenditure of taxpayer funds to benefit a private HOA was a significant constitutional matter that requires a declaratory judgment. The Circuit Court granted Summary Judgment for the Respondents on the merits (R. pp. 9-10).

STATEMENT OF FACTS

On July 13, 2011, Reggie Ebner, a resident of Woodside Plantation in Aiken, S.C. sent an email to John Walsh, Deputy Secretary for Engineering for the SCDOT, requesting SCDOT's assistance in a disagreement and potential legal dispute between Ebner and the developers of the Woodside Plantation neighborhood (R. pp. 34-51).

Ebner claimed to be an engineer licensed in Texas. Ebner's July 13 email alleged three engineering or construction flaws related to the bridges: (1) the substitution of wooden bridges for design-specified metal culverts, which would require expensive maintenance by the HOA; (2) the road failure over the sewer pipe, which would require expensive repairs by the HOA; and (3) defects in a concrete bridge, which would require expensive repairs by the HOA (R. pp. 38-51).

Ebner had earlier written to the City of Aiken asking, "What government entity is the Woodside Property Owners Association responsible to for the well being of its citizens?" (R. p. 38). City officials had replied to Ebner that the HOA was "responsible to its shareholders, not a governmental entity" (R. p. 39).

Ebner also sent questions to his State Representative, Tom Young about these issues. He wanted answers that "could be used in future legal proceedings" (R. p. 41). He asked, "What government agency is responsible for design approval, construction inspection, safety requirements and final approval for bridges located in South Carolina?" (R. p. 41). Representative Young told Ebner that the "bridges in question are NOT on the state system" (capitalization in original), and "the Department [of Transportation] is not responsible for maintaining these structures" (R. p. 42).

Instead of engaging a private sector structural engineer, Ebner disregarded the answers he had received and attempted to enlist the help of his Representative and Senator to pressure the SCDOT into inspecting and reporting on the wooden bridges, even though they are on private property in a gated community. Ebner requested, "If SCDOT approval and quality control of the wooden bridges cannot be established, request roads be installed as designed with culverts" (R. p. 36). He further requested, "If SCDOT has approved the installation and quality control of the wooden bridges, request is to verify installation meets SCDOT bridge specifications and safety requirements." (R. p. 36).

Finally, as to a concrete bridge in Woodside Plantation, Ebner requested, "SCDOT will need to determine if concrete bridge can be certified for use. If concrete bridge is certified, verify safety requirements for use and construction of bridge approaches are to specification." (R. p. 37). He further requested, "Once your review is complete, I propose a meeting to discuss the findings and any corrections that need to be made with the appropriate parties." (R. p. 37).

In summary, Ebner was asking the State to pay for the inspection, evaluation, and expert opinion regarding these privately owned bridges. If the evaluation indicated a problem, he planned to use legal or political pressure to require the developer to replace the wooden bridges with metal culverts and to repair the concrete bridge and its approaches (R. pp. 36-37). He was attempting to engage the SCDOT as his unpaid and politically connected expert witness.

His Representative and Senator passed along his request to the SCDOT, and they appeared to endorse his request for the publicly financed inspection and report. These

two legislators appeared to exert political pressure on the SCDOT to inspect and report on these privately owned bridges, at public expense under the mistaken impression that public school buses passed over these bridges. However, the Affidavit of Edward D. Sloan, Jr. and the approved bus routes published on the official website for the School District of Aiken County demonstrate that no public school bus on any official route traverses any of the three bridges at issue (R. pp. 31, 110-119).

After the SCDOT completed its bridge inspection and made its report to Ebner and the legislators, the DOT's Chief Internal Auditor ("Auditor") investigated the propriety of SCDOT's actions in using public funds to inspect bridges not in the SCDOT's system. The investigation stemmed from concerns of SCDOT employees who warned Chief Engineer for Operations Clem Watson that the inspection of these off-system bridges violated established policy. The Auditor issued an Aiken Bridge Inspection Investigation Report ("Auditor's Report") dated October 12, 2011. (R. pp. 171-174). The Department acknowledged, "These bridges were not on the state's system. Inspection staff also had to ***create fake bridge ID numbers*** because the bridges were off system" (R. p. 172). (emphasis added).

The Auditor researched the law and confirmed with SCDOT's Chief Legal Counsel "that SCDOT has no obligation to inspect bridges on private property." (R. p. 172). The Auditor interviewed various SCDOT personnel under the Chief Engineer for operations. "Without any reservation, ***all personnel were certain the activity was wrong***, stated that they ***expressed reluctance to their supervisor***, and knew it would later resurface because it was ***against established policy.***" (R. p. 172). (emphasis added). Nevertheless, the SCDOT official had ordered the investigation to proceed. The report

concludes that the SCDOT decided to go forward with the inspection because school buses used the roads. (R. p. 173). The Auditor also determined that "no bus driver or citizen had complained to the school district about the bridges." (R. p. 173).

