

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000794
Trial Court Case No. 2016-CP-40-02875

RECEIVED
DEC 10 2018
SC Court of Appeals

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

v.

Richland County, ... Respondent,

And

Central Midlands Regional Transit Authority Intervenor/Respondent

RECORD ON APPEAL

James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 E. North Street
Greenville, South Carolina 29601
(864) 235-1269 (telephone)
(864) 331-3083 (facsimile)
Jim@CarpenterLawFirm.net
Attorney for Appellants

Other Counsel of Record:
Andrew Lindemann
Lindemann, Davis & Hughes, P.A.
Post Office Box 6923
Columbia, South Carolina 29260

Elizabeth Gray
Rob Tyson
Alexis K. Lindsay
PO Box 11449
Columbia, SC 29211

INDEX

1.	Order Denying Motion to Alter or Amend entered April 17, 2018.	1
2.	Order Granting Motion to Dismiss entered November 30, 2017.	4
3.	Order Granting CMRTA's Motion for Summary Judgment, entered November 22, 2017.	10
4.	Form 4 Order entered October 30, 2017.	19
5.	Amended Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings entered March 27, 2017.	21
6.	Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings entered March 3, 2017.	39
7.	Form 4 Order entered February 17, 2017.	61
8.	Consent Scheduling Order entered November 18, 2016.	62
9.	Consent Order for Complex Case Designation dated entered September 6, 2016.	64
10.	Order granting CMRTA's Motion to Intervene dated July 27, 2016	67
11.	Summons and Complaint filed May 9, 2016.	69
12.	Motion to Intervene by the Central Midlands Regional Transit Authority filed on or about July 7, 2016	80
13.	Answer to Amended Complaint filed by Richland County Council July 15, 2016.....	93
14.	Notice of Motion and Motion to Dismiss or Alternatively Motion for Judgment on the Pleadings filed July 15, 2016 by Richland County Council	103
15.	Amended Complaint for Declaratory Judgment filed July 19, 2016.	106
16.	Notice of Motion and Motion to Dismiss filed by CMRTA on or about August 26, 2016	116
17.	Memorandum in Support of Motion to Dismiss by a Intervenor Defendant Central Midlands Regional Transit Authority filed on or about February 13, 2017	119
18.	Memorandum in Support of Motion to Dismiss or Alternatively, Motion First Judgment on the Pleadings filed on or about February 13, 2017 by Richland County Council.	126

19.	Notice of Motion and Motion to Alter or Amend Order filed on or about March 16, 2017 by Defendant Richland County.	136
20.	Intervenor Defendant Central Midlands Regional Transit Authority's Joinder in Support of Richland County's Motion to Alter or Amend filed on or about March 16, 2017.	155
21.	Answer of Intervenor Defendant Central Midlands Regional Transit Authority to Plaintiffs' Amended Complaint filed on or about March 23, 2017.	158
22.	Plaintiff's Memorandum of Law in Opposition to Motions to Alter or Amend filed on or about March 27, 2017.	166
23.	Richland County's Notice of Motion and Motion to Dismiss and/or Motion for Summary Judgment filed on or about September 18, 2017.	174
24.	Intervenor CMRTA's Motion for Summary Judgment filed September 19, 2017.	181
25.	Plaintiffs' Memorandum of Law in Opposition to Motions for Summary Judgment, with exhibits, filed on or about October 25, 2017.	186
26.	Richland County's Memorandum in Support of Motion to Dismiss And/or Motion for Summary Judgment Filed October 30, 2017.	223
27.	Plaintiffs' Supplemental Memorandum of Law in Opposition to Motions for Summary Judgment, with exhibits, filed on or about November 10, 2017.	235
28.	Proposed Order Granting Motion to Dismiss And/or Motion for Summary Judgment (Submitted by Richland County November 17, 2017).	266
29.	Plaintiffs' Motion to Alter or Amend the Order and Judgment filed on or about December 8, 2017.	285
30.	Plaintiffs' Motion to Alter or Amend the Order Granting Summary Judgment to CMRTA filed on or about December 8, 2017.	291
31.	Intervenor Defendant CMRTA's Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend filed December 15, 2017.	297
32.	Plaintiffs' Supplemental Memorandum of Law in Support of Motion to Alter or Amend the Order Granting Summary Judgment to CMRTA filed on or about March 26, 2018.	301
33.	Intervenor Defendant CMRTA's Supplemental Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend, with exhibits filed April 12, 2018.	308
34.	Transcript, October 26, 2017 motion hearing, pp. 1-46.	328

35.	Order Granting Plaintiff's Motion to Strike, filed July 15, 2016, SCDOR Litigation, Civil Action Number 2016-CP-40-3102.	374
36.	Complaint in 2017-CP-40-06286.	380
37.	Richland County Ordinance Number 039-12HR.....	388
38.	Certificate of Counsel	396

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	C/A No. 2016-CP-40-02875
	)	
South Carolina Public Interest Foundation,	)	
Edward D. Sloan, Jr., and William B.	)	
Depass, Jr., individually, and on behalf	)	
of others similarly situated,	)	
	)	
Plaintiffs,	)	ORDER DENYING PLAINTIFFS'
	)	MOTIONS TO ALTER OR AMEND
v.	)	THE ORDERS DISMISSING
	)	RICHLAND COUNTY AND GRANTING
Richland County,	)	SUMMARY JUDGMENT TO CMRTA
	)	
Defendant.	)	
	)	
Central Midlands Regional Transit	)	
Authority,	)	
Intervenor.	)	
	)	

After careful consideration of the Plaintiffs' Motions to Alter or Amend the Order and Judgment Dismissing Richland County, and Plaintiffs' Motion to Alter or Amend the Order Granting Summary Judgment to CMRTA, and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Plaintiffs' Motions pursuant to Rule 59(e) SCRCP to Alter or Amend Judgment of this Court's Orders entered on or about November 22, 2017 and November 30, 2017. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.

Presiding Judge, Fifth Judicial Circuit



Richland Common Pleas

Case Caption: South Carolina Public Interest Foundation , plaintiff, et al vs Richland County , defendant, et al

Case Number: 2016CP4002875

Type: Order/Other

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit
Judge 2126

Electronically signed on 2018-04-17 11:14:40 page 3 of 3

ELECTRONICALLY FILED - 2018 Apr 17 11:32 AM - RICHLAND - COMMON PLEAS - CASE#2016CP4002875

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2016CP4002875**

South Carolina Public Interest Foundation

Richland County

William B DePass Jr

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code **2126**

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 1 day of December, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

Elizabeth Van Doren Gray
Robert E. Tyson Jr.Andrew F. Lindemann
Alexis Kaylor Lindsay

ATTORNEY(S) FOR THE PLAINTIFF(S)

Court Reporter _____

ATTORNEY(S) FOR THE DEFENDANT(S)

Clerk of Court

Jeanette W. [Signature]

SCRPC Form 4C (10/2011)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2016-CP-40-2875

Plaintiffs,)

v.)

Richland County,)

Defendant,)

Central Midlands Regional Transit)
Authority,)

Intervenor-Defendant.)

ORDER GRANTING
MOTION TO DISMISS

2017 NOV 30 AM 8:41
RICHLAND COUNTY
FILED
JANETTE W. MCBRIDE
C.C.P. & G.S.

This matter is before this Court on the Motion to Dismiss and Motion for Summary Judgment filed by the Defendant Richland County. A hearing was held with all counsel of record present on October 26, 2017. After a review of the pleadings, written submissions by the parties, and the oral arguments of counsel, this Court grants the Defendant County's motions as follows:

BACKGROUND

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



In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1.¹

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

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

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

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



Following approval of the referendum, Richland County began establishing the framework for the implementation of the Transportation Penny Program to be paid for by the sales and use tax collected pursuant to the referendum. The Penny Tax was levied and collected for Richland County effective May 1, 2013.

The Plaintiffs have filed this action challenging the legality of Richland County Ordinance Number 039-12HR including categories of expenditures that have been made in accordance with that Ordinance. The Central Midlands Regional Transit Authority ("CMRTA") has intervened as a Defendant. The Defendant County has moved to dismiss and/or for summary judgment as to each of the Plaintiffs' causes of action.

LEGAL ANALYSIS

I. Motion to Dismiss -- Failure to Prosecute

Plaintiffs have failed to prosecute this action which thereby warrants dismissal under Rule 41(b), SCRPC. Rule 41(b), SCRPC, authorizes a court to dismiss an action based upon a plaintiff's failure to prosecute. In *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802 (1970), the Supreme Court held that "it is within the inherent power of the court to dismiss an action for failure to prosecute." 175 S.E.2d at 803. The Supreme Court has further held that "[t]he plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause. This authority is necessary if the courts are to control and efficiently manage an ever-expanding docket." *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757, 758 (1983). See also, *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997).



In the case at bar, the record reflects that the Plaintiffs have taken no action to prosecute their claims in the eighteen or so months since the Complaint was filed on May 9, 2016. The Plaintiffs pursued no discovery as part of this lawsuit.⁴ No written discovery was timely served by the Plaintiffs, and no depositions have been taken.⁵ In the Amended Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings filed March 27, 2017, the Court wrote as follows: "The Court finds that the issue in the First Cause of Action is not one that should be decided on judgment on the pleadings, but rather should be developed factually and legally through the course of the litigation. There has been no discovery in this case." Since that time, the Court is advised that discovery has still not been conducted. In short, this Court finds that no timely discovery has been initiated or completed, and based on the Scheduling Order filed November 18, 2016, the discovery deadline has now expired. Based upon the lack of activity in prosecuting this action by the Plaintiffs, the Court finds that the dismissal of this action under Rule 41(b) and the inherent authority of the Court is warranted.

⁴ In response, the Plaintiffs only point to a Freedom of Information Act (FOIA) request that was submitted to the County prior to this action being filed. The Plaintiffs concede that that is the only "discovery" that has been undertaken.

⁵ The Court is advised that the Plaintiffs served its initial set of interrogatories on the Defendant County on September 22, 2017, which was four days after the County had filed its dispositive motions. In addition, the service of those interrogatories was more than two months after the discovery deadline set by the Court's Scheduling Order.

6/24

CONCLUSION

IT IS, THEREFORE, ORDERED that the Motion to Dismiss and Motion for Summary Judgment filed by the Defendant Richland County are hereby granted, and the Plaintiffs' Amended Complaint is dismissed with prejudice. The Plaintiffs' claims for declaratory and injunctive relief are denied for the reasons herein stated.

AND IT IS SO ORDERED.



G. THOMAS COOPER, JR.
Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

November 24, 2017

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4002875

South Carolina Public Interest Foundation

Richland County

William B DePass Jr

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
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		\$
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If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code 2126

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 31 day of November, 20 17 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

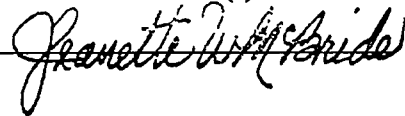
Elizabeth Van Doren Gray
Robert E. Tyson Jr.Andrew F. Lindemann
Alexis Kaylor Lindsay

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court



SCRPC Form 4C (10/2011)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

South Carolina Public Interest Foundation,) Civil Action No. 2016-CP-40-02875
Edward D. Sloan, Jr., and William B.)
DePass, Jr., individually, and on behalf of all)
others similarly situated,)

Plaintiffs,)
vs.)
Richland County,)
Defendant,)
Central Midlands Regional Transit)
Authority,)
Intervenor Defendant.)

**ORDER GRANTING INTERVENOR
CMRTA'S MOTION FOR SUMMARY
JUDGMENT**

2017 OCT 22 AM 8:36
JEANETTE W. MCBRIDE
CLERK, P. & G.S.
RICHLAND COUNTY
FILED

This matter is before this Court on the Motion for Summary Judgment filed by Intervenor-Defendant Central Midlands Regional Transit Authority ("CMRTA"). A hearing was held on October 26, 2017. James G. Carpenter of The Carpenter Law Firm, PC, appeared on behalf of the Plaintiffs. Andrew F. Lindemann of Davidson & Lindemann, P.A., appeared on behalf of Defendant Richland County and Robert E. Tyson, Jr. of Sowell Gray Robinson Stepp & Laffitte, LLC, appeared on behalf of CMRTA. After a review of the pleadings, written submissions by the parties, and the oral arguments of counsel, this Court grants CMRTA's Motion for Summary Judgment.

BACKGROUND

Title 4, Chapter 37 of the South Carolina Code of Laws which is entitled "Optional Methods for Financing Transportation Facilities" (hereinafter referred to as the "Transportation Act") was enacted in 1995. The Transportation Act established a mechanism for counties to authorize and finance transportation-related projects.



On July 18, 2012, the Richland County Council enacted Ordinance Number 039-12HR for the purpose of levying a one percent sales and use tax (the "penny tax") pursuant to Section 4-37-30 of the Transportation Act. Ordinance Number 039-12HR set a county-wide referendum to be held on November 6, 2012. The Ordinance established the program upon approval of the referendum. By a large margin, the voters of Richland County approved the referendum.

Plaintiffs have filed this action challenging the legality of Richland County Ordinance Number 039-12HR including expenditures that have been made in accordance with that Ordinance. The Plaintiffs alleged Richland County has not complied with the Transportation act and has not complied with some provisions of Ordinance Number 039-HR12. The CMTRA intervened as a Defendant. Per Rule 56, SCRPC, CMRTA has moved for summary judgment in favor of CMRTA whereby the Court authorizes the use of penny tax revenues for operating and administrative costs as valid and legal under the Transportation Act and Ordinance 039-12HR. Defendant Richland County has moved to dismiss the Complaint for failure to prosecute and has moved for summary judgment. CMRTA joined in and incorporated in full the grounds raised by Richland County in their motions.

STANDARD

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." Singleton v. Sherer, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most

 2

favorable to the nonmoving party.” Quail Hill, LLC v. County of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

“Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” Singleton, 377 S.C. at 197-98, 659 S.E.2d at 203. Instead, “[t]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” Id. at 198, 659 S.E.2d at 203. “It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine.” Evans v. Stewart, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006).

CONCLUSIONS OF LAW

I. Section 4-37-30 Authorizes Mass Transit Systems as a Transportation Related Project.

In S.C. Code Ann. § 4-37-30, the General Assembly describes how sales and use taxes may be used as revenue for transportation projects. The relevant section of § 4-37-30 is below:

SECTION 4-37-30. Sales and use taxes or tolls as revenue for transportation facilities.

To accomplish the purposes of this chapter, counties are empowered to impose one but not both of the following sources of revenue: a sales and use tax as provided in item (A) or to authorize an authority established by the county governing body as provided in Section 4-37-10 to use and impose tolls in accordance with the provisions of item (B):

(A) Subject to the requirements of this section, the governing body of a county may 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.

(1) The governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance. The ordinance must specify:

(a) the project or projects and a description of the project or projects for which the proceeds of the tax are to be used, which may



include projects located within or without, or both within and without, the boundaries of the county imposing the tax and which may include:

(i) highways, roads, streets, bridges, *mass transit systems*, greenbelts, *and other transportation-related projects* facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, *and other transportation-related projects*;

.....

In (A), the legislature gives counties the authority to "impose by ordinance a sales and use tax ...for a single project or multiple projects..." Further, (A)(1) states a governing body, by passing an ordinance, can set a referendum for county wide vote to approve the sales and use tax. This section mandates the ordinance must specify a list of items. Section (A)(1)(a) mandates the ordinance must specify the project or projects with a description of each project. The statute further describes the type of projects contemplated by the General Assembly when it states, "and which may include." To be clear, (A)(1)(a)(i), certain projects are specifically referenced: "highways, roads, streets, bridges, *mass transit systems*, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects."

To recap, the statute permits the use of sales and use tax revenues for "projects". The law further provides a list of projects which includes "mass transit systems....and other transportation-related projects." The plain language of §4-37-30 mandates an interpretation that mass transit systems, such as CMRTA, are defined as transportation-related projects.

II. Ordinance 039-12HR Does Not Exceed the Scope of the Statute.

Richland County Ordinance Number 039-12HR complies with the Transportation Act and does not exceed the scope of the law. Ordinances are presumed valid. See, e.g., State v. Roper, 274 S.C. 14, 18, 260 S.E.2d 705, 707 (1979); Huffman v. City of Columbia, 146 S.C. 436, 438,



144 S.E. 157, 159 (1928) (finding an ordinance that has been passed is “presumptively valid”). Determining whether a local ordinance is valid is a two-step process. The first step is to determine whether the county had the power to adopt the ordinance. In this case, Section 4-37-30 authorizes a county to impose a sales and use tax by enacting an ordinance that orders a referendum to be voted on by citizens of the county. Given Richland County had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State. Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997); Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000).

“It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question.” Smith v. Tiffany, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017); see also Timmons v. S.C. Tricentennial Comm’n, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970) (“If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning.”). “Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.” Tiffany, 419 S.C. at 555, 799 S.E.2d at 483. “[T]here is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning unless a statutory provision is ambiguous.” Id. (citing Paschal v. State Election Comm’n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)). “Only where the language of an act gives rise to doubt or uncertainty as to legislative intent may the construing court search for that intent beyond the borders of the act itself.” Id. (citing Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001)). A statute is ambiguous if it “is susceptible to two reasonable interpretations.” S.C. Dept. of Social Servs. v. Lisa C., 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008) (citing Sloan v. S.C. Bd. of Physical Therapy Exam’rs, 370 S.C. 452, 489, 636 S.E.2d 598, 617 (2006)).



Whether ambiguity exists is a question of law for the Court to decide. See, e.g., Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010) (“[Q]uestions of statutory interpretation are questions of law.”)).

Specifically, the Ordinance complies with §4-37-30(A)(1)(a) by listing the specific projects and a description of said projects. Section 1 (c) states:

The County Council finds that a one percent sales and use tax should be levied and imposed within Richland County, for the **following projects** and purposes: For financing the costs of highways, roads, streets, bridges, greenways, pedestrian sidewalks, and bike paths and lanes and other transportation-related projects facilities, and drainage facilities related thereto, and **mass transit systems** operated by Richland County or (jointly) operated by Richland County, other governmental entities and transportation authorities.

As described above, Section 4-37-30 requires the ordinance to list the projects and a description of the projects. The law also requires the maximum time for which the tax may be imposed; the estimated capital cost of the project; and the anticipated year the tax will end. Richland County Ordinance 039-12HR complies with all three requirements. Section 2(b) provides the tax shall be imposed no longer than 22 years. Section 2(c) describes the maximum total costs of the projects to be \$1,037,900,000 and of the total, the cost for mass transit systems shall not exceed \$300,991,000. Section 2(f) provides the termination date of April 1, 2035 or when the revenues raised meet the maximum capital costs.

Following the statutory conditions set out in §4-37-30, Richland Ordinance 039-12HR accordingly is valid and does not does not exceed the scope of the statute.

III. Section 37-4-30 Does Not Prohibit Penny Tax Revenues to be used for Operating and Administrative Expenses.

Plaintiffs allege CMRTA's use of penny tax revenues for operating expenses or administrative expenses is unlawful. They allege this use of funds exceeds the scope of §4-37-30.

Also, Plaintiffs take exception to the language in Section 2 of Ordinance 039-12HR describing the mass transit systems project, "continued operation of mass transit services." Plaintiffs maintain these penny tax revenues must be used solely on capital costs for transportation facilities and not the continued operation of the system.

However, the statutory language does not make such declaration. The statute authorizes the imposition of a sales and use tax for transportation projects. The statute further establishes terms the county must include in its authorizing ordinance and subsequently, the referendum. However, there is no statutory language stating penny tax revenues cannot be used for operating and administrative expenses.

In fact, concluding otherwise would lead to an illogical result. The General Assembly clearly intended mass transit systems to be included as a transportation-related project by listing mass transit systems in the type projects contemplated by the General Assembly. But if one used the Plaintiffs' interpretation of the statute, the penny tax revenues could be used for mass transit systems, but only for expenditures on capital costs. This interpretation goes beyond the plain language of the statute and would result in the expenditures being used only to buy buses or construct facilities related to the mass transit system. The statute does not provide such a limitation; thus, the Plaintiffs' interpretation is rejected.

As described more fully above, Ordinance Number 039-12HR is presumed to be valid. In the preamble to the Transportation Act passed in 1995, the General Assembly's authorized penny tax revenues to be used for "operating" transportation-related projects, which was later amended to include "mass transit systems." The Supreme Court routinely has held the "preamble of an act may be used as a guide in determining legislative intent." State v. Thrift, 312 S.C. 282, 440 S.E.2d 341, 354 (1994) and Sloan v. Friends of Hunley, Inc., 393 S.C. 152, 711 S.E.2d 895, 898 (2011).

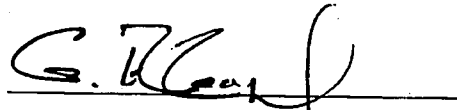
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The Court finds that the legislative intent is clear from the enabling Act itself. There is no statutory language that states expenditures of penny tax revenues are limited to "capital costs". Further, the legislature's preamble and findings lead to an opposite result -- penny tax revenues may be expended on the operation of transportation-related projects, which the statute specifically defines to include mass transit systems, such as the CMRTA.

CONCLUSION

Having considered all the materials submitted and arguments raised, both at the hearing and through the written submissions, the Court finds the Central Midlands Regional Transit Authority is entitled to a judgment as a matter of law in this case for the reasons addressed above. Accordingly, CMRTA's Motion for Summary Judgment is granted.

IT IS SO ORDERED.



G. THOMAS COOPER, JR.
Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

November 21, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-40-02875

South Carolina Public Interest Foundation, et al

Richland County, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

RICHLAND COUNTY'S MOTION FOR SUMMARY JUDGMENT IS UNDER ADVISEMENT.
CENTRAL MIDLANDS REGIONAL TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT IS UNDER ADVISEMENT.

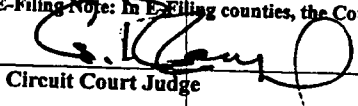
This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details. E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2126

Judge Code

10-26-17

Date

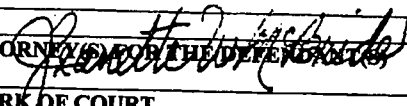
For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of Oct, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

James Carpenter

Andrew Lindemann, Robert Tyson, Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)



ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4002875

South Carolina Public Interest Foundation

Richland County

William B DePass Jr

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 28 day of May, 2017 and a copy mailed first class or placed in the appropriate attorney's box on this 28 day of May, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

Elizabeth Van Doren Gray
Robert E. Tyson Jr.

Andrew F. Lindemann
Alexis Kaylor Lindsay

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

SCRPC Form 4C (10/2011)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

v.

Richland County,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT
CASE NO: 2016-CP-40-2875

**AMENDED ORDER DENYING
MOTIONS TO DISMISS AND MOTION
FOR JUDGMENT ON THE
PLEADINGS.**

FILED
MAR 27 PM 4:48
CLERK OF COURT
RICHLAND COUNTY

This action came before the Court for hearing on February 14, 2017, in Berkeley County, by the consent of the parties, to consider Motions to Dismiss filed by the Defendants and by the Intervenor Central Midlands Regional Transit Authority ("CMRTA"). James G. Carpenter represented the Plaintiffs. Andrew Lindemann represented Richland County Council, and Rob Tyson represented Central Midlands Regional Transit Authority.

This Court issued its Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings on March 3, 2017. Defendant received the Order on March 6, 2017, and filed their Motion to Alter or Amend that Order on March 16, 2017.

On May 9, 2016, Plaintiff South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr. filed suit. On July 19, 2016, Plaintiffs filed an Amended Complaint for Declaratory Judgment, alleging seven causes of action.

On or about July 7, 2016, CMRTA moved to intervene as a Defendant, alleging an interest that was not protected by the Defendant Richland County Council. Plaintiffs

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consented to the motion. On July 27, 2016, the Court ordered that CMRTA be allowed to intervene as a Defendant.

On or about July 15, 2016, Defendant Richland County Council moved to dismiss the Amended Complaint, and asserting the Plaintiffs lacked standing, that the claims were barred by the statute of limitations, and that Richland County Council is not a proper party Defendant. In the alternative, Defendants moved for Judgment on the Pleadings as to the Plaintiffs' First Cause of Action.

On or about August 26, 2016, CMRTA moved to dismiss alleging Plaintiffs' lack of standing and that claims are barred by the statute of limitations. The Defendant and the Intervenor advised the Court at the hearing that they were withdrawing the statute of limitations ground for purposes of the Motions to Dismiss but reserved the right to re-assert that defense at a later stage of the litigation.

The Court denies the Motions to Dismiss and for Judgment on the Pleadings.

On February 14, 2017, Plaintiffs moved in open court to substitute Richland County as a Defendant for Richland County Council. The Court granted the Plaintiffs' Motion.

DISCUSSION

I. PLAINTIFFS POSSESS TAXPAYER STANDING AND PUBLIC IMPORTANCE STANDING.

Plaintiffs have asserted both taxpayer standing and public importance standing. The appellate courts have endorsed taxpayer standing and public importance standing on many occasions. *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009),



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. Richland 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).

A. Taxpayer Standing

All three Plaintiffs have paid the Penny Tax to Richland County. Accordingly, each Plaintiff possesses standing as a Richland County taxpayer to contest the unlawful payments from the Penny Tax receipts. Taxpayer standing has a long history in South Carolina.

More than 125 years ago, in *Mauldin v City Council of Greenville*, the South Carolina Supreme Court recognized taxpayers' standing to contest allegedly illegal or *ultra vires* actions of a city. 33 S.C. 1, 11 S.E. 434 (1890). The City argued against taxpayer standing: "The individual tax-payer, merely as such, can obtain a standing in court only by alleging and proving that the illegal act complained of will inflict damage special and peculiar to himself, etc." The South Carolina Supreme Court rejected that presumption and reasoned,

Can it be that, in such case, a number of citizens, tax-payers of a city, cannot be heard against the corporate authorities in a court of equity asking for an

GR #3

injunction against the consummation of the contemplated wrongs, without alleging special damages to themselves individually? There is a certain relation in the nature of agency between the municipal authorities and all tax-payers of the corporation.

* * *

Here the tax-paying citizens of Greenville are not the whole public, but comparatively a small part of it. They are not strangers to the municipality. They, and they alone, are affected by their acts. As to them this is more in the nature of "a private" than "public" matter.

Id. 33 S.C. 1, 11 S.E. 434, 435. The South Carolina Supreme Court ruled, "We think the plaintiffs had a standing in court, and were entitled to have their case heard on its merits."

Id. 11 S.E. at 436.

In *Mauldin*, the South Carolina Supreme Court cited older South Carolina cases, and cases from Maryland, Connecticut, New Hampshire, Iowa, and Missouri, all acknowledging taxpayer standing. Finally, the Court cited Dillon on Municipal Corporations in support of taxpayer standing. The South Carolina Supreme Court, quoting a case from Maryland, stated,

[T]he plaintiffs "as tax-payers of the city, and others similarly situated, *** constitute a class especially damaged by the alleged unlawful act of the corporation, in the alleged increase of the burden of taxation upon their property situated within the city. The complainants have therefore a special interest in the subject-matter of the suit, distinct from that of the general public;"

Id., quoting *Mayor, etc., v. Gill*, 31 Md. 375-394.

For more than 135 years, there has been "no serious question" concerning a taxpayer's standing to bring a civil action to prevent unlawful use of taxpayer funds.

In South Carolina, Plaintiffs possess standing to seek an injunction against illegal expenditures.

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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. *Sligh v. Bowers*, 62 S.C. 409, 40 S.E. 885; *Mauldin v. City Council of Greenville*, 33 S.C. 1, 11 S.E. 434, 8 L.R.A. 291; *McCullough v. Brown*, 41 S.C. 220, 19 S.E. 458, 23 L.R.A. 410; Pom.Eq.Jur., Page 277, Sec. 260; 2 Dill.Mun.Corp., Sec. 736.

Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13, 15 (1939).

The court in *Kirk v. Clark* also noted:

"Perhaps the most frequent ground of application for relief by injunction against municipal corporations is for the prevention of an illegal or unlawful diversion of public funds. . . . [Courts] will . . . relieve in behalf of citizens and taxpayers against such official acts on the part of such bodies, when they move without authority or warrant of law and in excess of the corporate powers. High on Injunctions, Vol. 2, Sec. 1237."

Id.

The South Carolina Supreme Court has repeatedly acknowledged that a private citizen has standing to contest an illegal action by a governmental body. *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948). In *Shillito*, the plaintiff sued for declaratory and injunctive relief when a tax was illegally collected. Shillito's action was aimed "(a) against the illegality of the tax; (b) against the levying of subsequent assessments under the alleged unlawful tax; and (c) against the disbursement of funds collected from such tax." The Court found that the plaintiff had standing for all three purposes.

As a 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. An apparent exception to this rule exists when the Act sought to be enjoined is an unlawful diversion of public funds. 52 Am. Jur., Sec. 3, Page 3. 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. The decided preponderance of authority holds that a taxpayer singly or in a class suit, may maintain a suit in equity to restrain unlawful

CL #5

municipal action which leads, directly or indirectly, to taxation, and that a taxpayer, as specially damaged by the increase of the burden of taxation on his property, has a special interest, distinct from the general public, in the subject matter of such a suit which entitles him to relief. 52 Am. Jur., Sec. 3, Page 3.

A citizen and taxpayer has standing as such to contest the expenditure of public funds under an alleged unconstitutional statute. 52 Am. Jur., Sec. 15, Page 11. Under the foregoing authorities, we are satisfied that the action as brought can be maintained to challenge the validity of this special law and the alleged unlawful diversion of public funds to the designated beneficiary.

Id. at 22. Thus, under *Shillito*, the Plaintiffs, as taxpayers, have standing to seek declaratory and injunctive relief against an illegal expenditure.

In *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985), two taxpayers sued the Mayor and City Council of Greenwood because they had spent public money for expenses incurred by spouses of the Council members on a trip to the National League of Cities Convention. The taxpayers sought declaratory relief. Council members argued that the taxpayers lacked standing. The court found that the taxpayers had standing to contest the unlawful expenditure. "As in *Lee [v. Clark]*, 224 S.C. 138, 77 S.E.2d 485 (1953)), respondents, as taxpayers, have an interest in seeing that city officials disburse funds in a lawful manner. They have presented a justiciable controversy under the [Declaratory Judgment] Act, and the demurrer was properly overruled." 285 S.C. at 480.

Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993) is a similar holding. A plaintiff had standing as a taxpayer to contest the allegedly unlawful transfer of money collected for one purpose to a fund set up to address another purpose. The South Carolina Supreme Court ruled, "A taxpayer who . . . has contributed to the sum jeopardized, is considered to have sufficient interest to enjoin the illegal act." The Court ruled against the

 6

plaintiffs on the merits, but nevertheless found that they had standing as taxpayers to contest the illegal diversion of funds.

These cases finding taxpayer standing were not limited to acts and disbursements which violate some specific provision of the state or federal constitution. These rulings dealt in broad terms with the illegality of the actions, or the unlawful manner in which the funds were spent.

"A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina." *Sloan v. School District of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000). Plaintiffs have standing, under the common law, as taxpayers and citizens to seek declaratory and injunctive relief against an illegal act of the Defendants.

Plaintiffs possess standing as citizens and taxpayers to seek declaratory and injunctive relief for an *ultra vires* act. One clear statement of this rule of standing is Justice Toal's dissenting opinion in *Newman v. Richland County Historic Preservation Comm'n.*, 325 S.C. 79, 480 S.E.2d 72 (1997). The majority ruled that because the plaintiff was a member of the Commission whose actions she was attacking in court, she had no standing. If she had not been a member of the Commission whose decision she was attacking, the Supreme Court would likely have found that she had standing. The majority reasoned that other citizens' right to sue would protect the public and denied standing to Ms. Newman. The court quoted from *Control Data Corporation v. Controlling Board*, 16 Ohio App. 3d 30, 16 Ohio B. Rep. 32, 474 N.E.2d 336 (Oh. App. 1983). "Sufficient representation of the public's interest could be provided by a citizen affected by the decision of the Controlling Board and not by allowing a member of the Board to take a partisan position



and challenge the outcome." *Newman*, at 83. The dissent would have granted plaintiff standing even though she was a member of the Commission.

Apart from this issue of Commission membership, Justice Toal's dissent provides a clarifying discussion of the history of citizen standing to seek declaratory and injunctive relief for *ultra vires* acts.

Generally, a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom. *Florence Morning News, Inc. v. Building Comm'n*, 265 S.C. 389, 218 S.E.2d 881 (1975). . . . However, an exception to this rule exists for *ultra vires* acts by government officials. For example, we have said that a court will not . . . interfere, by means of a taxpayer suit, to restrain the authorities of a county board from the exercise of their discretionary power . . . in the absence of illegality, fraud, or clear abuse of authority. *Owens v. Magill*, 308 S.C. 556, 419 S.E.2d 786 (1992) *see also Ex Parte Hart*, 190 S.C. 473, 477, 2 S.E.2d 52, 53-54.

* * *

As with most things, moderation is required. 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. Thus, I would find that an individual has standing to contest a governmental action if he alleges particularized *ultra vires* acts by the governmental entity. The complaint cannot be a general assertion of *ultra vires* action on the part of the governmental actor, but must identify (1) the specific act or acts that have exceeded the actor's authority, and (2) the specific constitutional, statutory, or other law that has been exceeded.

Newman v. Richland County Historic Preservation Comm'n., 325 S.C. 79, 84-85, 480 S.E.2d 72, 75-76 (1997).

An authoritative case on this kind of standing is *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Several doctors sued Charleston County alleging that the manner in which Charleston County had voted to fund the acquisition and renovation of a hospital for the Medical University of South Carolina was *ultra vires*. The doctors alleged that to use tax exempt bonds for this purpose would violate the authorizing statutes.

CLB

Charleston County moved to dismiss, arguing among other things, that the doctors lacked standing to bring the action. The trial court granted the County's motion, and the doctors appealed. The Supreme Court, in a unanimous decision, reversed the ruling on standing. Justice Toal, writing for the court, ruled that when an issue was "of such public importance as to require its resolution for future guidance," then "a court may confer standing upon a party."

In this case, Doctors have specifically alleged that County committed an *ultra vires* act by exceeding its statutory authority to issue the hospital bonds. Moreover, the issuance of the hospital bonds clearly impacts a profound public interest--the public health and welfare. In fact, the express purpose of the Act is to promote the public health and welfare. See S.C. Code Ann. § 44-7-1420 (1985). It is hard to conceive of any greater societal interest [*16] than this one. Thus, as citizens of Charleston County, Doctors have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development. Thus, by virtue of the immense public interest at stake here, Doctors have standing to bring the present action, and any further determination of imminent prejudice is unnecessary.

333 S.C. 519, 531. The issues Plaintiffs raise in this case, by which municipal governments run afoul of the law are also important public issues.

In *Baird v. Charleston County*, the doctors were granted standing, not because they were physicians in competition with the clinic, but rather because they were citizens of Charleston County, they challenged an *ultra vires* act, and the matter was of public interest. "Thus, as citizens of Charleston County, Doctors have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development." *Id.*

In the case at bar, Plaintiffs have met the burden set out in the *Newman* dissent and in *Baird*. They have identified (1) the specific act or acts that have exceeded the actor's

CL-9

authority in the seven causes of action and (2) the specific statute and ordinance that have been exceeded.

In the language cited by the Court's opinion in *Newman*, each Plaintiff is "a citizen affected by the decision of the [defendant]." Lawsuits by such "citizens" provide "sufficient representation of the public's interest." *Newman, quoting Control Data Corporation v. Controlling Board*, 16 Ohio App. 3d 30, 16 Ohio B. Rep. 32, 474 N.E.2d 336 (Oh. App. 1983). Hence, each Plaintiff has standing as a citizen to represent the public's interest and to contest the *ultra vires* acts alleged in the Complaint.

The case at bar is not a mere zoning challenge (See *ATC South Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008)) nor is it a challenge to legislative action by the General Assembly to provide tax exemptions to certain categories of commerce (See *Bodman v State*, 403 S.C. 60, 742 S.E.2d 363 (2013)). This case constitutes a challenge to the method by which Defendants are using tax dollars the Plaintiffs claim is unlawful.

Plaintiffs allege standing as citizens and taxpayers. They allege that the Defendants engaged in an *ultra vires* acts in violation of the state law and the county ordinance. Just as the doctors in Charleston possessed standing to argue that the funding of the hospital acquisition was *ultra vires*, because of the public interest involved, these Plaintiffs are granted standing to contest the *ultra vires* acts alleged in this case. A decision is necessary for future guidance, "and any further determination of imminent prejudice is unnecessary."

Id.

B. Public Importance Standing

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Defendants argued that the public importance of this case does not warrant a ruling of standing. The doctrine of public importance standing has a long history in South Carolina.

In 1873, the South Carolina Supreme Court addressed an indictment for practicing law without a license. The Court ruled that defects in the indictment disposed of the case, but then reasoned:

This view is sufficient to dispose of the whole case, but as both the defendant and the Attorney General have pressed this Court for a decision on the question whether the Legislature had constitutional authority to enact a tax law imposing taxes of the character imposed by the license law, and as the question is of public importance, we will consider and decide it.

State v. Hayne, 4 S.C. 403, 411, 4 Rich. 403 (1873). The Court addressed the question and found several aspects of the statute unconstitutional.

Similarly, in *Ashmore v Greater Greenville Sewer District*, the South Carolina Supreme Court ruled that the board established to govern the Greenville Memorial Auditorium District was unconstitutionally composed. That ruling was sufficient to dispose of the case, but the Court continued:

If this were an ordinary case, our opinion might well stop here. The Board of Trustees of the projected Auditorium District has been held invalid in toto. The district is a headless body and cannot function under the present legislation. But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the legislature undertook to create by their enactments; and raised on the record are earnestly argued public questions of importance. The last stated factor brings into play the principle, now generally established, that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest. 3 Am.Jur. 310, Annotation, 132 A.L.R. 1185.

Ashmore v Greater Greenville Sewer District, 211 S. C. 77, 95, 44 S.E.2d 88, 96-97 (1947).

CE 11

The South Carolina Supreme Court rendered a holding similar to *Ashmore in City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957). *Sanders* was a declaratory judgment action addressing the municipal merger of Columbia and Eau Claire and their water systems. The case raised questions about Columbia's revenue bonds issued to fund further expansion of the water system. At the conclusion of the opinion, the Supreme Court stated:

We have been in considerable doubt as to whether the pleadings present a proper case for any kind of declaratory relief. But since the rule requiring the existence of a justiciable controversy is somewhat relaxed where the public interest is involved, Anderson, Declaratory Judgments, Second Edition, Volume I, Section 63, and Volume II, Sections 686, 707, 709 and 714, we have decided to make the foregoing limited declaration with respect to the issuance of further revenue bonds.

97 S.E.2d 213. The Supreme Court repeated this holding in *State ex rel McLeod v. McGinnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982): "We held that where the public interest is involved, the rule requiring the existence of a justiciable controversy is somewhat relaxed." See also, *Palmer v. Dunn*, 216 S.C. 558, 559, 59 S.E.2d 158, 159 (1950) ("This Court took original jurisdiction of the controversy because of its urgency and public importance"); *Thompson v. South Carolina Commission on Alcohol and Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719, 85 A.L.R.3d 692 (1976) ("the rule [of standing] is not an inflexible one, and we are of the opinion that the questions involved are of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action"); *Gilstrap v. South Carolina Budget & Control Bd.*, 310 S.C. 210, 213, 423 S.E.2d 101, 103 (1992) ("[T]he questions involved here are of such wide concern that the rules on standing will not be inflexibly applied").

In *Sloan v. Dept. of Transportation*, the Supreme Court analyzed the public

CL 17

importance exception.

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).... Furthermore, "[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 v. Wilkins*, 362 S.C. at 436-37, 608 S.E.2d at 583 (quoting *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)).

The Court of Appeals has stated that "[t]he expenditure of public funds pursuant to a competitive bidding statute is of immense public importance." *Sloan v. School Dist. of Greenville County*, 342 S.C. at 524, 537 S.E.2d at 303. Numerous other jurisdictions which have addressed taxpayer standing when the issue involves competitive bidding requirements have specifically found that competitive bidding laws are for the benefit of taxpayers. *See id.* at 521-22, 537 S.E.2d at 302-03 (and cases cited therein). Indeed, the requirement 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." *Id.* at 524, 537 S.E.2d at 303.

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, 169, 666 S.E.2d 236, 240 (2008).

The South Carolina Supreme Court has ruled many times that public interest standing should be granted to address issues of great public importance. *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); Defendants’ well-publicized projections indicate the Penny Tax will result in more than \$1 billion in extra revenues and expenditures by Richland County. Plaintiffs’ allegations of illegal use of these funds make this an issue of great public importance. Accordingly, this body of case law leans strongly toward the conclusion that Plaintiffs should be granted standing based on the public importance of the issues they raise.

II. THE MOTION FOR JUDGMENT ON THE PLEADINGS IS DENIED.

Defendants moved the Court for Judgment on the Pleadings as to the Plaintiffs’ First Cause of Action. Plaintiffs ask the Court to rule that Ordinance Number 039-12HR exceeds the statutory authority of S.C. Code Ann. § 4-37-30, by purporting to use the 1% sales tax to finance “continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements;” and “pedestrian sidewalks [and] bike paths and lanes.”

Plaintiffs contend that the South Carolina General Assembly enacted Title IV, Chapter 37 of the South Carolina Code Annotated entitled “Optional Methods for Financing Transportation Facilities” which authorizes counties to adopt an ordinance imposing a sales and use tax for “financing transportation facilities.” Plaintiffs further contend that the authorizing statute establishes the kinds of “transportation facilities” for



which such "optional methods of financing" may be used: "highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects" S.C. Code Ann. 4-37-30(a)(1).

Richland County adopted Ordinance Number 039-12HR ("Ordinance") to levy and impose a 1% sales and use tax subject to a referendum within Richland County pursuant to S.C. Code Ann. § 4-37-30. The Ordinance states, "The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenues established by the Act, the provisions of this Ordinance, and other applicable law." *Id.*, Section 1 (c).

Ordinance Number 039-12HR also purported to adopt a 1% tax for "continued operation" of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements." *Id.*, Section 2. (c), Project 2. Plaintiffs contend that using the proceeds of the 1% tax for "continued operation of mass transit services" does not comport with the stated statutory purpose of the 1% tax: "financing transportation facilities" and accordingly, those provisions are unlawful.

Plaintiffs contend that this tax was authorized for capital projects, "facilities." They contend it was not authorized for "continued operation" of the mass transit system. The statute authorizes this Penny Tax only for a limited number of years. If these funds are used for the "continued operation" of the mass transit system, what will be the source of the "continued funding" when the statutory authorization for the Penny Tax expires?

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Ordinance Number 039-12HR also purported to adopt a 1% tax for "improvements to pedestrian sidewalks [and] bike paths." *Id.*, Section 2 (c), Project 3. Direction of penny tax funds to "Pedestrian sidewalks [and] bike paths and lanes" are not authorized by S.C. Code Ann. § 4-37-30, and accordingly, those provisions are unlawful.

The Court finds that the issue in the First Cause of Action is not one that should be decided on judgment on the pleadings, but rather should be developed factually and legally through the course of the litigation. There has been no discovery in this case, and defendants have not met their burden for the Court to award Judgment on the Pleadings at this time. Accordingly, the Motion for Judgment on the Pleadings is denied at this time.

III. RICHLAND COUNTY IS SUBSTITUTED AS A DEFENDANT.

Richland County Council asserted that it is not a properly named defendant in this action. Plaintiffs contended that the naming of a public official as a defendant in his official capacity is equivalent to naming the entity of that official represents. "Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Department of Social Services*, 436 U.S. 658 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

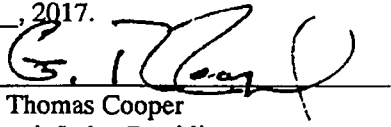
Nevertheless, Plaintiffs moved in open court to substitute Richland County as a Defendant in the place of Richland County Council, and the Court granted the motion. Accordingly, this issue is moot.

CL

CONCLUSION

The Motions to Dismiss are denied, the Motion for Judgment on the Pleadings is denied, and Richland County is substituted as a Defendant in the place of Richland County Council.

SO ORDERED, this 24 day of March, 2017.


G. Thomas Cooper
Circuit Judge Presiding

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4002875

South Carolina Public Interest Foundation

Richland County

William B DePass Jr

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 6 day of March, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

Elizabeth Van Doren Gray

Andrew F. Lindemann

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

v.

Richland County,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

**ORDER DENYING MOTIONS
TO DISMISS AND MOTION FOR
JUDGMENT ON THE PLEADINGS.**

RICHLAND COUNTY
FILED
MAR -3 PM 3:56
JANETTE H. MCCORMIE
Clerk, C.C.P. & C.S.

This action came before the Court for hearing on February 14, 2017, in Berkeley County, by the consent of the parties, to consider Motions to Dismiss filed by the Defendants and by the Intervenor Central Midlands Regional Transit Authority ("CMRTA"). James G. Carpenter represented the Plaintiffs. Andrew Lindemann represented Richland County Council, and Rob Tyson represented Central Midlands Regional Transit Authority.

On May 9, 2016, Plaintiff South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr. filed suit. On July 19, 2016, Plaintiffs filed an Amended Complaint for Declaratory Judgment, alleging seven causes of action.

On or about July 7, 2016, CMRTA moved to intervene as a Defendant, alleging an interest that was not protected by the Defendant Richland County Council. Plaintiffs consented to the motion. On July 27, 2016, the Court ordered that CMRTA be allowed to intervene as a Defendant.

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On or about July 15, 2016, Defendant Richland County Council moved to dismiss the Amended Complaint, and asserting the Plaintiffs lacked standing, that the claims were barred by the statute of limitations, and that Richland County Council is not a proper party Defendant. In the alternative, Defendants moved for Judgment on the Pleadings as to the Plaintiffs' First Cause of Action.

On or about August 26, 2016, CMRTA moved to dismiss alleging Plaintiffs' lack of standing and that claims are barred by the statute of limitations.

The Court denies the Motions to Dismiss and for Judgment on the Pleadings.

On February 14, 2017, Plaintiffs moved in open court to substitute Richland County as a Defendant for Richland County Council. The Court granted the Plaintiffs' Motion.

DISCUSSION

I. PLAINTIFFS POSSESS TAXPAYER STANDING AND PUBLIC IMPORTANCE STANDING.

Plaintiffs have asserted both taxpayer standing and public importance standing. The appellate courts have endorsed taxpayer standing and public importance standing on many occasions. *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *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);

GL 2

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. Richland 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).

A. Taxpayer Standing

All three Plaintiffs have paid the Penny Tax to Richland County. Accordingly, each Plaintiff possesses standing as a Richland County taxpayer to contest the unlawful payments from the Penny Tax receipts. Taxpayer standing has a long history in South Carolina.

More than 125 years ago, in *Mauldin v City Council of Greenville*, the South Carolina Supreme Court recognized taxpayers' standing to contest allegedly illegal or *ultra vires* actions of a city. 33 S.C. 1, 11 S.E. 434 (1890). The City argued against taxpayer standing: "The individual tax-payer, merely as such, can obtain a standing in court only by alleging and proving that the illegal act complained of will inflict damage special and peculiar to himself, etc." The South Carolina Supreme Court rejected that presumption and reasoned,

Can it be that, in such case, a number of citizens, tax-payers of a city, cannot be heard against the corporate authorities in a court of equity asking for an injunction against the consummation of the contemplated wrongs, without alleging special damages to themselves individually? There is a certain relation in the nature of agency between the municipal authorities and all tax-payers of the corporation.

* * *

Here the tax-paying citizens of Greenville are not the whole public, but comparatively a small part of it. They are not strangers to the municipality.

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They, and they alone, are affected by their acts. As to them this is more in the nature of "a private" than "public" matter.

Id. 33 S.C. 1, 11 S.E. 434, 435. The South Carolina Supreme Court ruled, "We think the plaintiffs had a standing in court, and were entitled to have their case heard on its merits."

Id. 11 S.E. at 436.

In *Mauldin*, the South Carolina Supreme Court cited older South Carolina cases, and cases from Maryland, Connecticut, New Hampshire, Iowa, and Missouri, all acknowledging taxpayer standing. Finally, the Court cited Dillon on Municipal Corporations in support of taxpayer standing. The South Carolina Supreme Court, quoting a case from Maryland, stated,

[T]he plaintiffs "as tax-payers of the city, and others similarly situated, *** constitute a class especially damaged by the alleged unlawful act of the corporation, in the alleged increase of the burden of taxation upon their property situated within the city. The complainants have therefore a special interest in the subject-matter of the suit, distinct from that of the general public;"

Id., quoting *Mayor, etc., v. Gill*, 31 Md. 375-394.

For more than 135 years, there has been "no serious question" concerning a taxpayer's standing to bring a civil action to prevent unlawful use of taxpayer funds.

In South Carolina, Plaintiffs possess standing to seek an injunction against illegal expenditures.

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. *Sligh v. Bowers*, 62 S.C. 409, 40 S.E. 885; *Mauldin v. City Council of Greenville*, 33 S.C. 1, 11 S.E. 434, 8 L.R.A. 291; *McCullough v. Brown*, 41 S.C. 220, 19 S.E. 458, 23 L.R.A. 410; *Pom.Eq.Jur.*, Page 277, Sec. 260; 2 *Dill.Mun.Corp.*, Sec. 736.

Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13, 15 (1939).

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The court in *Kirk v. Clark* also noted:

"Perhaps the most frequent ground of application for relief by injunction against municipal corporations is for the prevention of an illegal or unlawful diversion of public funds. . . . [Courts] will . . . relieve in behalf of citizens and taxpayers against such official acts on the part of such bodies, when they move without authority or warrant of law and in excess of the corporate powers. High on Injunctions, Vol. 2, Sec. 1237."

Id.

The South Carolina Supreme Court has repeatedly acknowledged that a private citizen has standing to contest an illegal action by a governmental body. *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948). In *Shillito*, the plaintiff sued for declaratory and injunctive relief when a tax was illegally collected. Shillito's action was aimed "(a) against the illegality of the tax; (b) against the levying of subsequent assessments under the alleged unlawful tax; and (c) against the disbursement of funds collected from such tax." The Court found that the plaintiff had standing for all three purposes.

As a 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. An apparent exception to this rule exists when the Act sought to be enjoined is an unlawful diversion of public funds. 52 Am. Jur., Sec. 3, Page 3. 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. The decided preponderance of authority holds that a taxpayer singly or in a class suit, may maintain a suit in equity to restrain unlawful municipal action which leads, directly or indirectly, to taxation, and that a taxpayer, as specially damaged by the increase of the burden of taxation on his property, has a special interest, distinct from the general public, in the subject matter of such a suit which entitles him to relief. 52 Am. Jur., Sec. 3, Page 3.

A citizen and taxpayer has standing as such to contest the expenditure of public funds under an alleged unconstitutional statute. 52 Am. Jur., Sec. 15, Page 11. Under the foregoing authorities, we are satisfied that the action as brought can be maintained to challenge the validity of this special law

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and the alleged unlawful diversion of public funds to the designated beneficiary.

Id. at 22. Thus, under *Shillito*, the Plaintiffs, as taxpayers, have standing to seek declaratory and injunctive relief against an illegal expenditure.

In *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985), two taxpayers sued the Mayor and City Council of Greenwood because they had spent public money for expenses incurred by spouses of the Council members on a trip to the National League of Cities Convention. The taxpayers sought declaratory relief. Council members argued that the taxpayers lacked standing. The court found that the taxpayers had standing to contest the unlawful expenditure. "As in *Lee [v. Clark]*, 224 S.C. 138, 77 S.E.2d 485 (1953)], respondents, as taxpayers, have an interest in seeing that city officials disburse funds in a lawful manner. They have presented a justiciable controversy under the [Declaratory Judgment] Act, and the demurrer was properly overruled." 285 S.C. at 480.

Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993) is a similar holding. A plaintiff had standing as a taxpayer to contest the allegedly unlawful transfer of money collected for one purpose to a fund set up to address another purpose. The South Carolina Supreme Court ruled, "A taxpayer who . . . has contributed to the sum jeopardized, is considered to have sufficient interest to enjoin the illegal act." The Court ruled against the plaintiffs on the merits, but nevertheless found that they had standing as taxpayers to contest the illegal diversion of funds.

These cases finding taxpayer standing were not limited to acts and disbursements which violate some specific provision of the state or federal constitution. These rulings dealt in broad terms with the illegality of the actions, or the unlawful manner in which the funds were spent.

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"A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina." *Sloan v. School District of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000). Plaintiffs have standing, under the common law, as taxpayers and citizens to seek declaratory and injunctive relief against an illegal act of the Defendants.

Plaintiffs possess standing as citizens and taxpayers to seek declaratory and injunctive relief for an *ultra vires* act. One clear statement of this rule of standing is Justice Toal's dissenting opinion in *Newman v. Richland County Historic Preservation Comm'n.*, 325 S.C. 79, 480 S.E.2d 72 (1997). The majority ruled that because the plaintiff was a member of the Commission whose actions she was attacking in court, she had no standing. If she had not been a member of the Commission whose decision she was attacking, the Supreme Court would likely have found that she had standing. The majority reasoned that other citizens' right to sue would protect the public and denied standing to Ms. Newman. The court quoted from *Control Data Corporation v. Controlling Board*, 16 Ohio App. 3d 30, 16 Ohio B. Rep. 32, 474 N.E.2d 336 (Oh. App. 1983). "Sufficient representation of the public's interest could be provided by a citizen affected by the decision of the Controlling Board and not by allowing a member of the Board to take a partisan position and challenge the outcome." *Newman*, at 83. The dissent would have granted plaintiff standing even though she was a member of the Commission.

Apart from this issue of Commission membership, Justice Toal's dissent provides a clarifying discussion of the history of citizen standing to seek declaratory and injunctive relief for *ultra vires* acts.

Generally, a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is

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in danger of sustaining, prejudice therefrom. *Florence Morning News, Inc. v. Building Comm'n*, 265 S.C. 389, 218 S.E.2d 881 (1975). . . . However, an exception to this rule exists for *ultra vires* acts by government officials. For example, we have said that a court will not . . . interfere, by means of a taxpayer suit, to restrain the authorities of a county board from the exercise of their discretionary power . . . in the absence of illegality, fraud, or clear abuse of authority. *Owens v. Magill*, 308 S.C. 556, 419 S.E.2d 786 (1992) *see also Ex Parte Hart*, 190 S.C. 473, 477, 2 S.E.2d 52, 53-54.

* * *

As with most things, moderation is required. 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. Thus, I would find that an individual has standing to contest a governmental action if he alleges particularized *ultra vires* acts by the governmental entity. The complaint cannot be a general assertion of *ultra vires* action on the part of the governmental actor, but must identify (1) the specific act or acts that have exceeded the actor's authority, and (2) the specific constitutional, statutory, or other law that has been exceeded.

Newman v. Richland County Historic Preservation Comm'n., 325 S.C. 79, 84-85, 480 S.E.2d 72, 75-76 (1997).

An authoritative case on this kind of standing is *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Several doctors sued Charleston County alleging that the manner in which Charleston County had voted to fund the acquisition and renovation of a hospital for the Medical University of South Carolina was *ultra vires*. The doctors alleged that to use tax exempt bonds for this purpose would violate the authorizing statutes. Charleston County moved to dismiss, arguing among other things, that the doctors lacked standing to bring the action. The trial court granted the County's motion, and the doctors appealed. The Supreme Court, in a unanimous decision, reversed the ruling on standing. Justice Toal, writing for the court, ruled that when an issue was "of such public importance as to require its resolution for future guidance," then "a court may confer standing upon a party."

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In this case, Doctors have specifically alleged that County committed an *ultra vires* act by exceeding its statutory authority to issue the hospital bonds. Moreover, the issuance of the hospital bonds clearly impacts a profound public interest--the public health and welfare. In fact, the express purpose of the Act is to promote the public health and welfare. See S.C. Code Ann. § 44-7-1420 (1985). It is hard to conceive of any greater societal interest [*16] than this one. Thus, as citizens of Charleston County, Doctors have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development. Thus, by virtue of the immense public interest at stake here, Doctors have standing to bring the present action, and any further determination of imminent prejudice is unnecessary.

333 S.C. 519, 531. The issues Plaintiffs raise in this case, by which municipal governments run afoul of the law are also important public issues.

In *Baird v. Charleston County*, the doctors were granted standing, not because they were physicians in competition with the clinic, but rather because they were citizens of Charleston County, they challenged an *ultra vires* act, and the matter was of public interest. "Thus, as citizens of Charleston County, Doctors have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development." *Id.*

In the case at bar, Plaintiffs have met the burden set out in the *Newman* dissent and in *Baird*. They have identified (1) the specific act or acts that have exceeded the actor's authority in the seven causes of action and (2) the specific statute and ordinance that have been exceeded.

In the language cited by the Court's opinion in *Newman*, each Plaintiff is "a citizen affected by the decision of the [defendant]." Lawsuits by such "citizens" provide "sufficient representation of the public's interest." *Newman*, quoting *Control Data Corporation v. Controlling Board*, 16 Ohio App. 3d 30, 16 Ohio B. Rep. 32, 474 N.E.2d

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336 (Oh. App. 1983). Hence, each Plaintiff has standing as a citizen to represent the public's interest and to contest the *ultra vires* acts alleged in the Complaint.

The case at bar is not a mere zoning challenge (*See ATC South Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008)) nor is it a challenge to legislative action by the General Assembly to provide tax exemptions to certain categories of commerce (*See Bodman v State*, 403 S.C. 60, 742 S.E.2d 363 (2013)). This case constitutes a challenge to the method by which Defendants are using tax dollars the Plaintiffs claim is unlawful.

Plaintiffs allege standing as citizens and taxpayers. They allege that the Defendants engaged in an *ultra vires* acts in violation of the state law and the county ordinance. Just as the doctors in Charleston possessed standing to argue that the funding of the hospital acquisition was *ultra vires*, because of the public interest involved, these Plaintiffs are granted standing to contest the *ultra vires* acts alleged in this case. A decision is necessary for future guidance, "and any further determination of imminent prejudice is unnecessary." *Id.*

B. Public Importance Standing

Defendants argued that the public importance of this case does not warrant a ruling of standing. The doctrine of public importance standing has a long history in South Carolina.

In 1873, the South Carolina Supreme Court addressed an indictment for practicing law without a license. The Court ruled that defects in the indictment disposed of the case, but then reasoned:

This view is sufficient to dispose of the whole case, but as both the defendant and the Attorney General have pressed this Court for a decision on the question whether the Legislature had constitutional authority to enact

GT 12

a tax law imposing taxes of the character imposed by the license law, and as the question is of public importance, we will consider and decide it.

State v. Hayne, 4 S.C. 403, 411, 4 Rich. 403 (1873). The Court addressed the question and found several aspects of the statute unconstitutional.

Similarly, in *Ashmore v Greater Greenville Sewer District*, the South Carolina Supreme Court ruled that the board established to govern the Greenville Memorial Auditorium District was unconstitutionally composed. That ruling was sufficient to dispose of the case, but the Court continued:

If this were an ordinary case, our opinion might well stop here. The Board of Trustees of the projected Auditorium District has been held invalid in toto. The district is a headless body and cannot function under the present legislation. But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the legislature undertook to create by their enactments; and raised on the record are earnestly argued public questions of importance. The last stated factor brings into play the principle, now generally established, that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest. 3 Am.Jur. 310, Annotation, 132 A.L.R. 1185.

Ashmore v Greater Greenville Sewer District, 211 S. C. 77, 95, 44 S.E.2d 88, 96-97 (1947).

The South Carolina Supreme Court rendered a holding similar to *Ashmore* in *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957). *Sanders* was a declaratory judgment action addressing the municipal merger of Columbia and Eau Claire and their water systems. The case raised questions about Columbia's revenue bonds issued to fund further expansion of the water system. At the conclusion of the opinion, the Supreme Court stated:

We have been in considerable doubt as to whether the pleadings present a proper case for any kind of declaratory relief. But since the rule requiring the existence of a justiciable controversy is somewhat relaxed where the public interest is involved, Anderson, Declaratory Judgments, Second Edition, Volume I, Section

GT 11

63, and Volume II, Sections 686, 707, 709 and 714, we have decided to make the foregoing limited declaration with respect to the issuance of further revenue bonds.

97 S.E.2d 213. The Supreme Court repeated this holding in *State ex rel McLeod v. McGinnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982): "We held that where the public interest is involved, the rule requiring the existence of a justiciable controversy is somewhat relaxed." See also, *Palmer v. Dunn*, 216 S.C. 558, 559, 59 S.E.2d 158, 159 (1950) ("This Court took original jurisdiction of the controversy because of its urgency and public importance"); *Thompson v. South Carolina Commission on Alcohol and Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719, 85 A.L.R.3d 692 (1976) ("the rule [of standing] is not an inflexible one, and we are of the opinion that the questions involved are of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action"); *Gilstrap v. South Carolina Budget & Control Bd.*, 310 S.C. 210, 213, 423 S.E.2d 101, 103 (1992) ("[T]he questions involved here are of such wide concern that the rules on standing will not be inflexibly applied").

In *Sloan v. Dept. of Transportation*, the Supreme Court analyzed the public importance exception.

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).... Furthermore, "[s]tanding may be conferred upon a party 'when an issue is of such public importance as to

GT 12

require its resolution for future guidance.' " *Sloan v. Wilkins*, 362 S.C. at 436-37, 608 S.E.2d at 583 (quoting *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)).

The Court of Appeals has stated that "[t]he expenditure of public funds pursuant to a competitive bidding statute is of immense public importance." *Sloan v. School Dist. of Greenville County*, 342 S.C. at 524, 537 S.E.2d at 303. Numerous other jurisdictions which have addressed taxpayer standing when the issue involves competitive bidding requirements have specifically found that competitive bidding laws are for the benefit of taxpayers. *See id.* at 521-22, 537 S.E.2d at 302-03 (and cases cited therein). Indeed, the requirement 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." *Id.* at 524, 537 S.E.2d at 303.

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, 169, 666 S.E.2d 236, 240 (2008).

The South Carolina Supreme Court has ruled many times that public interest standing should be granted to address issues of great public importance. *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); Defendants' well-publicized projections indicate the Penny Tax will result in more than \$1 billion in extra revenues and expenditures by Richland County. Plaintiffs' allegations of illegal use of these funds make this an issue of

GT 13

great public importance. Accordingly, this body of case law leans strongly toward the conclusion that Plaintiffs should be granted standing based on the public importance of the issues they raise.

II. THE STATUTES OF LIMITATION HAVE NOT EXPIRED.

Plaintiffs have asserted seven statutory and constitutional violations. Defendants have asserted a statute of limitations defense. However, they have not articulated a sufficient rationale for such an argument.

A. The Breadth of the Ordinance Exceeds the Statute.

First, Plaintiffs have alleged that the breadth of the enabling ordinance exceeds the statute authorizing the Penny Tax. The South Carolina General Assembly enacted Title IV, Chapter 37 of the South Carolina Code Annotated entitled "Optional Methods for Financing Transportation Facilities" which authorizes counties to adopt an ordinance imposing a sales and use tax for "financing transportation facilities."

Richland County adopted Ordinance Number 039-12HR ("Ordinance") to levy and impose a 1% sales and use tax subject to a referendum within Richland County pursuant to S.C. Code Ann. § 4-37-30. Ordinance Number 039-12HR purported to adopt a 1% tax not only for "highways, roads, streets, [and] bridges" but also for "pedestrian sidewalks [and] bike paths and lanes." *Id.* Section 1(b). Ordinance Number 039-12HR also purported to adopt a 1% tax for "continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements." *Id.*, Section 2. (c), Project 2. Plaintiffs contend that using the proceeds of the 1% tax for "continued operation of mass transit services" does not comport

GZ 14

with the stated statutory purpose of the 1% tax: "financing transportation facilities" and accordingly, Plaintiffs contend those provisions are unlawful.

Ordinance Number 039-12HR also purported to adopt a 1% tax for "improvements to pedestrian sidewalks [and] bike paths." *Id.*, Section 2 (c), Project 3. Plaintiffs contend that using penny tax funds to "Pedestrian sidewalks [and] bike paths and lanes" is not authorized by S.C. Code Ann. § 4-37-30, and accordingly, Plaintiffs contend those provisions are unlawful. The ongoing unlawful expenditures are not barred by the statute of limitations.

B. Defendants violated S.C. Code Ann. § 11-35-50.

Second, Plaintiffs have alleged that Defendants have violated S.C. Code Ann. § 11-35-50 which requires all political subdivisions to "adopt ordinances or procedures embodying sound principles of appropriately competitive procurement." One of the "sound principles of appropriately competitive procurement" is directing procurement decisions in "the appropriate chief procurement officer." S.C. Code Ann. § 11-35-510. Procurements from the proceeds of the penny sales tax are not made by the chief procurement officer, or even by the procurement department consisting of procurement professionals, but rather they are made by the members of the County Council, in contrast to and isolated from all other procurements of Richland County. Plaintiffs contend these political decisions have departed from "sound principles of appropriately competitive procurement." S.C. Code Ann. § 11-35-50. The claim based on this ongoing violation is not barred by the statute of limitations.

G07 15

C. Defendants Have Exceeded the Scope of S.C. Code Ann. § 4-37-30.

Third, Plaintiffs have alleged that Richland County has used the proceeds of the 1% tax for expenditures that do not fall within the scope of S.C. Code Ann. § 4-37-30, including millions of dollars for public relations contracts not related to specific transportation facilities, contracts for administration not related to specific transportation facilities, training programs not related to specific transportation facilities, and the expenditure of \$619,457 for the creation of the Small Local Business Enterprise Program not related to specific transportation facilities. Accordingly, Plaintiffs contend all the foregoing contracts and expenditures were unlawful. Claims based on these unlawful expenditures are not barred by the statute of limitations.

D. Defendants Failed to Publicize an Annual Audit.

Fourth, Plaintiffs have alleged that Defendants have failed to make such spending subject to an annual independent audit made available to the public. The Ordinance states, "All spending shall be subject to an annual independent audit to be made available to the public." *Id.*, Section 2. (c). Accordingly, Plaintiffs contend all such spending pursuant to this ordinance is unlawful. This claim is based on the Defendants' ongoing failure to publicize an annual audit and is not barred by the statute of limitations.

E. Defendants Failed to Make and Publicize an Annual Budget.

Fifth, Plaintiffs have alleged that Defendants have failed to make annual budgets available to the public of such expenditures of sales and use tax revenues. The Ordinance states, "County Council shall adopt annually prior to the beginning of each fiscal year a budget for expenditures of Sales and Use Tax revenues." *Id.*, Section 3. (b). Accordingly, Plaintiffs contend all such spending pursuant to this ordinance is unlawful. The claim

GT 16

based on the Defendants' failure to make and publicize an annual budget is not barred by the statute of limitations.

F. Defendants Failed to Require Annual Audits from Agencies Receiving Appropriations from the Penny Tax.

Sixth, Plaintiffs alleged that Defendants have failed to require annual independent audits from agencies receiving appropriations from the Penny Tax. The Ordinance states, "Except as specifically authorized by County Council, any outside agency organization receiving an appropriation of the Sales and Use Tax must provide to County Council an independent annual audit of such agency organization financial records and transactions and such other and more frequent financial information as required by County Council, all in form satisfactory to County Council." *Id.*, Section 2. (c). Accordingly, Plaintiffs contend all spending pursuant to this ordinance is unlawful. This claim is based upon the Defendants' ongoing failure to require annual audits from agencies receiving appropriations from the penny tax and is not barred by the statute of limitations.

G. Defendants Failed to Follow Mandatory Procurement Laws.

Seventh, Plaintiffs have alleged that Defendants have failed to comply with S.C. Code Ann. § 4-37-25. Ordinance Number 039-12HR states, "The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and the conditions or restrictions on the use and expenditure of sales and use tax revenue established by the act, the provisions of this Ordinance, and other applicable law." *Id.* One of the "conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenue established by the Act" (Ordinance, Section 1 (c)) is set out in S.C. Code Ann. § 4-37-25: "When procuring the construction, maintenance, and repair of bridges, highways, and roads, an authority

SoTe 17

must use the same procurement methods and apply the same procurement requirements used by and applied to the South Carolina Department of Transportation in the construction, maintenance, and repair of bridges, highways, and roads." Plaintiffs contend Defendants have failed to comply with these provisions. This claim is based on the Defendant's failure to follow mandatory procurement laws and is not barred by the statute of limitations.

The Plaintiffs' allegations of statutory violations and constitutional violations are ongoing. Therefore they are not susceptible to a motion to dismiss based on a statute of limitations defense. Accordingly, the Motion to Dismiss based on the statute of limitations is denied.

III. THE MOTION FOR JUDGMENT ON THE PLEADINGS IS DENIED.

Defendants moved the Court for Judgment on the Pleadings as to the Plaintiffs' First Cause of Action. Plaintiffs ask the Court to rule that Ordinance Number 039-12HR exceeds the statutory authority of S.C. Code Ann. § 4-37-30, by purporting to use the 1% sales tax to finance "continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements;" and "pedestrian sidewalks [and] bike paths and lanes."

Plaintiffs contend that the South Carolina General Assembly enacted Title IV, Chapter 37 of the South Carolina Code Annotated entitled "Optional Methods for Financing Transportation Facilities" which authorizes counties to adopt an ordinance imposing a sales and use tax for "financing transportation facilities." Plaintiffs further contend that the authorizing statute establishes the kinds of "transportation facilities" for which such "optional methods of financing" may be used: "highways, roads, streets,

GT 18

bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects" S.C. Code Ann. 4-37-30(a)(1).

Richland County adopted Ordinance Number 039-12HR ("Ordinance") to levy and impose a 1% sales and use tax subject to a referendum within Richland County pursuant to S.C. Code Ann. § 4-37-30. The Ordinance states, "The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenues established by the Act, the provisions of this Ordinance, and other applicable law." *Id.*, Section 1 (c).

Ordinance Number 039-12HR also purported to adopt a 1% tax for "continued operation" of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements." *Id.*, Section 2. (c), Project 2. Plaintiffs contend that using the proceeds of the 1% tax for "continued operation of mass transit services" does not comport with the stated statutory purpose of the 1% tax: "financing transportation facilities" and accordingly, those provisions are unlawful.

Plaintiffs contend that this tax was authorized for capital projects, "facilities." They contend it was not authorized for "continued operation" of the mass transit system. The statute authorizes this Penny Tax only for a limited number of years. If these funds are used for the "continued operation" of the mass transit system, what will be the source of the "continued funding" when the statutory authorization for the Penny Tax expires?

GC 19

Ordinance Number 039-12HR also purported to adopt a 1% tax for "improvements to pedestrian sidewalks [and] bike paths." *Id.*, Section 2 (c), Project 3. Direction of penny tax funds to "Pedestrian sidewalks [and] bike paths and lanes" are not authorized by S.C. Code Ann. § 4-37-30, and accordingly, those provisions are unlawful.

The Court finds that the issue in the First Cause of Action is not one that should be decided on judgment on the pleadings, but rather should be developed factually and legally through the course of the litigation. There has been no discovery in this case, and defendants have not met their burden for the Court to award Judgment on the Pleadings at this time. Accordingly, the Motion for Judgment on the Pleadings is denied at this time.

IV. RICHLAND COUNTY IS SUBSTITUTED AS A DEFENDANT.

Richland County Council asserted that it is not a properly named defendant in this action. Plaintiffs contended that the naming of a public official as a defendant in his official capacity is equivalent to naming the entity of that official represents. "Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Department of Social Services*, 436 U.S. 658 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Nevertheless, Plaintiffs moved in open court to substitute Richland County as a Defendant in the place of Richland County Council, and the Court granted the motion. Accordingly, this issue is moot.

GE 20

CONCLUSION

The Motions to Dismiss are denied, the Motion for Judgment on the Pleadings is denied, and Richland County is substituted as a Defendant in the place of Richland County Council.

SO ORDERED, this 3rd day of MARCH, 2017.


G. Thomas Cooper
Circuit Judge Presiding



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP402875

South Carolina Public Interest Foundation, et al

Richland County

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: Dismissed without prejudice
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

DEFENDANT RICHLAND COUNTY'S MOTION TO DISMISS OR ALTERNATIVELY FOR JUDGMENT ON THE PLEADINGS IS UNDER ADVISEMENT

DEFENDANT CMRTA'S MOTION TO DISMISS IS UNDER ADVISEMENT

PLAINTIFF PUBLIC INTEREST FOUNDATION'S MOTION TO AMEND PLEADINGS TO ADD RICHLAND COUNTY AS A DEFENDANT IS GRANTED

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code 2126

Date 2-26-17

For Clerk of Court Office Use Only

This judgment was entered on the 24 day of Feb, 2017 and a copy mailed first class or placed in the appropriate attorney's box on this 24 day of Feb, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

James Carpenter

SCRCP Form 4C (10/2011)

Andrew Lindemann; Robert Tyson; Ray Stevens; Larry Smith; Elizabeth Van Doren Gray; Alexis Lindsay

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4002875

South Carolina Public Interest Foundation

Richland County

William B DePass Jr

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2164 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 21 day of Nov, 20 16 and a copy mailed first class or placed in the appropriate attorney's box on this 21 day of Nov, 20 16 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

Elizabeth Van Doren Gray

Andrew F. Lindemann

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

SCRPC Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest	)	Civil Action No. 2016-CP-40-02875
Foundation, and William B. DePass, Jr.,	)	
individually, and on behalf of all others	)	
similarly situated,	)	
	)	
	)	
Plaintiff,	)	<u>CONSENT SCHEDULING ORDER</u>
vs.	)	
Richland County,	)	
	)	
Defendant,	)	
	)	
Central Midlands Regional Transit	)	
Authority,	)	
Intervenor Defendant.	)	

RICHLAND COUNTY
 FILED
 2016 NOV 18 AM 9:37
 JEANETTE W. McBRIDE
 C.C.P. & G.S.

This matter comes before the Court, pursuant to Rules 16(d) and 26(f) of the South Carolina Rules of Civil Procedure. With the consent for all parties, it appears to this Court that a Scheduling Order is appropriate in this case, and therefore the Court enters the following:

IT IS THEREFORE ORDERED THAT:

1. Motions to Dismiss shall be heard by January 17, 2017.
2. Discovery shall be completed by July 17, 2017.
3. Mediation shall be heard on or before August 17, 2017.
4. All dispositive motions shall be filed no later than September 18, 2017.
5. The date this case shall be called for trial shall be no earlier than October 18, 2017.

IT IS SO ORDERED.


 Honorable G. Thomas Cooper, Jr.
 Fifth Judicial Circuit

Columbia, South Carolina
 November 17, 2016

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2016CP4002875**

South Carolina Public Interest Foundation

Richland County

William B DePass Jr

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
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If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code 2161

Date

For Clerk of Court Office Use Only

This judgment was entered on the 8 day of Sept, 2016, and a copy mailed first class or placed in the appropriate attorney's box on this 8 day of Sept, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

Elizabeth Van Doren Gray

Andrew F. Lindemann

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

South Carolina Public Interest Foundation) Civil Action No. 2016-CP-40-02875
and William B. DePass, Jr., individually,)
and on behalf of all others similarly)
situated,)

Plaintiff,)

vs.)

Richland County,)

Defendant,)

Central Midlands Regional Transit)
Authority,)

Intervenor Defendant.)

**CONSENT ORDER FOR COMPLEX
CASE DESIGNATION**

RECEIVED
2016 SEP -6 PM 4:27
CLERK OF COURT
G.S. 1-361106

This Motion comes before me upon motion of Intervenor Defendant Central Midlands Regional Transit Authority ("CMRTA"), by and with consent of the Plaintiffs and the Defendant, for designation of this action as a complex case.

The parties have waived their respective rights for notice or opportunity for a hearing as provided by statute and/or under the South Carolina Rules of Civil Procedure.

In a case with similar facts and legal issues, the case was designated complex and assigned to Judge G. Thomas Cooper. See *Richland County, SC, and CMRTA v. SCDOR and Rick Reames, III, in his Official capacity as its Director v. Richland PDT, a joint venture consisting of M.B. Kahn Construction Company, Inc., ICA Engineering, Inc., and Brownstone Construction Group, LLC*, as a unit and individually, *CA# 16-CP-40-310*.

Both cases challenge the validity of Richland County's Ordinance authorizing a penny tax and the use of penny tax funds by Richland County. It is expected there will be significant discovery

sought in this case because of the issues in the case and there may be similar legal and administrative issues that would require duplication of, and potential inconsistent results, were the cases not assigned to the same trial judge. Thus, in this Court's interest in judicial economy and efficacy, and applicable law, I hereby find and conclude that this case meets the criteria for designation as a Complex Case, and hereby so designate this case as complex and assign this case to the Honorable G. Thomas Cooper for the future handling of all matters relating to this case, including trial.

AND IT IS SO ORDERED.


DeAndrea G. Benjamin
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina
Date: 8-31-16

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGM IN A CIVIL CASE

CASE NUMBER: 2016CP4002875

South Carolina Public Interest Foundation

Richland County

William B DePass Jr

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit);
☐ Rule 43(k), SCRCF (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCF; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 28 day of July, 20 16 and a copy mailed first class or placed in the appropriate attorney's box on this 28 day of July, 20 16 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

Elizabeth Van Doren Gray

Andrew F. Lindemann

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeannette W. McBride

SCRCF Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation
and William B. DePass, Jr., individually,
and on behalf of all others similarly
situated,

Plaintiff,

vs.

Richland County,

Defendant.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) Civil Action No. 2016-CP-40-02875

ORDER

RICHLAND COUNTY
FILED
2016 JUL 27 AM 11:45
JEANETTE W. MCBRIDE
C.C.P. & G.S.

On July 7, 2016, Central Midlands Regional Transit Authority ("CMRTA") moved to intervene as a defendant-intervenor in the above-captioned matter. CMRTA informs the Court that all parties either consent or do not object to the motion; thus, the Court having considered this Motion, finds that it is meritorious and should be granted.

THEREFORE IT IS ORDERED that CMRTA is permitted to intervene in this action as a defendant.

AND IT IS SO ORDERED.


DeAndrea G. Benjamin.
Judge, Fifth Judicial Circuit

Columbia, South Carolina
July 27, 2016

SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,

Plaintiff(s)

vs.

Richland County

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2016 - CP - 40 - 2835

(Please Print)

Submitted By: James G. Carpenter
Address: 819 E. North St., Suite 230
Greenville, SC 29601

SC Bar #: 1136
Telephone #: 864-235-1269
Fax #: 864-331-3058
Other:
E-mail: james.carpenter@carpenterlawfirm.net

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)

- Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399)

- Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

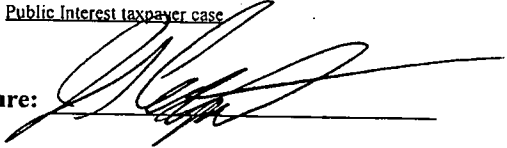
- Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

- Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

- Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☒ Other (699)

Public Interest taxpayer case

Submitting Party Signature: 

Date: May 5, 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Murray, Lexington, Richland, Greenville, and Anderson**
** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,
and William B. DePass, Jr., individually,
and on behalf of all others similarly
situated,
Plaintiffs,

v.

Richland County,
Defendants.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-_____

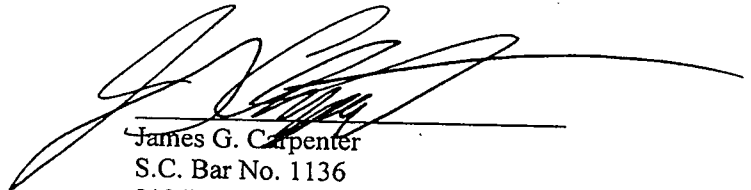
SUMMONS

RICHLAND COUNTY
FILED
2016 MAY - 9 AM 10:42
JEANNE D. V. ROBERTS
C.C.P. & G.S.

TO THE DEFENDANTS:

You are hereby summoned and required to serve upon the attorney at the address below an Answer to the attached Complaint within 30 days of the date of service hereof. If you fail to do so, judgment by default will be entered against you for the relief demanded in the Complaint.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiff

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

South Carolina Public Interest Foundation,) and William B. DePass, Jr., individually,) and on behalf of all others similarly) situated,)
Plaintiffs,)

v.)

Richland County Council,)
Defendants.)

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-_____

**COMPLAINT FOR
DECLARATORY JUDGMENT**

RICHLAND COUNTY
FILED
2016 MAY -9 AM 10:42
JERAMIE W. HOSKINS
C.C.P. & G.S.

NOW COME the Plaintiffs, by their undersigned attorney, and as a Complaint against the Defendants, would show unto the Court:

1. Plaintiff South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution and statutes.
2. Plaintiff William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County. He brings this action individually and on behalf of all others similarly situated.
3. Defendant Richland County Council is the governing body of Richland County, South Carolina.
4. This Court possesses jurisdiction under the South Carolina Constitution, Art. VIII, § 13(D); and under the following decisions, which address public interest and taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572,

677 S.E.2d 16 (2009), *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. Richland 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); and under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act.

5. This action raises Constitutional and statutory issues of great public importance, and, Plaintiffs ask the Court to grant them standing based upon the great public importance of the Constitutional issues this action raises.
6. DePass also possesses standing to bring this lawsuit as a Richland County taxpayer.
7. The South Carolina General Assembly enacted to Title IV, Chapter 37 of the South Carolina Code Annotated entitled “Optional Methods for Financing **Transportation Facilities**” (emphasis added), which authorizes counties to adopt an ordinance imposing a sales and use tax for “financing **transportation facilities**” (emphasis added).

8. The authorizing statute sets out the kinds of “transportation facilities” for which such “optional methods of financing” may be used: “highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects” S.C. Code Ann. 4-37-30(a)(1) (emphasis added).
9. Richland County adopted Ordinance Number 039-12HR (“Ordinance”) to levy and impose a 1% sales and use tax subject to a referendum within Richland County pursuant to S.C. Code Ann. § 4-37-30.
10. The Ordinance states, “The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenues established by the Act, the provisions of this Ordinance, and other applicable law.” *Id.*, Section 1 (c).

First Cause of Action
Ordinance Exceeds the Scope of S.C. Code Ann. § 4-37-30

11. Plaintiffs incorporate by reference all the foregoing allegations.
12. Ordinance Number 039-12HR purported to adopt a 1% tax not only for “highways, roads, streets, [and] bridges” but also for “pedestrian sidewalks [and] bike paths and lanes.” *Id.* Section 1. (b).
13. Ordinance Number 039-12HR also purported to adopt a 1% tax for “continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements.” *Id.*, Section 2. (c), Project 2 (emphasis added).

14. Using the proceeds of the 1% tax for “continued operation of mass transit services” (emphasis added) does not comport with the stated statutory purpose of the 1% tax: “financing transportation facilities” (emphasis added) and therefore, those provisions are unlawful.
15. Ordinance Number 039-12HR also purported to adopt a 1% tax for “improvements to pedestrian sidewalks [and] bike paths.” *Id.*, Section 2 (c), Project 3.
16. “Pedestrian sidewalks [and] bike paths and lanes” are not authorized by S.C. Code Ann. § 4-37-30, and therefore, those provisions are unlawful.

Second Cause of Action
Procurements Exceed the Scope of S.C. Code Ann. § 4-37-30

17. Plaintiffs incorporate by reference all the foregoing allegations.
18. Procurements from the proceeds of the penny sales tax are not made by the procurement department consisting of procurement professionals, but rather they are made by the members of the County Council, separate from all other procurements of Richland County.
19. Richland County has used the proceeds of the 1% tax for expenditures that do not fall within the scope of S.C. Code Ann. § 4-37-30, including
 - a. millions of dollars for public relations contracts not related to specific transportation facilities,
 - b. contracts for administration not related to specific transportation facilities,
 - c. training programs not related to specific transportation facilities, and
 - d. the expenditure of \$619,457 for the creation of the Small Local Business Enterprise Program, not related to specific transportation facilities;therefore, all the foregoing contracts and expenditures were unlawful.

**Third Cause of Action
No Annual, Independent, Public Audit**

20. Plaintiffs incorporate by reference all the foregoing allegations.
21. The Ordinance states, "All spending shall be subject to an annual independent audit to be made available to the public." *Id.*, Section 2. (c).
22. Upon information and belief, Defendants have failed to make such spending subject to an annual independent audit made available to the public. Therefore all such spending pursuant to this ordinance is unlawful.

**Fourth Cause of Action
No Annual Budget**

23. Plaintiffs incorporate by reference all the foregoing allegations.
24. The Ordinance states, "County Council shall adopt annually prior to the beginning of each fiscal year a budget for expenditures of Sales and Use Tax revenues." *Id.*, Section 3. (b).
25. Upon information and belief, Defendants have failed to make such spending subject to an annual budget for expenditures of sales and use tax revenues made available to the public. Therefore all such spending pursuant to this ordinance is unlawful.

**Fifth Cause of Action
No Annual, Independent Audits of Agencies Receiving Appropriations**

26. Plaintiffs incorporate by reference all the foregoing allegations.
27. The Ordinance states, "Except as specifically authorized by County Council, any outside agency organization receiving an appropriation of the Sales and Use Tax must provide to County Council an independent annual audit of such agency organization financial records and transactions and such other and more frequent

financial information as required by County Council, all in form satisfactory to County Council.” *Id.*, Section 2. (c).

28. Upon information and belief, Defendants have failed to require such annual independent audits from such agencies. Therefore all such spending pursuant to this ordinance is unlawful.

Sixth Cause of Action
Violation of S.C. Code Ann. § 4-37-25

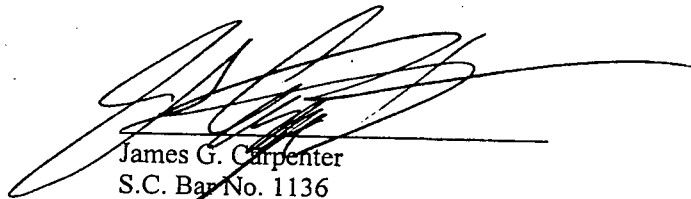
29. Plaintiffs incorporate by reference all the foregoing allegations.
30. Ordinance Number 039-12HR states, “The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and the conditions or restrictions on the use and expenditure of sales and use tax revenue established by the act, the provisions of this Ordinance, and other applicable law.” *Id.*,
31. One of the “conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenue established by the Act” (Ordinance, Section 1 (c)) is set out in S.C. Code Ann. § 4-37-25: “When procuring the construction, maintenance, and repair of bridges, highways, and roads, an authority must use the same procurement methods and apply the same procurement requirements used by and applied to the South Carolina Department of Transportation in the construction, maintenance, and repair of bridges, highways, and roads.”
32. Upon information and belief, the Defendants have failed to comply with S.C. Code Ann. § 4-37-25.

WHEREFORE, Plaintiffs pray the Court:

1. Rule that Ordinance Number 039-12HR exceeds the statutory authority of S.C. Code Ann. § 4-37-30, by purporting to use the 1% sales tax to finance:
 - a. “continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements;” and
 - b. “pedestrian sidewalks [and] bike paths and lanes;”
2. Rule that the Defendants’ procurements relating to the Small Local Business Enterprise Program exceeding the scope of S.C. Code Ann. § 4-37-30 and were illegal;
3. Rule that Defendants’ failure to make spending pursuant to the ordinance subject to an annual independent audit made available to the public, and all such spending pursuant to this ordinance is unlawful;
4. Rule that Defendants’ failure to make spending of funds from the Sales and Use Tax subject to a budget for expenditures of sales and use tax revenues, and all such spending is unlawful;
5. Rule that Defendants failure to require annual independent audits from agencies receiving funds from the sales and use tax and all appropriations to such agencies are unlawful;
6. Rule that Defendants’ failure to “use the same procurement methods and apply the same procurement requirements used by and applied to the South Carolina Department of Transportation in the construction, maintenance, and repair of bridges, highways, and roads” is unlawful;

7. Enjoin all future expenditures from the proceeds of the penny sales tax until Defendants comply fully with all aspects of State law related to the penny sales tax;
8. Enjoin Defendants to recover all expenditures made from the penny sales tax proceeds in violation of State law;
9. Grant Plaintiffs their costs and attorneys' fees under S.C. Code Ann. § 15-77-300 ff.; and
10. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

May 5, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest Foundation	)	Civil Action No. 2016-CP-40-02875
and William B. DePass, Jr., individually,	)	
and on behalf of all others similarly	)	
situated,	)	
	)	
Plaintiff,	)	<u>MOTION TO INTERVENE BY THE</u>
	)	<u>CENTRAL MIDLANDS REGIONAL</u>
vs.	)	<u>TRANSIT AUTHORITY</u>
	)	
Richland County,	)	
	)	
Defendant.	)	

Central Midlands Regional Transit Authority ("CMRTA") hereby moves, pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, for an order permitting it to intervene as a Defendant in the above-captioned matter for the purpose of moving, responding and answering to the Complaint filed by the South Carolina Public Interest Foundation and William B. DePass, Jr. (hereinafter "Plaintiffs").