The Auditor determined that the request for inspection "came from a city councilman but ***not from the City of Aiken.***" (R. p. 173). (emphasis added). Furthermore, the Auditor found that "[Ebner] is a resident of Woodside Plantation." (R. p. 173). The Auditor further determined that the SCDOT did not seek its own legal department's clarification on the issue. (R. p. 173). The SCDOT Chief Internal Auditor found that contrary to its long-standing policy, SCDOT provided an engineering inspection and report to Ebner, without any cost or fee whatsoever. (R. pp. 172-174).

Finally, the Auditor stated, "There is also the possibility that SCDOT could be called as an expert witness for the plaintiff without any compensation if the property owners Association decides to sue the developer of the private gated community." (R. pp. 173-174).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT APPELLANTS PUBLIC IMPORTANCE STANDING.

The Supreme Court has repeatedly recognized, developed, and expanded jurisprudence of public importance standing and the standing of a South Carolinian to challenge unconstitutional actions by State officers. *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County,* 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997). The Circuit Court erred in failing to follow this long line of cases affording public importance standing on similar issues.

The Court of Appeals addressed an expenditure in violation of the Procurement Code of the School District of Greenville County. This Court found both taxpayer standing and public importance standing:

> Our decision to allow Sloan to proceed with this suit does not rest entirely on his ***status as a taxpayer*** of Greenville County. Recently, in *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999), the Supreme Court held "a court may confer standing upon a party ***when an issue is of such public importance as to require its resolution for future guidance.***" *Id.* at 531, 511 S.E.2d at 75. In *Baird,* the Appellants alleged Charleston County committed an *ultra vires* act by ***exceeding its statutory authority***

> to issue hospital bonds. The Court explained the case impacted a profound public interest—the public health and welfare—and stated ***the citizens of Charleston County "have a significant interest in ensuring that their county acts within the legal parameters established by the legislature*** for funding hospital development." *Id.* Accordingly, the Supreme Court held the Appellants had standing to proceed. *Id.* at 531, 511 S.E.2d at 75-76.
>
> In this case, the ***public interest involved is the prevention of the unlawful expenditure of money raised by taxation***. "Public policy demands a system of ***checks and balances*** whereby taxpayers can hold public officials accountable for their acts.... Taxpayers must have ***some mechanism of enforcing the law***." *Eastern Missouri Laborers Dist. Council,* 781 S.W.2d at 47.

Sloan v. School District of Greenville County, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (2000) (emphasis added). The Courts of this State have ruled that the manner in which public funds are spent is of "immense public importance."

> The ***expenditure of public funds*** pursuant to a competitive bidding statute is of ***immense public importance***. Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to ***maintain the public's trust and confidence in governmental management of public funds***.

Sloan v. School District of Greenville County, 342 S.C. 515, 524, 537 S.E.2d 299, 303 (2000) (emphasis added). If the statutes that require competitive sealed bidding in the expenditure of taxpayer funds are matters of great public importance, Constitutional provisions forbidding the expenditure of public funds for private purposes are matters of even greater public importance.

The Court of Appeals expanded on this analysis in *Sloan v. Greenville County*.

> ***There is a keen public interest in the stewardship of public funds and a strong need to provide guidance for future procurement decisions.*** Our inability to provide any effective relief in this case should not be a barrier to the courts consideration of this question of exceptional public interest.

Id. 356 S.C. 531, 554, 590 S.E.2d 338, 350 (2003) (emphasis added). The "keen public input interest in the stewardship of public funds" is even greater in the Constitutional prohibitions of expenditures of public funds for private purposes, because the ends or the result is forbidden and not just the means or manner of the selection of source for the expenditure.

The Circuit Court erred in failing to grant the Foundation and Mr. Sloan standing because of the great public importance of ensuring that the State does not violate the constitutional prohibitions that govern its expenditures.

The Supreme Court made a similar ruling in *Sloan v. Dept. of Transportation,* the *Ravenel Bridge* case.

> Under the public importance exception, standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance." *Baird v. Charleston Cty.,* 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). This Court has never held that there must be no other potential plaintiffs with a greater interest in the case or some other nexus, as the respondents now argue.

Id., 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005). The standard for public importance standing includes (1) a need for future guidance on the subject matter, and (2) a benefit to all the citizens of the State or local government whose actions are challenged. *Freemantle v. Preston,* 398 S.C. 186, 197, 728 S.E.2d 40 (2012). Similarly, the issue in this case is one of great public importance and requires future guidance, as Appellants could find no case law directly on point for the subject of an agency expending public funds for private purposes and interests.

SCPIF and Mr. Sloan do not seek monetary damages. Furthermore, constitutional violations by the SCDOT and other State agencies are more critical to the citizens of South Carolina than the termination of an employee's employment contract. In this case,

the SCDOT has violated the S.C. Constitution's prohibition against using public funds and resources for private purposes. Although they knew the illegality of their actions, the SCDOT officials provided professional engineering services to a private individual seeking to support his and his private legal claims (R. pp. 172-174). The citizens of this State have a strong public interest in ensuring that State government does not violate the substantive provisions of the South Carolina Constitution.