LAW AND ARGUMENT

A. CMRTA may intervene as a matter of right.

Rule 24(a) provides that "[u]pon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." The party seeking intervention must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate

that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. *Berkeley Electric Coop., Inc. v. Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties. *Id.* Accordingly, the Court should consider the practical implications of a decision denying or allowing intervention. *Id.*

First, CMRTA is filing this motion within two months of the date the Complaint was filed and prior to Defendant Richland County filing a response. Therefore, this application is timely.

Next, CMRTA has an interest in the subject of this action and must be able to intervene to protect that interest. Plaintiffs have alleged in their complaint Richland County Ordinance 039-12HR "purported to adopt a tax for continued 'operation' of the mass transit services provided by Central Midlands Regional Transit Authority" exceeded the scope of South Carolina statute S.C. Code Ann. § 4-37-30. Complaint, ¶ 13. In their prayer for relief, Plaintiffs seek to enjoin all future expenditures from the proceeds of the penny sales tax until Richland County complies fully with all aspects of state law and to enjoin Richland County to recover all expenditures made from the penny sales tax proceeds in violation of state law. Complaint, pp. 7-8. The CMRTA receives 29% of the Penny Tax Richland County receives every quarter from the South Carolina Treasurer. As a principal recipient of the Richland County Penny Tax money, the CMRTA has an interest in a dispute involving the disbursement of those funds. As reflected in the Affidavit of Dr. Robert Schneider, Executive Director of the CMRTA, the CMRTA is dependent on the proceeds of the Penny Tax for its operation, and without such funding the bus system operated by the CMRTA

would be diminished significantly, and Richland County residents would lose transportation services essential to their daily lives.¹

Additionally, Plaintiffs seek a declaration by the Court that Richland County Ordinance No. 0398-12HR is illegal since it exceeds the statutory authority of S.C. Code Ann. § 4-37-30 by authorizing the “continued operation of mass transit services...” Complaint, ¶ 14. If the Plaintiffs prevail on this allegation, the CMRTA bus system will be out of business because the vast majority of its funding will be eliminated, and other funding sources are insufficient to operate the bus systems at existing levels. The residents of Richland County who utilize the bus system and the DART service will incur significant inconvenience and inability to travel to work, to seek medical assistance and to have access to public transportation for personal needs. CMRTA should be allowed to intervene in this action to protect its interests and to defend such allegations.

Finally, CMRTA cannot rely on Richland County to protect its interests. Richland County, like the CMRTA, is uniquely connected to the Penny Tax revenues; thus, CMRTA must intervene to litigate the issues with respect to it.

B. The Court should exercise its discretion and allow CMRTA to intervene.

Rule 24(b), SCRPC, allows the Court, in its discretion, to permit a party to intervene when that party’s claim and the main action have a question of law or fact in common. This case centers around the Plaintiff’s attempt to invalidate the ordinance and stopping penny tax expenditures from being used on operations. The CMRTA depends on those revenues to operate and, like the county, has an interest in the determination of the validity of the Ordinance to avoid restricted access to these funds. There exist common questions of law or fact which warrant intervention. In addition,

¹ See Affidavit of Dr. Robert Schneider, previously filed in a related case, *Richland County v. South Carolina Department of Revenue*, Civil Action No. 16-CP-40-3102. Attached hereto as Exhibit A.

this case was filed only recently, and the requested intervention will not delay or prejudice the adjudication of the rights of the parties. As such the Court should permit the requested intervention under South Carolina Rule of Civil Procedure 24(b).

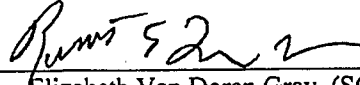
CMRTA preserves all its rights and upon a ruling by the Court, CMRTA will file its response.

Counsel for Richland County does not oppose this Motion. Counsel for Plaintiffs consents to this Motion.

CONCLUSION

For the reasons set forth above, CMRTA requests an Order permitting it to intervene in this action as a Defendant. This motion is based upon the South Carolina Rules of Civil Procedure, the record on file in this matter, and any legal memoranda which may be submitted prior to the hearing on this motion.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 
Elizabeth Van Doren Gray (SC Bar No. 2434)
egrav@sowellgray.com
Robert E. Tyson, Jr. (SC Bar No. 10820)
rtvson@sowellgray.com
Alexis K. Lindsay (SC Bar No. 78049)
alindsay@sowellgray.com
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400 Telephone
(803) 929-0300 Fax

*Attorneys for Central Midlands Regional Transit
Authority*

Columbia, South Carolina
July 7, 2016

Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

)
)
)

AFFIDAVIT OF
ROBERT A. SCHNEIDER

PERSONALLY APPEARED before me, Robert A. Schneider, who being duly sworn,
deposes and says as follows:

1. I am 40 years old, competent to make the statements herein, and have personal knowledge of the statements herein.

2. My educational experience includes a Bachelor of Science, Western Carolina University; Master of Public Administration and Doctor of Philosophy, University of Tennessee. My professional experience includes seventeen years of continually progressive experience in the mass transit industry to include expertise in award-winning operations, maintenance, and planning functions in Knoxville, TN (1999-2007); General Manager with Veolia/TransDev in Boise, ID (2007-2011). and Executive Director of the Central Midlands Regional Transit Authority d/b/a The COMET ("The COMET") in Columbia, SC (2011-current).

3. Prior to the Transportation Penny ("Transportation Penny" or "Penny") becoming available, The COMET relied heavily upon contributions from the City of Columbia and Richland County, the total of which allowed for a very limited level of service.

4. Beginning in May 2012, and based upon a balanced budget service plan, The COMET operated approximately 225 hours of weekday fixed route transit service and approximately 90 hours per Saturday. There was no transit service available on Sundays or most holidays. On weekdays, routes operated from approximately 6:00 a.m. until 7:15pm, with no service during mid-day periods or Saturdays on a number of routes. Most routes operated on a



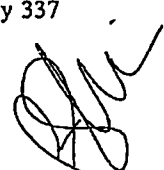
60-minute frequency (a bus would travel past a bus stop every 60 minutes) on a fleet of aged vehicles with no available access to any authority-owned shelters or benches.

5. DART, or Dial-A-Ride Transit is a service for persons with disabilities that operates at the same days, hours and availability (complements) as fixed route transit. If a route is not operational in the mid-day, DART riders in that area did not receive transit service, as there would be no complementary fixed route bus available.

6. The COMET now relies heavily upon its allocation of the Transportation Penny. For the July 1, 2015 – June 30, 2016 budget period, \$14,229,000 in Penny funds was allocated by Richland County government to fund on-street operations for transit services. The Penny amount budgeted for the upcoming fiscal year of July 1, 2016 – June 30, 2017 is \$16,779,545.

7. The revenue received by The COMET from the Transportation Penny is used to directly fund hourly services for fixed route and ADA paratransit service. This includes wages, fringes, fuel and associated costs such as on-street supervision, information, and operation of the transit center. The Penny also funds support functions for vehicle maintenance, facilities maintenance of both the transit center and operations & maintenance facilities, utilities, employee training, industrial safety program and oversight, financial support, human resources, planning capacity, community information and transit-based technology. The Penny funds also provide matching funds for capital purchases to include vehicles, shelters, benches, fleet parts and inventory and necessary facility upkeep and maintenance.

8. Based upon the availability of the Transportation Penny, service levels are significantly higher than could be previously provided. Current service levels are approximately 602 hours of weekday transit revenue hours across 28 transit routes, with service beginning as early as 5:15 a.m. and ending at 12:30 a.m. (after midnight). On weekends approximately 337

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hours of service are provided on both Saturday and Sunday, across a span from 6:00 a.m. to 10:30 p.m.. Service has expanded to approximately 40 square miles of rural area service, including outlying incorporated and unincorporated communities. The Penny tax dollars also fund DART services for persons with disabilities, many of who are unable to drive or access traditional means of transportation or navigate street networks.

9. The COMET is projected to serve 2.5 million passengers in CY2016 based upon year-to-date ridership data, which averages 48,000 trips per week. The COMET fixed route transit system serves an aggregate of 8700 trips week, fluctuating by time of the year. A significant amount of the service provides transit access to low-income and minority communities along corridors with high concentrations of public or subsidized housing. The US Census Bureau identifies more than 2,000 unique working individuals that are below the poverty level and identified at "transit dependent" within Richland County, as well as 250 workers in Lexington County (American Community Survey data, accessed 5/19/2016). Per the ACS data, more than 17% of Richland County is at or below the poverty level, with more than 62,000 residents. For Lexington County, similar numbers of 38,000, which is 14% of that county's population

10. National statistics note that nearly 70% of transit trips are work or school-based with approximately 10% for medical and essential shopping services (A Profile of Public Transportation Passenger Demographics and Travel Characteristics Reported in On-Board Surveys, May 2007).

11. Nearly 100% of DART riders are transit dependent, as they are unable to use fixed route services due to documented disability that limits mobility. Paratransit vehicles make approximately 761 trips per week. A substantial population is unable to obtain a driver's license

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due to their disability, which may include blindness, deafness, cerebral palsy, or multiple sclerosis. A significant portion of passengers are senior citizens with medical conditions that prohibit automobile use. There are approximately 4,000 eligible and registered DART passengers in Richland County.

12. The ADA does not allow for priority of trips (medical is not more important than social), as such close analysis of trips is not possible without asking customers the purpose of a visit to a location (work, shopping, illness, etc.). However, a sample of DART passenger trips from recent travel in May 2016 shows at least 25% of trips to employment centers and approximately 25% to medical appointments, with trips for groceries, church or other purposes comprising the remaining trip purpose. High-traffic areas include the four major hospitals in the region, along with subscription services to dialysis clinics, physical therapy, or oncology for treatment.

13. If the Transportation Penny is withheld, The Comet will only be able to operate at current levels until approximately Sunday, August 14, 2016. At that point, all services would have to be suspended indefinitely, including fixed route transit, rural transit, and ADA/DART service. A "scaled-down" service plan would not be feasible, as the available time to reduce service is insufficient to hold the requisite hearings, hold required public meetings, provide notices to general public of changes and then implement reductions. There is also insufficient time to provide notices to vendors and key contractors (including penalty payments for early termination, where applicable), and employee lay-offs (approximately 150 workers).

14. Additionally, necessary funds would have to be withheld to provide basic facilities maintenance and security, despite being operationally dormant. Funds would also be

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set aside for insurance, basic utilities, and rudimentary personnel to maintain the basic financial obligations and reporting, as required by rule and policy.

15. Moreover, in the past five years, The COMET has purchased more than \$27,000,000 in vehicles, major equipment, facility construction and upgrades and materials, which have not met their useful life. These purchases were made using federal Department of Transportation grants of 80% - 100% of purchase price; with The COMET providing 0% - 20%, depending on the purchase)). Under federal guidelines the transit system would be required to reimburse the federal government for the unused portions of the federal grants, estimated to be as much as \$17,500,000, dependent on the age of equipment at actual suspension on a straight-line depreciation model.

16. The COMET uses Governmental Accounting Standards to report its financial activities, including the receipt and expenditure of the Penny Tax funds. The COMET's financial statements are also annually subject to audits which are conducted in accordance with Government Auditing Standards, as required by the Comptroller General of the United States. Neither of these standards are directly related to the Internal Revenue Code Section 263.

17. Without the Transportation Penny funds, The COMET would essentially cease to operate, as any residual revenues would be necessary to maintain insurance, security, utilities and associated items.

18. The COMET is reliant on three other primary sources of revenue, excluding the penny sales tax, but are directly connected to the seed funds provided by the penny sales tax:

- a. State Mass Transit Fund (South Carolina Department of Transportation: \$460,000), which pays for approximately $\frac{1}{4}$ of the annual fuel requirement or operation of approximately two transit routes, but no utilities or staffing to support the system.



b. Passenger Fares (\$1,950,000), which are directly generated by transit services. The fares are collected from the passengers during the course of service and are reinvested in capital match for grants, payment of utilities or other transit-based activities. Without the Penny tax funds, these transit services still in operation would not generate more than 15% fare recovery, (estimated at \$12,000 annually).

Capital funds (\$0.00 - \$6,000,000 annually), which are used for capital purchases, reimbursement of expenses for support of capita items and other federally-allowed programs. Without the Penny Tax funds, grants could not be matched, services would not be delivered and there could be no additional capital purchases.

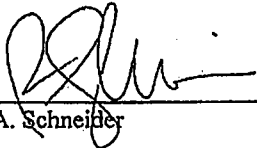
19. On May 12, 2016, The COMET sent a letter to Director Reames, South Carolina Department of Revenue ("SCDOR"), asking whether the SCDOR would withhold the Transportation Penny tax allocation from Richland County that was intended to be used for the operations of The COMET transportation system. (A true and correct copy of this letter is attached hereto as Exhibit A.)

20. On May 19, 2016, Milton G. Kimpson, Esquire sent a letter on behalf of Director Reames to me as Executive Director of The COMET stating: "As such, in the event the Penny Tax fund allocations are still being halted at the time of the normal July 2016 distribution, the Department will issue to Richland County the 29% of the revenue specified for (sic) COMET bus system operations." (A true and correct copy of this letter is attached hereto as Exhibit B.)

[Signature on next page]

A handwritten signature in black ink, appearing to be a stylized 'M' or 'G' followed by a flourish.

FURTHER AFFIANT SAYETH NOT!



Robert A. Schneider
Print Name here: Robert A. Schneider

Sworn to and subscribed before me

this 20 day of May, 2016

Lisa Gibson

Notary for South Carolina
Print Name here: Lisa Gibson
My Commission Expires: 2/8/2022

CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

**MOTION TO INTERVENE BY CENTRAL MIDLANDS
REGIONAL TRANSIT AUTHORITY**

Counsel Served:

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601
Attorneys for Plaintiffs

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568

Larry C. Smith, Esquire
Richland County Attorney
Post Office Box 192
Columbia, SC 29202


Christine L. Skalamera

July 7, 2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

v.

Richland County Council,
Defendant.

Civil Action No. 2016-CP-40-287

ANSWER TO AMENDED COMPLAINT

RICHLAND COUNTY
FILED
2016 JUL 15 PM 3:08
CLARENCE HICBRIDE
C.C.P. CLERK

The Defendant Richland County Council, reserving all rights pursuant to the Motion to Dismiss, or Alternatively, Motion for Judgment on the Pleadings filed contemporaneously herewith, answers the Plaintiffs' Amended Complaint herein as follows:

FOR A FIRST DEFENSE

1. The Defendant denies each and every allegation of the Plaintiffs' Amended Complaint not hereinafter specifically admitted, qualified, or explained.
2. As to the allegations set forth in Paragraph 1 of the Plaintiffs' Amended Complaint, the Defendant admits, upon information and belief, that the South Carolina Public Interest Foundation is a non-for-profit corporation organizing and existing under South Carolina law, but the Defendant lacks sufficient information to admit or deny the remaining allegations of Paragraph 1.
3. As to the allegations set forth in Paragraph 2 of the Plaintiffs' Amended Complaint, the Defendant admits, upon information and belief, that the Plaintiff Edward D. Sloan, Jr. is a

citizen, resident, taxpayer, and registered elector of Greenville County. The Defendant denies the remaining allegations of Paragraph 2.

4. As to the allegations set forth in Paragraph 3 of the Plaintiffs' Amended Complaint, the Defendant admits, upon information and belief, that the Plaintiff William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County. The Defendant denies the remaining allegations of Paragraph 3.

5. The allegations set forth in the first enumerated Paragraph 4 of the Plaintiffs' Amended Complaint are admitted.

6. The allegations set forth in the second enumerated Paragraph 4 of the Plaintiffs' Amended Complaint are denied.

7. The allegations set forth in Paragraph 5 of the Plaintiffs' Amended Complaint are denied.

8. The allegations set forth in Paragraph 6 of the Plaintiffs' Amended Complaint are denied.

9. The allegations set forth in Paragraph 7 of the Plaintiffs' Amended Complaint are denied.

10. The allegations set forth in Paragraph 8 of the Plaintiffs' Amended Complaint are denied.

11. As to the allegations set forth in Paragraph 9 of the Plaintiffs' Amended Complaint, the Defendant craves reference to the preamble or "Findings" section of 1995 Act No. 52, as contained in Section 1 of the Act, which reads as follows: "In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to

establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation." The Defendant avers that 1995 Act No. 52, § 1 specifically and expressly states the legislative intent of the South Carolina General Assembly. Any allegations as set forth in Paragraph 9 inconsistent with the foregoing are denied.

12. As to the allegations set forth in Paragraph 10 of the Plaintiffs' Amended Complaint, the Defendant craves reference to S.C. Code Ann. § 4-37-30 as the best evidence of its specific language, terms, conditions, and limitations. Further answering, for the legislative intent of the South Carolina General Assembly in its enactment of S.C. Code Ann. § 4-37-30, the Defendant craves reference to the preamble or "Findings" section of 1995 Act No. 52, as contained in Section 1 of the Act, which reads as follows: "In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation."

13. As to the allegations set forth in Paragraph 11 of the Plaintiffs' Amended Complaint, the Defendant admits that Richland County adopted Ordinance Number 039-12HR in accordance with the authority created by S.C. Code Ann. § 4-37-10, *et seq.* and further craves

reference to Ordinance Number 039-12HR as the best evidence of its precise terms, conditions, and limitations.

14. As to the allegations set forth in Paragraph 12 of the Plaintiffs' Amended Complaint, the Defendant craves reference to Ordinance Number 039-12HR as the best evidence of its precise terms, conditions, and limitations.

15. As to the allegations set forth in Paragraph 13 of the Plaintiffs' Amended Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer as set forth herein.

16. As to the allegations set forth in Paragraph 14 of the Plaintiffs' Amended Complaint, the Defendant craves reference to Ordinance Number 039-12HR as the best evidence of its precise terms, conditions, and limitations.

17. As to the allegations set forth in Paragraph 15 of the Plaintiffs' Amended Complaint, the Defendant craves reference to Ordinance Number 039-12HR as the best evidence of its precise terms, conditions, and limitations.

18. The allegations set forth in Paragraph 16 of the Plaintiffs' Amended Complaint are denied.

19. As to the allegations set forth in Paragraph 17 of the Plaintiffs' Amended Complaint, the Defendant craves reference to Ordinance Number 039-12HR as the best evidence of its specific language, terms, conditions, and limitations.

20. The allegations set forth in Paragraph 18 of the Plaintiffs' Amended Complaint are denied.

21. As to the allegations set forth in Paragraph 19 of the Plaintiffs' Amended Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer as set forth herein. The Defendant objects to the jumbling of causes of action.

22. As to the allegations set forth in Paragraph 20 of the Plaintiffs' Amended Complaint, the Defendant craves reference to S.C. Code Ann. § 11-35-50 as the best evidence of its specific language, terms, conditions, and limitations.

23. As to the allegations set forth in Paragraph 21 of the Plaintiffs' Amended Complaint, the Defendant craves reference to S.C. Code Ann. § 11-35-510 as the best evidence of its specific language, terms, conditions, and limitations.

24. The allegations set forth in Paragraph 22 of the Plaintiffs' Amended Complaint are denied.

25. As to the allegations set forth in Paragraph 23 of the Plaintiffs' Amended Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer as set forth herein. The Defendant objects to the jumbling of causes of action.

26. The allegations set forth in Paragraph 24 of the Plaintiffs' Amended Complaint are denied.

27. As to the allegations set forth in Paragraph 25 of the Plaintiffs' Amended Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer as set forth herein. The Defendant objects to the jumbling of causes of action.

28. As to the allegations set forth in Paragraph 26 of the Plaintiffs' Amended Complaint, the Defendant craves reference to Ordinance Number 039-12HR as the best evidence of its specific language, terms, conditions, and limitations.

29. The allegations set forth in Paragraph 27 of the Plaintiffs' Amended Complaint are denied.

30. As to the allegations set forth in Paragraph 28 of the Plaintiffs' Amended Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer as set forth herein. The Defendant objects to the jumbling of causes of action.

31. As to the allegations set forth in Paragraph 29 of the Plaintiffs' Amended Complaint, the Defendant craves reference to Ordinance Number 039-12HR as the best evidence of its specific language, terms, conditions, and limitations.

32. The allegations set forth in Paragraph 30 of the Plaintiffs' Amended Complaint are denied.

33. As to the allegations set forth in Paragraph 31 of the Plaintiffs' Amended Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer as set forth herein. The Defendant objects to the jumbling of causes of action.

34. As to the allegations set forth in Paragraph 32 of the Plaintiffs' Amended Complaint, the Defendant craves reference to Ordinance Number 039-12HR as the best evidence of its specific language, terms, conditions, and limitations.

35. The allegations set forth in Paragraph 33 of the Plaintiffs' Amended Complaint are denied.

36. As to the allegations set forth in Paragraph 34 of the Plaintiffs' Amended Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer as set forth herein. The Defendant objects to the jumbling of causes of action.

37. As to the allegations set forth in Paragraph 35 of the Plaintiffs' Amended Complaint, the Defendant craves reference to Ordinance Number 039-12HR as the best evidence of its specific language, terms, conditions, and limitations.

38. As to the allegations set forth in Paragraph 36 of the Plaintiffs' Amended Complaint, the Defendant craves reference to S.C. Code Ann. § 4-37-25 as the best evidence of its specific language, terms, conditions, and limitations.

39. The allegations set forth in Paragraph 37 of the Plaintiffs' Amended Complaint are denied.

40. The allegations and relief as set forth in the prayer for relief are denied.

FOR A SECOND DEFENSE

41. The Plaintiffs' Amended Complaint, in whole or in part, fails to state a cause of action upon which relief may be granted. The Defendant reserves its right to file a motion pursuant to Rule 12(b)(6), SCRCp.

FOR A THIRD DEFENSE

42. The Plaintiffs' Amended Complaint fails to set forth a claim that is ripe for adjudication.

FOR A FOURTH DEFENSE

43. The Plaintiffs lack standing to assert their claims for declaratory and injunctive relief.

FOR A FIFTH DEFENSE

44. The Amended Complaint raises a non-justiciable issue, a political question, attacking Richland County's policy judgments on economic development and related issues with such a challenge raising no case or controversy for this Court's decision.

FOR A SIXTH DEFENSE

45. The Plaintiffs have failed to exhaust their administrative remedies.

FOR A SEVENTH DEFENSE

46. The Plaintiffs' claims are, in whole or in part, barred by absolute legislative immunity.

FOR AN EIGHTH DEFENSE

47. The Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations.

FOR A NINTH DEFENSE

48. The Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

FOR A TENTH DEFENSE

49. The Circuit Court lacks subject matter jurisdiction over this action. The Defendant reserves its right to file a motion pursuant to Rule 12(b)(1), SCRCP.

FOR AN ELEVENTH DEFENSE

50. The Plaintiffs' claim for attorney's fees has no legal basis and should be stricken and/or dismissed. Further answering, the Plaintiffs' prayer for attorney's fees is barred by sovereign immunity and by the public policy of the State of South Carolina. Moreover, there is no provision in the Declaratory Judgment Act nor any contractual provision authorizing the recovery of attorney's fees against a governmental entity under the circumstances presented by this litigation.

FOR A TWELFTH DEFENSE

51. The Defendant Richland County Council is not a proper party. Richland County Council is not a body politic separate and apart from Richland County. Instead, Richland County Council is the governing body of Richland County.

WHEREFORE, the Defendants Richland County Council prays that the Plaintiffs' Amended Complaint be dismissed with prejudice; for the denial of all declaratory and injunctive relief as sought; for the costs of this action including reasonable attorney's fees; and for such other and further relief as the Court deems just and proper.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

RAY N. STEVENS
RAY E. JONES
COURT E. WALSH
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Post Office Box 1509
Columbia, South Carolina 29202
(803) 255-8000

Counsel for Defendant Richland County Council

Columbia, South Carolina

July 15, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

v.

Richland County Council,

Defendant.

Civil Action No. 2016-CP-40-2875

CERTIFICATE OF SERVICE

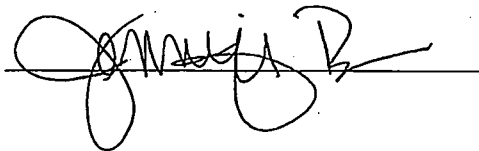
2016 JUL 15 PM 3:08
JEANETTE W. MCBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Defendant, does hereby certify that service of the **Motion to Dismiss, or Alternatively, Motion for Judgment on the Pleadings and Answer to Amended Complaint** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 15th day of July 2016:

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, South Carolina 29601

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Court E. Walsh, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Elizabeth Van Doren Gray, Esquire
Robert E. Tyson, Jr., Esquire
Alexis K. Lindsay, Esquire
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, South Carolina 29211



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

v.

Richland County Council,

Defendant.

Civil Action No. 2016-CP-40-2875

NOTICE OF MOTION AND
MOTION TO DISMISS
OR ALTERNATIVELY, MOTION FOR
JUDGMENT ON THE PLEADINGS

2016 JUL 5 PM 3:08
RICHLAND COUNTY
FILED
JAMES G. CARPENTER, P. & G.S.

TO: JAMES G. CARPENTER, COUNSEL FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned counsel for the Defendant Richland County Council will move before the Presiding Judge of the Fifth Judicial Circuit at the Richland County Judicial Center, Columbia, South Carolina, at such time and place as may be set by the Court, pursuant to Rule 12(b)(1), Rule 12(b)(6) and/or Rule 12(c), SCRCF, for an Order dismissing the Plaintiffs' Amended Complaint in its entirety, or in the alternative, dismissing the Plaintiffs' First Cause of Action.

The Defendant's motion is based on the following grounds:

1. The Plaintiffs lack standing to assert their claims for declaratory and injunctive relief.
2. The Plaintiffs' claims are barred by the applicable statute of limitations.
3. The Defendant Richland County Council is not a proper party. Richland County

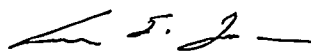
Council is not a body politic separate and apart from Richland County. Instead, Richland County Council is the governing body of Richland County.

4. The Plaintiffs' First Cause of Action presents purely issues of law. *See, Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012) ("[d]etermining the proper interpretation of a statute is a question of law"). Contrary to the Plaintiffs' allegations in their First Cause of Action, S.C. Code Ann. § 4-37-30, as adopted by 1995 Act No. 52 and as amended by 2000 Act No. 368, allows for the expenditure of penny tax revenue on operating transportation-related projects (including operating mass-transit projects which were added to the categories of projects and facilities by the amendment in 2000). The Plaintiffs are in error in suggesting that the penny tax revenue is authorized only for "transportation facilities" where 1995 Act No. 52 as well as S.C. Code Ann. § 4-37-30 expressly authorize its expenditure for "transportation-related projects." In addition, pedestrian sidewalks and bike paths qualify as "other transportation-related projects [or] facilities." *See*, S.C. Code Ann. § 4-37-30(A)(1)(a)(i). The intent of the General Assembly as to the scope of the authorized uses of the revenue is stated clearly in the preamble or "Findings" section of 1995 Act No. 52, as contained in Section 1 of the Act, which reads as follows: "In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and *operating* highways, roads, streets, and bridges, and *other transportation-related projects*, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation." *See*, 1995 Act No. 52, § 1. *See also, State v. Thift*, 312 S.C. 282, 440 S.E.2d 341, 354 (1994) ("preamble of an act may be used as a guide in determining

legislative intent"). The Defendant submits that the provisions of Ordinance Number 039-12HR, as challenged by the Plaintiffs in their First Cause of Action, are valid, enforceable and lawful under state law. The Defendant is therefore entitled to prevail as a matter of law on the statutory construction issues raised by the Plaintiffs' First Cause of Action.

This motion is based upon the pleadings filed in this case; a memorandum of law as may be submitted at or prior to the hearing; and such other matters as may be presented to the Court.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

RAY N. STEVENS
RAY E. JONES
COURT E. WALSH
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Post Office Box 1509
Columbia, South Carolina 29202
(803) 255-8000

Counsel for Defendant Richland County Council

Columbia, South Carolina

July 15, 2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

v.

Richland County Council,
Defendants.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

**AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT**

2016 JUL 19 AM 8:49
JANETTE W. MCBRIDE
J.C.P. & G.S.
RICHLAND COUNTY
FILED

NOW COME the Plaintiffs, by their undersigned attorney, and as a Complaint against the Defendants, would show unto the Court:

1. Plaintiff South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution and statutes.
2. Plaintiff Edward D. Sloan, Jr. is a citizen, resident, taxpayer, and registered elector of Greenville County. He brings this action individually and on behalf of all others similarly situated.
3. Plaintiff William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County. He brings this action individually and on behalf of all others similarly situated.
4. Defendant Richland County Council is the governing body of Richland County, South Carolina.
4. This Court possesses jurisdiction under the South Carolina Constitution, Art. VIII, § 13(D); and under the following decisions, which address public interest

and taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *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. Richland 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); and under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act.

5. This action raises Constitutional and statutory issues of great public importance, and Plaintiffs ask the Court to grant them standing based upon the great public importance of the Constitutional issues this action raises.
6. Plaintiff Sloan has paid the Penny Tax to Richland County, and therefore possesses standing as a Richland County taxpayer to contest the unlawful payments from the Penny Tax receipts.
7. Plaintiff Sloan has paid the Penny Tax to Richland County on behalf of the South Carolina Public Interest Foundation, and therefore South Carolina Public

Interest Foundation possesses standing as a Richland County taxpayer to contest the unlawful payments from the Penny Tax receipts.

8. Plaintiff DePass also possesses standing to bring this lawsuit as a Richland County taxpayer, and DePass has paid the Penny Tax to Richland County, and therefore possesses standing as a taxpayer to contest the unlawful payments from the Penny Tax receipts.
9. The South Carolina General Assembly enacted to Title IV, Chapter 37 of the South Carolina Code Annotated entitled "Optional Methods for Financing Transportation Facilities" (emphasis added), which authorizes counties to adopt an ordinance imposing a sales and use tax for "financing transportation facilities" (emphasis added).
10. The authorizing statute sets out the kinds of "transportation facilities" for which such "optional methods of financing" may be used: "highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects" S.C. Code Ann. 4-37-30(a)(1) (emphasis added).
11. Richland County adopted Ordinance Number 039-12HR ("Ordinance") to levy and impose a 1% sales and use tax subject to a referendum within Richland County pursuant to S.C. Code Ann. § 4-37-30.
12. The Ordinance states, "The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and conditions or restrictions on the use and expenditure of

sales and use tax revenues established by the Act, the provisions of this Ordinance, and other applicable law.” *Id.*, Section 1 (c).

**First Cause of Action
Ordinance Exceeds the Scope of S.C. Code Ann. § 4-37-30**

13. Plaintiffs incorporate by reference all the foregoing allegations.
14. Ordinance Number 039-12HR purported to adopt a 1% tax not only for “highways, roads, streets, [and] bridges” but also for “pedestrian sidewalks [and] bike paths and lanes.” *Id.* Section 1. (b).
15. Ordinance Number 039-12HR also purported to adopt a 1% tax for “continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements.” *Id.*, Section 2. (c), Project 2 (emphasis added).
16. Using the proceeds of the 1% tax for “continued operation of mass transit services” (emphasis added) does not comport with the stated statutory purpose of the 1% tax: “financing transportation facilities” (emphasis added) and therefore, those provisions are unlawful.
17. Ordinance Number 039-12HR also purported to adopt a 1% tax for “improvements to pedestrian sidewalks [and] bike paths.” *Id.*, Section 2 (c), Project 3.
18. “Pedestrian sidewalks [and] bike paths and lanes” are not authorized by S.C. Code Ann. § 4-37-30, and therefore, those provisions are unlawful.

**Second Cause of Action
Violation of S.C. Code Ann. § 11-35-50**

19. Plaintiffs incorporate by reference all the foregoing allegations.

20. All political subdivisions are required to “adopt ordinances or procedures embodying sound principles of appropriately competitive procurement.” S.C. Code Ann. § 11-35-50.
21. One of the “sound principles of appropriately competitive procurement” is the centralization of procurement decisions in “the appropriate chief procurement officer.” S.C. Code Ann. § 11-35-510.
22. Procurements from the proceeds of the penny sales tax are not made by the chief procurement officer, or even by the procurement department consisting of procurement professionals, but rather they are made by the members of the County Council, separate from all other procurements of Richland County.

Third Cause of Action
Procurements Exceed the Scope of S.C. Code Ann. § 4-37-30

23. Plaintiffs incorporate by reference all the foregoing allegations.
24. Richland County has used the proceeds of the 1% tax for expenditures that do not fall within the scope of S.C. Code Ann. § 4-37-30, including
 - a. millions of dollars for public relations contracts not related to specific transportation facilities,
 - b. contracts for administration not related to specific transportation facilities,
 - c. training programs not related to specific transportation facilities, and
 - d. the expenditure of \$619,457 for the creation of the Small Local Business Enterprise Program, not related to specific transportation facilities;therefore, all the foregoing contracts and expenditures were unlawful.

Fourth Cause of Action
No Annual, Independent, Public Audit

25. Plaintiffs incorporate by reference all the foregoing allegations.
26. The Ordinance states, "All spending shall be subject to an annual independent audit to be made available to the public." *Id.*, Section 2. (c).
27. Upon information and belief, Defendants have failed to make such spending subject to an annual independent audit made available to the public. Therefore all such spending pursuant to this ordinance is unlawful.

Fifth Cause of Action
No Annual Budget

28. Plaintiffs incorporate by reference all the foregoing allegations.
29. The Ordinance states, "County Council shall adopt annually prior to the beginning of each fiscal year a budget for expenditures of Sales and Use Tax revenues." *Id.*, Section 3. (b).
30. Upon information and belief, Defendants have failed to make such spending subject to an annual budget for expenditures of sales and use tax revenues made available to the public. Therefore all such spending pursuant to this ordinance is unlawful.

Sixth Cause of Action
No Annual, Independent Audits of Agencies Receiving Appropriations

31. Plaintiffs incorporate by reference all the foregoing allegations.
32. The Ordinance states, "Except as specifically authorized by County Council, any outside agency organization receiving an appropriation of the Sales and Use Tax must provide to County Council an independent annual audit of such agency organization financial records and transactions and such other and more frequent

financial information as required by County Council, all in form satisfactory to County Council.” *Id.*, Section 2. (c).

33. Upon information and belief, Defendants have failed to require such annual independent audits from such agencies. Therefore all such spending pursuant to this ordinance is unlawful.

Seventh Cause of Action
Violation of S.C. Code Ann. § 4-37-25

34. Plaintiffs incorporate by reference all the foregoing allegations.
35. Ordinance Number 039-12HR states, “The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and the conditions or restrictions on the use and expenditure of sales and use tax revenue established by the act, the provisions of this Ordinance, and other applicable law.” *Id.*,
36. One of the “conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenue established by the Act” (Ordinance, Section 1 (c)) is set out in S.C. Code Ann. § 4-37-25: “When procuring the construction, maintenance, and repair of bridges, highways, and roads, an authority must use the same procurement methods and apply the same procurement requirements used by and applied to the South Carolina Department of Transportation in the construction, maintenance, and repair of bridges, highways, and roads.”
37. Upon information and belief, the Defendants have failed to comply with S.C. Code Ann. § 4-37-25.

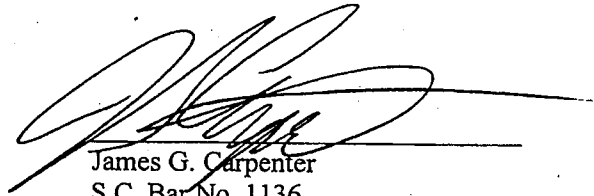
WHEREFORE, Plaintiffs pray the Court:

1. Rule that Ordinance Number 039-12HR exceeds the statutory authority of S.C. Code Ann. § 4-37-30, by purporting to use the 1% sales tax to finance:
 - a. “continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements;” and
 - b. “pedestrian sidewalks [and] bike paths and lanes;”
2. Rule that the Defendants violated S.C. Code Ann. 11-35-50.
3. Rule that the Defendants’ procurements relating to the Small Local Business Enterprise Program exceeding the scope of S.C. Code Ann. § 4-37-30 and were illegal;
4. Rule that Defendants’ failure to make spending pursuant to the ordinance subject to an annual independent audit made available to the public, and all such spending pursuant to this ordinance is unlawful;
5. Rule that Defendants’ failure to make spending of funds from the Sales and Use Tax subject to a budget for expenditures of sales and use tax revenues, and all such spending is unlawful;
6. Rule that Defendants failure to require annual independent audits from agencies receiving funds from the sales and use tax and all appropriations to such agencies are unlawful;
7. Rule that Defendants’ failure to “use the same procurement methods and apply the same procurement requirements used by and applied to the South

Carolina Department of Transportation in the construction, maintenance, and repair of bridges, highways, and roads" is unlawful;

8. Enjoin all future expenditures from the proceeds of the penny sales tax until Defendants comply fully with all aspects of State law related to the penny sales tax;
9. Enjoin Defendants to recover all expenditures made from the penny sales tax proceeds in violation of State law;
10. Grant Plaintiffs their costs and attorneys' fees under S.C. Code Ann. § 15-77-300 ff.; and
11. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

July 7, 2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

v.

Richland County Council,
Defendants.

IN THE CIRCUIT COURT
CASE NO: 2016-CP-40-2875

CERTIFICATE OF SERVICE

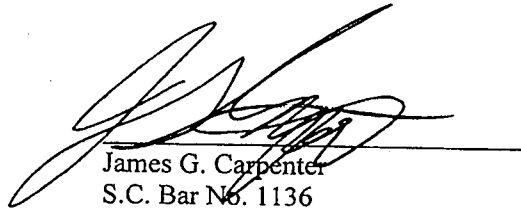
2016 JUL 19 AM 8:49
JENNIFER W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

The undersigned attorney hereby certifies that he served a copy of the foregoing
Amended Complaint for Declaratory Judgment upon counsel for the Defendants by first
class mail, postage prepaid, this July 7, 2016, addressed as follows:

Ray Jones
Parker Poe Adams & Bernstein, LLP
PO Box 1509
Columbia, SC 29202

Andrew F. Lindemann
Davidson & Lindemann, PA
PO Box 8568
Columbia, SC 29202-8568

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest Foundation	)	Civil Action No. 2016-CP-40-02875
and William B. DePass, Jr., individually,	)	
and on behalf of all others similarly	)	
situated,	)	
	)	
Plaintiff,	)	
	)	<u>NOTICE OF MOTION</u>
vs.	)	<u>AND MOTION TO DISMISS</u>
	)	
Richland County,	)	
	)	
Defendant,	)	
	)	
Central Midlands Regional Transit	)	
Authority,	)	
	)	
Intervenor Defendant.	)	

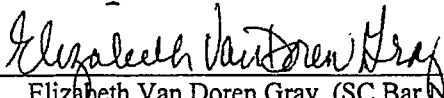
Pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Intervenor Defendant Central Midlands Regional Transit Authority ("CMRTA"), by and through undersigned counsel, hereby moves for an Order dismissing the Complaint filed by the South Carolina Public Interest Foundation and William B. DePass, Jr. (hereinafter "Plaintiffs"). CMRTA respectfully requests this Court issue an Order dismissing this action with prejudice on the following grounds.

1. Plaintiffs lack standing necessary to maintain this action; and/or
2. Plaintiffs' claims are barred by the applicable statute of limitations.

The arguments and authorities in support of this Motion to Dismiss shall be set forth in a memorandum timely submitted before a hearing on this Motion.

WHEREFORE, CMRTA prays that this Court dismiss this action with prejudice, that the costs of this action be taxed against the Plaintiffs, and for such other and further relief as the Court may deem just and proper.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 
Elizabeth Van Doren Gray (SC Bar No. 2434)
egray@sowellgray.com
Robert E. Tyson, Jr. (SC Bar No. 10820)
rtyson@sowellgray.com
Alexis K. Lindsay (SC Bar No. 78049)
alindsay@sowellgray.com
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400 Telephone
(803) 929-0300 Fax

*Attorneys for Central Midlands Regional Transit
Authority*

Columbia, South Carolina
August 26, 2016

CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Document:

NOTICE OF MOTION AND MOTION TO DISMISS

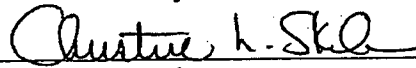
Counsel Served:

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601
Attorneys for Plaintiffs

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568

Larry C. Smith, Esquire
Richland County Attorney
Post Office Box 192
Columbia, SC 29202
Attorneys for Richland County


Christine L. Skalamera

August 26, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
South Carolina Public Interest)
Foundation, and William B. DePass, Jr.,)
individually, and on behalf of all others)
similarly situated,)
)
)
Plaintiffs,)
)
vs.)
)
Richland County,)
)
Defendant,)
)
)
Central Midlands Regional Transit)
Authority,)
)
Intervenor Defendant.)
)
)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No. 2016-CP-40-02875

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS BY
INTERVENOR DEFENDANT
CENTRAL MIDLANDS REGIONAL
TRANSIT AUTHORITY

Intervenor Defendant Central Midlands Regional Transit Authority (“CMRTA”) submits this memorandum in support of its motion, pursuant to South Carolina Rules of Civil Procedure 12(b)(1) and Rule 12(b)(6) for an Order dismissing the Complaint by the South Carolina Public Interest Foundation and William B. DePass, Jr. (hereinafter “Plaintiffs”). CMRTA maintains the Plaintiffs do not have standing to bring this action. Further, if the Court determines the Plaintiffs have standing, CMRTA requests the Court dismiss the Complaint because the Plaintiffs failed to bring it within the appropriate statute of limitations. CMRTA offers further support below.

INTRODUCTION

In the Complaint filed on May 9, 2016, Plaintiffs are South Carolina Public Interest Foundation and William B. DePass, Jr.¹ Plaintiffs allege Richland County

¹ In July, 2016, Plaintiffs filed a Motion to Amend their Complaint. The Court has not ruled on said Motion. On July 19, 2016, Plaintiffs filed their Amended Complaint whereby they added Edward D. Sloan, Jr. as a Plaintiff. CMRTA submits the Amended

Ordinance 039-12HR “purported to adopt a tax for continued ‘operation’ of the mass transit services provided by Central Midlands Regional Transit Authority” exceeded the scope of South Carolina statute S.C. Code Ann. § 4-37-30. (Complaint, ¶ 13). In their prayer for relief, Plaintiffs seek to enjoin all future expenditures from the proceeds of the penny sales tax until Richland County complies fully with all aspects of state law and to require Richland County to recover all expenditures made from the penny sales tax proceeds in violation of state law.

The Amended Complaint alleges “[t]his action raises Constitutional and statutory issues of great public importance”. (Amended Complaint, ¶ 5). Further, the Amended Complaint avers Plaintiffs’ Sloan and DePass have paid the penny tax so they have standing as taxpayers. The Amended Complaint alleges Since Plaintiff Sloan has paid the Penny tax on behalf of Plaintiff Foundation, it too has standing.

ARGUMENT

I. Plaintiffs Do Not Have Standing.

A. Plaintiffs do not Meet Elements of Standing.

Plaintiffs do not have standing to bring this matter. To establish standing, a plaintiff must prove (1) an injury in fact, which is concrete, particularized, and actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) it is likely as opposed to speculative that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). “The party seeking to establish

Complaint was filed in an untimely manner. However, CMRTA’s Motion to Dismiss seeks to dismiss Plaintiffs’ Sloan, DePass, and the Foundation, as if Plaintiffs’ Motion to Amend had been granted.

standing carries the burden of demonstrating each of the three elements.” *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). In this case, Sloan, Depass, or the Foundation cannot establish standing because they have not been injured and cannot show particularized harm to itself.

Plaintiffs do not plead any injury in fact. They simply argue their taxpayer status gives them the standing to pursue this challenge. (Compl. ¶¶ 6, 7, and 8). Plaintiff Sloan admits he is a resident of Greenville County; thus, any connection he has as a taxpayer in Richland County, is de minimis, at best and fails to meet the basis for standing. Similarly, Plaintiffs attempt to rely solely on their status as a taxpayer to acquire standing. Our Supreme Court holds such an allegation is insufficient to vest a plaintiff with standing.

In *Fremantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012), the Supreme Court held that if one seeks standing as a taxpayer, standing may be acquired by 1) through the rubric of “constitutional standing”; 2) under the “public importance” exception; or 3) by statute. (at 192, 43). *Preston* focused solely on whether the plaintiff’s status as a taxpayer could satisfy the elements of constitutional standing. In *Preston*, the plaintiff argued his status as a taxpayer was sufficient to confer standing to maintain the action. 398 S.C. at 192, 728 S.E.2d at 43. The Supreme Court rejected this contention. *Id.* The Court held:

In our judgment, the injury, if any, to Appellant as a taxpayer is common to all citizens and taxpayers of Anderson County. Thus, this feature of commonality defeats the constitutional requirement of a concrete and particularized injury. We therefore affirm the trial court in rejecting [plaintiffs] claim of taxpayer standing under constitutional standing principles.

Id. at 193, 728 S.E.2d at 44. The Supreme Court held that a plaintiff's status as a taxpayer cannot establish constitutional standing.

In the present case, the facts are similar. The plaintiffs cannot demonstrate an "injury in fact" which is a required element for constitutional standing. In *Preston*, the Supreme Court held, "A taxpayer lacks constitutional standing when he "suffers in some *indefinite* way in common with people *generally*. *Preston*, at 193. Paragraphs 6, 7, and 8 of the Amended Complaint simply state "[plaintiff] has p[aid the Penny Tax..." Clearly, the plaintiffs have not suffered an injury in fact unique to them individually.

Additionally, the Plaintiffs do not allege standing is obtained by statute. No statute gives them the authority to challenge the use of the Penny Tax revenues.

B. Plaintiffs Do Not Meet Public Importance Exception.

There is an exception to the general standing requirements known as the "public importance exception" when an issue is of "such public importance as to require its resolution for future guidance." *Preston*, at 186, 193 (quoting *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008)). "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." *Id.* "For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. at 198. The Complaint principally takes exception with the Richland County Ordinance authorizing the use of Penny Tax funds. More specifically, Plaintiffs challenge the expenditure of these revenues on operating costs of the mass

transit services. An interpretation of the appropriate use of the Penny Tax funds does not and will not rise to the level of “public importance” to warrant standing.

Plaintiffs' actions establish that this matter contains no overriding public importance. Plaintiffs were aware of the passage on July 28, 2012, of Ordinance No.039-12HR, which scheduled a referendum on November 6, 2012. The referendum passed overwhelmingly on November 6, 2012. However, the Plaintiffs observed the implementation and execution of the Ordinance for nearly four years before they filed this Complaint in May, 2016. This nearly four-year delay illustrates how Plaintiffs cannot reasonably assert that this matter presents a matter of overriding public importance or some immediate need for future guidance. Thus, standing cannot be acquired utilizing the public importance exception.

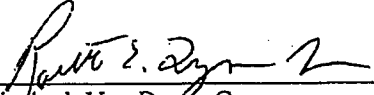
II. Plaintiffs' Claims Are Barred by the Statute of Limitations.

As described above, Plaintiffs were aware of how the Penny Tax revenues were being utilized. However, they did nothing. By not acting within the appropriate statute of limitations period, the Complaint should be dismissed.

CONCLUSION

For the reasons set forth above, CMRTA requests the Court dismiss this action.

SOWELL GRAY ROBINSON STEPP & LAFFITTE, L.L.C.

By: 

Elizabeth Van Doren Gray
(SC Bar No. 2434)

egrav@sowellgray.com

Robert E. Tyson, Jr.
(SC Bar No. 10820)

rtyson@sowellgray.com

Alexis K. Lindsay
(SC Bar No. 78049)

alindsav@sowellgray.com

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400 Telephone

(803) 929-0300 Fax

*Attorneys for Central Midlands Regional Transit
Authority*

Columbia, South Carolina
February 13, 2017

CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Robinson Stepp & Laffitte, L.L.C., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by emailing and mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

**MEMORANDUM IN SUPPORT OF MOTION TO
DISMISS BY INTERVENOR DEFENDANT
CENTRAL MIDLANDS REGIONAL TRANSIT
AUTHORITY**

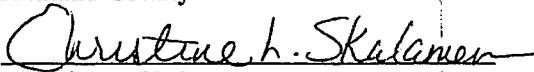
Counsel Served:

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601
Attorneys for Plaintiffs

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568

Larry C. Smith, Esquire
Richland County Attorney
Post Office Box 192
Columbia, SC 29202
Attorneys for Richland County


Christine L. Skalamera

February 13, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2016-CP-40-2875

Plaintiffs,)

v.)

Richland County Council,)

Defendant.)
_____)

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
OR ALTERNATIVELY, MOTION FOR
JUDGMENT ON THE PLEADINGS

BACKGROUND

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

In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1.¹

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

Following approval of the referendum, Richland County began establishing the framework for the implementation of the Transportation Penny Program to be paid for by the sales and use tax collected pursuant to the referendum. The Penny Tax was levied and collected for Richland County effective May 1, 2013.

The Plaintiffs have filed this action challenging the legality of Richland County Ordinance Number 039-12HR including categories of expenditures that have been made in accordance with that Ordinance. The Plaintiffs have brought this action against Richland County

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

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

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

Council. The Defendant Richland County Council has moved to dismiss or for judgment on the pleadings under Rule 12(b)(1), Rule 12(b)(6) and/or Rule 12(c), SCRPC.

DISCUSSION

I. Lack of Standing

The Defendant Richland County Council submits that the Plaintiffs lack standing to bring this action. The Plaintiff South Carolina Public Interest Foundation is a non-profit corporation. The Plaintiff Edward D. Sloan, Jr. is a resident and taxpayer in Greenville County. The Plaintiff William B. DePass, Jr. is a resident and taxpayer in Richland County.

It is well settled that "[s]tanding to sue is a fundamental requirement in instituting an action." *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 366 (2013). Under South Carolina law, "[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008). In this case, the Plaintiffs do not claim to have standing by statute. Instead, they are asserting a right to sue through taxpayer standing and by the "public importance" exception to the general standing requirements.

A. Taxpayer Standing

Constitutional standing requires as one of its "core requirements" that the party suffered a "concrete and particularized injury." *Bodman*, 742 S.E.2d at 366. However, where the harm is one shared by all taxpayers, the requisite showing of standing has not been made. *Id.* As the Supreme Court explained in *ATC*, the injury claimed by the taxpayer was common to all property

owners in Charleston County, and "[t]his feature of commonality defeats the constitutional requirement of a concrete and particularized injury." *ATC*, 669 S.E.2d at 341. The Supreme Court noted that "a taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'" *Id.*, citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

In the present case, the Plaintiffs have not pled nor shown any "concrete and particularized" injury that they will suffer – a harm separate from that allegedly common to all taxpayers. For this reason, the Plaintiffs' status as taxpayers (to the extent even supportable by the evidence) is insufficient to confer standing in this case.

B. "Public Importance" Standing

The Plaintiffs further claim standing under the "public importance" exception to general standing requirements, a rule that the Supreme Court has recently acknowledged "has been the subject of much confusion and misapplication." *Bodman*, 742 S.E.2d at 366. The Supreme Court has explained that "standing is not inflexible." *Id.* Thus, "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* The Supreme Court in recent years has "tempered the application of the public importance exception somewhat," and in doing so, the Court has "reminded the bench and bar that 'whether an issue of public importance exists necessitates a cautious balancing of the competing interests presented.'" *Bodman*, 742 S.E.2d at 367, citing *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 341 (2008). In *Carnival Corp. v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014), the Supreme Court addressed the "competing policy concerns" that underlie the application of the public importance exception as follows:

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

753 S.E.2d at 853.

The Plaintiffs have frankly made no showing of any need for judicial intervention to provide "future guidance" with respect to expenditures of the Penny Tax revenues. To the contrary, the preamble to the Transportation Act sets forth in clear, specific terms the scope of expenditures for which the Penny Tax may be utilized. Quite simply, the Plaintiffs have not demonstrated any confusion or a need for "future guidance" from this court. The Plaintiff have baldly asserted their claims without giving due consideration to the legislative history and clear legislative intent as spelled out in that preamble. Moreover, the Plaintiffs have not sustained *their* burden of showing that a cautious balancing of the competing interests supports the use of the "public importance" exception in this case. *See, Joseph v. South Carolina Dept. of Labor, Licensing and Regulation*, 417 S.C. 436, 790 S.E.2d 763, 770 (2016) ("[a] party seeking to establish standing carries the burden of demonstrating each element").

II. Richland County Council is Not Amenable to Suit

The Plaintiffs have named as the sole Defendant the Richland County Council which is not a body politic separate and apart from Richland County. Instead, Richland County Council is the governing body of Richland County which is not amenable to suit in its own name. Section 4-4-10(1) provides as follows: "The State of South Carolina is divided into forty-six counties. Each county is a body politic and corporate for the following purposes: (1) To sue and be sued." S.C. Code Ann. § 4-4-10(1). Likewise, Article VII, § 9 of the South Carolina

Constitution provides that "[e]ach County ... shall be a body politic and corporate." Thus, the proper party-defendant is Richland County and not its governing body.

III. Plaintiffs' First Cause of Action Should be Dismissed on the Merits

In its First Cause of Action, the Plaintiffs allege that Richland County Ordinance Number 039-12HR exceeds the scope of Section 4-37-30 by allowing for the Penny Tax revenues to be expended for such matters as the operation of the COMET mass transit services provided by the Central Midlands Regional Transit Authority (CMRTA) as well as the construction of pedestrian sidewalks and bike lanes and paths. However, contrary to the Plaintiffs' allegations in their First Cause of Action, Section 4-37-30, as adopted by 1995 Act No. 52 and as amended by 2000 Act No. 368, allows for the expenditure of Penny Tax revenues for operating transportation-related projects (including operating mass-transit projects which were added to the categories of projects and facilities by the amendment in 2000). Moreover, the Plaintiffs are in error in suggesting that the Penny Tax revenues are authorized only for "transportation facilities" where 1995 Act No. 52 as well as Section 4-37-30 expressly authorize its expenditure for "transportation-related projects." In addition, applying the plain and ordinary meaning of the terms, pedestrian sidewalks and bike paths and lanes qualify as "other transportation-related projects [or] facilities." *See*, S.C. Code Ann. § 4-37-30(A)(1)(a)(i).⁴

⁴ Importantly, the Plaintiffs' First Cause of Action presents purely issues of law. *See, Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012) ("[d]etermining the proper interpretation of a statute is a question of law"). The United States Supreme Court has explained that "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). Similarly, it is well settled that "Rule 12(c) typically is applied to issues that are true issues of law such as statutory interpretation." *Versata Software, Inc. v. Sun Microsystems, Inc.*, 2009 WL 1084412 (E.D. Tex. 2009).

The intent of the General Assembly as to the scope of the authorized uses of the Penny Tax revenues is stated clearly in the preamble or "Findings" section of 1995 Act No. 52, as contained in Section 1 of the Act, which reads as follows:

In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and **operating** highways, roads, streets, and bridges, and other **transportation-related projects**, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1. (Emphasis added).

To that end, as authorized by S.C. Code Ann. § 4-37-30(A)(1)(a), Section 1(c) of Richland County Ordinance Number 039-12HR specified that purposes for which the Penny Tax revenues must be used:

For financing the costs of highways, roads, streets, bridges, greenways, pedestrian sidewalks, and bike paths and lanes and other transportation-related projects facilities, and drainage facilities related thereto, and mass transit systems operated by Richland County or (jointly) operated by Richland County, other governmental entities and transportation authorities.

Moreover, Section 2(c) of the Ordinance provided in part:

The maximum cost of the projects to be funded from the proceeds of the Sales and Use Tax shall not exceed, in the aggregate, the sum of \$1,037,900,000, and the maximum amount of net proceeds to be raised by the Sales and Use Tax shall not exceed \$1,070,000,000, *which includes administrative costs* and debt service on bonds issued to pay for the projects.

(Emphasis added). Thus, the Ordinance does expressly include operating costs as contemplated by the Transportation Act.

These provisions of Ordinance Number 039-12HR, as challenged by the Plaintiffs, are, as a matter of law, valid, enforceable and lawful under state law, and the Plaintiffs are not entitled

to the declaratory or injunctive relief sought. The General Assembly's preamble to 1995 Act No. 52 gives express permission for the Penny Tax revenue to be used for "operating" transportation-related projects, which by later amendment includes "mass transit systems."⁵ In *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341, 354 (1994), the Supreme Court specifically explained that "preamble of an act may be used as a guide in determining legislative intent." Likewise, in *Benjamin v. Housing Authority of Darlington County*, 198 S.C. 79, 15 S.E.2d 737, 738 (1941), the Supreme Court recognized that legislative findings are accorded "great weight because of the high regard we hold for a coordinate branch of the government." 15 S.E.2d at 738. *See also*, *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152711 S.E.2d 895, 898 (2011) (Supreme Court addressed legislative intent "as expressed in the preamble to our FOIA statute"); *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369, 374 (Ct. App. 1989) (Court of Appeals cited Act's preamble as "expressly stating" legislative intent).

In sum, the legislative intent is clear from the enabling Act itself. The expenditure of Penny Tax Revenue is not limited to "capital costs" for the construction of "facilities." Instead, the Penny Tax Revenues may be expended on the operation of transportation-related projects, which includes the operation of the COMET mass transit system. The Penny Tax Revenues may also be used to fund such transportation facilities as sidewalks and bike paths and lanes. The plain and ordinary meaning of those terms demonstrate that they are transportation-related. Bike lanes themselves are indeed part of roadways. Moreover, historically in South Carolina, sidewalks are constructed, owned and maintained by governmental entities as part of the adjoining roadways. *See generally*, *Bryant v. City of North Charleston*, 304 S.C. 123, 403

⁵ When "mass transit systems" were added to Section 4-37-30(A)(1)(a)(i) in 2000, the General Assembly did not make any additional "findings" nor include a preamble section. Moreover, no attempt was made to delete or amend the "findings" section from the 1995 Act. The title to 2000 Act No. 368 states that the amendment was "to provide that the proceeds of the tax may be used for mass transit systems and greenbelt projects." *See*, 2000 Act No. 368.

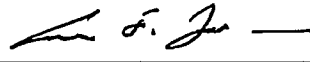
S.E.2d 159 (Ct. App. 1991); *Vaughn v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006); S.C. Code Ann. § 5-27-120. Therefore, as a matter of law, the Plaintiffs are not entitled to the declaratory and injunctive relief sought in their First Cause of Action.

CONCLUSION

Based on the foregoing discussion, the Defendant Richland County Council respectfully requests that the Court dismiss with prejudice the Plaintiffs' Amended Complaint in its entirety, or in the alternative, dismiss the Plaintiffs' First Cause of Action.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

RAY N. STEVENS
RAY E. JONES
COURT E. WALSH
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Post Office Box 1509
Columbia, South Carolina 29202
(803) 255-8000

Counsel for Defendant Richland County Council

Columbia, South Carolina

February 13, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

v.

Richland County Council,

Defendant.

Civil Action No. 2016-CP-40-2875

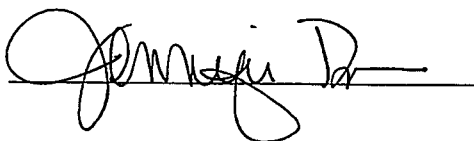
CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Defendant, does hereby certify that service of the **Memorandum in Support of Motion to Dismiss, or Alternatively, Motion for Judgment on the Pleadings** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 21st day of February 2017:

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, South Carolina 29601

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Court E. Walsh, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Elizabeth Van Doren Gray, Esquire
Robert E. Tyson, Jr., Esquire
Alexis K. Lindsay, Esquire
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, South Carolina 29211



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2016-CP-40-2875

Plaintiffs,

v.

NOTICE OF MOTION AND
MOTION TO ALTER OR AMEND ORDER

Richland County,

Defendant,

Central Midlands Regional
Transit Authority,

Intervenor.

TO: THE HONORABLE G. THOMAS COOPER, JR.

JAMES G. CARPENTER, COUNSEL FOR PLAINTIFFS

ELIZABETH VAN DOREN GRAY, ROBERT E. TYSON, JR., AND
ALEXIS K. LINDSAY, COUNSEL FOR INTERVENOR

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant Richland County will move before the Honorable G. Thomas Cooper, Jr. at such time and place as may be set by the Court, for an Order pursuant to Rule 59(e), SCRCPP, altering and/or amending the Order Denying Motions to Dismiss and for Judgment on the Pleadings filed March 3, 2017. The Defendant's counsel received written notice of entry of that Order Denying Motions to Dismiss and for Judgment on the Pleadings on March 6, 2017.

The Defendant County's motion is based on the following:

1. In its Order Denying Motions to Dismiss and for Judgment on the Pleadings filed March 3, 2017, the Court addressed the Defendant County's and the Intervenor's statute of limitations defense and ruled on the merits that the Plaintiff's claims are not barred by the statute of limitations. The Court should have declined to rule on the statute of limitations defense because the Defendant and the Intervenor advised the Court at the hearing that they were withdrawing the statute of limitations ground for purposes of the Motions to Dismiss but reserved the right to re-assert that defense at a later stage of the litigation. That was reiterated in the proposed order that was submitted to the Court by the Defendant and the Intervenor. Moreover, in the Court's Order, it states: "Defendants have asserted a statute of limitations defense. However, they have not articulated a sufficient rationale for such an argument." That is true only because that defense as a basis for the Motions to Dismiss was withdrawn. In addition, there was no factual development presented which would allow this Court to rule as a matter of law that the Plaintiffs' claims are not barred by the statute of limitations. The Court is therefore respectfully requested to amend the Order to omit the section addressing the statute of limitations defense which had been withdrawn for purposes of the motions before the Court. *See, City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462, 464 (Ct. App. 2004) ("[i]t is an error of law for a court to decide a case on a ground not before it").

2. The Court is also respectfully requested to reconsider its ruling on taxpayer standing. The Court's Order includes a detailed history of taxpayer standing in South Carolina going back more than 100 years. However, the numerous cases cited by the Court do not address taxpayer standing within the parameters established by constitutional standing principles. Notably, the Court fails to acknowledge that the jurisprudence on taxpayer standing as recognized by the South Carolina Supreme Court has changed over time in a substantial way. Most critically,

taxpayer standing must now meet the strict requirements of constitutional standing which requires the Plaintiffs to show a "concrete and particularized" injury that they will suffer. That distinguishes the long history of cases which the Court cites and on which the Plaintiffs rely. Those cases, quite simply, do not address the requirements of constitutional standing in the taxpayer context.

The Court is urged to consider and apply the more recent case law such as *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 366 (2013); *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008); and *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012). The Supreme Court has made clear in those cases that constitutional standing requires as one of its "core requirements" that the party suffered a "concrete and particularized injury." *Bodman*, 742 S.E.2d at 366. However, where the harm is one shared by all taxpayers, the requisite showing of standing has not been made. *Id.* As the Supreme Court explained in *ATC*, *supra*, the injury claimed by the taxpayer was common to all property owners in Charleston County, and "[t]his feature of commonality defeats the constitutional requirement of a concrete and particularized injury." *ATC*, 669 S.E.2d at 341. The Supreme Court noted that "a taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'" *Id.*, citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

Likewise, in *Freemantle*, *supra*, the plaintiff, as a taxpayer of Anderson County, sued Anderson County and members of County Council challenging the legality of a severance agreement and payments made to a former county administrator. The plaintiff raised allegations of "secret meetings" and "collusion" and also claimed that the severance package was an illegal expenditure because it far exceeded what was provided for in the employment contract. The Supreme Court, however, rejected the plaintiff's claim of taxpayer standing under constitutional

standing principles. The Supreme Court concluded that "[i]n our judgment, the injury, if any, to Appellant as a taxpayer is common to all citizens and taxpayers of Anderson County. Thus, this feature of commonality defeats the constitutional requirement of a concrete and particularized injury." 728 S.E.2d at 44.

Similar to the *ATC* and *Freemantle* cases, in the present case, the Plaintiffs have not pled nor shown any "concrete and particularized" injury that they will suffer – a harm separate from that allegedly common to all taxpayers. At best, they are claiming an "injury" allegedly suffered by all taxpayers. Under current jurisprudence, including the dictates of constitutional standing, the Plaintiffs' status as taxpayers is insufficient to confer standing in this case.

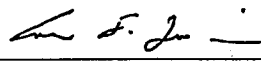
In sum, the Court is respectfully asked to reconsider its ruling on taxpayer standing and specifically to discuss the *current* law on the issue. The Court is asked to address specifically whether the Plaintiffs have shown any "concrete and particularized" injury that they will suffer – a harm separate from that allegedly common to all taxpayers – so as to meet the strict requirements of constitutional standing.

3. The Court is also respectfully requested to reconsider its ruling on "public importance" standing and to specifically engage in the proper analysis as required by recent South Carolina Supreme Court case law on the issue. In its Order, the Court failed to recognize that the Supreme Court in recent years has "tempered the application of the public importance exception somewhat," and in doing so, has "reminded the bench and bar that 'whether an issue of public importance exists necessitates a cautious balancing of the competing interests presented.'" *Bodman*, 742 S.E.2d at 367, *citing ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 341 (2008). In addressing the issue of "public importance" standing, the Court relied only on outdated and arguably obsolete case law that was erroneously relied on by the Plaintiffs.

There is no mention in the Order of the *Bodman*, *ATC* or *Freemantle* cases which establish the current law on the issue. Moreover, the Court failed to engage in the "balancing of competing interests" test that the Supreme Court now requires. In fact, the Court makes no mention of any competing interests that the Court evaluated. The Court is therefore requested to address the issue of "public importance" standing under the current jurisprudence. The Defendant County asks that the Court address the competing interests as discussed in detail in the proposed order submitted by the Defendant and the Intervenor.

The Defendant County's motion is based upon the pleadings filed in this case, the Order Denying Motions to Dismiss and for Judgment on the Pleadings filed March 3, 2017; the proposed order submitted by the Defendant and the Intervenor (copy attached); the supporting case law; and the rules of court.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

RAY N. STEVENS
RAY E. JONES
COURT E. WALSH
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Post Office Box 1509
Columbia, South Carolina 29202
(803) 255-8000

Counsel for Defendant Richland County

Columbia, South Carolina

March 16, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2016-CP-40-2875

Plaintiffs,

v.

Richland County Council,

Defendant,

Central Midlands Regional Transit
Authority,

Intervenor-Defendant.

**ORDER GRANTING
MOTIONS TO DISMISS
OR ALTERNATIVELY, MOTION FOR
JUDGMENT ON THE PLEADINGS**

This matter is before this Court on the Motion to Dismiss or alternatively Motion for Judgment on the Pleadings filed by the Defendant Richland County Council and the Motion to Dismiss filed by the Intervenor-Defendant Central Midlands Regional Transit Authority ("CMRTA").¹ A hearing was held with all counsel of record present on February 14, 2017, in Berkeley County. The hearing was held outside of the Fifth Circuit with the consent of the parties. After a review of the pleadings, written submissions by the parties, and the oral arguments of counsel, this Court grants the Defendants' motions as follows:

¹ For ease of discussion, Richland County Council and CMRTA will be referred to collectively as "Defendants" in this Order.

BACKGROUND

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

In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1.²

On July 18, 2012, the Richland County Council enacted Ordinance Number 039-12HR for the purpose of levying a one percent sales and use tax pursuant to Section 4-37-30 of the Transportation Act (hereinafter referred to as the "Penny Tax").³ The Penny Tax Ordinance provided for a referendum to be held on November 6, 2012. The Ordinance also provided for the

² The title to 1995 Act No. 52 states that the Transportation Act was intended "to authorize counties to establish optional methods for the financing of transportation facilities including the acquisition, construction, equipment, and operation of highways, roads, streets, bridges, and other transportation-related projects." *See*, 1995 Act No. 52. The list of transportation-related projects was expanded in 2000. The title to 2000 Act No. 368 states that the amendment was "to provide that the proceeds of the tax may be used for mass transit systems and greenbelt projects." *See*, 2000 Act No. 368.

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

County's implementation of the Penny Tax upon approval by the electorate. On November 6, 2012, the voters of Richland County approved the referendum.

The Plaintiffs have filed this action challenging the legality of Richland County Ordinance Number 039-12HR including categories of expenditures that have been made in accordance with that Ordinance. The Plaintiffs have brought this action against Richland County Council. The CMTRA has intervened as a Defendant. The Defendants have moved to dismiss or for judgment on the pleadings under Rule 12(b)(1), Rule 12(b)(6) and/or Rule 12(c), SCRCP.

I. Standing

The Defendants contend that the Plaintiffs lack standing to bring this action. The Plaintiff South Carolina Public Interest Foundation is a non-profit corporation located in Greenville County. The Plaintiff Edward D. Sloan, Jr. is a resident and taxpayer in Greenville County. The Plaintiff William B. DePass, Jr. is a resident and taxpayer in Richland County. The Plaintiffs allege that they have each paid the Penny Tax in Richland County.

It is well settled that "[s]tanding to sue is a fundamental requirement in instituting an action." *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 366 (2013). Under South Carolina law, "[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008). In this case, the Plaintiffs do not claim to have standing by statute. Instead, they are asserting a right to sue through taxpayer standing and by the "public importance" exception to the general standing requirements.

A. Taxpayer Standing

Constitutional standing requires as one of its "core requirements" that the party suffered a "concrete and particularized injury." *Bodman*, 742 S.E.2d at 366. However, where the harm is

one shared by all taxpayers, the requisite showing of standing has not been made. *Id.* As the Supreme Court explained in *ATC*, the injury claimed by the taxpayer was common to all property owners in Charleston County, and "[t]his feature of commonality defeats the constitutional requirement of a concrete and particularized injury." *ATC*, 669 S.E.2d at 341. The Supreme Court noted that "a taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'" *Id.*, citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

The Supreme Court's decision in *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012), is also instructive. In that case, the plaintiff, as a taxpayer of Anderson County, sued Anderson County and members of County Council challenging the legality of a severance agreement and payments made to a former county administrator. The plaintiff raised allegations of "secret meetings" and "collusion" and also claimed that the severance package was an illegal expenditure because it far exceeded what was provided for in the employment contract. The Supreme Court, however, rejected the plaintiff's claim of taxpayer standing under constitutional standing principles. The Supreme Court concluded that "[i]n our judgment, the injury, if any, to Appellant as a taxpayer is common to all citizens and taxpayers of Anderson County. Thus, this feature of commonality defeats the constitutional requirement of a concrete and particularized injury." 728 S.E.2d at 44.

Similar to the *ATC* and *Freemantle* cases, in the present case, the Plaintiffs have not pled nor shown any "concrete and particularized" injury that they will suffer – a harm separate from that allegedly common to all taxpayers. At best, they are claiming an "injury" allegedly suffered by all taxpayers. Under current jurisprudence, including the dictates of constitutional standing,⁴

⁴ The Plaintiffs have provided the Court with a detailed history of taxpayer standing in South Carolina going back more than 100 years. However, the Plaintiffs cite numerous cases that do not address taxpayer standing within the parameters established by constitutional

this Court concludes that the Plaintiffs' status as taxpayers is insufficient to confer standing in this case.

B. "Public Importance" Standing

The Plaintiffs further claim standing under the "public importance" exception to general standing requirements. In their Amended Complaint, the Plaintiffs generally allege that "[t]his action raises Constitutional and statutory issues of great public importance." *See*, Amended Complaint, ¶ 5. Yet, the Plaintiffs never state with specificity what those issues are. Moreover, a careful reading of the Amended Complaint does not reflect any mention of the United States or South Carolina Constitutions nor the pleading of any constitutional claim or theory for relief. Thus, there are no constitutional claims asserted in this case.

Recently, the Supreme Court has acknowledged "public importance" standing "has been the subject of much confusion and misapplication." *Bodman*, 742 S.E.2d at 366. The Supreme Court has explained that "standing is not inflexible." *Id.* Thus, "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* The Supreme Court in recent years has "tempered the application of the public importance exception somewhat," and in doing so, the Court has "reminded the bench and bar that 'whether an issue of public importance exists necessitates a cautious balancing of the competing interests presented.'" *Bodman*, 742 S.E.2d at 367, *citing ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 341 (2008).

standing principles. Notably, the Plaintiffs do not cite this Court to such cases as *ATC* and *Freemantle* which set forth the *current* jurisprudence on taxpayer standing. Most critically, and as discussed herein, taxpayer standing must now meet the strict requirements of constitutional standing which requires the Plaintiffs to show a "concrete and particularized" injury that they will suffer. That distinguishes the long history of cases on which the Plaintiffs rely. Those cases, quite simply, do not address the requirements of constitutional standing.

The Plaintiffs have cited this Court to numerous cases where one or more of these very parties have been conferred standing in the past by our appellate courts. However, most of those cases pre-date *ATC* and *Bodman*, where the Supreme Court has admittedly "tempered the application of the public importance exception somewhat." *Id.*

This Court is therefore required to engage in a "cautious balancing of the competing interests." In addition, this Court recognizes that the Plaintiffs have the burden of showing that a cautious balancing of the competing interests supports the use of the "public importance" exception in this case. *See, Joseph v. South Carolina Dept. of Labor, Licensing and Regulation*, 417 S.C. 436, 790 S.E.2d 763, 770 (2016) ("[a] party seeking to establish standing carries the burden of demonstrating each element"). The Court concludes that the Plaintiffs have not sustained that burden of proof.

At the hearing, the Plaintiffs argued that they must simply make allegations of "illegal conduct" by the governmental entity and that suffices for the Court to confer "public importance" standing. This Court disagrees. Mere allegations of illegality do not permit the Court to appropriately engage in a cautious balancing of the competing interests as required by the Supreme Court's current case law.

In this respect, the Supreme Court's 2012 decision in *Freemantle* is again instructive. In addition to rejecting Freemantle's claim of taxpayer standing, the Supreme Court also rejected his claim of "public importance" standing. The Supreme Court reiterated that "for a court to relax general standing rules, the matter of importance must, *in the context of the case*, be inextricably connected to the public need for court resolution for future guidance." *Freemantle*, 728 S.E.2d at 44. (Emphasis added). Despite the allegations of "collusion" and similar illegal

conduct, as well as what the Court described as a "seemingly excessive severance package," the Supreme Court found no need for future guidance. *Id.*

As highlighted above, the Supreme Court requires the "context of the case" to be considered by the Court in evaluating whether the case warrants the invocation of the public importance exception. In the case at bar, however, the Plaintiffs have made no showing of any need for judicial intervention to provide "future guidance" with respect to expenditures of the Penny Tax revenues or the application of the Penny Tax Ordinance, including any audit, budgeting and procurement provisions. In adjudicating the "public importance" standing issue, it is entirely appropriate for the Court to look at the legal issues presented and not rest its analysis on the bald allegations of the Plaintiffs' Amended Complaint. In doing so, the Court recognizes – as discussed in more detail below – that the preamble to the Transportation Act sets forth in clear, specific terms the scope of expenditures for which the Penny Tax may be utilized. The Plaintiffs have baldly asserted their claims without giving due consideration to the legislative history and clear legislative intent as spelled out in that preamble.

The Court is also cognizant that many of the Plaintiffs' allegations of "illegality" on which they are basing their assertion of "public importance" standing are alleged in the Amended Complaint "upon information and belief" and are alleged with absolutely no specificity. For example, in the Second and Seventh Causes of Action, the Plaintiffs have not alleged any specific error or omission committed by Richland County in the procurement process but instead they allege a general violation of Section 11-35-50 which only requires "sound principles of appropriately competitive procurement." S.C. Code Ann. § 11-35-50. Thus, the Plaintiffs have not shown the need for any future guidance. The Seventh Cause of Action cites to a non-specific violation of Section 4-37-25 which by its express language applies only to "an authority created

pursuant to this chapter." S.C. Code Ann. § 4-37-25. Yet, the Richland County Ordinance, as submitted by the Plaintiffs in opposition to the Motions to Dismiss, reflects that Richland County chose not to adopt a transportation authority. Thus, a balancing of the competing interests -- in which this Court has necessarily engaged -- demonstrates that Section 4-37-25 would have no applicability. The Plaintiffs' audit and budgeting allegations are similar. The Court is not persuaded that those allegations rise to the level of "illegal conduct" or that any future guidance from the judiciary is required on those issues -- just as future guidance was not deemed necessary by the Supreme Court in *Freemantle*.

In sum, this Court concludes that the Plaintiffs have not sustained their burden of demonstrating a need for future guidance from this Court in order to warrant the invocation of the public importance exception. Any necessary guidance is already stated in the language of the statutory enactments themselves, and the Plaintiffs are hereby denied standing to proceed with their claims.

II. Scope of Permissible Expenditures under Transportation Act

The Defendant Richland County Council also moved to dismiss or for judgment on the pleadings specifically with regard to the declaratory and injunctive relief sought by the Plaintiffs in their First Cause of action. The Defendant-Intervenor CMRTA joined that motion at the hearing without objection.

In their First Cause of Action, the Plaintiffs allege that Richland County Ordinance Number 039-12HR exceeds the scope of Section 4-37-30 by allowing for the Penny Tax revenues to be expended for such matters as the operation of the COMET mass transit services provided by the CMRTA as well as the construction of pedestrian sidewalks and bike lanes and paths. However, contrary to the Plaintiffs' allegations in their First Cause of Action, Section 4-37-30, as adopted by

1995 Act No. 52 and as amended by 2000 Act No. 368, allows for the expenditure of Penny Tax revenues for operating transportation-related projects (including operating mass-transit projects which were added to the categories of projects and facilities by the amendment in 2000). Moreover, the Plaintiffs are in error in suggesting that the Penny Tax revenues are authorized only for "transportation facilities" where 1995 Act No. 52 as well as Section 4-37-30 expressly authorize its expenditure for "transportation-related projects." In addition, applying the plain and ordinary meaning of the terms, pedestrian sidewalks and bike paths and lanes qualify as "other transportation-related projects [or] facilities." *See*, S.C. Code Ann. § 4-37-30(A)(1)(a)(i).⁵

The intent of the General Assembly as to the scope of the authorized uses of the Penny Tax revenues is stated clearly in the preamble or "Findings" section of 1995 Act No. 52, as contained in Section 1 of the Act, which reads as follows:

In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and **operating** highways, roads, streets, and bridges, and other **transportation-related projects**, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1. (Emphasis added).

⁵ Importantly, the Plaintiffs' First Cause of Action presents purely issues of law. *See, Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012) ("[d]etermining the proper interpretation of a statute is a question of law"). The United States Supreme Court has explained that "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). Similarly, it is well settled that "Rule 12(c) typically is applied to issues that are true issues of law such as statutory interpretation." *Versata Software, Inc. v. Sun Microsystems, Inc.*, 2009 WL 1084412 (E.D. Tex. 2009).

As authorized by S.C. Code Ann. § 4-37-30(A)(1)(a), Section 1(c) of Richland County Ordinance Number 039-12HR specified that purposes for which the Penny Tax revenues must be used:

For financing the costs of highways, roads, streets, bridges, greenways, pedestrian sidewalks, and bike paths and lanes and other transportation-related projects facilities, and drainage facilities related thereto, and mass transit systems operated by Richland County or (jointly) operated by Richland County, other governmental entities and transportation authorities.

Moreover, Section 2(c) of the Ordinance provided in part:

The maximum cost of the projects to be funded from the proceeds of the Sales and Use Tax shall not exceed, in the aggregate, the sum of \$1,037,900,000, and the maximum amount of net proceeds to be raised by the Sales and Use Tax shall not exceed \$1,070,000,000, *which includes administrative costs* and debt service on bonds issued to pay for the projects.

(Emphasis added). Thus, the Ordinance does expressly include operating costs as contemplated by the Transportation Act.

These provisions of Ordinance Number 039-12HR, as challenged by the Plaintiffs, are, as a matter of law, valid, enforceable and lawful under state law, and the Plaintiffs are not entitled to the declaratory or injunctive relief sought. The General Assembly's preamble to 1995 Act No. 52 gives express permission for the Penny Tax revenue to be used for "operating" transportation-related projects, which by later amendment includes "mass transit systems."⁶ In *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341, 354 (1994), the Supreme Court specifically explained that "preamble of an act may be used as a guide in determining legislative intent." Likewise, in

⁶ When "mass transit systems" were added to Section 4-37-30(A)(1)(a)(i) in 2000, the General Assembly did not make any additional "findings" nor include a preamble section. Moreover, no attempt was made to delete or amend the "findings" section from the 1995 Act. The title to 2000 Act No. 368 states that the amendment was "to provide that the proceeds of the tax may be used for mass transit systems and greenbelt projects." See, 2000 Act No. 368.

Benjamin v. Housing Authority of Darlington County, 198 S.C. 79, 15 S.E.2d 737, 738 (1941), the Supreme Court recognized that legislative findings are accorded "great weight because of the high regard we hold for a coordinate branch of the government." 15 S.E.2d at 738. *See also*, *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 711 S.E.2d 895, 898 (2011) (Supreme Court addressed legislative intent "as expressed in the preamble to our FOIA statute"); *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369, 374 (Ct. App. 1989) (Court of Appeals cited Act's preamble as "expressly stating" legislative intent).

The Court finds that the legislative intent is clear from the enabling Act itself. The expenditure of Penny Tax Revenue is not limited to "capital costs" for the construction of "facilities." Instead, the Penny Tax Revenues may be expended on the operation of transportation-related projects, which includes the operation of the COMET mass transit system. The Penny Tax Revenues may also be used to fund such transportation-related facilities as sidewalks and bike paths and lanes. The plain and ordinary meaning of those terms demonstrate that they are transportation-related. Bike lanes themselves are often part of roadways. Moreover, historically in South Carolina, sidewalks are constructed, owned and maintained by governmental entities as part of the adjoining roadways. *See generally*, *Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991); *Vaughn v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006); S.C. Code Ann. § 5-27-120. They are certainly "facilities" which are transportation-related. Therefore, this Court concludes as a matter of law that the Plaintiffs are not entitled to the declaratory and injunctive relief sought in their First Cause of Action.⁷

⁷ The Defendants also asserted a statute of limitations ground in their motions. At the hearing, counsel indicated that they were withdrawing the statute of limitations ground for purposes of these motions and reserved the right to re-assert that defense at a latter stage of the litigation, should it become necessary.

III. Substitution of Richland County

The Defendant Richland County Council also argued that it is not a body politic separate and apart from Richland County. Instead, Richland County Council is the governing body of Richland County and is not amenable to suit in its own name. The Court agrees that the proper party-defendant is Richland County and not its governing body. The Plaintiffs made an oral motion to substitute Richland County as the party-defendant in place of Richland County Council. That motion is granted.

IT IS, THEREFORE, ORDERED THAT:

1. The Plaintiff's Amended Complaint is dismissed for lack of standing.
2. Alternatively, the Plaintiffs' First Cause of Action is dismissed as a matter of law.

This Court rules as a matter of law that the Transportation Act authorizes the Penny Tax revenues to be expended on administrative costs and the operation of transportation-related facilities and projects, which includes the operation of the COMET mass transit system and the construction of such transportation-related facilities as sidewalks and bike paths and lanes.

3. Richland County is substituted as the proper party-Defendant in place of Richland County Council.

AND IT IS SO ORDERED.

G. THOMAS COOPER, JR.
Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

February __, 2017

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,)

v.)

Richland County,)

Defendant,)

Central Midlands Regional)
Transit Authority,)

Intervenor.)

Civil Action No. 2016-CP-40-2875

CERTIFICATE OF SERVICE

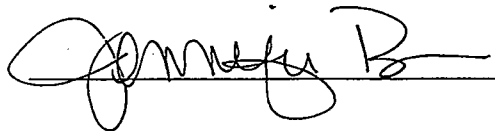
The undersigned employee of Davidson & Lindemann, P.A., counsel for the Defendant, Richland County, does hereby certify that service of the **Notice of Motion and Motion to Alter or Amend Order** in the above-captioned matter was made upon the Honorable G. Thomas Cooper, Jr. and all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 16th day of March 2017:

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge
Post Office Box 192
Columbia, South Carolina 29202-0192
Email: gcooperj@sccourts.org; gcooperlc@sccourts.org

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, South Carolina 29601
Email: james.carpenter@carpenterlawfirm.net

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Court E. Walsh, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202
Email: raystevens@parkerpoe.com
Email: rayjones@parkerpoe.com
Email: courtwalsh@parkerpoe.com

Elizabeth Van Doren Gray, Esquire
Robert E. Tyson, Jr., Esquire
Alexis K. Lindsay, Esquire
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, South Carolina 29211
Email: egrays@sowellgray.com
Email: rtyson@sowellgray.com
Email: alindsay@sowellgray.com

A handwritten signature in black ink, appearing to read "Robert E. Tyson, Jr.", written over a horizontal line.

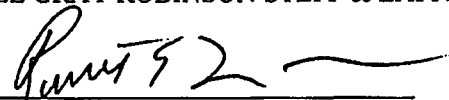
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation,	)	Civil Action No. 2016-CP-40-02875
Edward D. Sloan, Jr., and William B.	)	
DePass, Jr., individually, and on behalf of	)	
all others similarly situated,	)	
	)	
	)	INTERVENOR DEFENDANT
vs.	)	CENTRAL MIDLANDS REGIONAL
	)	TRANSIT AUTHORITY'S JOINDER IN
Richland County,	)	SUPPORT OF RICHLAND COUNTY'S
	)	MOTION TO ALTER OR AMEND
	)	
Central Midlands Regional Transit	)	
Authority,	)	
	)	
Intervenor Defendant.	)	

Intervenor Defendant Central Midlands Regional Transit Authority ("CMRTA"), by and through its undersigned counsel and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, hereby joins in the "Motion to Alter or Amend" filed by Defendant Richland County.

This motion is made pursuant to the South Carolina Rules of Civil Procedure, applicable South Carolina case and statutory law, the Richland County Motion, and all other materials, authority, and memoranda which CMRTA may submit to the Court.

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC

By:


Elizabeth Van Doren Gray (SC Bar No. 2434)
egrays@sowellgray.com
Robert E. Tyson (SC Bar No. 10820)
rtyson@sowellgray.com
Alexis K. Lindsay (SC Bar No. 78049)
alindsay@sowellgray.com
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211

(803) 929-1400 Telephone
(803) 929-0300 Fax

*Attorneys for Central Midlands Regional Transit
Authority*

Columbia, South Carolina
March 16, 2017

CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Robinson Stepp & Laffitte, L.L.C., do hereby certify that I have served all counsel in this action with a copy of the motion(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Motion: **Intervenor CMRTA'S Joinder In Support of Richland County's Motion to Alter or Amend Order**

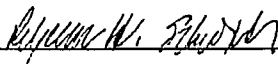
Counsel Served:

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601
Attorneys for Plaintiffs

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568

Larry C. Smith, Esquire
Richland County Attorney
Post Office Box 192
Columbia, SC 29202
Attorneys for Richland County



March 16, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation,	)	Civil Action No. 2016-CP-40-02875
Edward D. Sloan, Jr., and William B.	)	
DePass, Jr., individually, and on behalf of	)	
all others similarly situated,	)	
	)	
	)	
	)	
Plaintiffs,	)	
vs.	)	
Richland County,	)	
	)	
Defendant,	)	
	)	
Central Midlands Regional Transit	)	
Authority,	)	
	)	
Intervenor Defendant.	)	
	)	
	)	

**ANSWER OF INTERVENOR
DEFENDANT CENTRAL MIDLANDS
REGIONAL TRANSIT AUTHORITY
TO PLAINTIFFS' AMENDED
COMPLAINT**

Now comes Intervenor Defendant Central Midlands Regional Transit Authority (hereinafter "CMRTA"), by and through its undersigned attorneys, answering the Plaintiffs' Amended Complaint as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Amended Complaint not hereinafter specifically admitted, qualified, or explained is denied.
2. Responding to the allegations of Paragraph 1, CMRTA admits Plaintiff South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of South Carolina but lacks information sufficient to form a belief as to the remaining allegations of Paragraph 1; thus, they are denied.
3. Responding to the allegations of Paragraph 2, CMRTA admits Plaintiff Edward D. Sloan is a resident of Greenville County, South Carolina but lacks information sufficient to form a belief as to the remaining allegations of Paragraph 2; thus, they are denied.

4. Responding to the allegations of Paragraph 3, CMRTA admits Plaintiff William B. DePass, Jr. is a resident of Richland County, South Carolina but lacks information sufficient to form a belief as to the remaining allegations of Paragraph 3; thus, they are denied.

5. Responding to the allegations of the first enumerated Paragraph 4, CMRTA admits.

6. Responding to the allegations of the second enumerated Paragraph 4, CMRTA denies.

7. Responding to the allegations of Paragraph 5, CMRTA denies.

8. Responding to the allegations of Paragraph 6, CMRTA lacks information sufficient to form a belief as to whether Plaintiff Sloan has paid the penny tax; therefore, it and the remaining allegations of Paragraph 6 are denied.

9. Responding to the allegations of Paragraph 7, CMRTA lacks information sufficient to form a belief as to whether Plaintiff Sloan has paid the penny tax on behalf of Plaintiff South Carolina Public Interest Foundation; therefore, it and the remaining allegations of Paragraph 7 are denied.