The Supreme Court recently rejected an argument similar to the SCDOT's argument based upon Article III, § 11 in *Anderson v. South Carolina Election Commission,* 397 S.C. 551, 725 S.E.2d 704 (2012). In *Anderson*, the Republican Party argued that the Supreme Court lacked jurisdiction to address the legal requirement that a candidate for the General Assembly file a Statement of Economic Interest. The Supreme Court disagreed.

> Here we are not asked to judge a disputed legislative election but rather to interpret a statute. ***The construction of a statute is a judicial function and responsibility***. *JRS Builders, Inc. v. Neunsinger,* 364 S.C. 596, 614 S.E.2d 629 (2005). Accordingly, we reject the argument that this Court lacks subject matter jurisdiction in this case.

Id., 397 S.C. 551, 555, 725 S.E.2d 704, 706 (emphasis added).

Just as "the construction of a statute is a judicial function and responsibility," so too is the construction of a section of the South Carolina Constitution. *Anderson v. S.C. Election Commission,* 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012). Just as the Supreme Court ruled that the Appellants in *Anderson* properly possessed standing and the Court possessed jurisdiction to interpret and apply the statute to members of the General Assembly, so also in the case at bar, this Court possesses jurisdiction to interpret the Constitutional prohibition on expenditures of public funds for private purposes and to apply it to the facts of this matter.

The Circuit Court mistakenly relied on *Freemantle v. Preston*, in which a citizen brought an action seeking to invalidate a severance agreement between a county and its former county administrator, contending the approval of the severance agreement violated the common law and South Carolina's Freedom of Information Act (FOIA). *Id.* at 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012). In *Freemantle*, the Supreme Court ruled that the citizen lacked standing pursuant to the public importance exception to the general standing requirements to challenge the validity of a severance agreement between a county and its former county administrator. The Court ruled that because ***the citizen sought monetary damages for himself*** in his common law causes of action while claiming to represent the taxpayers of the county, his case directly conflicted with the purpose and spirit of the public importance exception. The Court ruled that the personnel choices of the county, even in the face of a seemingly excessive severance package, did not require further guidance.

The *Freemantle* Court also said: "[S]tanding is not inflexible and standing ***may be conferred upon*** a party when an issue is of such public importance as to require its resolution for future guidance." [*ATC South, Inc. v. Charleston County*, 380 S.C. 191] 198, 669 S.E.2d [337,] 341 (2008)] (quoting *Davis v. Richland Cnty. Council,* 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007) (citation omitted))" (emphasis added). The Court noted that *Freemantle* involved the disapproval of an individual citizen with the details of one former employee's private personnel matters.

> This nexus between the public importance exception and the need for future guidance from the Court is invariably linked to a need for and entitlement to injunctive relief. ***That Appellant sought monetary damages for himself in his common law causes of action***, while claiming to represent the taxpayers of Anderson County, ***directly conflicts with the purpose and spirit of the public importance exception***. Moreover, the

> personnel choices of Anderson County, even in the face of a seemingly excessive severance package, do not necessitate further guidance. Thus, we affirm the circuit court's finding that this action does not warrant invocation of the public importance exception.

Id. at 192, fn. 14) (emphasis added).

The Foundation and Mr. Sloan's challenge to the SCDOT's dedication of public funds to private endeavors is entirely distinguishable from *Freemantle.*

II. THE CIRCUIT COURT ERRED IN FAILING TO ACKNOWLEDGE SLOAN'S TAXPAYER STANDING.

The Circuit Court ruled that Mr. Sloan lacks taxpayer standing to address illegal expenditures by the SCDOT (R. pp. 4-5). South Carolina courts have long recognized the right of a taxpayer to bring an action to contest an illegal government expenditure of taxpayer funds.

In this case, the Circuit Court erred in denying taxpayer standing because both the means and the ends of the expenditure are unconstitutional. This is not merely a case of procedural unconstitutionality, but rather a case of an unconstitutional expenditure of public funds, which the S.C. Constitution forbids. In South Carolina, taxpayers possess broad standing to bring such actions and request such judicial relief.

The Supreme Court recounted this long-standing right in *Myers v. Patterson*:

> As a general rule, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. *Shillito v. City of Spartanburg,* 214 S.C. 11, 51 S.E.2d 95 (1948). An exception to this rule exists when the act sought to be enjoined is an unlawful diversion of public funds, such as the ***expenditure of public funds*** under an alleged ***unconstitutional*** statute. *Id.* at 22, 51 S.E.2d at 97. In such cases, a ***taxpayer*** who may be compelled to pay the assessment, or ***who has contributed*** to the sum jeopardized, is considered to have ***sufficient interest to enjoin the illegal act.*** *Id. See also Kirk v. Clark,* 191 S.C. 205, 4 S.E.2d 13 (1939) (the principle is firmly settled in this State that ***a taxpayer may maintain an action in equity***, on behalf of himself and all other taxpayers, ***to restrain***

> ***public officers from paying out public money for purposes unauthorized by law***). Because the plaintiffs have alleged that the ***challenged expenditure of tax revenues violates the constitution***, we find that they have ***standing*** to bring this action and turn to the merits of their claim that the Legislature lacks authority to divert SHIMS tax revenue to a use different from that for which they were levied.

Id. 315 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (emphasis added).