10. Responding to the allegations of Paragraph 8, CMRTA lacks information sufficient to form a belief as to whether Plaintiff DePass has paid the penny tax; therefore, it and the remaining allegations of Paragraph 8 are denied.

11. Responding to the allegations of Paragraph 9, CMRTA craves reference to the specific statute referenced. To the extent the allegations are inconsistent with the statute, the allegations are denied.

12. Responding to the allegations of Paragraph 10, CMRTA craves reference to the specific statute referenced. To the extent the allegations are inconsistent with the statute, the allegations are denied.

13. Responding to the allegations of Paragraph 11, CMRTA admits Richland County Ordinance 039-12HR was adopted per the statute and craves reference to the statute for its specific language.

14. Responding to the allegations of Paragraph 12, CMRTA craves reference to the specific language of Ordinance 039-12HR. To the extent the allegations are inconsistent with the Ordinance, the allegations are denied.

15. Responding to the allegations of Paragraph 13, CMRTA reiterates and realleges each corresponding paragraph of 1-12 of this Answer as set forth herein.

16. Responding to the allegations of Paragraph 14, CMRTA craves reference to the specific language of Ordinance 039-12HR. To the extent the allegations are inconsistent with the Ordinance, the allegations are denied.

17. Responding to the allegations of Paragraph 15, CMRTA craves reference to the specific language of Ordinance 039-12HR. To the extent the allegations are inconsistent with the Ordinance, the allegations are denied.

18. Responding to the allegations of Paragraph 16, CMRTA denies.

19. Responding to the allegations of Paragraph 17, CMRTA craves reference to the specific language of Ordinance 039-12HR. To the extent the allegations are inconsistent with the Ordinance, the allegations are denied.

20. Responding to the allegations of Paragraph 18, the allegations call for a conclusion of law; therefore, no response is warranted; but if a response was warranted, CMRTA denies.

21. Responding to the allegations of Paragraph 19, CMRTA reiterates and realleges each corresponding paragraph of paragraphs 1-18 of this Answer as set forth herein.

22. Responding to the allegations of Paragraph 20, the allegations call for a conclusion of law; therefore, no response is warranted; but if a response was warranted, CMRTA denies.

23. Responding to the allegations of Paragraph 21, the allegations call for a conclusion of law; therefore, no response is warranted; but if a response was warranted, CMRTA denies.

24. Responding to the allegations of Paragraph 22, the allegations do not call for a response; however, if a response was warranted, CMRTA denies.

25. Responding to the allegations of Paragraph 23, CMRTA reiterates and realleges each corresponding paragraph of paragraphs 1-22 of this Answer as set forth herein.

26. Responding to the allegations of Paragraph 24, CMRTA lacks information sufficient to form a belief; therefore, the allegations are denied.

27. Responding to the allegations of Paragraph 25, CMRTA reiterates and realleges each corresponding paragraph of paragraphs 1-24 of this Answer as set forth herein.

28. Responding to the allegations of Paragraph 26, CMRTA craves reference to the specific language of Ordinance 039-12HR. To the extent the allegations are inconsistent with the Ordinance, the allegations are denied.

29. Responding to the allegations of Paragraph 27, CMRTA lacks information sufficient to form a belief; therefore, the allegations are denied.

30. Responding to the allegations of Paragraph 28, CMRTA reiterates and realleges each corresponding paragraph of paragraphs 1-27 of this Answer as set forth herein.

31. Responding to the allegations of Paragraph 29, CMRTA craves reference to the specific language of Ordinance 039-12HR. To the extent the allegations are inconsistent with the Ordinance, the allegations are denied.

32. Responding to the allegations of Paragraph 30, CMRTA lacks information sufficient to form a belief; therefore, the allegations are denied.

33. Responding to the allegations of Paragraph 31, CMRTA reiterates and realleges each corresponding paragraph of paragraphs 1-30 of this Answer as set forth herein.

34. Responding to the allegations of Paragraph 32, CMRTA craves reference to the specific language of Ordinance 039-12HR. To the extent the allegations are inconsistent with the Ordinance, the allegations are denied.

35. Responding to the allegations of Paragraph 33, CMRTA lacks information sufficient to form a belief; therefore, the allegations are denied.

36. Responding to the allegations of Paragraph 34, CMRTA reiterates and realleges each corresponding paragraph of paragraphs 1-33 of this Answer as set forth herein.

37. Responding to the allegations of Paragraph 35, CMRTA craves reference to the specific language of Ordinance 039-12HR. To the extent the allegations are inconsistent with the Ordinance, the allegations are denied.

38. Responding to the allegations of Paragraph 36, the allegations call for a conclusion of law; therefore, no response is warranted; but if a response was warranted, CMRTA denies.

39. Responding to the allegations of Paragraph 37, CMRTA lacks information sufficient to form a belief; therefore, the allegations are denied.

40. The allegations set forth in the prayer for relief are denied.

FOR A SECOND DEFENSE

41. Each allegation and defense contained above is realleged and incorporated by reference.

42. The allegations contained in the Amended Complaint fail to state a cause of action upon which relief can be granted.

FOR A THIRD DEFENSE

43. Each allegation and defense contained above is realleged and incorporated by reference.

44. Plaintiffs do not have standing to assert their claims as stated in the Amended Complaint.

FOR A FOURTH DEFENSE

45. Each allegation and defense contained above is realleged and incorporated herein by reference.

46. The equitable doctrines of waiver, estoppel, unclean hands, and laches bar Plaintiffs' claims against CMRTA.

FOR A FIFTH DEFENSE

47. Each allegation and defense contained above is realleged and incorporated herein by reference.

48. Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations.

FOR A SIXTH DEFENSE

49. Each allegation and defense contained above is realleged and incorporated herein by reference.

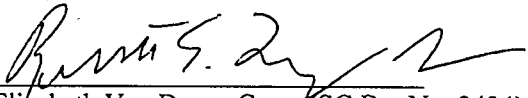
50. Plaintiffs' claim for attorneys' fees is not supported by South Carolina law nor do the Plaintiffs assert their request is supported by a contract; thus, this claim should be stricken and dismissed.

WHEREFORE having fully answered the Amended Complaint, CMRTA prays that all relief sought by the Plaintiffs be denied; for the costs of this action including reasonable attorneys' fees; that the Amended Complaint be dismissed with prejudice; and for any other such relief the Court deems just and proper.

(signature on following page)

SOWELL GRAY ROBINSON STEPP & LAFFITTE, L.L.C.

By:


Elizabeth Van Doren Gray (SC Bar No. 2434)

egrav@sowellgray.com

Robert E. Tyson, Jr. (SC Bar No. 10820)

rtyson@sowellgray.com

Alexis K. Lindsay (SC Bar No. 78049)

alindsav@sowellgray.com

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400 Telephone

(803) 929-0300 Fax

*Attorneys for Central Midlands Regional Transit
Authority*

Columbia, South Carolina
March 23, 2017

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

v.

Richland County Council,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

**MEMORANDUM OF LAW IN
OPPOSITION TO MOTIONS TO
ALTER OR AMEND**

RICHLAND COUNTY
FILED
2017 MAR 27 PM 1:06
JEALETTE W. McBRIDE
C.C.P. & G.S.

NOW COME the Plaintiffs, by their undersigned attorney, and submit this Memorandum of Law in Opposition to the Motions to Alter or Amend filed by the Defendants and by the Intervenor Central Midlands Regional Transit Authority ("CMRTA").

Defendants first assert that they withdrew the statute of limitations defense as a basis for their motion to dismiss. Plaintiff does not have a clear recollection to the contrary, and therefore does not object to this part of the motion to alter or amend.

Second, Defendants re-assert that the Plaintiffs lack standing. Simply put, the Court's decision was right, and the Defendants are wrong.

Plaintiffs have asserted both taxpayer standing and public importance standing. Plaintiffs rely on a multitude of cases supporting their claims of taxpayer standing and public importance standing.

The Defendants rely on three cases to contend that the Plaintiffs lack standing: *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 366 (2013); *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008); and *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012). None of these cases affords the Defendants any relief, and each of these cases is distinguishable from the case at bar.

In *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 366 (2013) a citizen-taxpayer asked the Supreme Court, in its original jurisdiction, to rule that all of the caps and exceptions to the taxation laws of South Carolina violated the equal protection clause and violated the Constitutional provision against special legislation. The Court accepted the case in its original jurisdiction, thereby confirming that the matter had public importance.

The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in the lower court in the first instance, without material prejudice to the rights of the parties. **If the public interest is involved**, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition with supporting affidavits.,

SCACR 245 (a). In *Bodman*, only one justice would have ruled that the Petitioner lacked standing. (See the opinion of Justice Pleicones, concurring in the judgment.) Accordingly, this case did not alter the rules relating to public importance standing.

In *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008), the Court ruled that the Plaintiff lacked standing, but this case was not a typical taxpayer case. Charleston County had followed appropriate channels and granted a zoning change to the owner of some real estate in order to allow him to build a cellular telephone tower. A competitor had opposed the change and lost administratively. He then sought to overturn the zoning change through a declaratory judgment action in the Circuit Court.

The Circuit Court ruled that the competitor, plaintiff ATC South, lacked standing, and the Supreme Court agreed.

The Supreme Court first ruled that a statute allowing “an owner of adjoining land” to contest a zoning change did not apply to this plaintiff, because his property was more than a mile away. Second, the Court followed the majority rule that in addressing a zoning contest, the possibility of increased competition does not afford standing to a competitor to contest the zoning change of another person’s property. Third, the Court also rejected taxpayer standing. In this case there was no allegation of illegality, and no unlawful expenditure of taxpayer money. Accordingly, the plaintiff in that action lacked taxpayer standing.

Finally, the Court did not find that this case merited a grant of standing under the public importance exception, because it was essentially a private dispute between two competing companies in the business of raising cellular telephone towers, and it raised no issue requiring judicial guidance. There was no allegation of unlawful or *ultra vires* action. There was a simple difference of opinion on the appropriate political solution to this agreement. Accordingly, this case did not alter the rules regarding taxpayer standing to contest illegal activities of government.

Finally, Defendants rely on *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012). In that case, the plaintiff sued Anderson County and members of County Council challenging the legality of a severance agreement and payments made to a former county administrator, but instead of seeking only declaratory and injunctive relief, the plaintiff sought damages for himself. The Court rejected taxpayer and public importance standing with this analysis:

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., 398 S.C. 186, 194, 728 S.E.2d 40, 44 (emphasis added).

Richland County and the CMRTA also assert that in *Freemantle* the Court cited *Frothingham v. Mellon*, 262 U.S. 447(1923), arguing that *Frothingham* required a particularized injury for standing. *Frothingham* addressed standing in the federal courts, which are governed by Article III of the United States Constitution. Article III limits the jurisdiction of federal courts to "cases" and "controversies." Federal courts are courts of limited jurisdiction, and state courts are courts of general jurisdiction. This distinction is critical. When *Freemantle* discussed "Constitutional standing," it was addressing standing under the U.S. Constitution, which requires a "case" or "controversy." While that proposition is sound, that is beside the point, because this case is not under federal limited jurisdiction, it is in state court, a court of general jurisdiction. In addition, the United States Supreme Court in *Frothingham* explicitly affirmed taxpayer standing:

[R]esident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. *Roberts v. Bradfield*, 12 App. D. C. 453, 459, 460. The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court. *Crampton v. Zabriskie*, 101 U. S. 601, 609, 25 L. Ed. 1070.

262 U.S. 447, 486.

By insisting that State courts also require a "concrete and particularized injury," Defendants confuse the limited jurisdiction of the federal courts with the general jurisdiction of the State courts. Defendants fail to understand that the "concrete and particularized injury" arises from standing under federal law and is connected intricately with the "case or controversy" requirement from Article III of the United States Constitution.

The United States Court of Appeals for the Fourth Circuit explained this relationship in *Maryland Highways Contractors Association, Inc. v. The State of Maryland*, 933 F.2d 1246 (1991).

Standing is a component of a **federal court's limited jurisdiction**. Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." U.S. Const. Art. III. The requirement of standing "focuses on the party seeking to get his complaint before a **federal court** and not on the issues he wished to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). Thus, in order to have standing, a party must be able to demonstrate a "distinct and palpable injury" that is likely to be redressed if the requested relief is granted. *Valley Forge College v. Americans United*, 454 U.S. 464, 488, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982).

Id., 933 F.2d at 1250 (emphasis added). Later the Court of Appeals relied on precedent from the United States Supreme Court:

However, as the Supreme Court has noted,

an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the **concrete injury required by Article III**. Insofar as these organizations seek standing based on their special interest [in the subject matter of litigation] their complaint must fail. Since they allege no **injury** to themselves as organizations, ... they can establish standing only as representatives of those of their members who have been **injured in fact**, and thus could have brought suit in their own right.

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976).

Id., 933 F.2d at 1250 (emphasis added).

Similarly, in another case, the Fourth Circuit stated as follows:

(“The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.” (internal quotation marks and alteration omitted)). To that end, we must “assure ourselves of [Stephens’s] standing under Article III,” for the requirement of standing enforces “the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340, 341–42, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (internal quotation marks omitted).⁴

It is well-established that, to satisfy Article III’s standing requirements, a plaintiff must show that:

(1) [she] has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). “The party invoking federal jurisdiction bears the burden of establishing these elements.” *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130.

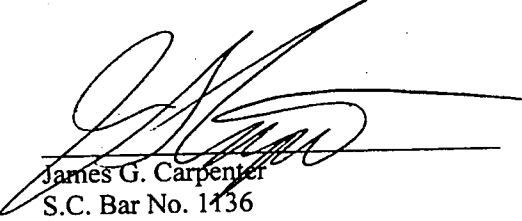
Stephens v. County of Albemarle, VA, 524 F.3d 485, 490–91 (2008) (emphasis added).

Under the federal authorities cited above, it is clear that the requirement of a “concrete and particularized injury,” discussed under the rubric of “Constitutional standing,” relates to the jurisdiction of the Article III federal courts, and although it is a valid and useful theory, it does not prohibit a State court, which is a court of general jurisdiction, from granting a plaintiff public important standing, and it does not prevent or limit taxpayer standing.

CONCLUSION

Plaintiffs respectfully suggest that they possess standing as taxpayers based on the fact they have paid into the Penny Tax fund and that they possess public important standing, because in this action, they have raised issues of great public importance which require judicial decision: the breadth of the ordinance exceeds the statute; Defendants violated S.C. Code Ann. § 11-35-50; Defendants exceeded the scope of S.C. Code Ann. § 4-37-30; Defendants failed to publicize an annual audit; Defendants failed to make an publicize an annual budget; Defendants failed to require annual audits from agencies receiving appropriations from the Penny Tax; and Defendants failed to follow mandatory procurement laws. Accordingly, Plaintiffs pray the Court to deny the Motion to Alter or Amend based on lack of standing, and that the Court grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1436
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

March 23, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

v.

Richland County Council,
Defendants.

IN THE CIRCUIT COURT
CASE NO: 2016-CP-40-2875

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the foregoing
Memorandum of Law in Opposition to Motions to Alter or Amend upon counsel for the
Defendants by first class mail, postage prepaid, this March 23, 2017, addressed as follows:

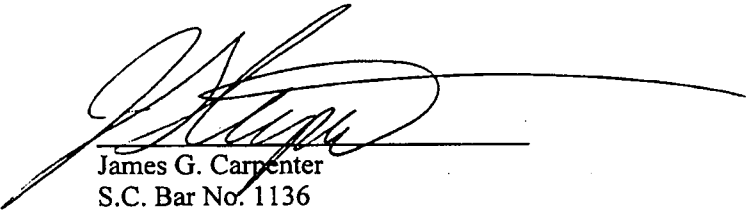
Andrew F. Lindemann
Davidson & Lindemann, PA
PO Box 8568
Columbia, SC 29202-8568

Ray N. Stevens
Ray Jones
PO Box 1509
Columbia, SC 29202

Elizabeth Gray
Rob Tyson
Alexis K. Lindsay
PO Box 11449
Columbia, SC 29211

Larry C. Smith
PO Box 192
Columbia, SC 29202

Respectfully submitted,
THE CARPENTER LAW FIRM, PC


James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

RICHLAND COUNTY
FILED
2017 MAR 27 PM 1:06
JEANETTE W. MCBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2016-CP-40-2875

Plaintiffs,

v.

NOTICE OF MOTION AND
MOTION TO DISMISS AND/OR
MOTION FOR SUMMARY JUDGMENT

Richland County,

Defendant,

Central Midlands Regional
Transit Authority,

Intervenor.

TO: JAMES G. CARPENTER, COUNSEL FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned counsel for the Defendant Richland County will move before the Presiding Judge of the Fifth Judicial Circuit at the Richland County Judicial Center, Columbia, South Carolina, at such time and place as may be set by the Court, pursuant to Rule 41(b) and/or Rule 56, SCRCP, dismissing this action for failure to prosecute or otherwise granting summary judgment to the Defendant Richland County and dismissing the Plaintiffs' Amended Complaint with prejudice.

The Defendant County's motion is based on the following:

1. Rule 41(b), SCRCP, authorizes a court to dismiss an action based upon a plaintiff's failure to prosecute. In *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802 (1970), the Supreme

Court held that "it is within the inherent power of the court to dismiss an action for failure to prosecute." 175 S.E.2d at 803. The Supreme Court has further held that "[t]he plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause. This authority is necessary if the courts are to control and efficiently manage an ever-expanding docket." *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757, 758 (1983). *See also, Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997).

In the case at bar, the Plaintiffs have taken no action to prosecute their claims in the 16+ months since the Complaint was filed. The Plaintiffs have pursued no discovery. No written discovery has been served by the Plaintiffs, and no depositions have been taken. In the Amended Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings, the Court wrote as follows: "The Court finds that the issue in the First Cause of Action is not one that should be decided on judgment on the pleadings, but rather should be developed factually and legally through the course of the litigation. There has been no discovery in this case." That situation has not changed. No discovery has been initiated or completed, and based on the Scheduling Order filed November 18, 2017, the discovery deadline has now expired. The mediation deadline has also expired, and the Plaintiffs made no attempt to have mediation scheduled in this case. In short, the absolute lack of any activity in prosecuting this action by the Plaintiffs compels the dismissal of this action under Rule 41(b) and the inherent authority of the Court.

2. The Plaintiffs lack both taxpayer standing and public importance standing to assert each of their claims for declaratory and injunctive relief.

3. The Plaintiffs' First Cause of Action presents purely issues of law. *See, Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012) ("[d]etermining the proper interpretation of

a statute is a question of law"). Contrary to the Plaintiffs' allegations in their First Cause of Action, S.C. Code Ann. § 4-37-30, as adopted by 1995 Act No. 52 and as amended by 2000 Act No. 368, allows for the expenditure of Penny Tax Revenues on operating transportation-related projects (including operating mass-transit projects which were added to the categories of projects and facilities by the amendment in 2000). The Plaintiffs are in error in suggesting that the Penny Tax Revenues are authorized only for "transportation facilities" where 1995 Act No. 52 as well as S.C. Code Ann. § 4-37-30 expressly authorize its expenditure for "transportation-related projects." In addition, pedestrian sidewalks and bike paths qualify as "other transportation-related projects [or] facilities." See, S.C. Code Ann. § 4-37-30(A)(1)(a)(i). The intent of the General Assembly as to the scope of the authorized uses of the revenue is stated clearly in the preamble or "Findings" section of 1995 Act No. 52, as contained in Section 1 of the Act, which reads as follows: "In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and *operating* highways, roads, streets, and bridges, and *other transportation-related projects*, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation." See, 1995 Act No. 52, § 1. See also, *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341, 354 (1994) ("preamble of an act may be used as a guide in determining legislative intent").

In sum, the expenditure of Penny Tax Revenues is not limited to "capital costs" for the construction of "facilities." Instead, the Penny Tax Revenues may be expended on the operation of transportation-related projects, which includes the operation of the COMET mass transit

system. The Penny Tax Revenues may also be used to fund such transportation facilities as sidewalks and bike paths and lanes. The plain and ordinary meaning of those terms demonstrate that they are transportation-related. Bike lanes themselves are part of roadways. Moreover, historically in South Carolina, sidewalks are constructed, owned and maintained by governmental entities as part of the adjoining roadways. *See generally, Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991); *Vaughn v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006); S.C. Code Ann. § 5-27-120. Therefore, as a matter of law, the Plaintiffs are not entitled to the declaratory and injunctive relief sought in their First Cause of Action.

4. In their Second Cause of Action, the Plaintiffs have alleged in only conclusory terms that the Defendant County has violated S.C. Code Ann. § 11-35-50, which requires "[a]ll political subdivisions of the State [to] adopt ordinances or procedures embodying sound principles of appropriately competitive procurement." The Plaintiffs have failed to meet their burden of proving that the procurement provisions at issue violate S.C. Code Ann. § 11-35-50. In addition, S.C. Code Ann. § 11-35-50 provides that "[a] political subdivision's failure to adopt appropriate ordinances, procedures, or policies of procurement is not subject to the legal remedies provided in this code."

5. In their Third Cause of Action, the Plaintiffs have alleged that Penny Tax Revenues have been used for expenditures that do not fall within the scope of S.C. Code Ann. § 4-37-30. This claim is duplicative of the First Cause of Action in that the Plaintiffs contend that the Penny Tax Revenues cannot be used for non-capital or administrative costs, which is contrary to the legislative intent as stated clearly in the preamble or "Findings" section of 1995 Act No. 52. The

Plaintiffs have failed to meet their burden of showing any expenditures of Penny Tax Revenues, as alleged in the Third Cause of Action, do not fall within the scope of S.C. Code Ann. § 4-37-30.

6. As to their Fourth Cause of Action, the Plaintiffs have failed to meet their burden of showing a violation of the audit provision of Ordinance Number 039-12HR. In addition, the Plaintiffs cannot demonstrate that any previous spending of Penny Tax Revenues is unlawful or that any prospective relief is warranted on the basis alleged in the Fourth Cause of Action.

7. As to their Fifth Cause of Action, the Plaintiffs have failed to meet their burden of showing a violation of the budget provision of Ordinance Number 039-12HR. In addition, the Plaintiffs cannot demonstrate that any previous spending of Penny Tax Revenues is unlawful or that any prospective relief is warranted on the basis alleged in the Fifth Cause of Action.

8. As to their Sixth Cause of Action, the Plaintiffs have failed to meet their burden of showing a violation of the outside agency audit provision of Ordinance Number 039-12HR. In addition, the Plaintiffs cannot demonstrate that any previous spending of Penny Tax Revenues is unlawful or that any prospective relief is warranted on the basis alleged in the Sixth Cause of Action.

9. As to their Seventh Cause of Action, the Plaintiffs have failed to meet their burden of showing a violation of S.C. Code Ann. § 4-37-25. In addition, the Plaintiffs have failed to demonstrate that S.C. Code Ann. § 4-37-25 has any applicability given that Richland County Council never established a transportation authority as created pursuant to Chapter 37 of Title 4.

10. The Amended Complaint raises a non-justiciable issue, a political question, attacking Richland County's policy judgments on economic development and related issues with such a challenge raising no case or controversy for this Court's decision.

11. The Plaintiffs have failed to exhaust their administrative remedies.

12. The Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches or alternatively the statute of limitations.

The Defendant County's motion is based upon the pleadings filed in this case, such affidavits as may be filed, the rules of court, and such other matters as may be properly presented to the Court at the time of the hearing.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

-AND-

RAY N. STEVENS
RAY E. JONES
PARKER POE ADAMS & BERNSTEIN, LLP
1221 Main Street, Suite 1100
Post Office Box 1509
Columbia, South Carolina 29202
(803) 255-8000

Counsel for Defendant Richland County

Columbia, South Carolina

September 18, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

v.

Richland County,

Defendant,

Central Midlands Regional
Transit Authority,

Intervenor.

Civil Action No. 2016-CP-40-2875

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Defendant, Richland County, does hereby certify that service of the **Notice of Motion and Motion to Dismiss and/or Motion for Summary Judgment** in the above-captioned matter was made upon all counsel of record by email transmission and by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 18th day of September 2017:

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, South Carolina 29601

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Elizabeth Van Doren Gray, Esquire
Robert E. Tyson, Jr., Esquire
Alexis K. Lindsay, Esquire
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation and
William B. DePass, Jr., individually, and on behalf of
all others similarly situated,

Plaintiff,

vs.

Richland County,

Defendant.

Central Midlands Regional Transit Authority,

Intervenor Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-40-02875

RICHLAND CO. CLERK
FILED
2017 SEP 19 PM 3:16
JEANETTE W. MCBRIDE
C.C.P. & G.S.

Plaintiff's Attorney: SEE ATTACHED		Defendant's Attorney: SEE ATTACHED	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Motion for Summary Judgment by CMRTA</u>			
Estimated Time Needed: <u>20 minutes</u>		Court Reporter Needed: ☒ YES/ ☐ NO	
SECTION II: Motion/Order Type			
☐ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff/ ☐ Defendant Date submitted			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: <u>\$25.00</u> ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

Attorneys for CMRTA

Elizabeth Van Doren Gray
(SC Bar No. 2434)
egray@sowellgray.com
Robert E. Tyson
(SC Bar No. 10820)
rtyson@sowellgray.com
Alexis K. Lindsay
(SC Bar No. 78049)
alindsay@sowellgray.com
Sowell Gray Robinson Stepp &
Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400 Telephone
(803) 929-0300 Fax

Attorneys for Plaintiff

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601

Attorneys for Richland County

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Parker Poe Adams & Bernstein,
LLP
Post Office Box 1509
Columbia, South Carolina 29202

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568

Larry C. Smith, Esquire
Richland County Attorney
Post Office Box 192
Columbia, SC 29202

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

South Carolina Public Interest Foundation,) Civil Action No. 2016-CP-40-02875
Edward D. Sloan, Jr., and William B.)
DePass, Jr., individually, and on behalf of all)
others similarly situated,)

Plaintiffs,)

vs.)

Richland County,)

Defendant,)

Central Midlands Regional Transit)
Authority,)

Intervenor Defendant.)

**INTERVENOR CMRTA'S MOTION
FOR SUMMARY JUDGMENT**

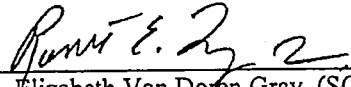
RICHLAND COUNTY
FILED
SEP 19 PM 3:16
JENNIFER W. MCBRIDE
C.C.P. & G.S.

Intervenor Central Midlands Regional Transit Authority ("CMRTA"), by and through its undersigned counsel and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, hereby moves this court requesting it grant summary judgment in favor of CMRTA and dismiss the Plaintiff's Amended Complaint with prejudice. CMRTA hereby supports and incorporates in full, the arguments made by Richland County in its Motion to Dismiss and/or Motion for Summary Judgment.

S.C. Code Ann. § 4-37-30 permits the revenues of the Penny Tax to be expended on "mass transit systems...and other related transportation facilities." Richland County Ordinance 039-12HR adheres to the statutory requirements detailing the authorized use of the Penny Tax revenues. Thus, CMRTA moves to request this Court to rule as a matter of law that the expenditures of CMRTA fall within the statute.

This motion is made pursuant to the South Carolina Rules of Civil Procedure, applicable South Carolina case and statutory law, and all other materials, authority, and memoranda which CMRTA may submit to the Court.

SOWELL GRAY ROBINSON STEPP & LAFFITTE, L.L.C.

By: 
Elizabeth Van Doren Gray (SC Bar No. 2434)
egrav@sowellgray.com
Robert E. Tyson, Jr. (SC Bar No. 10820)
rtvson@sowellgray.com
Alexis K. Lindsay (SC Bar No. 78049)
alindsay@sowellgray.com
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400 Telephone
(803) 929-0300 Fax

*Attorneys for Central Midlands Regional Transit
Authority*

Columbia, South Carolina
September 19, 2017

CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Robinson Stepp & Laffitte, L.L.C., do hereby certify that I have served all counsel in this action with a copy of the motion(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Motion:

**INTERVENOR CMRTA'S MOTION FOR SUMMARY
JUDGMENT**

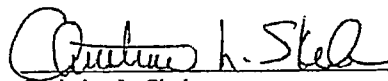
Counsel Served:

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601
Attorneys for Plaintiffs

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568

Larry C. Smith, Esquire
Richland County Attorney
Post Office Box 192
Columbia, SC 29202
Attorneys for Richland County


Christine L. Skalamera
Legal Assistant

RICHLAND CO.
FILED
2017 SEP 19 PM 3:16
JANETTE W. MCBRIDE
C.C.P. & G.S.

September 19, 2017

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

v.

Richland County,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

**MEMORANDUM OF LAW IN
OPPOSITION TO MOTIONS
FOR SUMMARY JUDGMENT**

RICHLAND COUNTY
FILED
OCT 26 AM 10:28
JENNIFER W. MCBRIDE
C.C.P. & G.S.

NOW COME the Plaintiffs, by their undersigned attorney, and submit this Memorandum of Law in Opposition to the Motions for Summary Judgment filed by the Defendants and by the Intervenor Central Midlands Regional Transit Authority ("CMRTA").

STATEMENT OF THE CASE

In November 2012, Richland County enacted a sales and use tax for transportation facilities. The sales and use tax must be used for "transportation facilities." S.C. Code Ann. § 4-37-30.

Plaintiffs South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr. filed suit and later an Amended Complaint for Declaratory Judgment, alleging seven causes of action. Defendants moved to dismiss and in the alternative for Judgment on the Pleadings. The Court denied the Motions to Dismiss and for Judgment on the Pleadings. *See* Amended Order Denying Motions to Dismiss and

Motion for Judgment on the Pleadings, entered March 27, 2017. This Court ruled that Plaintiffs possess taxpayer standing and public importance standing; and that the Motions to Dismiss and for Judgment on the Pleadings were denied. Defendants have now filed Motions for Summary Judgment. The Motions for Summary Judgment should also be denied.

As a preliminary matter, Motion for Summary Judgment should be denied because the South Carolina Supreme Court has many of the same issues under consideration, having heard oral argument in the case between the South Carolina Department of Revenue and Richland County. On March 23, 2017, the Supreme Court certified the case pursuant to Rule 204(b), SCACR, and ruled that the briefing and argument schedule would be expedited. That Order scheduled oral arguments for June, 2017. It is now four months past oral argument.

The issues in the DOR case overlap significantly with the issues in this case. The parties disputed whether the Penny Tax Revenues could be used for expenditures not related to transportation capital investment. In the case at bar, the biggest of such issues would be the funding of the CMRTA. The County argued that this Court's Order ruled for the County on this point, citing the following language from the Circuit Court's Amended Order:

The County is given authority to exercise control over its Penny Tax Program. The words "acquiring, designing, . . . and operating" cannot be ignored. . . . I find that the legislative intent of the Transportation Act is to give the authority to the County to administer and operate the Penny Tax Program and to use the Penny Tax Revenues and interest earnings only for the purposes stated in the Ordinance.

Final Respondent's Brief of the County, p. 25. From this language, the County argues that this Court authorized expenditures from the Penny Tax Revenues for the operation of the bus system.

On the other hand, the Department of Revenue argues to the contrary in Section II of its Reply Brief with the heading: "The Word 'Operating' Does Not Appear in the Text of the Statute." Over the next several pages, the DOR quotes the statute extensively and contends that any reference to "operation" or some variant of "operate" is in the context of toll roads and toll bridges, not in the context of operating a bus system. Accordingly, DOR argues that the Transportation Act does not authorize the use of Penny Tax Revenues for the operation of the bus system or many of the other administrative and public relations expenditures that the County has made from the Penny Tax Revenues. It seems plausible that the Supreme Court may rule on this issue and resolve an important issue pending in this case before this Court.

In addition, once the Supreme Court resolves the public importance standing issue, assuming the DOR is allowed to pursue these issues, the DOR seems prepared to pursue declaratory judgment on the issue of authorized expenditures, the failure to have proper procurement processes in place, unauthorized exceptions to the procurement processes, and other issues, many of which overlap with the allegations in the case at bar. Accordingly, Plaintiffs respectfully suggest that, from a case management standpoint, it would be prudent for this Court to wait until the Supreme Court rules on some of these issues, and then this Court should make decisions about the management of both cases, possibly joining the two cases, since they involve many of the same parties and address many of the same facts, and legal issues.

Defendants assert that the Plaintiffs have issued no discovery. This needs to be addressed in context. Prior to the filing of this lawsuit, as is Plaintiffs' practice, Plaintiffs used the Freedom of Information Act to secure documents from Richland County. Plaintiffs were required to file a FOIA suit to compel enforcement of the FOIA requests. Plaintiffs eventually succeeded by securing many documents and by securing payment for their attorneys' fees under FOIA.

One difference between FOIA and the discovery rules is that the discovery rules require supplementation, but FOIA would require new or supplemental FOIA requests, which Plaintiffs have recently served. Defendants have refused to produce the public records or provide a written response stating that they would be produced. Accordingly, Plaintiffs have again filed suit under FOIA to enforce their FOIA requests for public records. Plaintiffs have requested counsel for Richland County to accept service of the FOIA case complaint, but have not received a definite or positive response.

In addition, Plaintiffs recently served the standard Interrogatories on Richland County Council and on CMRTA. If either party identifies fact witnesses or experts, Plaintiffs would like to depose their named fact witnesses or experts.

As mentioned above, the case involving the Department of Revenue and Richland County arising out of this same set of facts is pending before the South Carolina Supreme Court. Discovery must be conducted in that case as well. Furthermore, the legal rulings from the Supreme Court will have a significant impact on this case.

For all these reasons, as a preliminary matter, Plaintiffs respectfully suggest that the Motions for Summary Judgment should be denied.

LEGAL DISCUSSION

Plaintiffs have asserted valid statutory and constitutional violations, and for these reasons as well, the Motions for Summary Judgment should be denied.

I. THE BREADTH OF THE ORDINANCE EXCEEDS THE STATUTE.

The South Carolina General Assembly enacted Title IV, Chapter 37 of the South Carolina Code Annotated entitled "Optional Methods for Financing Transportation Facilities" (emphasis added), which authorizes counties to adopt an ordinance imposing a sales and use tax for "financing transportation facilities" (emphasis added). Further, the authorizing statute establishes the kinds of "transportation facilities" for which such "optional methods of financing" may be used: "highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects" S.C. Code Ann. 4-37-30(a)(1) (emphasis added).

Richland County adopted Ordinance Number 039-12HR ("Ordinance") (**Exhibit A**) to levy and impose a 1% sales and use tax, subject to a referendum within Richland County pursuant to S.C. Code Ann. § 4-37-30. Ordinance Number 039-12HR purported to adopt a 1% tax not only for "highways, roads, streets, [and] bridges" but also "pedestrian sidewalks [and] bike paths and lanes." *Id.* Section 1(b). The Ordinance states, "The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenues established by the Act, the provisions of this Ordinance, and other applicable law." *Id.*, Section 1 (c).

Ordinance Number 039-12HR exceeds the statutory authority of S.C. Code Ann. § 4-37-30. “Pedestrian sidewalks [and] bike paths and lanes” are not “transportation facilities,” and funding them with the Penny Tax funds is not authorized by S.C. Code Ann. § 4-37-30. Accordingly, those provisions are unlawful.

Ordinance Number 039-12HR also purported to fund “continued operation of mass transit services provided by [CMRTA] including implementation of near, mid and long-term service improvements.” *Id.*, Section 2. (c), Project 2 (emphasis added). Using the proceeds of the 1% tax for “continued operation of mass transit services” (emphasis added) does not comport with the stated statutory purpose of the 1% tax: “financing transportation facilities” (emphasis added). CMRTA is being funded from the Penny Tax proceeds at a rate of about \$3.5 million per quarter (**Exhibit B**).

This tax was authorized for capital projects “facilities.” It was not authorized for “continued operation” of the mass transit system. The statute authorizes this Penny Tax only for a limited number of years. If these funds are used for the “continued operation” of the mass transit system, the source of the “continued funding” will expire when the statutory authorization for the Penny Tax expires. In addition to being unlawful, these provisions are unwise, and do not create sustainable funding for CMRTA.

The Court should rule that Ordinance Number 039-12HR exceeds the statutory authority of S.C. Code Ann. § 4-37-30, by purporting to use the 1% sales tax to finance “continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements;” and “pedestrian sidewalks [and] bike paths and lanes.”

Defendants have argued in the Supreme Court that the word “operate” or derivations thereof appear in the preamble of the statute, and from this observation, they argue that the statute authorizes the ongoing funding of the CMRTA. A closer examination of the statute reveals the flaws of this contention.

First, the Act’s preamble is not codified. Second, the preamble states that counties are “authorized to establish transportation authorities and to finance . . . the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects” The term “operating” in the preamble modifies “transportation-related projects” including “roads, streets, and bridges.”

Defendants may contend that the word “operate” appears in the text of the statute, and from that they may argue that funding of CMRTA operations is justified. A close examination of the statute reveals that this argument is unfounded. The statute states the following:

To accomplish the purposes of this chapter, counties are empowered to impose one but not both of the following sources of revenue: a sales and use tax as provided in item (A) or to authorize an authority established by the county governing body as provided in Section 4-37-10 to use and impose tolls in accordance with the provisions of item (B):

(A) Subject to the requirements of this section, the governing body of a county may 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.

(1) The governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance. The ordinance must specify:

(a) the project or projects and a description of the project or projects for which the proceeds of the tax are to be used, which may include projects located within or without, or both within and without, the boundaries of the county imposing the tax and which may include:

- (i) highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects;
- (ii) jointly-operated projects, of the type specified in sub-subitem (i), of the county and South Carolina Department of Transportation; or
- (iii) projects, of the type specified in sub-subitem (i), operated by the county or jointly-operated projects of the county and other governmental entities;

S.C. Code Ann. § 4-37-30 (A) (emphasis added).

The use of the phrase “jointly-operated” is not a reference to “operational” or “administrative” costs for purposes of revenue expenditures. It refers to which entity is already operating the project—the County alone or jointly with another government entity. This becomes clear by the phrase in subpart (1)(a) that requires the governing body to specify “the project or projects and a description of the project or projects for which the proceeds of the tax are to be used,” including projects “within and without” the county’s boundaries.

The County’s reference to the specific uses of the word “operated” do not support their contention that the County may use the revenues to cover “operational expenses,” such as for public relations, mentor programs, and other various expenditures unrelated to capital expenditures.

The Act also provides for toll roads and toll bridges as an alternative to the 1% tax:

(B)(1)(a) This item (B) is intended to provide an additional and alternative method, subject to a referendum, for the provision of and financing for highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities to the end that these transportation-related projects may be undertaken in such manner as may best be calculated to expedite relief of hazardous and congested traffic conditions on the highways in the State, including the authorization for turnpike projects undertaken by the Department of Transportation in Article 9 of Chapter 5 of Title 57. The

Department of Transportation is prohibited from removing funds previously dedicated to the project or designated county area under its allocation formula based upon the fact that a county has passed a referendum to impose the tax provided in this chapter.

(b) Subject to the requirements of this item (B), the governing body of a county may by ordinance authorize, subject to a referendum, an authority to use tolls to finance projects authorized by this section.

(c) The ordinance enacted by the governing body of the county to authorize an authority to use tolls must specify:

(i) the purpose for which the toll revenues are to be used which may include jointly-operated projects between the authority and the South Carolina Department of Transportation;

(ii) the maximum time, stated in calendar years or calendar quarters, or a combination of them, not to exceed twenty-five years, for which the tolls may be imposed; and

(iii) the maximum cost of the project or facilities to be funded in whole or in part from toll revenues and the principal amount of bonds to be supported by the tolls.

* * *

(2) If the voters have approved the imposition of tolls by referendum and if the authority enters into a partnership, consortium, or other contractual arrangement with the Department of Transportation relating to turnpike facilities, the authority may designate, establish, plan, improve, construct, maintain, operate, and regulate designated highways, roads, streets, and bridges as "turnpike facilities" as a part of the state highway system or any federal aid system whenever the authority determines the traffic conditions, present or future, justify these facilities. Under such partnership arrangement, the authority may utilize funds available for the maintenance of the state highway system for the maintenance of any turnpike facility financed pursuant to this chapter. If the authority determines it is feasible to make all or part of a construction project a turnpike facility, it may engage in the preliminary estimates and studies incident to the determination of the feasibility or practicability of constructing any toll road as it from time to time considers necessary and the cost of the preliminary estimates and studies may be paid from the general highway fund and must be reimbursed from funds provided under this chapter only if the studies and estimates lead to the construction of a toll road.

* * *

(6) In addition to the powers listed above, the authority may in connection with such toll facilities:

* * *

(g) enter into contracts with the Department of Transportation for sharing the cost of building and the revenues derived from the facilities authorized in this chapter and for the operation and maintenance of the facilities for transportation infrastructure debts only.

S.C. Code Ann. § 4-37-30 (B) (emphasis added). Although these provisions contain the words “jointly-operated,” “operate,” and “operation,” all of these provisions are limited to toll roads, turnpikes, and associated revenues. They are not related to the 1% sales tax, nor do they authorize such things as public relations, mentoring programs, or similar administrative expenditures. Accordingly, the County’s contention is unfounded. The word “operating” in the un-codified preamble of the Act did not find its way into the text of the statute, as it pertains to the 1% sales tax. The specific provisions demonstrate that the Legislature did not intend to provide a means for the County to use Transportation Act Revenues to pay those costs.

Richland County’s Penny Tax Ordinance, Ordinance Number 039-12HR, exceeds the scope of the state enabling statute, because the ordinance seeks to allow broad payment of expenses that the enabling statute does not permit. Neither S.C. Code Ann. § 4-37-30 (the enabling statute), nor any other part of Chapter 37, Title IV (Penny Tax Act) refers to administrative expenses as allowable for transportation projects. Other statutes, in other contexts, specifically authorize costs of administration, but this Act does not. The statute controls what expenses can be paid out of Penny Tax monies, and the act is very asset-specific, and requires the County’s enabling ordinance to specifically list “the estimated capital costs of the project or projects to be funded in whole or in part from the proceeds

of the tax.” S.C. Code Ann. § 4-37-30(A)(1)(c) (emphasis added). Under the statute, the expenditures must be used for facilities (tangible assets) and not general County operating expenses, and the expenses incurred must be related to the facilities themselves.

While some administrative costs may be appropriate expenditures under the enabling statute, the statutes use of the term “capital costs” indicates that only capital administrative costs may be properly allowable. “Capital costs” are one time costs incurred for the creation or improvement of tangible property, either real property or personal property, such as buildings, infrastructure, and equipment. Other terms for such expenditures include “capital expenses” and “capital expenditures.” Black’s Law Dictionary defines “capital expenditure” as “an outlay of funds to acquire or improve a fixed asset.” Black’s Law Dictionary, Seventh Edition, West Group, St. Paul, Minnesota, 1999. Black’s Law Dictionary defines “capital expense” as “an expense made by a business to provide a long-term benefit; a capital expenditure. A capital expense is not deductible, but can be used for depreciation or amortization.” *Id.*

An appropriate analytical tool is in US Internal Revenue Code, §§ 263 and 263A, which specifically distinguishes between capitalized costs associated with a particular asset, and other expenditures, more properly considered supplemental expenses. The Internal Revenue Code requires that a taxpayer that produces real property and tangible personal property must capitalize all direct costs and an allocable portion of indirect costs and mixed costs associated with the purchase, creation, or improvements of property into what is called the “basis” of that property. Any costs that are traceable to the construction, purchase or improvement of property, such as a building or road, must be capitalized into the basis of that asset. These costs generally include the cost of labor to create the property,

pensions for the employees working to create the property, accounting and legal services, and other items associated with the creation, construction or purchase of the property. Labor costs incurred in building an office building and the legal fees associated with acquiring the land must be capitalized into the "basis" of the office building. However, costs for an attorney to learn how to do real estate closings would not be considered a "capital cost" be included in the basis of the property. Because the enabling Act for the Penny Tax does not define "capital costs," these Internal Revenue Code principles would serve as a useful guide for which "capital costs" are properly allowable under the Penny Tax act.

In contrast to the reasonable principles from the Internal Revenue Code, the County seems to be employing no limit on unrelated and unauthorized expenditures, instead of allowing only "capital costs."

Richland County has been using Penny Tax funds to establish and staff the County's Small Local Business Enterprise ("SLBE") Program, in violation of the state statute's specification that Penny Tax revenue be spent on transportation-related projects. The SLBE Program was established as a county-wide program intended to support all facets of County operations, not just Penny Tax projects. The County stated, "It is Richland County's plan to expand the use of the SLBE program to all procurements within the county, following its initial use on transportation projects." Letter dated December 31, 2015, to Rick Reames from Tony McDonald, County Administrator, p. 2. Expenditures, including more than \$200,000 for legal services related to "SLBE Program Administration" to a Maryland law firm, approximately \$219,000 in estimated personnel costs, \$122,000 for a software management system, and \$13,000 for website development,

are all made to support the entire SLBE Program, and not specifically related to Penny Tax projects. Accordingly, these expenditures are an unlawful use of Penny tax proceeds, contrary to the enabling Act.

Richland County has used Penny tax revenues to pay for public relations services and "mentoring." This expenditure is inappropriate and unlawful under the enabling Act's requirement that funds be used specifically for transportation facilities. Furthermore, the public relations contract paid for from Penny Tax funds is excessive in relation to similar services offered by substantially similar firms. Defendants have not revealed substantial documentation that would verify or validate what services were performed and the number of hours spent on those projects. Richland County has not presented documentation as to what services were actually performed for these \$3 million in fees or how much these services cost on a per service basis.

The scope of the Ordinance exceeds the scope of the enabling statute. Furthermore, certain practices and expenditures from the Penny Tax funds revenues are not authorized by the enabling statute or the Ordinance. The Defendants have not met their burden for the Court to award Summary Judgment. Accordingly, the Motion for Summary Judgment should be denied.

II. DEFENDANTS VIOLATED S.C. CODE ANN. § 11-35-50.

Defendants have violated S.C. Code Ann. § 11-35-50 which requires all political subdivisions to "adopt ordinances or procedures embodying sound principles of appropriately competitive procurement." One of the "sound principles of appropriately competitive procurement" is having procurement decisions made by "the appropriate chief procurement officer." S.C. Code Ann. § 11-35-510.

On May 6, 2014, Richland County Council amended the Richland County procurement law to grant itself the authority to exempt Penny Tax expenditures, and only Penny Tax expenditures, from the standard procurement rules. Richland County Code, § 2-591. Procurements from the proceeds of the Penny Sales Tax are not made by the Chief Procurement Officer, or even by the Procurement Department consisting of procurement professionals, but rather they are made by the members of the County Council, in contrast to and isolated from, all other procurements of Richland County.

Furthermore, Richland County passed the ordinance allowing Penny Tax fund contracts to be approved, subject to Richland County Code § 2-591, which does not contain any protest or appeal rights. Finally, because Richland County did not use the ordinance method to approve a contract, the protest procedures contained in Richland County Code § 2-621.1 were not applicable. Nor was the possible referral of the protest to the County's independent procurement review panel available, as ordinarily provided by Richland County Code § 2-621.4.

Tim Donovan is the Audit Manager for Foreign Audit, Nexis and Discovery for the South Carolina Department of Revenue. He provided an affidavit in the case of Richland County versus the South Carolina Department of Revenue, Civil Action No. 16-CP-40-3102, before this Court (**Exhibit C**) ("Donovan Affidavit"). He testified that he had "audited Richland County to determine compliance with the provisions of the state's tax statutes and in particular section 4-37-30 (A) (the sales and use tax provision)." (Donovan Affidavit, paragraph 5).

Donovan also testified that Richland County amended the RFP process:

While the amended RFP process does require an evaluation committee to determine and submit a short list of qualified firms to the Council for

consideration, the process appears to be substantially abbreviated and does not include the rigorous scoring of the original procurement procedure. Further, the law specifically exempts contracts granted (or not granted) using this procedure from the protest provisions of the Richland County law. *See* Richland County code, section 2-591, section (f).

Donovan Affidavit, par. 8. Donovan further addressed the Program Development Team (“PDT”) contract granted by counsel.

Under this second procedure, counsel, on the first round of voting, awarded Team ICA/Brownstone/MB Kahn the PDT contract. The effect of the May 6, 2014 amendment and the subsequent contract award is that Council awarded a \$31 million contract for project management without independent scoring by an impartial scoring committee. . . . Without independent scoring, there is little oversight regarding conflicts of interest, efficiency of costs, or experience, and qualification of service providers cannot properly exist.

Donovan Affidavit, par. 9.

These politically infused decisions have departed severely from “sound principles of appropriately competitive procurement.” S.C. Code Ann. § 11-35-50. Accordingly, these measures violate state law.

III. DEFENDANTS HAVE AUTHORIZED UNLAWFUL EXPENDITURES.

Defendants’ expenditures under the Penny tax program have been a public embarrassment to the County. They have resulted in indictments and resignations of public officials. In addition, they resulted in grand jury investigations of improper expenditures (**Exhibit D**). Donovan’s Affidavit addressed some of these unlawful expenditures, including multiple overlapping payments going to insiders or members of the PDT.

Concerns also exist about some of the relationships between the PDT (Team ICA/Brownstone/MB Kahn), the COMET bus system, and the parties who have been granted contracts with Penny Tax funds. For example, the Comet Board is scheduled to receive at least \$300 million of Penny Tax dollars over the life of the Penny Tax program to run the

Midlands' bus system. The company which received the contract to operate the bus system is represented by Darryl Campbell. Mr. Campbell owns a one-third equity interest in Brownstone which is one of the three firms that comprise the PDT. Campbell Consulting Group, solely owned by Mr. Campbell, also received a contract to perform public relations services for its client who operates the Comet bus system. Finally, the PDT awarded a \$1.5 million contract to Campbell Consulting Group for public relations work potentially associated with the Penny Tax program. Thus, Mr. Campbell, through his ownership interest in Brownstone and Campbell Consulting Group, are potentially being paid three times from Penny Tax funds: (1) through his one third ownership in one of the three firms that were awarded the PDT contract, (2), through the contract involving the COMET bus system, and (3) through the \$1.5 million public relations contract awarded through the PDT.

Donovan Affidavit, par 11.

The Donovan Affidavit also addresses the questionable payments to insiders for seemingly unnecessary or in appropriate training.

Additionally, the chair of the COMET board was hired as a member of the PDT and received a nearly \$400,000 contract to perform "right-of-way" closings. At the same time, chair received \$200 an hour to be "mentored" on how to perform right of way closings. In total, he received over \$38,000 as a "mentee". Similarly, a local real estate broker was hired to provide immediate service regarding "right-of-way" matters for one of the firms hired by the PDT to work on Penny Tax projects. This broker also received "mentee" payments to be trained in the various activities of "right of way acquisition" process.

Donovan Affidavit, par. 12. It would seem that persons already well acquainted with this fairly simple process could have been hired, without spending tens or hundreds of thousands of dollars to mentor them.

Finally, Defendants' records indicate they plan to spend \$25 million on sidewalks, \$21 million on bikeways, and \$2.8 million on pedestrian intersection improvements (**Exhibit E**). None of these projects are "transportation facilities" as that term is commonly understood. Accordingly such projects are beyond the scope of the authorizing statutes and unlawful.

IV. DEFENDANTS FAILED TO REQUIRE ANNUAL AUDITS FROM AGENCIES RECEIVING APPROPRIATIONS FROM THE PENNY TAX.

Defendants have failed to require annual independent audits of the Penny tax program itself, and from agencies receiving appropriations from the Penny Tax. The Ordinance states, "Except as specifically authorized by County Council, any outside agency organization receiving an appropriation of the Sales and Use Tax must provide to County Council an independent annual audit of such agency organization financial records and transactions and such other and more frequent financial information as required by County Council, all in form satisfactory to County Council." *Id.*, Section 2. (c).

Donovan also testified to the lack of auditing is required by the Richland County ordinance.

My audit review of the Penny Tax Program gave no indication that an annual independent audit of Penny Tax funds was conducted as required by the statute. See Richland County Ordinance No. 039-12HR, Section 1, paragraph 2 and Section 3, subsection (b), paragraph 3. . . . Since [April, 2015], the County has not produced to the Department a copy of any audits. Furthermore, the audit review that I conducted did not indicate that any independent audits of the financial records and transactions of the agencies organizations receiving and appropriation of the Penny Tax were audited as required by the ordinance. Council admitted in correspondence to the Department that no audits, as required by the statute, were conducted.

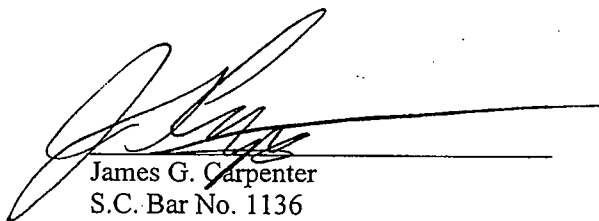
Donovan Affidavit, par 9.

In response to Plaintiffs' FOIA request, Richland County admitted that it does not have any independent audits of agencies receiving appropriations from the Penny Tax funds. Accordingly, all spending pursuant to this ordinance is unlawful.

CONCLUSION

Plaintiffs have established with competent evidence their claims that Defendants are exceeding the scope of the statutes that authorize the Penny Tax. These claims include both the continued operation of the bus system, improper expenditures, and the failure to adopt "sound principles of appropriately competitive procurement." Furthermore, Defendants have failed to comply with the auditing requirements both as to the Penny tax program and as to the agencies that receive Penny tax funds. Accordingly, Plaintiffs pray the Court to deny the Motion for Summary Judgment and grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

A handwritten signature in black ink, appearing to read 'J. Carpenter', is written over a horizontal line.

James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

October 25, 2017

STATE OF SOUTH CAROLINA
COUNTY COUNCIL FOR RICHLAND COUNTY
ORDINANCE NO. 039-12HR

AN ORDINANCE TO LEVY AND IMPOSE A ONE PERCENT (1%) SALES AND USE TAX, SUBJECT TO A REFERENDUM, WITHIN RICHLAND COUNTY PURSUANT TO SECTION 4-37-30 OF THE CODE OF LAWS OF SOUTH CAROLINA 1976, AS AMENDED; TO DEFINE THE PURPOSES AND DESIGNATE THE PROJECTS FOR WHICH THE PROCEEDS OF THE TAX MAY BE USED; TO PROVIDE THE MAXIMUM TIME FOR WHICH SUCH TAX MAY BE IMPOSED; TO PROVIDE THE ESTIMATED COST OF THE PROJECTS FUNDED FROM THE PROCEEDS OF THE TAX; TO PROVIDE FOR A COUNTY-WIDE REFERENDUM ON THE IMPOSITION OF THE SALES AND USE TAX AND THE ISSUANCE OF GENERAL OBLIGATION BONDS AND TO PRESCRIBE THE CONTENTS OF THE BALLOT QUESTIONS IN THE REFERENDUM; TO PROVIDE FOR THE CONDUCT OF THE REFERENDUM BY THE RICHLAND COUNTY ELECTION COMMISSION; TO PROVIDE FOR THE ADMINISTRATION OF THE TAX, IF APPROVED; TO PROVIDE FOR THE PAYMENT OF THE TAX, IF APPROVED; AND TO PROVIDE FOR OTHER MATTERS RELATING THERETO.

Pursuant to the authority by the Constitution of the State of South Carolina and the General Assembly of the State of South Carolina, BE IT ENACTED BY RICHLAND COUNTY COUNCIL:

SECTION 1. Findings and Determinations. The County Council (the "County Council") of Richland County, South Carolina (the "County"), hereby finds and determines:

(a) The South Carolina General Assembly has enacted Section 4-37-30 of the Code of Laws of South Carolina 1976, as amended (the "Act"), pursuant to which the county governing body may impose by ordinance a sales and use tax in an amount not to exceed one percent, subject to the favorable results of a referendum, within the county area for a specific purpose or purposes and for a limited amount of time to collect a limited amount of money.

(b) Pursuant to the terms of Section 4-37-10 of the Code of Laws of South Carolina 1976, as amended, the South Carolina General Assembly has authorized county government to finance the costs of acquiring, designing, constructing, equipping and operating highways, roads, streets, bridges, greenways, pedestrian sidewalks, bike paths and lanes, and other transportation-related projects either alone or in partnership with other governmental entities. As a means to furthering the powers granted to the County under the provisions of Section 4-9-30 and Sections 6-21-10, *et. seq.* of the Code of Laws of South Carolina 1976, as amended, the County Council is authorized to form a transportation authority or to enter into a partnership, consortium, or other contractual arrangement with one or more other governmental entities pursuant to Title 4, Chapter 37 of the Code of Laws of the South Carolina 1976, as amended. The County Council has decided to provide funding for highways, roads, streets, bridges, mass transit, greenways, pedestrian sidewalks, bike paths and lanes, *inter alia*, without the complexity of a transportation authority or entering into a partnership, consortium, or other contractual arrangements with one or more other governmental entities at this time; provided that nothing herein shall preclude County Council from entering into partnerships, consortiums, or other contractual arrangements in the future. County Council may utilize such

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provisions in the future as necessary or convenient to promote the public purposes served by funding highways, roads, streets, bridges, mass transit, greenways, pedestrian sidewalks, and bike paths and lanes as provided in this Ordinance.

(c) The County Council finds that a one percent sales and use tax should be levied and imposed within Richland County, for the following projects and purposes: For financing the costs of highways, roads, streets, bridges, greenways, pedestrian sidewalks, and bike paths and lanes and other transportation-related projects facilities, and drainage facilities related thereto, and mass transit systems operated by Richland County or (jointly) operated by the County, other governmental entities and transportation authorities.

For a period not to exceed twenty-two (22) years from the date of imposition of such tax, to fund the projects at a maximum cost not to exceed \$1,037,900,000 to be funded from the net proceeds of a sales and use tax imposed in Richland County pursuant to provisions of the Act, subject to approval of the qualified electors of Richland County in referendum to be held on November 6, 2012. The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenue established by the Act, the provisions of this Ordinance, and other applicable law. Subject to annual appropriations by County Council, sales and use tax revenues shall be used for the costs of the projects established in this Ordinance, as it may be amended from time to time, including, without limitation, payment of administrative costs of the projects, and such sums as may be required in connection with the issuance of bonds, the proceeds of which are applied to pay costs of the projects. All spending shall be subject to an annual independent audit to be made available to the public.

(d) County Council finds that the imposition of a sales and use tax in Richland County for the projects and purposes defined in this Ordinance for a limited time not to exceed twenty-two (22) years to collect a limited amount of money will serve a public purpose, provide funding for roads and transportation, mass transit, and greenbelts to facilitate economic development, promote public safety, provide needed infrastructure, promote desirable living conditions, enhance the quality of life in Richland County, and prepare Richland County to meet present and future needs of Richland County and its citizens.

Section 2. Approval of Sales and Use Tax Subject to Referendum.

(a) A sales and use tax (the "Sales and Use Tax"), as authorized by the Act, is hereby imposed in Richland County, South Carolina, subject to a favorable vote of a majority of the qualified electors voting in a referendum on the imposition of the Sales and Use Tax to be held in Richland County, South Carolina on November 6, 2012.

(b) The Sales and Use Tax shall be imposed for a period not to exceed twenty-two (22) years from the date of imposition.

(c) The maximum cost of the projects to be funded from the proceeds of the Sales and Use Tax shall not exceed, in the aggregate, the sum of \$1,037,900,000, and the maximum amount of net proceeds to be raised by the Sales and Use Tax shall not exceed \$1,070,000,000, which includes administrative costs and debt service on bonds issued to pay for the projects. The estimated principal amount of initial authorization of bonds to be issued to pay costs of the projects and to be paid by a

portion of the Sales and Use Tax is \$450,000,000. The proceeds of these bonds shall be used for a portion of the following projects:

- Project 1: Improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements.
Amount: \$656,020,644
- Project 2: Continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements.
Amount: \$300,991,000
- Project 3: Improvements to pedestrian sidewalks, bike paths, intersections and greenways.
Amount: \$80,888,356

A list of the 2012 Roadway Projects and the 2012 Pedestrian/Bike/Greenway Projects are attached hereto as Appendix A and incorporated herein by reference.

(d) The Sales and Use Tax shall be expended for the costs of the following projects, including payment of any sums as may be required for the issuance of and debt service for bonds, the proceeds of which are applied to such projects, for the following purposes:

(i) Improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements. Amount: \$656,020,644;

(ii) Continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements. Amount: \$300,991,000; and

(iii) Improvements to pedestrian sidewalks, bike paths, intersections and greenways.
Amount: \$80,888,356.

(e) The Sales and Use Tax, if approved in the referendum conducted on November 6, 2012, shall terminate on the earlier of:

(i) April 1, 2035; or

(ii) the end of the calendar month during which the Department of Revenue determines that the Sales and Use Tax has raised revenues sufficient to provide the greater of either the costs of the projects as approved in the referendum or the cost to amortize all debts related to the approved projects.

(f) The amounts of Sales and Use Tax collected in excess of the required proceeds must first be applied, if necessary, to complete each project for which the Sales and Use Tax was imposed. Any additional revenue collected above the specified amount must be applied to the reduction of debt principal of Richland County on transportation infrastructure debts only.

(g) The Sales and Use Tax must be administered and collected by the South Carolina Department of Revenue in the same manner that other sales and use taxes are collected. The Department may prescribe amounts that may be added to the sales price because of the Sales and Use Tax.

(h) The Sales and Use Tax is in addition to all other local sales and use taxes and applies to the gross proceeds of sales in the applicable area that is subject to the tax imposed by Chapter 36 of Title 12 of the Code of Laws of South Carolina, and the enforcement provisions of Chapter 54 of Title 12 of the Code of Laws of South Carolina. The gross proceeds of the sale of items subject to a maximum tax in Chapter 36 of Title 12 of the Code of Laws of South Carolina are exempt from the tax imposed by this Ordinance. The gross proceeds of the sale of food lawfully purchased with United States Department of Agriculture Food Stamps are exempt from the Sales and Use Tax imposed by this Ordinance. The Sales and Use Tax imposed by this Ordinance also applies to tangible property subject to the use tax in Article 13, Chapter 36 of Title 12 of the Code of Laws of South Carolina.

(i) Taxpayers required to remit taxes under Article 13, Chapter 36 of Title 12 of the Code of Laws of South Carolina must identify the county in which the personal property purchased at retail is stored, used, or consumed in this State.

(j) Utilities are required to report sales in the county in which the consumption of the tangible personal property occurs.

(k) A taxpayer subject to the tax imposed by Section 12-36-920 of the Code of Laws of South Carolina 1976, as amended, who owns or manages rental units in more than one county must report separately in his sales tax return the total gross proceeds from business done in each county.

(l) The gross proceeds of sales of tangible personal property delivered after the imposition date of the Sales and Use Tax, either under the terms of a construction contract executed before the imposition date, or written bid submitted before the imposition date, culminating in a construction contract entered into before or after the imposition date, are exempt from the Sales and Use Tax provided in this ordinance if a verified copy of the contract is filed with the Department of Revenue within six months after the imposition date of the Sales and Use Tax provided for in this Ordinance.

(m) Notwithstanding the imposition date of the Sales and Use Tax with respect to services that are billed regularly on a monthly basis, the Sales and Use Tax authorized pursuant to this ordinance is imposed beginning on the first day of the billing period beginning on or after the imposition date.

Section 3. Remission of Sales and Use Tax; Segregation of Funds; Administration of Funds; Distribution to Counties: Confidentially.

(a) The revenues of the Sales and Use Tax collected under this Ordinance must be remitted to the State Treasurer and credited to a fund separate and distinct from the general fund of the State. After deducting the amount of any refunds made and costs to the Department of Revenue of administering the Sales and Use Tax, not to exceed one percent of such revenues, the State Treasurer shall distribute the revenues quarterly to the Richland County Treasurer and the revenues must be used only for the purposes stated herein. The State Treasurer may correct misallocations by adjusting

subsequent distributions, but these distributions must be made in the same fiscal year as the misallocation. However, allocations made as a result of city or county code errors must be corrected prospectively.

(b) Any outside agencies, political subdivisions or organizations designated to receive funding from the Sales and Use Tax must annually submit requests for funding in accordance with procedures and schedules established by the County Administrator. The County Administrator shall prepare the proposed budget for the Sales and Use Tax and submit it to the County Council at such time as the County Council determines. At the time of submitting the proposed budget, the County Administrator shall submit to the County Council a statement describing the important features of the proposed budget.

County Council shall adopt annually prior to the beginning of each fiscal year a budget for expenditures of Sales and Use Tax revenues. County Council may make supplemental appropriations for the Sales and Use Tax following the same procedures prescribed for the enactment of other budget ordinances. The provisions of this section shall not be construed to prohibit the transfer of funds appropriated in the annual budget for the Sales and Use Tax for purposes other than as specified in the annual budget when such transfers are approved by County Council. In the preparation of the annual budget, County Council may require any reports, estimates, and statistics from any county agency or department as may be necessary to perform its duties as the responsible fiscal body of the County.

Except as specifically authorized by County Council, any outside agency or organization receiving an appropriation of the Sales and Use Tax must provide to County Council an independent annual audit of such agency or organization financial records and transactions and such other and more frequent financial information as required by County Council, all in form satisfactory to County Council.

(c) The Department of Revenue shall furnish data to the State Treasurer and to the Richland County Treasurer for the purpose of calculating distributions and estimating revenues. The information which must be supplied to the County upon request includes, but is not limited to, gross receipts, net taxable sales, and tax liability by taxpayers. Information about a specific taxpayer is considered confidential and is governed by the provisions of S.C. Code Ann. §12-54-240. Any person violating the provisions of this section shall be subject to the penalties provided in S.C. Code Ann. § 12-54-240.

Section 4. Sales and Use Tax Referendum: Ballot Question.

(a) The Commission shall conduct a referendum on the question of imposing the Sales and Use Tax in the area of Richland County on Tuesday, November 6, 2012, between the hours of 7 a.m. and 7 p.m. under the election laws of the State of South Carolina, *mutatis mutandis*. The Commission shall publish in a newspaper of general circulation the question that is to appear on the ballot, with the list of projects and purposes as set forth herein, and the cost of projects, and shall publish such election and other notices as are required by law.

(b) The referendum question to be on the ballot of the referendum to be held in Richland County on November 6, 2012, must read substantially as follows:

RICHLAND COUNTY SPECIAL SALES AND USE TAX

QUESTION 1

I approve a special sales and use tax in the amount of one percent (1%) to be imposed in Richland County, South Carolina (the "County") for not more than twenty-two (22) years, or until a total of \$1,070,000,000 in sales tax revenue has been collected, whichever occurs first. The sales tax revenue will be used to pay the costs of administrative expenses and the following projects:

- Project 1: Improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements.
Amount: \$656,020,644
- Project 2: Continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements.
Amount: \$300,991,000
- Project 3: Improvements to pedestrian sidewalks, bike paths, intersections and greenways.
Amount: \$80,888,356

YES

NO

- Instructions to Voters: All qualified electors desiring to vote in favor of levying the special sales and use tax shall vote YES and
- All qualified electors opposed to levying the special sales and use tax shall vote NO

QUESTION 2

I approve the issuance of not exceeding \$450,000,000 of general obligation bonds of Richland County, payable from the special sales and use tax described in Question 1 above, maturing over a period not to exceed twenty-two (22) years, to fund projects from among the categories described in Question 1 above.

YES

NO

- Instructions to Voters: All qualified electors desiring to vote in favor of the issuance of bonds for the stated purposes shall vote YES and
- All qualified electors opposed to the issuance of bonds for the stated purposes shall vote NO

(c) In the referendum on the imposition of the Sales and Use Tax in Richland County, all qualified electors desiring to vote in favor of imposing the tax for the stated purposes shall vote "yes" and all qualified electors opposed to levying the tax shall vote "no." If a majority of the electors voting in the referendum shall vote in favor of imposing the Sales and Use Tax, then the Sales and Use Tax is imposed as provided in the Act and this Ordinance. Expenses of the referendum must be paid by Richland County government.

(d) In the referendum on the issuance of bonds, all qualified electors desiring to vote in favor of the issuance of bonds for the stated purpose shall vote "yes" and all qualified electors opposed to the issuance of bonds shall vote "no." If a majority of the electors voting in the referendum shall vote in favor of the issuance of bonds, then the issuance of bonds shall be authorized in accordance with S.C. Constitution Article X, Section 14, Paragraph (6). Expenses of the referendum must be paid by Richland County government.

Section 5. Imposition of Tax Subject to Referendum.

The imposition of the Sales and Use Tax in Richland County is subject in all respects to the favorable vote of a majority of qualified electors casting votes in a referendum on the question of imposing the Sales and Use Tax in the area of Richland County in a referendum to be conducted by the Board of Elections and Voter Registration of Richland County on November 6, 2012, and the favorable vote of a majority of the qualified electors voting in such referendum shall be a condition precedent to the imposition of a sales and use tax pursuant to the provisions of this Ordinance.

Section 6. Miscellaneous.

(a) If any one or more of the provisions or portions hereof are determined by a court of competent jurisdiction to be contrary to law, then that provision or portion shall be deemed severable from the remaining terms or portions hereof and the invalidity thereof shall in no way affect the validity of the other provisions of this Ordinance; if any provisions of this Ordinance shall be held or deemed to be or shall, in fact, be inoperative or unenforceable or invalid as applied to any particular case in any jurisdiction or in all cases because it conflicts with any constitution or statute or rule of public policy, or for any other reason, those circumstances shall not have the effect of rendering the provision in question inoperative or unenforceable or invalid in any other case or circumstance, or of rendering any other provision or provisions herein contained inoperative or unenforceable or invalid to any extent whatever; provided, however, that the Sales and Use Tax may not be imposed without the favorable results of the referendum to be held on November 6, 2012.

(b) This Ordinance shall be construed and interpreted in accordance with the laws of the State of South Carolina.

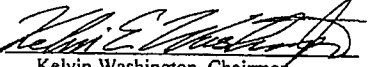
(c) The headings or titles of the several sections hereof shall be solely for convenience of reference and shall not affect the meaning, construction, interpretation, or effect of this ordinance.

(d) This Ordinance shall take effect immediately upon approval at third reading.

(e) All previous ordinances regarding the same subject matter as this ordinance are hereby repealed.

Enacted this 18th day of July, 2012.

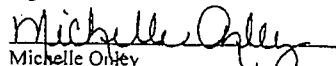
RICHLAND COUNTY, SOUTH CAROLINA

By: 
Kelvin Washington, Chairman
Richland County Council

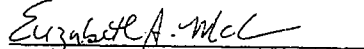
(SEAL)

ATTEST THIS 26th DAY OF

July, 2012:


Michelle Orley
Interim Clerk to County Council

RICHLAND COUNTY ATTORNEY'S OFFICE


Approved As To LEGAL Form Only
No Opinion Rendered As To Content

Date of First Reading:	June 5, 2012
Date of Second Reading:	June 19, 2012
Date of Public Hearing:	June 19, 2012
Date of Third Reading:	July 18, 2012

Fund	Key	Key Description	Obj	Object Description	Post Date	Desc	Ref1	Debit	Credit	JL Key	JL Key Description	JL Object
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	11/6/2013	CENTRAL MIDLAND CMRTA May - Ju	2635CMRTA1FY14	3,465,338.14	-	2635	Mass Transit Disbursement	527600
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	2/5/2014	CENTRAL MIDLAND 005550-IN Aug-	2	3,613,719.69	-	2635	Mass Transit Disbursement	527600
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	5/28/2014	CENTRAL MIDLAND CMRTA NOV-JAN	2635CMRTA3FY14	3,878,326.73	-	2635	Mass Transit Disbursement	527600
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	6/30/2014	CENTRAL MIDLAND CMRTA Feb-Apr	2635CMRTAFY14	3,987,159.15	-	2635	Mass Transit Disbursement	527600
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	11/18/2014	CENTRAL MIDLAND CMRTA MAY 2014	2635CMRTA5FY15	4,103,153.15	-	2635	Mass Transit Disbursement	527600
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	2/12/2015	CENTRAL MIDLAND CMRTA AUGUST 2	2635CMRTA6FY15	3,901,241.38	-	2635	Mass Transit Disbursement	527600
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	6/10/2015	CENTRAL MIDLAND CMRTA NOV14 -	2635CMRTA7FY15	3,557,250.00	-	2635	Mass Transit Disbursement	527600
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	9/29/2015	CENTRAL MIDLAND CMRTA FEB-APR2	2635CMRTA8FY15	3,561,258.00	-	2635	Mass Transit Disbursement	527600
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	10/30/2015	CENTRAL MIDLAND MAY THRU JULY	0007525-IN	3,825,680.00	-	2635	Mass Transit Disbursement	527600
1230	1230990000	Mass Transit	527600	Lump Sum Appropriations	2/17/2016	CENTRAL MIDLAND CMRTA AUG-OCT2	2635CMRTA10FY16	3,825,680.00	-	2635	Mass Transit Disbursement	527600



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CIVIL ACTION NO.: 16-CP-40-3102
Richland County, South Carolina,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF TIM DONOVAN
	)	
v.	)	
	)	
The South Carolina Department of	)	
Revenue, and Rick Reames, III in his	)	
Official capacity as its Director,	)	
	)	
Defendants/Third Party	)	
Plaintiff,	)	
	)	
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.	)	

The South Carolina Department of Revenue would respectfully submit the following:

I, Tim Donovan, after first being duly sworn, do hereby make oath and affirm as follows:

1. I am the Audit Manager for Foreign Audit, Nexus and Discovery for the South Carolina Department of Revenue ("Department"). I have a B.S.B.A. with emphasis in accounting from Winthrop University. I have been employed with the Department since October 1990 in the following positions: domestic tax auditor, foreign tax auditor, senior tax analyst, foreign audit supervisor, and Audit Manager for Foreign Audit, Nexus and Discovery. I have worked in my current position for approximately 6 years.

2. In my capacity as the Audit Manager for Foreign Audit, Nexus and Discovery, I am authorized to make this Affidavit on behalf of myself and on behalf of the Department.



Further, I make this Affidavit from my own personal knowledge, based on the experience that I have gained in approximately 25 years with the Department.

3. As part of my regular duties with the Department, I manage the foreign audit program that oversees the Department's multistate corporate income tax audits and compliance with the state's tax laws.

4. In November of 2012, voters in Richland County passed a sales and use tax for transportation facilities. This tax is a state tax that is collected and administered by the Department and is ultimately remitted by the Department to the County. Pursuant to S.C. Code Ann. § 4-37-30, the sales and use tax collected must be used solely for transportation facilities. In the statutes governing sales and use taxes and in the specific statute providing for the transportation sales and use tax, the General Assembly expressly provided that the Department is the proper party to administer and enforce the tax. The General Assembly further delegated authority to the Department to promulgate regulations to implement the transportation tax. S.C. Code Ann. § 4-37-30 and S.C. Code Ann. § 12-36-2660. The Department has begun the process of issuing regulations to provide additional guidance on the collection, administration, and enforcement of the transportation sales and use tax.

5. The Department received information concerning Richland County's misuse of the Penny Tax funds. Pursuant to S.C. Code Ann. § 12-4-387, the Department "conduct audits involving all taxes to promote voluntary compliance and to collect revenues for the general fund of the State and designated accounts." Given my extensive audit background and the Department's limited resources, in April of 2015, in my official capacity with the Department, I audited Richland County to determine compliance with the provisions of the state's tax statutes, and in particular section 4-37-30(A) (the sales and use tax provision). As part of my duties as a Department auditor, I am required to determine compliance with the state's tax statutes to include whether the nature and the amount of the Penny Tax Funds expended were proper. The County raised no objections to my audit. The audit revealed a number of concerns relating to Richland County's compliance with the law which are discussed in detail below. (See attached Exhibits "A" detailing expenditures that are not in compliance with section 4-37-30(A)).

6. In November 2013, County Council ("Council") issued a request for proposal ("RFP") to procure professional services for a project development team ("PDT") to help administer the penny tax program. At the time, Richland County law required that RFP submissions be reviewed and ranked by an independent selection committee ("Committee"). See Richland County Code, Section 2-600. The Richland County law also required Council to negotiate with the firm ranked highest by the Committee and if these negotiations failed, the Council would then negotiate with qualifying firms in descending rank. Richland County law also provides for protest procedures. See Richland County Code 2-621.1.

7. The Committee performed its responsibility and ranked Team CECS the highest (90.6 ranking) with Team Baker as the second selection (73.8). Team ICA (66.8), Team MB Kahn (53) and Team Enviro (46.4) were scored third, fourth and fifth, respectively. The three firms ultimately chosen as the PDT were not scored first or second by the Committee. Instead of negotiating with the highest scoring firm as was required by Richland County's own ordinance,

on January 7, 2014, after two rounds of voting, the Council selected the third ranked team, Team ICA. Team CSES protested and Council subsequently withdrew the PDT contract award from Team ICA.

8. On May 6, 2014, Council amended the Richland County procurement law granting itself the authority to exempt Penny Tax expenditures, and only Penny Tax expenditures, from the standard procurement rules. *See Richland County Code, Section 2-591.* While the amended RFP process does require an evaluation committee to determine and submit a short list of qualified firms to the Council for consideration, the process appears to be substantially abbreviated and does not include the rigorous scoring of the original procurement procedure. Further, the law specifically exempts contracts granted (or not granted) using this procedure from the protest provisions of the Richland County law. *See Richland County Code, Section 2-591, section (f).*

9. Under this second procedure, Council, on the first round of voting, awarded Team ICA/Brownstone/MB Kahn the PDT contract. The effect of the May 6, 2014 amendment and subsequent contract award is that Council awarded a \$31 million dollar contract for project management without independent scoring by an impartial scoring committee. As a Department auditor with over 25 years of experience, I have been involved with the Department's procurement process on various contracts. Without independent scoring, there is little oversight regarding conflicts of interest, efficiency of costs, or experience and qualification of service providers cannot properly exist. In fact, Team ICA/Brownstone/MB Kahn's level of experience related to building actual transportation facilities is questionable in comparison to the experience of other applicants. The elimination of any procedure to protest the awarding of the contract to another party eliminates any scrutiny of how the winner of the contract was chosen. As a part of the audit I conducted of Richland County, to include the documents I reviewed, the Transportation Project Oversight Committee was not granted any oversight role with respect to the Penny Tax by the Council. In my experience as an auditor, the evaluation of tests and controls, which includes oversight, is an important function to ensure proper procedures are followed. My audit review of the Penny Tax Program gave no indication that an annual independent audit of Penny Tax funds was conducted as required by the statute. *See Richland County Ordinance No. 039-12HR, Section 1, paragraph 2 and Section 3, subsection (b), paragraph 3.* I have reviewed recent financial statements of Richland County, and they do not reveal that such an audit was performed or was made available to the public as required by the ordinance. As mentioned, the Department's review of the Penny Tax program began in April 2015. Since that time, the County has not produced to the Department a copy of any audits. Furthermore, the audit review that I conducted did not indicate that any independent audits of the financial records and transactions of the agencies or organizations receiving an appropriation of the Penny Tax were audited as required by the ordinance. Council admitted in correspondence to the Department that no audits, as required by the statute, were conducted.

10. Although Richland County asserts that the County may circumvent the normal procurement process contained in Richland County Code 2-600 by approving any contract by ordinance, Richland County did not do that. Instead, Richland County passed the ordinance allowing Penny Tax fund contracts to be approved, subject to Richland Code Section 2-591. Richland Code Section 2-591 does not contain any protest or appeal rights. Furthermore,

because Richland County did not use the ordinance method to approve a contract the protest procedures contained in Richland County Code 2-621.1 were not applicable, as well as the possible referral of the protest to the county's independent procurement review panel as provided in Richland County Code 2-621.4.

11. Concerns also exist about some of the relationships between the PDT (Team ICA/Brownstone/MB Kahn), the COMET bus system, and parties who have been granted contracts with Penny Tax funds. For example, the Comet Board is scheduled to receive at least \$300 million of Penny Tax dollars over the life of the Penny Tax program to run the Midlands' bus system. The company which received the contract to operate the bus system is represented by Darryl Campbell. Mr. Campbell owns a one-third equity interest in Brownstone which is one of the three firms that comprise the PDT. Campbell Consulting Group, solely owned by Mr. Campbell, also received a contract to perform public relations services for its client who operates the Comet bus system. Finally, the PDT awarded a \$1.5 million contract to Campbell Consulting Group for public relations work potentially associated with the Penny Tax program. Thus, Mr. Campbell, through his ownership interests in Brownstone and Campbell Consulting Group, are potentially being paid three times from Penny Tax funds: (1) through his one-third ownership in one of the three firms that were awarded the PDT contract, (2) through the contract involving the COMET bus system, and (3) through the \$1.5 million dollar public relations contract awarded through the PDT. The Department is aware, as it was widely reported in the media, that MB Kahn and Mr. Campbell campaigned in favor the passage of the Penny Tax itself.

12. Additionally, the chair of the COMET Board was hired as a member of the PDT and received a nearly \$400,000 contract to perform "right of way" closings. At the same time, the chair received \$200 an hour to be "mentored" on how to perform right of way closings. In total, he received over \$38,000 as a "mentee". Similarly, a local real estate broker was hired to provide immediate service regarding "right of way" matters for one of the firms hired by the PDT to work on Penny Tax projects. This broker also received "mentee" payments to be trained in the various activities of the "right of way acquisition" process.

13. The use of Penny Tax funds to establish and staff the County's Small Local Business Enterprise ("SLBE") Program violates the statute's specification that Penny Tax revenue be spent on transportation-related projects. Even though Richland County asserts that all contracts awarded to date through the SLBE "have been solely related to the Penny Tax," the SLBE Program was established as a county-wide program intended to support all facets of county operations - not just Penny Tax projects. Expenditures - including more than \$200,000 for legal services related to "SLBE Program Administration" to a Maryland law firm; approximately \$219,000 in estimated personnel costs; \$122,000 for a software management system; and \$13,000 for website development - are to support the entire SLBE program and not specific Penny Tax projects.

14. The use of Penny Tax revenue to pay for public relations services and "mentoring" is inappropriate and inconsistent with the statute's requirement that funds be used specifically for transportation facilities. The public relations contract paid for from Penny Tax funds are excessive in relation to similar services offered by substantially similar firms. With respect to much of this work, my audit review indicated that there is a lack of any kind of

documentation that would verify what services were provided and the amount of hours spent on these projects. While Richland County states what the public relations firms were supposed to do for the \$3 million dollar contract, it did not present documentation as to what services were actually performed for these fees or how much each service cost.

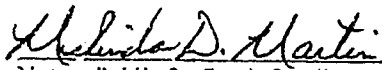
15. In addition, according to records of the Secretary of State, some entities included as part of the PDT have compliance issues. Richland County allowed these entities to be paid with Penny Tax dollars despite noncompliance.

FURTHER AFFIANT SAYETH NOT.



Tim Donovan
Audit Manager for Foreign Audit, Nexus
and Discovery
S.C. Department of Revenue

SWORN and subscribed to before me
this 27th day of June, 2016.



Notary Public for South Carolina

My Commission Expires: 7/30/19

EXHIBIT A

ATTACHMENT 1

PDT Joint Venture

3,810,330.61

PDT - Project Dev	240.83
PDT - CEI Resurfacing A	22,206.26
PDT - CEI Resurfacing B	26,755.30
PDT - CRM Greene St Phase 1	540,000.00
PDT - CRM Lincoln Tunnel	40,185.00

Total: 629,387.39

MB Kahn

MB Kahn - Program Mngt Fee:	545,922.10
MB Kahn - Reimbursables	19,954.96

Total: 565,877.06

Brownstone

Brownstone - Program Mngt Fee:	877,916.65
Brownstone - Reimbursables	193,249.68

Total: 1,071,166.33

ICA

ICA - Project Management Fee:	545,922.08
ICA - Reimbursables:	14,275.00
ICA Sub Contract Tolleson Eng.	292,000.00
ICA - Mitigation Bank Employee	6,029.50
ICA - Hussey Gay Bell Surveys	22,515.00

Total: 880,741.58

Campbell Consulting

Campbell - Public Involvement	125,000.00
Campbell - Reimbursables	10,589.10
Campbell - sub contract Banco	125,000.00

Total: 260,589.10

Davis & Floyd

Davis & Floyd - Program Mngt	131,560.00
Davis & Floyd - Reimbursable	6,875.00
D & F - Realty Mentoring	38,000.00
D & F - RW Acquisition	8,800.00

Total: 185,235.00

OLH Inc.

OLH - Program Controls Mngt	154,429.15
OLH - Reimbursables	1,055.00

Total: 155,484.15

Newman Law Firm

Newman - ROW Contracts	23,850.00
Newman - Mentoring	38,000.00

Total: 61,850.00

Note: The items highlighted in Yellow indicate those items in which the Department believes do not fall within the category for allowable expenditures.

Investigation into Richland's penny road tax program intensifies

BY CLIF LEBLANC
cleblanc@thestate.com
OCTOBER 14, 2017

South Carolina's most potent investigative tool, the state grand jury, is examining Richland County's penny sales tax program, a State Law Enforcement Division spokeswoman said Friday.

SLED spokeswoman Kathryn Richardson declined to elaborate when asked by The State newspaper about the extent of the previously secret case.

But four sources familiar with the investigation have told the newspaper the probe of the controversial program has been underway. Some sources said the active probe dates back at least five or six months.

More than one current or former public official and at least one private businessperson has been called to testify, some sources said.

The penny transportation program eventually is expected to generate \$1 billion within two decades, with the money paying for road construction, improved bus service and other items. So far, raising the tax by 1 cent for every dollar in sales has produced almost \$260 million. Roughly \$5 million is collected monthly, according to recent figures from the S.C. Department of Revenue, the state's tax collecting agency.

The grand jury investigation follows a dispute between the county and the Department of Revenue over a critical 2015 audit of the penny program conducted by the state agency. The dispute has been appealed to the state Supreme Court.

Former County Council Chairman Paul Livingston said Friday he was interviewed by SLED Lt. Pete Logan as long ago as late last year. Logan, who works with the grand jury, asked general questions about the penny program and then inquired whether Livingston was willing to testify.

"I told him, 'Yeah, I would,'" Livingston said, adding that someone with the state Attorney General's office also became involved. "But they said, 'We don't need you to come (testify).' So, I never went."

Councilwoman Dalhi Myers, who was not on council during the dispute with the Revenue Department, was taken aback when she learned Friday that the investigation is active.

"I'm completely surprised. I guess there are some people who know about this," Myers said. "I believe that every action that we're taking (currently) is ... (for) using the penny strictly as the referendum allows."

"I hope it's not true," she said of the criminal investigation.

Other members of council the newspaper reached out to Friday did not respond. County Administrator Gerald Seals declined to be interviewed.

How the investigation began

The grand jury investigation grew out of the 2015 audit.

Rick Reames, then director of the Revenue Department, spearheaded his agency's challenge of how Richland County was administering the penny program.

Reames, now a private civil law attorney in Columbia, would not

say Friday whether he had been subpoenaed by the grand jury.

"I need to decline to comment on that," Reames said, citing the confidentiality of state grand jury investigations.

There are no publicly known indictments, however, stemming from the probe.

It's been known publicly since December 2015 that SLED was looking into the Revenue Department's allegations.

A state grand jury investigation intensifies the depth and breadth of a normal SLED investigation because the grand jury, which operates in secret, has the authority to issue subpoenas to compel witnesses and to get documents. Specialized SLED agents are assigned to the grand jury, which has designated prosecutors and its own judge. The grand jury has jurisdiction in public corruption cases and over several other specified criminal offenses.

The Revenue Department raised serious questions about how Richland has spent some of the public money. The agency's seven-month audit led Reames to inform county leaders that evidence of "potential public corruption and fraud" had been uncovered.

Reames wrote in a letter that among other problems found by auditors were "multiple instances of illegal activity by individuals and/or companies associated with the penny program."

County leaders, including members of County Council, strongly protested Reames' allegations at the time. One former legislator, James Felder, said in July 2016 the allegations were "trumped up claims" by Reames, who had filed a

protest to overturn the 2012 penny referendum before he was appointed to lead the Revenue Department.

Taxpayers approved the 1-cent increase specifically to improve roads, to upgrade the capital city area's bus system and to build pedestrian and bicycle pathways. The controversial election was marred by irregularities, including long lines because there were too few voting machines, and lawsuits.

A lot of penny program questions

Among the concerns raised by revenue department auditors were:

- How a consortium of private companies hired by the county was spending money.
- How the county hired the companies, which collectively are called the "program development team."
- Why County Council decided to exempt some of its own procurement procedures for penny projects.

More precisely, Reames questioned the council's use of

\$619,000 to start a program intended to assure that small, minority- and women-owned businesses had a shot at winning contracts.

Further, the audit raised questions about \$600,000 used yearly to pay two marketing firms when the county has its own public relations staff. The firms are Campbell Consulting Group and BANCO Bannister Co.

At the \$600,000 yearly rate, Reames wrote, the county was on pace to spend \$3 million over five years "for the equivalent of fewer than two full-time employees — when an entire (county) public information office already exists."