The Supreme Court also acknowledged this right of taxpayer standing in *Ladson Road.*

> Generally, "a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained." *Sloan v. Wilkins,* 362 S.C. 430, 436, 608 S.E.2d 579, 582-83 (2005). **Nonetheless, "[a] taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina,"** *Sloan v. School Dist. of Greenville County,* 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct.App.2000), and **indeed has been repeatedly recognized as to Sloan himself**. *See, e.g., id.; Sloan v. Department of Transp.,* 365 S.C. at 304, 618 S.E.2d at 878-79; *Greenville County I,* 356 S.C. at 548, 590 S.E.2d at 347.
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> * * *
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> Likewise, in this case, **Sloan has standing because he has alleged** a misuse of the statutory emergency procurement provision and therefore **an unlawful expenditure by public officials**.

Sloan v. Dept. of Transportation, 379 S.C. 160, 169-171, 666 S.E.2d 236, 241 (2008) (emphasis added).

The most extensive discussion of this issue is by the Court of Appeals in *Sloan v. School District of Greenville County,* 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), a decision which the Supreme Court discussed at some length in *Ladson Road.*

> We find *Sloan v. School Dist. of Greenville County* is particularly instructive on this issue. In that case, the School District procured construction contracts in February 1998 for three middle schools pursuant to its own procurement code's emergency exception to the competitive sealed bid procedure. The District justified the need for the emergency

> procurement because it wanted the construction of the schools completed before school started in August 1999. **The Court of Appeals found Sloan had standing**, stating as follows: "the public interest involved is the prevention of the **unlawful expenditure** of money raised by taxation. **Public policy demands** a system of checks and balances whereby taxpayers can hold public officials accountable for their acts. **Taxpayers must have some mechanism of enforcing the law.**" *Id.* at 523, 537 S.E.2d at 303 (citation, quotation marks, and alteration omitted).

Sloan v. Dept. of Transportation, 379 S.C. 160, 170, 666 S.E.2d 236, 241 (2008) (emphasis added).

In *Sloan v. School District*, Mr. Sloan challenged the school district's unlawful expenditure of taxpayer funds to build three schools without competitive sealed bidding as the School District Procurement Code required. The Circuit Court dismissed the case for lack of standing. Mr. Sloan appealed, and the Court of Appeals reversed. The Court ruled that Mr. Sloan possessed taxpayer standing and discussed the nature of taxpayer standing at length.

> In the case at bar, Sloan is not maintaining this action as a "private person," nor is he maintaining it merely as a "member of the public." ***Sloan has pursued this action as a taxpayer*** of Greenville County.
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> In *Mauldin v. City Council,* 33 S.C. 1, 11 S.E. 434 (1890), the South Carolina Supreme Court examined the issue of taxpayer standing. In *Mauldin,* taxpayers challenged the purchase of an electric plant by the city council as *ultra vires,* claiming the purchase increased their tax burden. *Id.* at 15, 11 S.E. at 434. The Court explained how ***taxpayers differ from other members of the general public*** and how ***taxpayers suffer harm from ultra vires acts***. *Id.* at 18-21, 11 S.E. at 435-36. The *Mauldin* court stated:
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> > The injury charged as the result of the acts complained of is a private injury in which the ***tax-payers of the county . . . are the individual sufferers, rather than the public***. The people out of the county bear no part of the burden; nor do the people within the county, except the tax-payers, bear any part of it. ***It is therefore an injury peculiar to one class of persons, namely the tax-payers*** of the county . . . .
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> *Id.* at 20, 11 S.E. at 436 (quoting *Newmeyer v. Missouri & Miss. R.R. Co.,*

> 52 Mo. 81 (1873)). The Court held the taxpayers were "not the whole public, but comparatively a small part of it." *Id.* at 18, 11 S.E. at 435. The ***taxpayers "constitute a class specially damaged*** by the alleged unlawful act," and therefore have "a special interest in the subject-matter of the suit, distinct from that of the general public." *Id.* at 19, 11 S.E. at 436 (quoting *Mayor and City Council of Baltimore v. Gill,* 31 Md. 375, 394 (1869)).

Sloan v. School District of Greenville County, 342 S.C. 515, 518-21, 537 S.E.2d 299, 301-02 (Ct. App. 2000) (footnote omitted) (emphasis added).

Taxpayers are a distinct subset of residents. In *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993), taxpayers sued the Treasurer, Commissioners and Executive Director of the South Carolina Highways and Public Transportation Commission. The Treasurer was diverting funds raised by a gasoline tax to another purpose, and the Supreme Court ruled that the taxpayers had sufficient interest, by virtue of having ***paid the gasoline tax***, to have ***standing*** to contest the diversion. The Court acknowledged that a plaintiff ordinarily must allege damage to himself different from that sustained by the public generally, but also noted the exception to the rule: an unlawful diversion of public funds.

> In such cases, ***a taxpayer*** who may be compelled to pay the assessment, or ***who has contributed to the sum jeopardized***, is considered to have sufficient interest to enjoin the illegal act. [*Shillito v. City of Spartanburg,* 214 S.C. 11, 22, 51 S.E.2d 95, 97 (1948)]. *See also Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939) (the principle is firmly settled in this State that ***a taxpayer may maintain an action in equity***, on behalf of himself and all other taxpayers, to restrain public officers from ***paying out public money for purposes unauthorized by law***).