Another complaint of the state agency was that then-Columbia City Councilman Brian DeQuincey Newman's one-man law firm was to be paid nearly \$400,000 over five years to do property ownership and title research for right-of-way acquisitions. Newman also had sway over a large part of penny revenue because he was then chairman of the board that oversees The COMET bus system.

Newman stepped down from the county job in 2016 and pleaded guilty to failing to pay taxes on \$200,000 in income in 2012 and 2013. He did not seek re-election to City Council.

A dispute also erupted last year over bidding for a then-\$24.5 million contract to extend Shop Road, a project that would in part service a large fiberglass manufacturing plant that is under construction at the county's Pineview Industrial Park.

After Reames' office withheld about \$17 million of penny revenue, the county sued the agency in 2016. A state judge ruled the Revenue Department had overstepped its authority in freezing money. But Judge Thomas Cooper also said the agency could pursue its claims of misspending by the county.

The county and the agency have appealed Cooper's ruling to the S.C. Supreme Court. The justices have yet to issue a final decision, Rep. James Smith, D-Richland, said Friday. Smith was hired by the tax collection agency to argue its case.



Table 2 (g) - Other Sidewalk, Bikeway and Pedestrian Improvement Projects

All costs are shown in thousands of dollars and represent the calendar year the work is programmed to begin

Project Ranking	Council District or Districts	Project	Activity	Work Authorized Prior to CY 2016	Programmed 2016	Programmed 2017	Programmed - 2018	Programmed - 2019	Programmed - 2020	Total Cost in CTIP (2016 - 2020)	Cost to Complete - Beyond 2020	ESTIMATED TOTAL REMAINING PROJECT COST
Roadways - Widening												
Countywide		SIDEWALKS	Engr. & Design	Authorized	\$500	\$500	\$500	\$500	\$500	\$2,500		\$2,500
		(design & construction authorized for 2015 work)	ROW	Authorized	\$250	\$250	\$250	\$250	\$250	\$1,250		\$1,250
			Construction	Authorized	\$2,250	\$4,250	\$4,250	\$4,250	\$4,250	\$19,250	\$2,000	\$21,250
			Total		\$3,000	\$5,000	\$5,000	\$5,000	\$5,000	\$23,000	\$2,000	\$25,000
Countywide		BIKEWAYS	Engr. & Design	Authorized	\$500	\$500	\$500	\$500	\$400	\$2,400		\$2,400
		(design & construction authorized for 2015 work)	ROW	Authorized	\$250	\$250	\$250	\$250	\$200	\$1,200		\$1,200
		(as projects are designed, it is intended that construction begin as soon as feasible)	Construction	Authorized	\$1,750	\$3,250	\$2,750	\$3,250	\$3,400	\$14,400	\$3,000	\$17,400
			Total		\$2,500	\$4,000	\$3,500	\$4,000	\$4,000	\$18,000	\$3,000	\$21,000
Countywide		PEDESTRIAN INTER. IMP.	Engr. & Design		\$120	\$0	\$0			\$120		\$120
			ROW		\$3	\$3	\$0			\$6		\$6
		(as projects are designed, it is intended that construction begin as soon as feasible)	Construction			\$903	\$1,806			\$2,709		\$2,709
			Total		\$123	\$906	\$1,806	\$0	\$0	\$2,835	\$0	\$2,835

Project	Activity	Programmed 2016	Programmed 2017	Programmed - 2018	Programmed - 2019	Programmed - 2020	Total Cost in CTIP (2016 - 2020)	Cost to Complete - Beyond 2020	ESTIMATED TOTAL REMAINING PROJECT COST
Total Other Sidewalk, Bikeway and Pedestrian Intersection Projects	Engr. & Design	\$1,120	\$1,000	\$1,000	\$1,000	\$900	\$5,020	\$0	\$5,020
	ROW	\$503	\$503	\$500	\$500	\$450	\$2,456	\$0	\$2,456
	Construction	\$4,000	\$8,403	\$8,806	\$7,500	\$7,650	\$36,359	\$5,000	\$41,359
	Total	\$5,623	\$9,906	\$10,306	\$9,000	\$9,000	\$43,835	\$5,000	\$48,835

Activity Key: Engr. Design is all project engineering and project design; ROW is right-of-way acquisition; Construction is all construction activities to include utilities and construction inspection.



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

v.

Richland County,

Defendant.

Civil Action No. 2016-CP-40-2875

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AND/OR
MOTION FOR SUMMARY JUDGMENT

BACKGROUND

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

In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1.¹

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

Following approval of the referendum, Richland County began establishing the framework for the implementation of the Transportation Penny Program to be paid for by the sales and use tax collected pursuant to the referendum. The Penny Tax was levied and collected for Richland County effective May 1, 2013.

The Plaintiffs have filed this action challenging the legality of Richland County Ordinance Number 039-12HR including categories of expenditures that have been made in accordance with that Ordinance. The Plaintiffs have brought this action against Richland County Council. The Defendant Richland County has moved to dismiss and/or for summary judgment.

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

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

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

DISCUSSION

I. Failure to Prosecute

Rule 41(b), SCRC, authorizes a court to dismiss an action based upon a plaintiff's failure to prosecute. In *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802 (1970), the Supreme Court held that "it is within the inherent power of the court to dismiss an action for failure to prosecute." 175 S.E.2d at 803. The Supreme Court has further held that "[t]he plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause. This authority is necessary if the courts are to control and efficiently manage an ever-expanding docket." *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757, 758 (1983). See also, *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997).

In the case at bar, the Plaintiffs have taken no action to prosecute their claims in the 17+ months since the Complaint was filed. The Plaintiffs have pursued no discovery. No written discovery has been served by the Plaintiffs, and no depositions have been taken. In the Amended Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings, the Court wrote as follows: "The Court finds that the issue in the First Cause of Action is not one that should be decided on judgment on the pleadings, but rather should be developed factually and legally through the course of the litigation. There has been no discovery in this case." That situation has not changed. No timely discovery has been initiated or completed, and based on the Scheduling Order filed November 18, 2016, the discovery deadline has now expired. The mediation deadline has also expired, and the Plaintiffs made no attempt to have mediation

scheduled in this case. In short, the absolute lack of any activity in prosecuting this action by the Plaintiffs compels the dismissal of this action under Rule 41(b) and the inherent authority of the Court.

II. Plaintiffs' First Cause of Action

In its First Cause of Action, the Plaintiffs allege that Richland County Ordinance Number 039-12HR exceeds the scope of Section 4-37-30 by allowing for the Penny Tax revenues to be expended for such matters as the operation of the COMET mass transit services provided by the Central Midlands Regional Transit Authority (CMRTA) as well as the construction of pedestrian sidewalks and bike lanes and paths. However, contrary to the Plaintiffs' allegations in their First Cause of Action, Section 4-37-30, as adopted by 1995 Act No. 52 and as amended by 2000 Act No. 368, allows for the expenditure of Penny Tax revenues for operating transportation-related projects (including operating mass-transit projects which were added to the categories of projects and facilities by the amendment in 2000). Moreover, the Plaintiffs are in error in suggesting that the Penny Tax revenues are authorized only for "transportation facilities" where 1995 Act No. 52 as well as Section 4-37-30 expressly authorize its expenditure for "transportation-related projects." In addition, applying the plain and ordinary meaning of the terms, pedestrian sidewalks and bike paths and lanes qualify as "other transportation-related projects [or] facilities." *See*, S.C. Code Ann. § 4-37-30(A)(1)(a)(i).⁴

⁴ The Plaintiffs' First Cause of Action presents purely issues of law. *See, Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012) ("[d]etermining the proper interpretation of a statute is a question of law").

The intent of the General Assembly as to the scope of the authorized uses of the Penny Tax revenues is stated clearly in the preamble or "Findings" section of 1995 Act No. 52, as contained in Section 1 of the Act, which reads as follows:

In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and **operating** highways, roads, streets, and bridges, and other **transportation-related projects**, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1. (Emphasis added).

To that end, as authorized by S.C. Code Ann. § 4-37-30(A)(1)(a), Section 1(c) of Richland County Ordinance Number 039-12HR specified that purposes for which the Penny Tax revenues must be used:

For financing the costs of highways, roads, streets, bridges, greenways, pedestrian sidewalks, and bike paths and lanes and other transportation-related projects facilities, and drainage facilities related thereto, and mass transit systems operated by Richland County or (jointly) operated by Richland County, other governmental entities and transportation authorities.

Moreover, Section 2(c) of the Ordinance provided in part:

The maximum cost of the projects to be funded from the proceeds of the Sales and Use Tax shall not exceed, in the aggregate, the sum of \$1,037,900,000, and the maximum amount of net proceeds to be raised by the Sales and Use Tax shall not exceed \$1,070,000,000, *which includes administrative costs* and debt service on bonds issued to pay for the projects.

(Emphasis added). Thus, the Ordinance does expressly include operating costs as contemplated by the Transportation Act.

These provisions of Ordinance Number 039-12HR, as challenged by the Plaintiffs, are, as a matter of law, valid, enforceable and lawful under state law, and the Plaintiffs are not entitled

to the declaratory or injunctive relief sought. The General Assembly's preamble to 1995 Act No. 52 gives express permission for the Penny Tax revenue to be used for "operating" transportation-related projects, which by later amendment includes "mass transit systems."⁵ In *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341, 354 (1994), the Supreme Court specifically explained that "preamble of an act may be used as a guide in determining legislative intent." Likewise, in *Benjamin v. Housing Authority of Darlington County*, 198 S.C. 79, 15 S.E.2d 737, 738 (1941), the Supreme Court recognized that legislative findings are accorded "great weight because of the high regard we hold for a coordinate branch of the government." 15 S.E.2d at 738. *See also*, *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152711 S.E.2d 895, 898 (2011) (Supreme Court addressed legislative intent "as expressed in the preamble to our FOIA statute"); *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369, 374 (Ct. App. 1989) (Court of Appeals cited Act's preamble as "expressly stating" legislative intent).

In addition, the title to 1995 Act No. 52 states as follows:

AN ACT TO AMEND TITLE 4, CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 37 SO AS TO AUTHORIZE COUNTIES TO ESTABLISH OPTIONAL METHODS FOR THE FINANCING OF TRANSPORTATION FACILITIES INCLUDING THE **ACQUISITION, CONSTRUCTION, EQUIPMENT, AND OPERATION** OF HIGHWAYS, ROADS, STREETS, BRIDGES, AND OTHER TRANSPORTATION-RELATED PROJECTS EITHER ALONE, IN PARTNERSHIP WITH THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, OR JOINTLY-OPERATED PROJECTS OF THE COUNTY AND OTHER GOVERNMENTAL ENTITIES.

1995 Act No. 52. (Emphasis added). In *Whetstone v. South Carolina Department of Highways*

⁵ When "mass transit systems" were added to Section 4-37-30(A)(1)(a)(i) in 2000, the General Assembly did not make any additional "findings" nor include a preamble section. Moreover, no attempt was made to delete or amend the "findings" section from the 1995 Act. The title to 2000 Act No. 368 states that the amendment was "to provide that the proceeds of the tax may be used for mass transit systems and greenbelt projects." *See*, 2000 Act No. 368.

and Public Transportation, 272 S.C. 324, 252 S.E.2d 35 (1979), the Supreme Court stated its interpretation of a statute was supported by the "underlying legislative history as exemplified by the original title of the pre-codified Act." 252 S.E.2d at 37. *See also, Kennedy v. South Carolina Retirement System*, 345 S.C. 339, 549 S.E.2d 243, 248 (2001) (where the Supreme Court looked at the title of an Act to glean legislative intent); *Demas v. Convention Motor Inns*, 268 S.C. 186, 232 S.E.2d 724, 726 (1977) (noting that it is proper to discern legislative intent from the title of an Act); *Duvall v. South Carolina Budget & Control Board*, 377 S.C. 36, 659 S.E.2d 125, 130 (2008) (same).

In sum, the legislative intent is clear from the Act itself, including the title and the express legislative findings. The expenditure of Penny Tax revenues is not limited to "capital costs" for the construction of "capital improvements." Instead, the Penny Tax revenues may be expended on the "operation" of transportation-related facilities or projects, which includes the operation of The COMET mass transit system.

The Penny Tax Revenues may also be used to fund such transportation facilities as sidewalks and bike paths and lanes. The plain and ordinary meaning of those terms demonstrate that they are transportation-related. Bike lanes themselves are indeed part of roadways. Moreover, historically in South Carolina, sidewalks are constructed, owned and maintained by governmental entities as part of the adjoining roadways. *See generally, Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991); *Vaughn v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006); S.C. Code Ann. § 5-27-120. *See also, Mauldin v. City Council of Greenville*, 53 S.C. 285, 31 S.E. 252, 254 ("[s]idewalks are, after all, nothing but a part of the highway or roadway"). Therefore, as a matter of law, the Plaintiffs are not entitled to the declaratory and injunctive relief sought in their First Cause of Action.

III. Plaintiffs' Second Cause of Action

In their Second Cause of Action, the Plaintiffs have alleged in only conclusory terms that the Defendant County has violated S.C. Code Ann. § 11-35-50, which requires "[a]ll political subdivisions of the State [to] adopt ordinances or procedures embodying sound principles of appropriately competitive procurement." The Plaintiffs have failed to meet their burden of proving that the procurement provisions at issue violate S.C. Code Ann. § 11-35-50.

In rejecting a similar argument made by one of the Plaintiffs in the case at bar, the South Carolina Supreme Court explained that "section 11-35-50 does not specify any particular procedures that are considered to embody the 'appropriately competitive' standard; rather, the statute 'clearly was intended to afford local governments needed flexibility to determine what is 'appropriately competitive' in light of the public business they must transact.'" *Sloan v. Greenville Hospital System*, 388 S.C. 152, 694 S.E.2d 532, 541 (2010), *citing Glasscock Co. v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718, 721 (Ct. App. 2004). As the Court of Appeals in *Glasscock* recognized, "[t]hat local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures is entirely consistent with our state's now firmly rooted constitutional principle of 'home rule.'" *Glasscock*, 604 S.E.2d at 722. The Court of Appeals also explained as follows:

Glasscock urges this Court to construe section 11-35-50 as mandating sealed competitive bids in virtually every instance of public procurement. This approach would effectively strip our state's local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt. Indeed, such a reading of section 11-35-50 runs wholly contrary to the home rule authority vested in local government by our constitution. We reject Glasscock's argument.

Id.

In *Glasscock*, the Court found that an exemption from sealed competitive bidding provided for by the Sumter County Procurement Ordinance was valid under S.C. Code Ann. § 11-35-50. In that case, the county adopted contract amendments that extended the length of a contract without putting the contract extension out from competitive bidding.

In *Sloan v. Greenville Hospital System, supra*, the Supreme Court found that Sloan "failed to meet his burden of proving the challenged provisions did not comply with section 11-35-50." *Sloan*, 694 S.E.2d at 540. The same is true in the present case, and the County is entitled to summary judgment on the Second Cause of Action.

IV. Plaintiffs' Third Cause of Action

In their Third Cause of Action, the Plaintiffs have alleged that Penny Tax Revenues have been used for expenditures that do not fall within the scope of S.C. Code Ann. § 4-37-30. This claim is duplicative of the First Cause of Action in that the Plaintiffs contend that the Penny Tax Revenues cannot be used for non-capital or administrative costs, which is contrary to the legislative intent as stated clearly in the preamble or "Findings" section of 1995 Act No. 52. The Plaintiffs have failed to meet their burden of identifying and proving that any expenditures of Penny Tax Revenues do not fall within the scope of S.C. Code Ann. § 4-37-30.

V. Plaintiffs' Fourth Cause of Action

As to their Fourth Cause of Action, the Plaintiffs have failed to meet their burden of showing a violation of the audit provision of Ordinance Number 039-12HR. As alleged, Ordinance

Number 039-12HR does require an annual audit, and the Penny Tax Revenues and expenditures are included as part of the County's annual audits as discussed in the Comprehensive Annual Financial Reports (CAFR) prepared for each fiscal year. The Plaintiff has not alleged nor shown otherwise.

VI. Plaintiffs' Fifth Cause of Action

As to their Fifth Cause of Action, the Plaintiffs have failed to meet their burden of showing a violation of the budget provision of Ordinance Number 039-12HR. In addition, the Plaintiffs cannot demonstrate that any previous spending of Penny Tax Revenues is unlawful or that any prospective relief is warranted on the basis alleged in the Fifth Cause of Action.

VII. Plaintiffs' Sixth Cause of Action

As to their Sixth Cause of Action, the Plaintiffs have failed to meet their burden of showing a violation of the outside agency audit provision of Ordinance Number 039-12HR. In addition, the Plaintiffs cannot demonstrate that any previous spending of Penny Tax Revenues is unlawful or that any prospective relief is warranted on the basis alleged in the Sixth Cause of Action.

VIII. Plaintiffs' Seventh Cause of Action

The Plaintiffs Seventh Cause of Action cites to a non-specific violation of S.C. Code Ann. § 4-37-25 which by its express language applies only to "an authority created pursuant to this chapter." S.C. Code Ann. § 4-37-25. Yet, the Ordinance Number 039-12HR reflects that Richland County chose not to adopt a transportation authority. Thus, S.C. Code Ann. § 4-37-25 would have

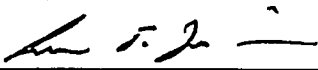
no applicability. In effect, the Plaintiffs have failed to meet their burden of showing a violation of S.C. Code Ann. § 4-37-25 because Richland County Council never established a transportation authority as created pursuant to Chapter 37 of Title 4.

CONCLUSION

Based on the foregoing discussion, the Defendant Richland County respectfully requests that the Court dismiss with prejudice the Plaintiffs' Amended Complaint.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 
ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

RAY N. STEVENS
RAY E. JONES
COURT E. WALSH
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Post Office Box 1509
Columbia, South Carolina 29202
(803) 255-8000

Counsel for Defendant Richland County

Columbia, South Carolina

October 24, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2016-CP-40-2875

Plaintiffs,)

CERTIFICATE OF SERVICE

v.)

Richland County,)

Defendant,)

Central Midlands Regional)
Transit Authority,)

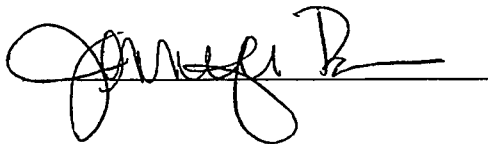
Intervenor.)
_____)

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Defendant, Richland County, does hereby certify that service of the **Memorandum in Support of Motion to Dismiss and/or Motion for Summary Judgment** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 26th day of October 2017:

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, South Carolina 29601

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Elizabeth Van Doren Gray, Esquire
Robert E. Tyson, Jr., Esquire
Alexis K. Lindsay, Esquire
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, South Carolina 29211



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

v.

Richland County,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

**PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM OF LAW IN
OPPOSITION TO MOTIONS
FOR SUMMARY JUDGMENT**

FROM AND COUNTY
FILED
2017 NOV 15 PM 2:24
JEANETTE W. MCGRIDE
C.C.P. & G.S.

NOW COME the Plaintiffs, by their undersigned attorney, and submit this Supplemental Memorandum of Law in Opposition to the Motions for Summary Judgment filed by the Defendants and by the Intervenor Central Midlands Regional Transit Authority ("CMRTA"). Plaintiffs received the County's Memorandum in Support of the Defendant's Motion for Summary Judgment on the morning of oral argument. Plaintiffs submit this Supplemental Memorandum to address two points.

I. PLAINTIFFS HAVE ACTIVELY PURSUED THIS CASE.

Defendants argued that Plaintiffs had not actively pursued the Penny Tax case, and therefore Defendants should be granted summary judgment. Plaintiffs argued that they had pursued relevant public records through FOIA. Plaintiff thought it prudent to explain to the Court a little more fully the nature of the pursuit of the public records through FOIA.

Plaintiff issued the FOIA Request to the Defendants February 11, 2016 (**Exhibit A**). After failing to receive a proper response, Plaintiffs filed suit on April 13, 2016, Civil

Action Number 2016-CP-40-2404, the Penny Tax FOIA case. Defendants filed an Answer on May 13, 2016. Defendants provided a substantive response to the FOIA request, with public records, on June 8, 2016 (**Exhibit B**). On or about September 19, 2016, Defendants provided 479 additional pages of responsive public records. Then on or about November 17, 2016, Defendants provided an additional 303 pages of additional public records.

On or about January 19, 2017 the parties agreed to settle the case, by which the Defendants agreed to pay \$3,000 in Plaintiffs' attorney's fees under FOIA. For nearly three months counsel wrote back and forth by letter and by email attempting to consummate the settlement agreement.

In addition, during this time, the parties were scheduling and arguing the motions to dismiss in the present action, down in Berkeley County, which the Court heard on February 14, 2017. The parties submitted proposed orders on February 22 and 24, 2017. On March 6, the Court entered an Order denying the motions to dismiss. On March 16, 2017, Defendants filed a Motion to Alter or Amend the Judgment. On March 23, Plaintiffs filed a responsive memorandum. On March 28, the Court filed an Amended Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings.

Defendants provided the settlement check via letter dated April 4, 2017, for the payment of attorneys' fees in the Penny Tax FOIA action. Defendants filed a Stipulation of Dismissal on or about April 11, 2017. Accordingly, Plaintiffs were pursuing the enforcement of their FOIA request and the acquisition of relevant public records related to this case from February 11, 2016, through April 11, 2017.

Recently, Plaintiffs issued a supplemental request under FOIA to Richland County, and received a letter stating that Richland County would not respond to the FOIA request.

Whereupon, Plaintiffs filed a second FOIA enforcement action against Richland County, Civil Action Number 2017-CP-40-06286 and emailed a copy of the filed Summons and Complaint to counsel for Richland County on October 19, 2017. Defendants have not filed an Answer to the Second FOIA case.

In addition, Plaintiff served additional FOIA requests on Defendant/Intervenor, CMRTA, and served a copy on counsel for CMRTA on October 27, 2017. Plaintiffs have not received a response to this FOIA request.

Plaintiff respectfully suggest that the foregoing demonstrates that the Plaintiffs have pursued this action, while waiting for a decision from the Supreme Court on the companion case, in which the Court heard oral argument five months ago, in June, 2017.

II. DEFENDANTS ADMIT THEY HAVE NOT REQUIRED AUDITS FROM ENTITIES RECEIVING PENNY TAX FUNDS.

Second, Plaintiffs asserted in their prior memorandum that Defendants had not required audits of those entities receiving funding from the Penny Tax. Although the Defendants did not dispute this assertion, Plaintiffs thought it prudent to substantiate that argument, and hereby submit to the Court Plaintiffs' initial FOIA request (**Exhibit A**), and the substantive response to the FOIA request received several months later from counsel for the Defendants (**Exhibit B**).

Of particular importance is request number 7: "All reports of audits of any outside agency receiving and appropriation of the sales and use tax" (**Exhibit A**). Defendants responded: "Richland County does not have in its possession audit reports for outside agencies receiving and appropriation of the sales and use tax" (**Exhibit B**).

These audits are required by the ordinance. The Ordinance states, "Except as specifically authorized by County Council, any outside agency organization receiving an

appropriation of the Sales and Use Tax must provide to County Council an independent annual audit of such agency organization financial records and transactions and such other and more frequent financial information as required by County Council, all in form satisfactory to County Council.” *Id.*, Section 2. (c).

Richland County admitted that it does not have any independent audits of agencies receiving appropriations from the Penny Tax funds. Accordingly, all such spending pursuant to this ordinance is unlawful.

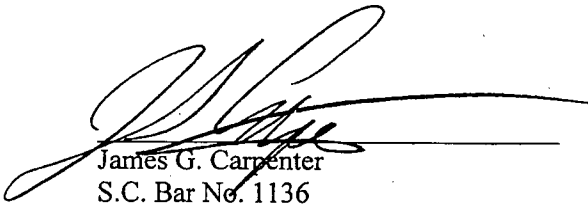
Furthermore, on September 20, 2017, County Administrator Gerald Seals issued Council Memorandum 9-3 to County Council (**Exhibit C**), reporting that outside auditors had found overdrafts amounting to nearly \$35 million of funds to pay for capital projects, many of which directly involved the Penny Tax funds. For this reason as well, summary judgment should be denied, and this matter should be held in abeyance pending the decision from the Supreme Court and joined for further action with the case on remand from the Supreme Court.

CONCLUSION

Plaintiffs have established with competent evidence that Defendants are exceeding the scope of the statutes that authorize the Penny Tax. These claims include both the continued operation of the bus system, improper expenditures, and the failure to adopt “sound principles of appropriately competitive procurement.” Furthermore, Defendants have failed to comply with the auditing requirements both as to the Penny tax program and as to the agencies that receive Penny tax funds. Finally, Defendants have nearly \$35 million in overdrafts related to capital projects.

Accordingly, Plaintiffs pray the Court to deny the Motion for Summary Judgment and grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

A handwritten signature in black ink, appearing to read 'J. Carpenter', is written over a horizontal line.

James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

November 10, 2017



ATTORNEYS AND COUNSELORS AT LAW

February 11, 2016

JAMES G. CARPENTER
james.carpenter@carpenterlawfirm.net

JENNIFER J. MILLER
jennifer.miller@carpenterlawfirm.net

L. WARREN CLAYTON, III
warren.clayton@carpenterlawfirm.net

*LICENSED IN S.C. & N.C.

The Hon. Torrey Rush, Chairman
Richland County Council
409 Burnwood
Columbia, SC 29203

CERTIFIED MAIL

RE: Freedom of Information Act
4207 1927 9651 2900 0000 20

Re: Freedom of Information Act Request

Dear Chairman Rush:

On behalf of my client, South Carolina Public Interest Foundation and pursuant to the South Carolina Freedom of Information Act, SC Code Ann. § 30-4-10 et seq., and 5 U.S.C. § 552 et seq., I respectfully request that you mail me a copy of the following public records in your possession, custody, or control, related to the penny sales tax and referendum in November, 2012:

1. Referendum question ballot.
2. Appendix A mentioned in section 2c of Ordinance 39-12HR.
3. All contracts for procurement entered into by Richland County, paid in whole or in part from the penny sales tax proceeds.
4. All records of expenditures exceeding \$10,000 paid from the penny sales tax proceeds.
5. All reports of audits of expenditures related to the penny sales tax.
6. Each budget for expenditures of sales and use tax revenues for each year since the adoption of the penny sales tax.

THE CARPENTER LAW FIRM, P.C. • 819 EAST NORTH STREET • GREENVILLE, SC 29601
TELEPHONE (864) 235-1269 • FACSIMILE (864) 331-3083 • WWW.CARPENTERLAWFIRM.NET



7. All reports of audits of any outside agency receiving an appropriation of the sales and use tax.
8. Determinations made pursuant to Section 2-591 of the Richland County Code.
9. Minutes of County Council meetings recording a Richland County Council vote pursuant to Section 2-591 (a).
10. Requests for Qualifications prepared pursuant to Section 2-591 (B) (1).
11. Documents relating to a short list evaluation committee established pursuant to Section 2-591 (B) (2).
12. Determinations by the County Administrator related to a short list evaluation committee established pursuant to Section 2-591 (B) (2).
13. Requests for Qualifications prepared pursuant to Section 2-591 (B) (3).
14. Determinations prepared pursuant to Section 2-591 (B) (3).
15. Notices of Request for Qualification published in a newspaper pursuant to Section 2-591 (B) (4).
16. Records of the public opening of responses to RFQ's issued pursuant to Section 2-591 (B) (6).
17. Determinations by the Director of Procurement related to the waving or curing of any information or irregularity in a response to Request for Qualifications pursuant to Section 2-591 (B) (7).
18. Determinations by County Council pursuant to Section 2-591 (B) (10).
19. Shortlist report, with rankings, referred to in Section 2-591 (B) (11).
20. Determinations by County Council pursuant to Section 2-591 (B) (13).
21. Record of the rankings of offerors pursuant to Section 2-591 (B) (13).
22. Changes made to a scope of the Request for Qualifications pursuant to Section 2-591 (B) (14) d.
23. Requests for Proposals prepared or issued pursuant to Section 2-591 (c) (1).

Torrey Rush, Chairman
Richland County Council
February 11, 2016
Page 3

24. Record of the opening of a response to Request for Proposals pursuant to Section 2-591 (c) (3).
25. Record of a short list evaluation committee established by the County Administrator pursuant to Section 2-591 (c) (5).
26. Determinations issued pursuant to Section 2-591 (c) (5).
27. Determinations made pursuant to Section 2-591 (c) (6).
28. Determinations regarding the waving or cure of a deficiency issued by the director of procurement pursuant to Section 2-591 (c) (6).
29. Notification or offeror's response relating to the waiver or curing of any deficiency issued pursuant to Section 2-591 (c) (6).
30. Determinations of County Council issued pursuant to Section 2-591 (c) (9).
31. Shortlist report issued pursuant to Section 2-591 (c) (10).
32. Determinations issued by County Council pursuant to Section 2-591 (c) (12).
33. Direction issued by County Council pursuant to Section 2-591 (c) (13).
34. Determinations issued by County Council pursuant to Section 2-591 (c) (13) a or c.

In the event you determine that a requested document contains material or information within the statutory exemptions to mandatory disclosure, I request you review such material for discretionary disclosure. Similarly, in the event you determine a document contains material or information within the statutory exemptions to mandatory disclosure, I request, in accordance with the provisions of S.C. CODE ANN. § 30-4-40(b), you produce any and all reasonably segregable portions of such document.

If you determine that all documents responsive to any individual requested item (or portion thereof) have been disclosed or specifically identified and withheld under the claim of authority, I request specific written confirmation of such fact. In the event you determine you have no document responsive to an individual request item (or portion thereof), I request specific written confirmation of that fact.

This request constitutes notice of demand for production of all described documents. If, for any reason, you determine that you will not send us any document (or portion thereof), or that this request will not, in whole or in part, be complied with, I request prompt notice of any action taken. In addition, I request such notice include complete identification of the withheld documents (or

Torrey Rush, Chairman
Richland County Council
February 11, 2016
Page 4

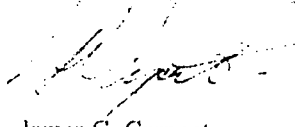
portions thereof) by title, author, date, nature of such material, and a thorough explanation of all legal and factual bases for your determination to deny disclosure. I request that in responding to this request you adhere to the time limitations set forth in S.C. CODE ANN. § 30-4-30(c).

I request that you mark the back of each copy of a public record with the corresponding number of the request, listed above. If you have no public record corresponding to a request, I request that you so state.

I will pay the reasonable and direct costs of locating and reproducing the requested documents to the extent required by S.C. CODE ANN. § 30-4-30(b). However, I request prior notice should you determine that such costs will exceed \$500.

Thank you for your assistance. Should you have any questions, please do not hesitate to call my office at (864) 235-1269.

Sincerely yours,
THE CARPENTER LAW FIRM, P.C.


James G. Carpenter

RECEIPT

2207 1927 9051 2000 0000 20

FROM:

James G. Carpenter
RE: Freedom of Information Act

SEND TO:

The Hon. Torrey Rush, Chairman
Richland County Council
409 Burrwood
Columbia SC 29203

FEES:

Postage	0.48
Certified Fee	3.30
Return Receipt	2.70
Restricted	

TOTAL \$ 6.48

POSTMARK OR DATE

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

Daniel C. Plyler
Joel S. Hughes
David A. DeMasters
Steven R. Spreeuwers
Todd R. Flippin

*Also Admitted In North Carolina
†Certified Mediator

June 8, 2016

Of Counsel
Kenneth P. Woodington
Writer's Email: alindemann@dml-law.com

Via Federal Express

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, South Carolina 29601

RE: South Carolina Public Interest Foundation v. Richland County and Torrey Rush,
Chairman of County Council
Civil Action Number: 2016-CP-40-2404
Our File Number: 314.9931

Dear Jim:

Per our recent telephone conversations, I am enclosing with this letter a CD containing the documents responsive as indicated below to your Freedom of Information Act (FOIA) request that was received by Richland County on March 9, 2016, and was previously addressed with you in earlier correspondence.

The following information has been redacted in accordance with S.C. Code Ann. § 30-4-40(a)(2) and (a)(5): Federal identification numbers, gross revenues, personal cellphone numbers, personal email addresses, and bonding capacity.

The following references the items contained in your FOIA request and the County's response thereto:

1. Referendum question ballot
Response: Documents provided
2. Appendix A mentioned in section 2c of Ordinance 39-12HR.
Response: Documents provided
3. All contracts for procurement entered into by Richland County, paid in whole or in part from the penny sales tax proceeds.
Response: Documents provided



4. All records of expenditures exceeding \$10,000 paid from the penny sales tax proceeds.
Response: Documents provided
5. All reports of audits of expenditures related to the penny sales tax.
Response: Documents provided
6. Each budget for expenditures of sales and use tax revenues for each year since the adoption of the penny sales tax.
Response: Documents provided
7. All reports of audits of any outside agency receiving an appropriation of the sales and use tax.
Response: Richland County does not have in its possession audit reports for outside agencies receiving an appropriation of the sales and use tax.
8. Determinations made pursuant to Section 2-591 of the Richland County Code.
Response: Documents provided
9. Minutes of County Council meetings recording a Richland County Council vote pursuant to Section 2-591(a).
Response: Documents provided
10. Requests for Qualifications prepared pursuant to Section 2-591(B)(1).
Response: Documents provided
11. Documents relating to a short list evaluation committee established pursuant to Section 2-591(B)(2).
Response: Documents provided
12. Determinations by the County Administrator related to a short list evaluation committee established pursuant to Section 2-591(B)(2).
Response: Documents provided
13. Requests for Qualifications prepared pursuant to Section 2-591(B)(3).
Response: Documents provided
14. Determinations prepared pursuant to Section 2-591(B)(3).
Response: Documents provided

15. Notices of Request for Qualification published in a newspaper pursuant to Section 2-591(B)(4).
Response: Documents provided
16. Records of the public opening of responses to RFQ's issued pursuant to Section 2-591(B)(6).
Response: Documents provided
17. Determinations by the Director of Procurement related to the waving or curing of any information or irregularity in a response to Request for Qualifications pursuant to Section 2-591(B)(7).
Response: No responsive documents
18. Determinations by County Council pursuant to Section 2-591(B)(10).
Response: Documents provided
19. Short-list report, with rankings, referred to in Section 2-591(B)(11).
Response: Documents provided. Please note that Section 2-591(B)(11) does not require rankings to be included in the short-list report.
20. Determinations by County Council pursuant to Section 2-591(B)(13).
Response: Documents provided
21. Record of rankings of offerors pursuant to Section 2-591(B)(13).
Response: Documents provided
22. Changes made to a scope of the Request for Qualifications pursuant to Section 2-591(B)(14)(d).
Response: No responsive documents.
23. Requests for Proposals prepared or issued pursuant to Section 2-591(c)(1).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).
24. Record of the opening of a response to Request for Proposals pursuant to Section 2-591(c)(3).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).

25. Record of a short list evaluation committee established by the County Administrator pursuant to Section 2-591(c)(5).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).
26. Determinations issued pursuant to Section 2-591(c)(5).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).
27. Determinations made pursuant to Section 2-591(c)(6).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).
28. Determinations regarding the waving or cure of a deficiency issued by the director of procurement pursuant to Section 2-591(c)(6).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).
29. Notification or offeror's response relating to the waiver or curing of any deficiency issued pursuant to 2-591(c)(6).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).
30. Determinations of County Council issued pursuant to Section 2-591(c)(9).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).
31. Shortlist report issued pursuant to Section 2-591(c)(10).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).
32. Determinations issued by County Council pursuant to Section 2-591(c)(12).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).
33. Direction issued by County Council pursuant to Section 2-591(c)(13).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).

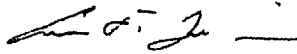
James G. Carpenter, Esquire
June 8, 2016
Page Five

34. Determinations issued by County Council pursuant to Section 2-591(c)(13)(a) or (e).
Response: No responsive documents. A request for proposals has never been issued pursuant to Section 2-591(c).

Please advise if your have any questions.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/
Enclosures



RICHLAND COUNTY GOVERNMENT

Office of the County Administrator

Council Memorandum 9-3

To: County Council
From: County Administrator Gerald Seals
Date: September 20, 2017
Subject: Auditors Findings on Overdraft of Funds to Pay for Capital Projects

Background

This memorandum follows up my August 8, 2017, email (archived as Council Memorandum 8-1, Attachment A) and summarizes Cherry Bekaert LLP's ("CB") forensics audit findings on the overdraft of funds from the Richland County's Concentration Account (aka Pool Cash) to pay for capital projects. The Concentration Account includes cash revenue from the General Fund, Special Revenue Funds, Debt Service Fund, and Parking Fund. This pooled cash is invested and **all earned interest** is debited to the General Fund, increasing the county's cash assets. In order for the county to pay its liabilities (i.e., accounts payables), when checks are cashed, funds are withdrawn from the Concentration Account automatically. The accounts are Zero Balance Accounts (ZBA) so only the funds for cleared checks are transferred daily. The funds from other accounts that are invested are transferred weekly to the Concentration Account to cover their expenses such as capital project accounts and enterprise accounts.

As County Council will recall, on May 2, 2017, Mr. Alan Robinson from CB briefed you in Executive Session on the preliminary audit findings, which included the overdraft of approximately \$25 million, based on information at that time. In fact, as of January 31, 2017, the total overdraft was \$34,897,882.81 (see Attachment B).

Issues

Overdraft of Funds to Pay for Capital Projects

Around the October/November 2016 timeframe, former Deputy Treasurer Stacey Hamm alerted Treasurer David Adams regarding improper charges against several capital projects accounts. Those accounts included the following: Public Safety FY10 (bond), the GO Bond 2010A, Transportation Tax CP, Bike/Pedestrian/Greenways, and RC Capital Projects. The improper charges created negative account balances because the accounts neither have budgets set up nor blocks to prevent making those expense charges.

In his January 19, 2017, email to former Chief Financial Officer Daniel Driggers, Treasurer Adams informed him about the liability those improper charges created to the General Fund and requested that he notifies the Treasurer's Office "when the necessary corrections have been made." In addition, Mr. Adams noted that the Transportation Penny fund information was "inaccurate and misleading" at that time because the fund showed having \$156,142,189.06. In fact, the Transportation Penny fund should have shown \$78,529,482.59 after deducting the negative balances from the Mass Transit (\$26,616,114.25) and the Transportation BAN (\$50,997,222.22) funds (see Attachment C).

From his response, you will note that Mr. Driggers showed lack of knowledge on the "specifics or the impact [of those financial transactions] on the general fund" (see Attachment D). As Richland County's CFO, Mr. Driggers should have been completely knowledgeable of the fiscal impacts that financial



transactions have on the county's finances and investments. In addition, he also failed to address the issue within the next several weeks after Treasurer Adams notified him. Not addressing this issue immediately showed negligence on Mr. Driggers' part.

In a follow up email on February 21, 2017, to Mr. Driggers, Treasurer Adams reiterated that "we are currently showing more than \$30 million restricted for capital project expenditures in our concentration account. It is costing significant amounts in our investment income to the general fund until this is fixed" (see Attachment E). Using almost \$35 million in cash from the Concentration Account to pay for capital projects not only decreased the amount of earned interest going to the General Fund by approximately \$82,000 but also violated generally accepted accounting principles promulgated by the Governmental Accounting Standards Board (GASB). Funds to cover capital projects were covered by the pooled cash instead of the bond proceeds. There were proceeds and Transportation funds available to cover these but were not used since the expenditures were coded to an account with no cash available. There were no loans for these projects posted to the books. The capital projects were on the general ledger as negative accounts which is not proper accounting.

Following up with a verbal discussion with Treasurer Adams and Ms. Hamm on February 22, 2017, Mr. Driggers fixed the issue (see Attachment F). However, Mr. Driggers continued keeping the situation to himself and did not notify me. It appears that the former county administrator had no knowledge of this situation since, as of June 30, 2016, two accounts had negative balances already (see Attachment B). Mostly certainly, Mr. Driggers did not inform me either verbally or in writing upon my arrival. I became aware of this situation when Cherry Bekaert began the audit and informed County Council and I of the preliminary findings.

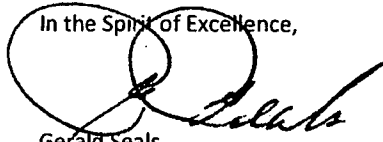
As you know, the fiduciary responsibility of taxpayers' monies lies ultimately with me, as Richland County Administrator, to ensure that Richland County manages its financial assets in a fiscally sound and transparent manner. Not carrying out this obligation in a responsible manner opens Richland County and County Council to serious financial liabilities.

Corrective Measures

Once I became aware of the situation, I directed former Interim Finance Director and Assistant County Administrator Kevin Bronson to place corrective measures in place. Current Finance Director Stacey Hamm continues implementing the necessary and required blocks on the financial system to prevent and avoid this or similar situations from occurring again. I have also directed Ms. Hamm to notify me right away of any abnormality that may occur with the financial system and to place corrective measures in place immediately. Last, I began holding quarterly meetings with Treasurer David Adams and Auditor Paul Brawley to discuss any issues that need to be addressed or that may arise in the future.

Please let me know if you have any questions.

In the Spirit of Excellence,



Gerald Seals
County Administrator

Cc: Stacey Hamm, Finance Director

SANDRA YUDICE

From: Brandon Madden
Sent: Thursday, August 17, 2017 8:57 AM
To: SANDRA YUDICE
Subject: FW: For Your Information Alert -- Forensic Review Status Report

FYI

From: GERALD SEALS
Sent: Tuesday, August 8, 2017 9:20 AM
To: Council Members
Cc: KEVIN BRONSON; SANDRA YUDICE; GERALD SEALS; LARRY SMITH; smafla@bellsouth.net; STACEY HAMM; JAMELLE ELLIS; JAMES HAYES; DAVID ADAMS; DWIGHT HANNA; Brandon Madden; Beverly Harris
Subject: For Your Information Alert -- Forensic Review Status Report

"FOR-YOUR-INFORMATION-ALERT"

Chairwoman Dickerson and members of County Council,

This "For-Your-Information-Alert" is also archived as Council Memorandum 8-1.

The forensic review of the County's "financial house" has been ongoing since May 2017. This memorandum transmits the following items that have been flagged by the review team as possible areas of malfeasance, fraud or corruption.

1. Resignation of Chief Financial Officer

The former Chief Financial Officer tendered his resignation in a manner that was atypical. The sudden resignation was subsequent to administrative inquiry into the status of the County's budget, financial house, fund structure and financial status. Immediately upon his resignation, he directed finance department staff to engage in the retrieval of confidential financial data, and began a "data sweep" of his assigned laptop and cell phone. It was not until days after his resignation, it was revealed that he setup an "in-house" satellite office for no apparent business reason.

2. Overdraw of General Fund

As noted during multiple Council briefings, the former Chief Financial Officer overdrew the County's General Fund to fund Transportation Penny Projects without proper authorization from County Council. It does not appear that the former county administrator was aware of this action; your current administrator was not aware. This action resulted in a loss of financial income to the County's General Fund.

3. No Budget on Bond Closing Costs

The County's financial system was set up in a manner that did not allow for the proper accounting of bond closing costs. In what appears to be intentional, at a minimum this action equates to professional negligence.

4. Distribution of Bond Closing Costs

The distribution of bond closing costs to the County's former financial advisor and current bond counsel was not consistent with the standard "vendor payment" process. The manner in which the closing costs were distributed involved a direct wire method; thereby, "camouflaging" the amount paid to each respective party. The former Chief Financial Officer, on multiple occasions, lied to the current county administrator and the assistant county administrators when questioned on the existence of a contractual agreement between the County and the former financial advisor. He consistently denied the existence of an agreement. The former financial advisor provided a copy of the agreement upon my request.

5. "Masked" Wage Garnishment Process

The financial review revealed that the County's process for documenting the garnishing of employee wages for Title 13 Bankruptcy is non-standard or atypical. The County's financial system properly reports the wages of employees pursuant to federal and state court orders. However, the manner in which the garnishments are documented is an area of concern; primarily, due to the level of confusion the financial data presents upon review for adherence to the relevant GAAP. Employees under court order have their wages garnished every pay period. The total of the garnishment is sent to a Trustee. The area of concern is that when the financial data associated with documenting this transaction is reviewed, it is challenging to delineate between that amount recorded as being disbursed and the amount being recorded as being invoiced. For example, in FY14 the amount recorded as being disbursed was approximately, \$400,000; however, the amount recorded as being invoiced was approximately \$3,400,000. Neither the current payroll manager nor current accounts payable manager were aware of the manner in which the financial generated the reports.

6. Bond Transfer

The former Chief Financial Officer directed non-standard transfers of bond proceeds between bond funds that resulted in a "muddled" accounting of the bonding records. This, in effective, contributes to the lack of order in the County's bond fund structure.