315 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (emphasis added). Just as the taxpayers in *Myers v. Patterson* possessed standing to sue the South Carolina Highways and Public Transportation Commission because they had contributed to the sum at issue, so also in the case at bar, Mr. Sloan has contributed, as a taxpayer to the jeopardized sum. The Court of Appeals in *Sloan v. School District*, and the Supreme Court in *Ladson Road*

granted Sloan taxpayer standing because "taxpayers must have some mechanism of enforcing the law." Accordingly, this Court should rule that Mr. Sloan possessed taxpayer standing as a "mechanism of enforcing the law."

The Circuit Court ruled that a taxpayer possesses no standing if his individual interest is *de minimis* (R. p. 4). The Circuit Court failed to cite any authority supporting a *de minimis* rule. Furthermore, such a rule is contrary to South Carolina case law granting standing to taxpayers to challenge illegal expenditures, such as *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948) in which the taxpayer had contributed a mere $6.28, and *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985), in which the issue was a few hundred dollars of travel expenses divided among all the taxpayers of the City of Greenwood. In *Brown v. Wingard*, although the amount of taxpayer funds was small, the Court held that taxpayers "have an interest in seeing that city officials disburse funds in a lawful manner." *Id.* at 480, 330 S.E.2d at 302.

In *Myer v. Patterson*, as in the case at bar, the taxpayers had contributed to the fund at issue by paying gasoline taxes. In these cases, the Courts could have, ***but refrained from***, adopting or acknowledging a *de minimis* rule. The Circuit Court's newly minted *de minimis* rule ignores and violates South Carolina precedent. The "unlawful diversion of public funds" creates "an exception to the rule" that generally requires Appellants "to allege and prove damage to themselves different in character from that sustained by the public generally." *Myers v. Patterson,* 315 S.C. 248, 433 S.E.2d 841 (1993).

Similarly, in *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95, 99 (1948), the Court ruled, "An apparent exception to this rule exists when the act sought to be enjoined

is an unlawful diversion of public funds." *Id.* at 99. The Court then ruled that a citizen should also be granted standing "to contest the expenditure of public funds under an alleged unconstitutional statute." *Id.* A long line of opinions addressing this issue have never applied the *de minimis* rule to taxpayer standing. *Mauldin v. City Council*, 33 S.C. 1, 11 S.E. 434 (1890); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939); *Brown v. Wingard, Sloan v. School Dist. of Greenville Cty.*

Furthermore, this *de minimis* rule is contrary to the opinion of other jurisdictions that have considered this issue.

> [I]f a plaintiff is a taxpayer the amount of the damage is immaterial. The money interest of the complaining party, if there is any, is sufficient, although infinitesimal.

18 Eugene McQuillin, *The Law of Municipal Corporations* § 52.13 *Citizens' and Taxpayers' Suits* (3d ed. 1993) (citing *Brockman v. City of Creston*, 79 Iowa 587, 44 N.W. 822 (1890) (A court cannot deny a taxpayer relief because his interest as a taxpayer is inconsiderable.); *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 106 Am.St.Rep. 931, 99 N.W. 603 (1904) ("A court will not stop to inquire respecting plaintiff's standing further than to determine whether he is a taxpayer ... even if personal loss to him would be infinitesimal."); *Suarez v. Police Jury of Parish of St. Bernard*, 203 La. 680, 14 So.2d 601 (1943) ("The fact that the taxpayer's interest might be small and not susceptible of accurate determination is not sufficient to deprive him of the right."); *Aichele v. Borough of Oaklyn*, 1 N.J.Super 621, 64 A.2d 924 (1948) ("[T]he standing of one otherwise qualified to question the resolution is not to be determined by the mere matter of dollars and cents involved."); *Saenz v. Lackey*, 533 S.W.2d 237, 522 S.W.2d 237 (1975) ("[W]hen a taxpayer brings an action to restrain the illegal expenditure by the

commissioners' court of tax money he sues for himself, and that his interest in the subject matter is sufficient to support the action.").

As a practical matter, in every taxpayer action, the individual taxpayer by definition will possess only a very small personal financial interest in the portion of the illegal expenditure by any public body. Accordingly, the Circuit Court's rule that a *de minimis* interest in any expenditure effectively disqualifies any taxpayer from bringing a taxpayer action and will effectively eliminate all taxpayer actions except those brought by the absolute wealthiest of our citizens.

Chief Justice Toal warned against such a result in her dissent in *Newman v. Richland County Historic Preservation Commission.*

> If citizens were barred from bringing all lawsuits that concern governmental action, then there would be no opportunity to remedy governmental abuse. . . . A moderate balance is achieved by granting citizens standing when they bring actions alleging *ultra vires* acts by a governmental agency, while denying citizens standing to challenge discretionary actions.

Id. at 325 S.C. 79, 480 S.E.2d 72, 75 (1997).

South Carolina Courts have consistently granted taxpayers standing to contest illegal government expenditures. *Sloan v. School District of Greenville County*, 342 S.C. 515, 524, 537 S.E.2d 299 303-304 (S.C. App. 2000); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15 (1939); *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948); *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); and *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993).

III. THE CIRCUIT COURT ERRED IN FAILING TO APPLY MULTIPLE EXCEPTIONS TO MOOTNESS.

The Circuit Court ruled that because the inspection was completed, and the expenditure was made, the action was moot (R. pp. 5-6). However, South Carolina courts have recognized three exceptions to the doctrine of mootness.

> First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. *E.g., id.; Sloan v. Department of Transp.,* 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005); *Byrd v. Irmo High Sch.,* 321 S.C. 426, 468 S.E.2d 861 (1996). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Curtis v. State,* 345 S.C. at 568, 549 S.E.2d at 596. Third, "if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.; accord Sloan v. Department of Transp.,* 365 S.C. at 303, 618 S.E.2d at 878.

Sloan v. Dept. of Transportation, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) ("Ladson Road").

A. This Matter Is Capable of Repetition, Yet Evading Review.

This matter falls within the first exception to the doctrine of mootness: it is capable of repetition, but evades review. The basic unlawful element of the expenditure was a State agency's dedicating taxpayer funds to the private purposes of a private individual and private association. The first public notice of the unlawful expenditure was (as is always the case with such an expenditure) after it had been made. This scenario is capable of repetition.

The South Carolina Supreme Court applied this standard in the "*Ravenel Bridge*" case, which held that the manner of selection of source of procurement of the Arthur Ravenel Bridge was unlawful, being by request for proposals instead of by competitive

sealed bids.

> The DOT contends this case should be dismissed as moot because the construction contracts have been awarded and fully performed. We disagree.
>
> "[A]n appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State,* 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

Sloan v. Dept. of Transportation, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005). In *Ravenel Bridge*, the Supreme Court ruled that use of the request for proposal process was designed to accelerate the procurement process. The Court ruled, "Clearly, this issue is capable of repetition, yet will usually evade review. Accordingly, despite mootness, we will address the merits." *Id.*

> The standard is *capable* of repetition, not *likelihood* of repetition.
>
> The party bringing the action need only show the issue raised is *capable* of repetition and **is not required to prove there is a "reasonable expectation" the issue will arise again**. *Byrd [v. Irmo High School],* 321 S.C. at 431-32, 468 S.E.2d at 864 (finding South Carolina has adopted the "lenient" approach to evading review analysis).

Sloan v. Greenville County, 356 S.C. 531, 554-555, 590 S.E.2d 338, 351 (2003) (italics in original; bold and underline added). The SCDOT and other State agencies are capable of continuing to dedicate public funds to private endeavors and keep the public uninformed until some accidental disclosure of the expenditure, which could surface years after the expenditure and thereby evade review.

In the *Ladson Road* case, the Supreme Court explained its reasoning on the standard of capable of repetition, yet evading review.

> We find the issue of whether the DOT properly authorized the emergency procurement is one that is capable of repetition, yet will usually evade review.[FN6] For example, here an emergency procurement came four years into the construction project, which was then ***completed within about six months.*** The project was completed only a few months after Sloan filed

> suit and well before the parties filed motions for summary judgment. Therefore, the "capable of repetition but evading review" exception to mootness applies here.

Sloan v. Dept. of Transportation, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008). If the manner of selection of source for the Ravenel Bridge was an issue capable of repetition, yet evading review, then certainly a project completed within a day or two meets the standard of capable of repetition, yet evading review. This exception to the mootness doctrine should apply here.

In footnote 6 in *Ladson Road*, the Supreme Court explained the standard "capable of repetition." "Although the DOT maintains this case is not capable of repetition because of its unique facts, we do not agree that this situation—a construction project which experiences substantial delays and then requires a replacement contractor—is particularly unique." *Id.* at n. 6. Likewise, any state agency's temptation to use public funds for a private purpose is not "particularly unique." It is capable of repetition, yet evading review.

B. This Matter is of Great Public Importance.

This case also falls within the second exception, public importance. Please see the discussion of public importance. The analysis that supports public importance standing (Section I, above) also supports a public importance exception to the doctrine of mootness.

> In our discussion of Sloan's ***standing*** to bring this action, this court has already found in an analogous case that the "expenditure of public funds pursuant to a competitive bidding statute is of ***immense public importance***." *Sloan [v. School District],* 342 S.C. at 524, 537 S.E.2d at 303. ***The same rationale applies with respect to mootness.***

Sloan v. Greenville County, 356 S.C. 531, 554, 590 S.E.2d 338, 350 (2003) (emphasis added).

In *Ladson Road*, analyzed the great public importance exception to the doctrine of mootness this way:

> This Court has noted "the limited nature of the exception for questions of 'imperative and manifest urgency.'" *Sloan v. Greenville County,* 361 S.C. 568, 571, 606 S.E.2d 464, 466 (2004) (*Greenville County II*). In *Greenville County II,* we held that ***where judicial guidance exists*** on the legal issue presented, ***there is no imperative and manifest urgency*** for an advisory opinion.
>
> ***In the instant case, however, there is no case law*** specifically addressing the DOT's authorization of an emergency procurement. Because this is a matter of public importance which ***could occur*** at any time (given the inherent unpredictability of emergencies), we find there is an urgent nature to this issue.
>
> Accordingly, even though the Ladson Road Project was completed in 2005, we will address the other issues raised in the case.

Sloan v. Dept. of Transportation, 379 S.C. 160, 169, 666 S.E.2d 236, 240 (2008). Similarly, there is no case law on the subject of an agency expending public funds for private purposes and interests, and this kind of expenditure "could occur at any time."

The Court made a similar ruling in the *Ravenel Bridge* case. "None of these cases required the plaintiff to show the absence of any other potential plaintiffs with a greater interest or any other nexus. Accordingly, ***despite the mootness in the present case,*** we find Sloan has standing ***to raise this issue.***" *Id.,* 365 S.C. 299, 304-5, 618 S.E.2d 876, 879 (2005). This Court should rule, like the *Ladson Road* Court, and the *Ravenel Bridge* Court, it should address the issue, even though it is technically moot.

C. This Matter May "Affect Future Events or Have Collateral Consequences."

Finally, the third exception to mootness applies. This ruling may "affect future events or have collateral consequences." The Supreme Court in *Ladson Road* also found this third exception to the doctrine of mootness. "Moreover, a decision on the merits of

this case certainly will affect future events, *to wit,* how the DOT decides to authorize emergency procurements in the future." *Id.* Likewise, the Supreme Court in the *Ravenel Bridge* case ruled that its decision would affect future events.

The constitutional provisions at issue apply not only to the SCDOT, but also to all agencies and branches of State government. There are no cases that interpret and apply these Constitutional provisions, and this ruling provides guidance to all agencies and departments of State government. Like the decisions in *Ladson Road* and *Ravenel Bridge*, a decision in this case will affect how the DOT and other South Carolina State agencies decide questions involving the use of public funds for private purposes.

IV. THE CIRCUIT COURT ERRED IN RULING THAT THE SCDOT WAS LEGITIMATELY ASSISTING A MUNICIPALITY.

The Auditor's Report demonstrated that there was no genuine issue of material fact as to the constitutionality of this expenditure. However, the expenditure violated S.C. Const. Art. X, §§ 5 and 11's prohibitions against either expending public funds for private purposes or pledging the State's full faith and credit for private purposes.

Despite the clear statement in the Auditor's Report that the City of Aiken was not involved in the request from Mr. Ebner, the Circuit Court stated that it agreed with the unsubstantiated allegation of the Respondents:

> The Department's position is that the ***city's investigation of the bridges*** was a legitimate exercise of a municipality's delegated police power to insure the health, safety, and welfare of persons within its boundaries as well as its power to abate public nuisances; and that ***SCDOT is authorized to assist local governments*** in these activities within areas of its expertise under its primary enabling statute. S.C. Code Ann., § 57-3-110(7) (Rev. 2006).

(R. pp. 2-3). (emphasis added). The Circuit Court also expressed his reluctance to "insert [. . .] itself into routine decisions of the State Highway Engineer as to when and

where to provide ***assistance to local governments***" (R. p. 5). (emphasis added)). The Circuit Court seemed to adopt the Department's assertion that "it has no interest in using its inspectors to inspect private bridges outside the occasional event that ***another governmental agency*** may request its assistance in doing so for a legitimate public purpose" (R. p. 5) (emphasis added). Similarly, the Circuit Court stated, "the inspection of the bridges was legitimately ***within the City's police power*** and the decision by Walsh to assist it was well within the Department's enumerated powers ***to assist other governmental entities*** in areas of its expertise" (R. p. 5) (emphasis added).

The source of the Department's authority, to assist municipalities, as endorsed by the Circuit Court, is S.C. Code Ann. § 57-3-110, which authorizes the Department to:

> 7) instruct, ***assist***, and cooperate with the agencies and departments, and ***bodies politic***, and legally constituted agencies of the State in street, highway, traffic, and mass transit matters when requested to do so, and, ***if requested by such government authorities***, supervise or ***furnish engineering supervision*** for the construction and improvement of roads and ***bridges***, provided such duties do not impair the attention to be given the highways in the state highway system;

Id. (emphasis added). Accordingly, the Circuit Court ruled,

> Through the forgoing statute, the legislature has conferred discretion upon the Department as to when it will ***assist local governments***. . . . Here, the Department properly responded to ***a request from City of Aiken officials*** and representatives for assistance in an area of the Department's expertise. ***The City had authority to make the request*** and the Department had authority to respond to it.

(R. p. 9) (emphasis added).

The flaw in all the Circuit Court's analysis is that ***the City of Aiken did not request the assistance of the Department of Transportation***. The Auditor noted, "The City of Aiken does not maintain or own the roads in Woodside Plantation," but they are "private property." (R. p. 173). One man, Reggie Ebner, who happened to serve on

Aiken City Council, requested the help of the Department, for a personal dispute he had with Woodside Plantation. The City of Aiken did not endorse Ebner's request. The City of Aiken had specifically declined to help Mr. Ebner. Ebner admitted this to Tom Young on September 6, 2010:

> ***The City has advised me in writing they are not responsible for bridges*** since they do not have an approved inspector; however they have allowed three wooden bridges and one concrete bridge to be installed in Woodside. It appears that the Developer got the Woodside Property Owners Association to agree to install the wooden bridges.

(R. p. 41) (emphasis added).

The City of Aiken had no ownership interest in the roads and bridges inside the Woodside Plantation (R. p. 39). The Auditor noted, "The City of Aiken does not maintain or own the roads in Woodside Plantation," but they are "private property." (R. p. 173). As demonstrated above, the City of Aiken had, in effect, washed its hands of the dispute between Mr. Ebner and the developers of Woodside Plantation. ("The city of Aiken does not have any authority to review the actions taken by this Corporation unless there is a violation of city ordinance or state statute that the city is authorized to enforce.") (R. p. 39). The City did not want to get involved in this dispute. It told Ebner that the dispute was a private one between the homeowners and the developers of Woodside Plantation. ("Typically, a nonprofit corporation is responsible to its shareholders, not to a governmental entity.") (R. p. 39). The bridge inspections and reports, requested by Mr. Ebner, were not for a public purpose. They were to create evidence for a private dispute ("Please advise what is the proper procedure to get technical answers to these questions that will could be used in future legal proceedings?") (R. p. 41).

Although federal law may require states to inspect "all highway bridges on public roads" (23 USC § 151; 23 CFR § 650.307), federal law does not require such inspections of private bridges on private property, nor does South Carolina law authorize such inspections by the State. The Auditor noted that the SCDOT had created an ethical conflict for its employees in asking them to deviate from federal and State law. (R. p. 172).

SCDOT employees warned Clem Watson, the Chief Engineer for Operations, "that it was wrong to inspect privately owned bridges." (R. p. 172). The Auditor's Report noted that 23 CRF 650 requires SCDOT to "inspect all highway bridges located on public roads" and "defines a public road as any road or street under the jurisdiction and maintained by a public authority and open to the public." (R. p. 172). The SCDOT Auditor confirmed that the SCDOT "did not seek any legal clarification" on this matter. (R. p. 173). Because the inspection was not assisting a municipality, the Circuit Court erred in relying on the statutes that allow such assistance.

V. THE CIRCUIT COURT ERRED IN FAILING TO RULE THAT RESPONDENTS VIOLATED S.C. CONSTITUTION, ARTICLE X, §§ 5 AND 11 BY USING PUBLIC FUNDS FOR "PRIVATE PURPOSES" AND TO "BENEFIT PRIVATE PARTIES."

The South Carolina Constitution Article X, § 5 requires that taxes (public funds) be spent for public purposes. S.C. Constitution, Article X, § 11 provides:

> (t)he credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or private education institution except as permitted by Section 3, Article XI of this Constitution.

Id.

Similarly, Article X, § 5 states that any tax "shall distinctly state the public purpose."

Article X, § 11 proscribes the expenditure of public funds "for the primary benefit of private parties." *State ex rel. McLeod v. Riley*, 276 S.C. 323, 329, 278 S.E.2d 612 (1981). In that case, the Supreme Court ruled that an act that authorized "the issuance of general obligation bonds in the amount of $5,000,000 in order to finance an "alcohol fuel development loan program" was primarily for the benefit of private parties and only incidentally benefiting the public. It was therefore unconstitutional. *Id.*, 276 S.C. 323, 328, 278 S.E.2d 612, 615 (1981). Finally, the Court ruled that "all legislative action must serve a public rather than a private purpose." *State ex rel McLeod v. Riley* 276 S. C. 323, 328, 278 S.E. 2d 612, 615 (1981).

The term "credit" has been construed as any "pecuniary liability" or "pecuniary involvement." *Elliott v. McNair*, 250 S.C. 75, 156 S.E.2d 421 (1967). In *Elliot*, the Court ruled that the Industrial Revenue Bond Act was for a public purpose as part of an established legislative policy of improving the industrial climate of the state.

In the case at bar, the three inspections served a private rather than a public purpose. They did not further an improvement to the public as a whole, but rather functioned to benefit an individual, or at best, a private homeowners' association in a gated community. They contravened the Constitutional provisions that require that expenditures serve a public purpose.

CONCLUSION

The wrongful and illegal expenditure of public funds by a state agency is a matter of great public importance, and supports "public importance" standing. Mr. Sloan also possesses taxpayer standing to challenge unconstitutional expenditures by government officials.

All three longstanding exceptions to the doctrine of mootness apply to this case, and the Court should rule on the important questions presented, despite the Respondents' claim of mootness.

The Circuit Court erred in ruling that the City of Aiken had requested assistance from the DOT. Clearly, it was a request from a private party for assistance in a private dispute.

Finally, the inspection and report of these three privately built, privately owned bridges on private property in a private, gated community did not serve a public purpose, and their inspection at public expense violated South Carolina Constitution Article X, §§ 5 and 11.

Respectfully submitted,
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