7. Capital Project Fund

The review team flagged the County's capital project fund as a potential vehicle for hiding malfeasance. For example, once a bond is issued for a capital project and its proceeds are expended to complete the project, it is capitalized or converted into an asset. This equates to "closing the books" on the project. Indications are that this process suggested "questionable" practices. Additionally, the revenues, budgets and expenditures for the capital projects are irreconcilable. This financial "chaos" has been occurring for the past decade and a half.

8. Construction Vendors

The financial review revealed six (6) construction vendors that were flagged for further examination to eliminate concerns regarding malfeasance, fraud or corruption: PDT; Brownstone Construction Group, LLC; Chao and Associates, Corley Construction, Carolina Demolition and M.B. Kahn.

9. Unqualified Financial Staff

The former Chief Financial Officer engaged in hiring practices that relied upon unqualified, temporary, ill-equipped and ill trained employees to manage the County's financial system. Given lack of expertise, he managed the staff by directing them to engage in practices that were non-

ATTACHMENT A

standard and outside of the lines of normal accounting practices. This overzealous management tactic belittled and demeaned staffers resulting in steady resignations. The review team suggested that this behavior may be indicative of corruption.

10. General Ledger Postings

The former Chief Financial Officer directed staff to make journal entries without sufficient or proper documentation. His access to the financial system allowed his activity to be hidden or "masked".

11. Changing of Vendor Master Files

The financial review revealed a suspiciously high number of modifications to the vendor master files. Manipulating the vendor master file is indicative of corruption and billing schemes where shell companies and non-accomplice vendor schemes are often utilized in similar situations to perpetuate fraud.

12. Improper Internal Revenue Service (IRS) Filings

The former Chief Financial Officer failed to submit basic and routine reports to the IRS. This resulted in an enforcement action by the IRS against the County's for failure to respond to repeated IRS notices. He willfully disregarded multiple IRS notices for compliance over almost a year and a half.

The aforementioned points are disturbing, unsettling and alarming. However, what is even more troubling is the amount of county resources, financial and man-hours, being utilized to correct, clean-up and restore the integrity of the County "financial house". There is an opportunity cost due to the amount of resource dedicated to implementing a "cure" to this matter.

In the Spirit of Excellence,

Gerald Seals

Gerald Seals, County Administrator
Richland County Government

2020 Hampton Street
Post Office Box 192
Columbia, SC 29202

Phone: 803-576-2054
Fax: 803-576-2137

sealsg@rcgov.us

Confidential and Privileged:

Unless otherwise indicated or obvious from the nature of the communication, the information contained herein may be privileged and confidential information/work product. The communication is intended for the use of the individual or entity named above. If the reader of this transmittal is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

If you have received this communication in error or are not sure whether it is privileged, please immediately notify me by return email and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

ATTACHMENT B

County Capital Project Funds

Fund	Name	6/30/2016 Balance	Accounts with Negative Balance	Interest rate .7000% GF Lost Monthly Interest
1304	Detention/Township	\$ 1,655,343.74		
1307	Countywide 2002B	\$ 499.21		
1318	RC Projects	\$ 71,027.59		
1321	Township	\$ 246,682.51		
1322	Public Safety 2007C	\$ 47.68		
1326	RC ADA Project	\$ 398,244.81		
1327	Public Safety FY10	\$ (209,479.29)	\$ (209,479.29)	(124.54)
1328	GO Bond 2010A	\$ 1,787,757.22		
1330	GO Bond 2012A	\$ 11,499,627.10		
1331	Fire Protection 2012B	\$ 2,887,444.93		
1332	Transportation Tax CP	\$ 7,951,287.00		
1333	Bike/Pedestrian/Greenways	\$ (3,831,138.18)	\$ (3,831,138.18)	(2,277.69)
1334	GO Bond 2013B	\$ 10,977,708.33		
1335	Richland Library 2014A	\$ 17,853,484.00		
1336	Destination Projects	\$ 867,525.12		
1337	Fac. Construction & Renovation	\$ 15,795,357.81		
1338	CIP Capital Projects	\$ 5,109,335.07		
1339	RC Capital Projects	\$ -		
1340	GO Bond 2016A	\$ -		
1341	Richland Library 2016B	\$ -		
		\$ 73,060,754.65	(4,040,617.47)	(2,402.23)

ATTACHMENT B

County Capital Project Funds

Fund	Name	12/8/2016 Balance	Accounts with Negative Balance	Interest rate .7804% GF Lost Monthly Interest
1304	Detention/Township	\$ 1,629,686.92		
1307	Countywide 2002B	\$ 499.21		
1318	RC Projects	\$ 70,595.59		
1321	Township	\$ 247,347.87		
1322	Public Safety 2007C	\$ 47.68		
1326	RC ADA Project	\$ 398,244.81		
1327	Public Safety FY10	\$ (709,698.38)	\$ (709,698.38)	(470.39)
1328	GO Bond 2010A	\$ (3,826,259.85)	\$ (3,826,259.85)	(2,536.07)
1330	GO Bond 2012A	\$ 11,529,150.16		
1331	Fire Protection 2012B	\$ 1,966,467.21		
1332	Transportation Tax CP	\$ (18,307,812.34)	\$ (18,307,812.34)	(12,134.52)
1333	Bike/Pedestrian/Greenways	\$ (4,964,059.92)	\$ (4,964,059.92)	(3,290.21)
1334	GO Bond 2013B	\$ 11,007,315.09		
1335	Richland Library 2014A	\$ 7,938,418.31		
1336	Destination Projects	\$ 641,451.92		
1337	Fac. Construction & Renovation	\$ 15,419,982.09		
1338	CIP Capital Projects	\$ 2,689,668.69		
1339	RC Capital Projects	\$ (571,414.00)	\$ (571,414.00)	(378.74)
1340	GO Bond 2016A	\$ 15,532,639.18		
1341	Richland Library 2016B	\$ 23,538,969.14		
		\$ 64,231,239.38	(28,379,244.49)	(18,809.92)

ATTACHMENT B

County Capital Project Funds

Fund	Name	12/22/2016 Balance	Accounts with Negative Balance	Interest rate .7804% GF Lost Monthly Interest
1304	Detention/Township	\$ 1,630,652.88		
1307	Countywide 2002B	\$ 499.21		
1318	RC Projects	\$ 70,595.59		
1321	Township	\$ 247,515.39		
1322	Public Safety 2007C	\$ 47.68		
1326	RC ADA Project	\$ 398,244.81		
1327	Public Safety FY10	\$ (710,688.95)	\$ (710,688.95)	(471.05)
1328	GO Bond 2010A	\$ (3,960,011.39)	\$ (3,960,011.39)	(2,624.72)
1330	GO Bond 2012A	\$ 11,534,723.81		
1331	Fire Protection 2012B	\$ 1,041,081.12		
1332	Transportation Tax CP	\$ (20,881,347.99)	\$ (20,881,347.99)	(13,840.27)
1333	Bike/Pedestrian/Greenways	\$ (5,101,181.71)	\$ (5,101,181.71)	(3,381.09)
1334	GO Bond 2013B	\$ 11,014,770.34		
1335	Richland Library 2014A	\$ 5,395,779.62		
1336	Destination Projects	\$ 641,451.92		
1337	Fac. Construction & Renovation	\$ 15,430,453.80		
1338	CIP Capital Projects	\$ 2,411,179.52		
1339	RC Capital Projects	\$ (601,414.00)	\$ (601,414.00)	(398.62)
1340	GO Bond 2016A	\$ 15,544,652.78		
1341	Richland Library 2016B	\$ 23,553,399.30		
		\$ 57,660,403.73	(31,254,644.04)	(20,715.75)

ATTACHMENT B

County Capital Project Funds

Fund	Name	1/31/2017 Balance	Accounts with Negative Balance	Interest rate .9045% GF Lost Monthly Interest
1304	Detention/Township	\$ 1,631,776.33		
1307	Countywide 2002B	\$ 499.21		
1318	RC Projects	\$ 70,595.59		
1321	Township	\$ 247,704.86		
1322	Public Safety 2007C	\$ 47.68		
1326	RC ADA Project	\$ 398,244.81		
1327	Public Safety FY10	\$ (710,688.95)	\$ (710,688.95)	(545.96)
1328	GO Bond 2010A	\$ (5,079,217.26)	\$ (5,079,217.26)	(3,901.88)
1330	GO Bond 2012A	\$ 11,543,560.34		
1331	Fire Protection 2012B	\$ 1,042,211.13		
1332	Transportation Tax CP	\$ (23,217,497.61)	\$ (23,217,497.61)	(17,835.81)
1333	Bike/Pedestrian/Greenways	\$ (5,134,720.99)	\$ (5,134,720.99)	(3,944.52)
1334	GO Bond 2013B	\$ 11,023,207.65		
1335	Richland Library 2014A	\$ 3,755,460.86		
1336	Destination Projects	\$ 641,451.92		
1337	Fac. Construction & Renovation	\$ 15,442,281.76		
1338	CIP Capital Projects	\$ 2,413,174.50		
1339	RC Capital Projects	\$ (755,758.00)	\$ (755,758.00)	(580.58)
1340	GO Bond 2016A	\$ 15,556,551.39		
1341	Richland Library 2016B	\$ 23,571,428.62		
		\$ 52,440,313.84	(34,897,882.81)	(26,808.74)

Transportation Penny 1-31-17

1230 Mass Transit	(26,616,114.25)
1231 Transportation Tax Admin	173,404,991.34
1417 Transportation BAN	<u>(50,997,222.22)</u>
	95,791,654.87

1332 Transportation Tax CP	(23,217,497.61)
1333 Bike/Pedestrian/Greenways	<u>(5,134,720.99)</u>
	(28,352,218.60)

Total	67,439,436.27

ATTACHMENT C

From: DAVID ADAMS
Sent: Thursday, January 19, 2017 2:49 PM
To: DANIEL DRIGGERS
Cc: DAVID ADAMS
Subject: Overdrawn Capital Project Funds

Over the last six months five capital project accounts have been overdrawn by more than \$31 ① Million. Currently, this is a liability to the General Fund.

These negative balances need to be addressed immediately. Negative balances need to be prevented by utilizing the OneSolution Accounting System safeguards to block overdrafts so that in the future employees cannot improperly create liabilities against these accounts.

There are other negative funds associated with the Transportation Penny. Balances in Budget Code 1231 on the General Ledger are inaccurate and misleading. The GL is showing \$156 Million, but due to the BAN and Mass Transit expenditures, Budget Code 1231 is actually \$78 million. ②

Please notify our office when the necessary corrections have been made. ③

All the Best,
David A. Adams
Richland County Treasurer
(803) 576-2275

ATTACHMENT C

County Capital Project Funds

Fund	Name	12/30/2016 Balance	Accounts with Negative Balance	Interest rate .8566% GF Lost Monthly Interest
1304	Detention/Township	\$ 1,630,683.50		
1307	Countywide 2002B	\$ 499.21		
1318	RC Projects	\$ 70,595.59		
1321	Township	\$ 247,515.39		
1322	Public Safety 2007C	\$ 47.68		
1326	RC ADA Project	\$ 398,244.81		
1327	Public Safety FY10	\$ (710,688.95)	\$ (710,688.95)	(517.04)
1328	GO Bond 2010A	\$ (3,960,011.39)	\$ (3,960,011.39)	(2,881.00)
1330	GO Bond 2012A	\$ 11,534,723.81		
1331	Fire Protection 2012B	\$ 1,041,081.12		
1332	Transportation Tax CP	\$ (20,881,347.99)	\$ (20,881,347.99)	(15,191.67)
1333	Bike/Pedestrian/Greenways	\$ (5,101,181.71)	\$ (5,101,181.71)	(3,711.23)
1334	GO Bond 2013B	\$ 11,014,770.34		
1335	Richland Library 2014A	\$ 5,395,779.62		
1336	Destination Projects	\$ 641,451.92		
1337	Fac. Construction & Renovation	\$ 15,430,453.80		
1338	CIP Capital Projects	\$ 2,411,179.52		
1339	RC Capital Projects	\$ (601,414.00)	\$ (601,414.00)	(437.54)
1340	GO Bond 2016A	\$ 15,544,652.78		
1341	Richland Library 2016B	\$ 23,553,399.30		
		\$ 57,660,434.35	① (31,254,644.04)	(22,738.48)

12/2016

Transportation Penny

1230 Mass Transit	(26,616,114.25)
1231 Transportation Tax Admin	156,142,819.06 (2)
1417 Transportation BAN	(50,997,222.22)
	78,529,482.59 (3)

1332 Transportation Tax CP	(20,881,347.99)
1333 Bike/Pedestrian/Greenways	(5,101,181.71)
	(25,982,529.70)

STACEY HAMM

From: DAVID ADAMS
Sent: Sunday, January 22, 2017 7:59 PM
To: STACEY HAMM; Carolyn Phillips; KENDRA DOVE
Subject: Fwd: Overdrawn Capital Project Funds

All the Best,
David A. Adams
Richland County Treasurer
(803) 576-2275

Sent from my iPad

Begin forwarded message:

From: JEFFREY KOSOSKI <KOSOSKIJ@rcgov.us>
Date: January 20, 2017 at 12:04:16 PM EST
To: DANIEL DRIGGERS <DRIGGERSD@rcgov.us>, DAVID ADAMS <ADAMSD@rcgov.us>
Subject: RE: Overdrawn Capital Project Funds

David,

We are working on this and will be in contact with your office. – Jeff

Jeff Kososki, CPA
Controller
Richland County Finance Dept.
2020 Hampton Street
Columbia, SC 29202
803-576-1338

From: DANIEL DRIGGERS
Sent: Thursday, January 19, 2017 5:45 PM
To: DAVID ADAMS; JEFFREY KOSOSKI
Subject: RE: Overdrawn Capital Project Funds

David

Thanks for the email. I'm not sure about the specifics or the impact on the general fund but by copy of this email, I'll ask Jeff to pull the information and review with me and necessary adjustments.

STACEY HAMM

From: DANIEL DRIGGERS
Sent: Tuesday, February 21, 2017 5:00 PM
To: DAVID ADAMS
Cc: STACEY HAMM
Subject: Re: Information Needed

David

I'll stop by on Wednesday.

Daniel Driggers | Chief Financial Officer | Richland County | driggersd@rcgov.us | 803-576-2103

> On Feb 21, 2017, at 4:44 PM, "DAVID ADAMS" <ADAMSD@rcgov.us> wrote:

>

> Daniel -

>

> We are currently showing more than \$30 million restricted for capital project expenditures in our concentration account. It is costing significant amounts in our investment income to the general fund until this is fixed.

>

> I need to know how this is fixed as soon as possible.

>

> All the Best,

> David A. Adams

> Richland County Treasurer

> (803) 576-2275

>

> Sent from my iPad

Notes from Stacey D Hamm.

Treasurer Adams sent a follow up email on February 21, 2017 asking how this would be fixed. It had been a month and the negative balances had not been corrected. Daniel responded he would stop by the next day. He did stop by but the Treasurer was out at the time. Daniel Driggers stop in my office and sat down. He told me his staff was working on fixing the problems and that since the Transportation bonds were not going to be issued any time soon, that we would be on a pay as we go basis for now. So that for going forward any expenses for the Transportation projects and Bike/pedestrian/greenway projects would come from the Transportation Penny money. I mentioned to him that with the general ledger as it was, it was very misleading if someone did not look at all the accounts the penny was funding. He seemed to agree. I was not present if he actually talked to Treasurer Adams. I informed Treasurer Adams that Daniel Driggers had stopped by and said the negative balances were in the process of being fixed. The entries were posted later that day, February 22, 2017.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

v.

Richland County Council,
Defendants.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2017 NOV 15 PM 2:24
JEANE E. W. McBRIDE
Clerk of Court

The undersigned attorney hereby certifies that he served a copy of the foregoing
Plaintiffs' Supplemental Memorandum of Law in Opposition to Motions to Summary
Judgment upon counsel for the Defendants by hand delivery, this November 10, 2017.

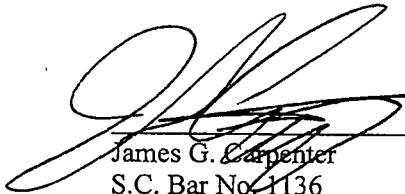
Andrew F. Lindemann
Davidson & Lindemann, PA
PO Box 8568
Columbia, SC 29202-8568

Ray N. Stevens
Ray Jones
PO Box 1509
Columbia, SC 29202

Elizabeth Gray
Rob Tyson
Alexis K. Lindsay
PO Box 11449
Columbia, SC 29211

Larry C. Smith
PO Box 192
Columbia, SC 29202

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 11136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

v.

Richland County,

Defendant,

Central Midlands Regional Transit
Authority,

Intervenor-Defendant.

Civil Action No. 2016-CP-40-2875

(Defendant Richland County's Proposed)

**ORDER GRANTING
MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT**

This matter is before this Court on the Motion to Dismiss and Motion for Summary Judgment filed by the Defendant Richland County. A hearing was held with all counsel of record present on October 26, 2017. After a review of the pleadings, written submissions by the parties, and the oral arguments of counsel, this Court grants the Defendant County's motions as follows:

BACKGROUND

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

In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1.¹

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

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

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

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

Following approval of the referendum, Richland County began establishing the framework for the implementation of the Transportation Penny Program to be paid for by the sales and use tax collected pursuant to the referendum. The Penny Tax was levied and collected for Richland County effective May 1, 2013.

The Plaintiffs have filed this action challenging the legality of Richland County Ordinance Number 039-12HR including categories of expenditures that have been made in accordance with that Ordinance. The Central Midlands Regional Transit Authority ("CMRTA") has intervened as a Defendant. The Defendant County has moved to dismiss and/or for summary judgment as to each of the Plaintiffs' causes of action. The CMRTA also filed a Motion for Summary Judgment that joined in and incorporated in full the grounds raised by the County.

LEGAL ANALYSIS

I. Motion to Dismiss -- Failure to Prosecute

As an initial ground for the dismissal of the Plaintiffs' action, the Defendant County argues that the Plaintiffs have failed to prosecute this action which thereby warrants dismissal under Rule 41(b), SCRPC.

The Court agrees with the County that Rule 41(b), SCRPC, authorizes a court to dismiss an action based upon a plaintiff's failure to prosecute. In *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802 (1970), the Supreme Court held that "it is within the inherent power of the court to dismiss an action for failure to prosecute." 175 S.E.2d at 803. The Supreme Court has further held that "[t]he plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause. This authority is necessary if the courts are to control and efficiently manage an ever-expanding docket." *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757, 758 (1983). See also, *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997).

In the case at bar, the record reflects that the Plaintiffs have taken no action to prosecute their claims in the eighteen or so months since the Complaint was filed on May 9, 2016. The Plaintiffs pursued no discovery as part of this lawsuit.⁴ No written discovery was timely served by the Plaintiffs, and no depositions have been taken.⁵ In the Amended Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings filed March 27, 2017, the Court wrote as follows: "The Court finds that the issue in the First Cause of Action is not one that should be decided on judgment on the pleadings, but rather should be developed factually and legally through the course of the litigation. There has been no discovery in this case." Since that time, the Court is advised that discovery has still not been conducted. In short, this Court finds that no timely discovery has been initiated or completed, and based on the Scheduling Order filed November 18, 2016, the discovery deadline has now expired. Based upon the absolute lack of any activity in prosecuting this action by the Plaintiffs, the Court finds that the dismissal of this action under Rule 41(b) and the inherent authority of the Court is well warranted, particularly given that this is a taxpayer lawsuit seeking prospective relief only.

II. Motion for Summary Judgment

A. Standard of Review

Under South Carolina law, summary judgment is proper when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC. The applicable standard for adjudicating a summary judgment motion is discussed at length

⁴ In response, the Plaintiffs only point to a Freedom of Information Act (FOIA) request that was submitted to the County prior to this action being filed. The Plaintiffs concede that that is the only "discovery" that has been undertaken.

⁵ The Court is advised that the Plaintiffs served its initial set of interrogatories on the Defendant County on September 22, 2017, which was four days after the County had filed its dispositive motions. In addition, the service of those interrogatories was more than two months after the discovery deadline set by the Court's Scheduling Order.

by the South Carolina Supreme Court in *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991), wherein the Court adopted and applied the *Celotex* standard promulgated by the United States Supreme Court. "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." 410 S.E.2d at 545. "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing -- that is, pointing out to the trial court -- that there is an absence of evidence to support the nonmoving party's case." *Id.* Importantly, the moving party -- here the Defendant County -- "need not support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (Emphasis in original).

Thereafter, "[o]nce the moving party carries its initial burden, opposing party must, under Rule 56(c), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*." *Id.* (Emphasis in original). "Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings." *Id.* Rule 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRPC.

The State Supreme Court in *Baughman* then cited to a portion of the *Celotex* opinion that is particularly critical to this Court's analysis of the pending summary judgment motions in this case.

The Court wrote:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there

can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Baughman, 410 S.E.2d at 545-46, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

In applying the *Baughman/Celotex* standard to the case at bar, the Court is cognizant of the fact that the Defendant County is moving for summary judgment on the Plaintiffs' failure of proof of the elements of their seven causes of action. The Plaintiffs indisputably have the burden of proof on those causes of action. The County is not relying on an affirmative defense nor any other legal basis for which the County would carry the burden of proof. As a result, the County, as the moving party, has met its initial burden by pointing out to the Court the absence of any evidence in the record or developed during the course of this litigation in discovery to support the Plaintiffs' claims. Indeed, the Court is well aware that the Plaintiffs have served no written discovery and have taken no depositions in order to develop any admissible evidence in support of their allegations. As the *Baughman/Celotex* standard provides, the County need not present evidence to negate or disprove the Plaintiffs' allegations but may rather require the Plaintiffs to present evidence -- at least a mere scintilla -- to justify to this Court that there is a genuine issue of material fact that requires this Court to allow one or more of the Plaintiffs' causes of action to proceed to trial.

B. Evidence Submitted by Plaintiffs

In applying the *Baughman/Celotex* standard to the case at bar, the Court must first consider the admissible evidence that was properly submitted by the Plaintiffs in opposition to the County's motion for summary judgment so as to create a genuine issue of material fact.

As an initial point, the Court also recognizes that many of the Plaintiffs' causes of action are based on issues of law, more specifically questions of statutory construction which are entirely

appropriate to be adjudicated on a motion for summary judgment even if there may be facts in dispute. Those facts in dispute would not be material to the Court's legal analysis and statutory interpretation.

Rule 5(d), SCRCP, requires that the non-moving parties -- here the Plaintiffs -- are required to serve opposing affidavits as well as an other materials in opposition to the motion no later than two days prior to the hearing. In this case, the Plaintiffs filed no materials at least two days prior to the October 26, 2017 hearing. Late on October 25, 2017, the Plaintiffs served a memorandum of law that included as attachments a copy of Ordinance Number 039-12HR, an exhibit that appears to be a statement of monies paid to the CMRTA, and the affidavit of Tim Donovan dated June 27, 2016. The Donovan affidavit is captioned for a different case, *Richland County v. South Carolina Department of Revenue*, Civil Action Number 2016-CP-40-3102 ("SCDOR litigation"). In addition, the memorandum of law included an October 14, 2017 article from *The State* newspaper and a table captioned "Other Sidewalk, Bikeway and Pedestrian Improvement Projects." The County does not object to the Court's consideration of Ordinance Number 039-12HR, but has raised objections to the remaining exhibits.

This Court finds that the submission of these exhibits is untimely. In addition, the Donovan affidavit was submitted in a different case and includes inadmissible opinions and conclusions. In fact, this Court has previously stricken large parts of the Donovan affidavit in the SCDOR litigation. This case also involves solely prospective relief, and the Donovan affidavit, having been executed in June 2016, addresses preliminary findings that SCDOR made in its investigation and does not appear to be necessarily current. The Court finds that it is inappropriate to rely on the Donovan affidavit to address whether there exist genuine issues of material fact *at the present time* so as to withstand the County's summary judgment motion. The Plaintiffs were not precluded from obtaining a current affidavit to be filed in this case to address the allegations actually made in this case as opposed to in the SCDOR litigation. The Defendant County would have then had the opportunity to timely respond

to that affidavit with counter affidavits, which opportunity the County does not have by the submission and reliance on an affidavit from another case submitted the day before the hearing.

The County also objects to the submission of the newspaper article. The Court agrees that the article is unsworn and constitutes hearsay without any applicable exception and should not be considered as evidence in opposition to the summary judgment motion. *See, Trustees of Erskine College v. Central Mutual Ins. Co.*, 270 S.C. 118, 241 S.E.2d 160 (1978).

Thereafter, on November 10, 2017, Plaintiffs' counsel submitted a supplemental memorandum of law without obtaining leave of court and submitted additional documents as an attachment thereto. Those additional documents consist of a FOIA request that pre-dated the litigation and a June 8, 2016 letter from the County's counsel responding to that FOIA request. The Plaintiffs' memorandum also includes as an attachment an unauthenticated memorandum dated September 20, 2017, from the County Administrator to County Council that does not appear to have any specific relevance to the issues raised by this litigation. The Defendant County has objected to this late submission of materials in opposition to the motion for summary judgment which has occurred after the hearing and the record was closed. The Court finds those objections to be meritorious.

C. Plaintiffs' First Cause of Action

In their First Cause of Action, the Plaintiffs allege that Richland County Ordinance Number 039-12HR exceeds the scope of Section 4-37-30 by allowing for the Penny Tax revenues to be expended for such matters as the operation of the COMET mass transit services provided by the CMRTA as well as the construction of pedestrian sidewalks and bike lanes and paths. The Court finds that this cause of action presents a purely legal issue, specifically an issue of statutory construction. As a result, there are no genuine issues of material fact presented that preclude the Court from adjudicating this issue at the summary judgment stage. *See, Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012) ("[d]etermining the proper interpretation of a statute is a question of law").

This Court finds that, contrary to the Plaintiffs' allegations in their First Cause of Action, Section 4-37-30, as adopted by 1995 Act No. 52 and as amended by 2000 Act No. 368, allows for the expenditure of Penny Tax revenues for operating transportation-related projects (including operating mass-transit projects which were added to the categories of projects and facilities by the amendment in 2000). Moreover, the Plaintiffs are in error in suggesting that the Penny Tax revenues are authorized only for "transportation facilities" where 1995 Act No. 52 as well as Section 4-37-30 expressly authorize its expenditure for "transportation-related projects." In addition, applying the plain and ordinary meaning of the terms, pedestrian sidewalks and bike paths and lanes qualify as "other transportation-related projects [or] facilities." *See*, S.C. Code Ann. § 4-37-30(A)(1)(a)(i).⁶

The intent of the General Assembly as to the scope of the authorized uses of the Penny Tax revenues is stated clearly in the preamble or "Findings" section of 1995 Act No. 52, as contained in Section 1 of the Act, which reads as follows:

In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4-9-30, and Section 6-21-10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and **operating** highways, roads, streets, and bridges, and other **transportation-related projects**, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

⁶ This Court notes what appears to be a scrivener's error in Section 4-37-30(A)(1)(a)(i) which refers to "transportation-related projects facilities." As the Defendant County has pointed out, there is no such thing as "projects facilities." Furthermore, the use of the plural of "projects" does not suggest that the General Assembly intended grammatically for the word "projects" to serve as an adjective modifying or describing "facilities." Rather, it seems logical to the Court that word "or" was inadvertently omitted from the text of the statute and that a proper reading of the language should be "transportation-related projects or facilities." *See, Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) (Court of Appeals recognized a scrivener's error resulted in the omission of the word "or" in Section 15-78-60(6) of the Tort Claims Act).

See, 1995 Act No. 52, § 1. (Emphasis added).

To that end, as authorized by S.C. Code Ann. § 4-37-30(A)(1)(a), Section 1(c) of Richland County Ordinance Number 039-12HR specified that purposes for which the Penny Tax revenues must be used:

For financing the costs of highways, roads, streets, bridges, greenways, pedestrian sidewalks, and bike paths and lanes and other transportation-related projects facilities, and drainage facilities related thereto, and mass transit systems operated by Richland County or (jointly) operated by Richland County, other governmental entities and transportation authorities.

Moreover, Section 2(c) of the Ordinance provided in part:

The maximum cost of the projects to be funded from the proceeds of the Sales and Use Tax shall not exceed, in the aggregate, the sum of \$1,037,900,000, and the maximum amount of net proceeds to be raised by the Sales and Use Tax shall not exceed \$1,070,000,000, *which includes administrative costs* and debt service on bonds issued to pay for the projects.

(Emphasis added). Thus, the Ordinance does expressly include operating costs as contemplated by the Transportation Act.

This Court concludes that these provisions of Ordinance Number 039-12HR, as challenged by the Plaintiffs, are, as a matter of law, valid, enforceable and lawful under state law, and the Plaintiffs are not entitled to the declaratory or injunctive relief sought. The General Assembly's preamble to 1995 Act No. 52 gives express permission for the Penny Tax revenues to be used for "operating" transportation-related projects, which by later amendment includes "mass transit systems."⁷ In *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341, 354 (1994), the Supreme Court

⁷ When "mass transit systems" were added to Section 4-37-30(A)(1)(a)(i) in 2000, the General Assembly did not make any additional "findings" nor include a preamble section. Moreover, no attempt was made to delete or amend the "findings" section from the 1995 Act. The title to 2000 Act No. 368 states that the amendment was "to provide that the proceeds of the tax may be used for mass transit systems and greenbelt projects." See, 2000 Act No. 368.

specifically explained that "preamble of an act may be used as a guide in determining legislative intent." Likewise, in *Benjamin v. Housing Authority of Darlington County*, 198 S.C. 79, 15 S.E.2d 737, 738 (1941), the Supreme Court recognized that legislative findings are accorded "great weight because of the high regard we hold for a coordinate branch of the government." 15 S.E.2d at 738. See also, *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 711 S.E.2d 895, 898 (2011) (Supreme Court addressed legislative intent "as expressed in the preamble to our FOIA statute"); *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369, 374 (Ct. App. 1989) (Court of Appeals cited Act's preamble as "expressly stating" legislative intent).

In addition, the title to 1995 Act No. 52 states as follows:

AN ACT TO AMEND TITLE 4, CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 37 SO AS TO AUTHORIZE COUNTIES TO ESTABLISH OPTIONAL METHODS FOR THE FINANCING OF TRANSPORTATION FACILITIES INCLUDING THE **ACQUISITION, CONSTRUCTION, EQUIPMENT, AND OPERATION** OF HIGHWAYS, ROADS, STREETS, BRIDGES, AND OTHER TRANSPORTATION-RELATED PROJECTS EITHER ALONE, IN PARTNERSHIP WITH THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, OR JOINTLY-OPERATED PROJECTS OF THE COUNTY AND OTHER GOVERNMENTAL ENTITIES.

1995 Act No. 52. (Emphasis added). In *Whetstone v. South Carolina Department of Highways and Public Transportation*, 272 S.C. 324, 252 S.E.2d 35 (1979), the Supreme Court stated its interpretation of a statute was supported by the "underlying legislative history as exemplified by the original title of the pre-codified Act." 252 S.E.2d at 37. See also, *Kennedy v. South Carolina Retirement System*, 345 S.C. 339, 549 S.E.2d 243, 248 (2001) (where the Supreme Court looked at the title of an Act to glean legislative intent); *Demas v. Convention Motor Inns*, 268 S.C. 186, 232 S.E.2d 724, 726 (1977) (noting that it is proper to discern legislative intent from the title of an Act); *Duvall v. South Carolina Budget & Control Board*, 377 S.C. 36, 659 S.E.2d 125, 130 (2008)

(same).

This Court finds that the legislative intent is clear from the Act itself, including the title and the express legislative findings. The expenditure of Penny Tax revenues is not limited to "capital costs" for the construction of "capital improvements." Instead, the Penny Tax revenues may be expended on the "operation" of transportation-related facilities or projects, which includes the operation of The COMET mass transit system.

This Court further finds that the Penny Tax Revenues may also be used to fund such transportation facilities as sidewalks and bike paths and lanes. The plain and ordinary meaning of those terms demonstrate that they are transportation-related. Bike lanes themselves are indeed part of roadways. Moreover, historically in South Carolina, sidewalks are constructed, owned and maintained by governmental entities as part of the adjoining roadways. *See generally, Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991); *Vaughn v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006); S.C. Code Ann. § 5-27-120. *See also, Mauldin v. City Council of Greenville*, 53 S.C. 285, 31 S.E. 252, 254 ("[s]idewalks are, after all, nothing but a part of the highway or roadway"). They are certainly "facilities" which are transportation-related.

In addition, as was argued at the hearing, the critical language that the General Assembly used in Section 4-37-30(A)(1)(a) is "which may include" followed by a listing of certain types of projects and facilities that may be included in the ordinance providing for the expenditure of Penny Tax revenues. The use of the language "may include" appears to be illustrative -- in other words, inclusive rather than exclusive. In the case of *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 443 S.E.2d 395 (1994), the Supreme Court looked at the ordinary and popular meaning of the word "include." In interpreting Section 2-7-30, the Supreme Court found "[t]he term *include* suggests that section 2-7-30 is not an exhaustive list of the legal entities comprehended by 'person.'" 443 S.E.2d at 397. (Emphasis in original). *See also, Baker v. Chavis*, 306 S.C. 203,

410 S.E.2d 600, 603 (Ct. App. 1991) (court explained that "the word 'including' is not a word of all embracing definition but an illustrative application of general principles"). Thus, the use of the language "may include" followed by a listing should not be construed as an exhaustive list of projects or facilities, but rather as an illustrative list. There is no basis to read that list as excluding the County's use of Penny Tax revenues for funding the operation of The COMET mass transit system or for funding the construction of sidewalks and bike paths and lanes. Likewise, there is no basis to limit the use of such funds to "capital costs" only and not include administrative costs for a transportation program, which is precisely what was included by Richland County in Ordinance Number 039-12HR and was approved by the voters in the 2012 referendum.

Therefore, this Court concludes as a matter of law that the Plaintiffs are not entitled to the declaratory and injunctive relief sought in their First Cause of Action.

D. Plaintiffs' Second Cause of Action

In their Second Cause of Action, the Plaintiffs have alleged in only conclusory terms that the Defendant County has violated Section 11-35-50 of the Code of Laws, which requires "[a]ll political subdivisions of the State [to] adopt ordinances or procedures embodying sound principles of appropriately competitive procurement." S.C. Code Ann. § 11-35-50. The Plaintiffs do not identify in their Complaint any specific provision in the County procurement laws that they contend or that any expert on procurement has opined do not embody "sound principles" of procurement. The Plaintiffs have not even submitted any procurement ordinances into evidence. *See, Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869, 872 (Ct. App. 1986) ("local ordinances are not subject to judicial notice").⁸ The Defendants argue that the Plaintiffs have failed

⁸ Likewise, in *Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000), the Supreme Court recognized that "this Court cannot take judicial notice of such local ordinances" and ultimately affirmed the lower court because "the ordinances governing appeals from the zoning administrator are not part of the record on appeal." 533 S.E.2d at 891.

to meet their burden of proving that the County's procurement provisions violate Section 11-35-50. This Court agrees.

In rejecting a similar argument made by one of these Plaintiffs in another case, the South Carolina Supreme Court explained that "section 11-35-50 does not specify any particular procedures that are considered to embody the 'appropriately competitive' standard; rather, the statute 'clearly was intended to afford local governments needed flexibility to determine what is 'appropriately competitive' in light of the public business they must transact.'" *Sloan v. Greenville Hospital System*, 388 S.C. 152, 694 S.E.2d 532, 541 (2010), citing *Glasscock Co. v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718, 721 (Ct. App. 2004). As the Court of Appeals in *Glasscock* recognized, "[t]hat local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures is entirely consistent with our state's now firmly rooted constitutional principle of 'home rule.'" *Glasscock*, 604 S.E.2d at 722. The Court of Appeals also explained as follows:

Glasscock urges this Court to construe section 11-35-50 as mandating sealed competitive bids in virtually every instance of public procurement. This approach would effectively strip our state's local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt. Indeed, such a reading of section 11-35-50 runs wholly contrary to the home rule authority vested in local government by our constitution. We reject Glasscock's argument.

Id.

In *Glasscock*, the Court of Appeals found that an exemption from sealed competitive bidding provided for by the Sumter County Procurement Ordinance was valid under S.C. Code Ann. § 11-35-50. In that case, the county adopted contract amendments that extended the length of a contract without putting the contract extension out from competitive bidding.

In *Sloan v. Greenville Hospital System*, *supra*, the Supreme Court found that Sloan "failed

to meet his burden of proving the challenged provisions did not comply with section 11-35-50." *Sloan*, 694 S.E.2d at 540. Specifically, the Supreme Court rejected the plaintiff's position that the hospital's procurement procedures were invalid and in violation of Section 11-35-50 simply because they varied from "the terms of the Procurement Code, the Model Procurement Ordinance, and other regional codes." 694 S.E.2d at 541.

In the present case, the Plaintiffs have not identified any expert nor presented an expert opinion on the issue of procurement. For criticism of the County's procurement ordinance that was not even placed in evidence, the Plaintiffs cite only to the affidavit of Tim Donovan filed in the SCDOR litigation, but even if the Court were to consider that affidavit as evidence in this case, that affidavit does not establish the witness as an expert in procurement or someone qualified to even offer opinions on the legality or "soundness" of the procurement procedures that the County has adopted. As a result, this Court finds that the County is entitled to summary judgment on the Second Cause of Action.

E. Plaintiffs' Third Cause of Action

In their Third Cause of Action, the Plaintiffs alleged that Penny Tax revenues have been used for expenditures that do not fall within the scope of Section 4-37-30 of the Code of Laws. The specific examples that have been pled are monies spent on public relations contracts, contracts for administration, training programs such as a mentor-mentee program, and the creation of the Small Local Business Enterprise Program (SLBE). The Court finds that summary judgment is appropriate on this cause of action for several reasons.

First, the Plaintiffs have not supported their claims with any admissible evidence. The Plaintiff cannot rest on their mere allegations under the *Baughman/Celotex* standard.

Second, this cause of action is largely duplicative of the First Cause of Action in that the Plaintiffs contend that the Penny Tax revenues cannot be used for non-capital or administrative costs,

which is contrary to the legislative intent as stated clearly in the preamble or "Findings" section of 1995 Act No. 52.

Third, the Plaintiffs have not shown that any of the expenditures generally described in the Complaint were improper in any respect and may not be utilized as part of a transportation program that has been implemented by Richland County in accordance with Ordinance Number 039-12HR and as approved by the voters in the 2012 referendum.

Finally, the Court is cognizant of the impact of Home Rule, which requires "[t]he powers of a county" to be "liberally construed in favor of the county." S.C. Code Ann. § 4-9-25. In *Hospitality Association of South Carolina, Inc. v. County of Charleston*, 320 S.C. 219, 464 S.E.2d 113 (1995), the Supreme Court held that:

As ratified, new Article VIII directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments by general law. S.C. Const. art. VIII, §§ 7 and 9. In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government. S.C. Const. art. VIII, § 17.

464 S.E.2d at 117. Thus, in construing a statute purporting to give local government power and responsibilities, this Court must liberally construe it so as to give the powers and duties in question to the local government. Most importantly, the Court must also refrain from substituting its own judgment or the judgment of the Plaintiffs for that of the county and its governing body as to how to appropriately expend any tax revenues including the Penny Tax revenues.

In sum, the Plaintiffs have failed to meet their burden of identifying and proving that any expenditures of the Penny Tax revenues do not fall within the scope of Section 4-37-30 or within the authority of the County in implementing and operating a transportation program created by Ordinance Number 039-12HR and approved by the voters in the 2012 referendum. As a result, the Defendant County is entitled to summary judgment on the Third Cause of Action.

F. Plaintiffs' Fourth Cause of Action

In their Fourth Cause of Action, the Plaintiffs have alleged that the Defendant County has failed to comply with the audit language contained in the "Findings and Determinations" section of Ordinance Number 039-12HR, which states: "All spending shall be subject to an annual independent audit to be made available to the public." The Plaintiffs have presented no evidence on this issue. As alleged, Ordinance Number 039-12HR does appear to require an annual audit, and the County represents that the Penny Tax revenues and expenditures are included as part of the County's annual audits as discussed in the Comprehensive Annual Financial Reports (CAFR) as are required by law and prepared for each fiscal year. The Plaintiffs have not alleged nor shown otherwise. As a result, this Court finds that the Plaintiffs have failed to meet their burden of showing a violation of the audit provision of Ordinance Number 039-12HR, and on that basis, summary judgment is warranted on the Fourth Cause of Action.

G. Plaintiffs' Fifth Cause of Action

In their Fifth Cause of Action, the Plaintiffs allege that the County has not complied with the budget provisions set forth in Ordinance Number 039-12HR. Again, the Plaintiffs have presented no evidence on this issue. The Court has no basis on this record to find that the County does not adopt an annual budget for expenditures using Penny Tax revenues. In sum, the Plaintiffs have failed to meet their burden of showing a violation of the budget provision of Ordinance Number 039-12HR. In addition, the Plaintiffs have not demonstrated that any previous spending of Penny Tax revenues is unlawful or that any prospective relief is warranted on the basis alleged in the Fifth Cause of Action.

H. Plaintiffs' Sixth Cause of Action

In their Sixth Cause of Action, the Plaintiffs allege that the County has violated the provision in Ordinance Number 039-12HR which reads as follows: "Except as specifically authorized by County Council, any outside agency or organization receiving an appropriation of

the Sales and Use Tax must provide to County Council an independent annual audit of such agency or organization financial records and transactions and such other and more frequent financial information as required by County Council, all in form satisfactory to County Council."

The record does not contain any evidence showing that agencies receiving Penny Tax revenues, such as the CMRTA, are not in compliance with this requirement. Moreover, the Plaintiffs have presented no evidence that the County Council has or has not elected to enforce this provision which appears to be its prerogative given the discretionary language of the Ordinance. Again, the record presented by the Plaintiff at the summary judgment stage fails to satisfy the *Baughman/Celotex* standard. Thus, the Court concludes that the Plaintiffs have failed to meet their burden of showing a violation of the outside agency audit provision of Ordinance Number 039-12HR.

I. Plaintiffs' Seventh Cause of Action

The Plaintiffs' Seventh Cause of Action cites to a non-specific violation of Section 4-37-25 which by its express language applies only to "an authority created pursuant to this chapter." S.C. Code Ann. § 4-37-25. As the Defendant County has pointed out, Ordinance Number 039-12HR reflects that Richland County chose not to adopt a transportation authority. Thus, this Court concludes that Section 4-37-25 would have no applicability. At the hearing, the Plaintiffs conceded this point and consented to the dismissal of the Seventh Cause of Action.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss and Motion for Summary Judgment filed by the Defendant Richland County are hereby granted, and the Plaintiffs' Amended Complaint is dismissed with prejudice. The Plaintiffs' claims for declaratory and injunctive relief are denied for the reasons herein stated.

AND IT IS SO ORDERED.

G. THOMAS COOPER, JR.
Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

November __, 2017

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

v.

Richland County,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

**PLAINTIFFS' MOTION TO
ALTER OR AMEND
THE ORDER AND JUDGMENT**

RULE 59

2017 DEC 11 AM 11:55
FILED
RICHLAND COUNTY
JEANETTE W. MCBRIDE
C.C.P. & G.S.

NOW COME the Plaintiffs, by their undersigned attorney, and move the Court to Alter or Amend the Order and Judgment entered November 30 and December 1, 2017.

The Court ruled that the Plaintiffs had failed to prosecute and therefore dismissed the action. The Court adopted the first section of the Proposed Order of Defendant Richland County. The Court declined to endorse that part of the proposed Order related to Summary Judgment. Accordingly, it seems that the Court's decision was based solely on the failure to prosecute.

Plaintiffs respectfully suggest that the appellate courts of this State have adopted standards for analyzing the subject of dismissal for failure to prosecute, and that this case does not meet those standards. Defendant's Proposed Order, endorsed in part by the Court, cites one sentence from one case on this legal issue, but the Proposed Order and the Court's Order did not address the analytical standards endorsed by the appellate courts of this State.

The plaintiff has the burden of prosecuting her action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in

proceeding with her cause. *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. See *Small v. Mungo*, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for hours); *Bond v. Corbin*, 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904). In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of the defendant. E.g., *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of willful disobedience when exclusion amounted to a judgment of default or dismissal).

Our Fourth Circuit Court of Appeals has also addressed this issue. The court in *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir.1976) held that dismissal is a harsh sanction, which "should be resorted to only in extreme cases." Dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff. *Id.* The discretion should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal. *Id.*; *Bush v. U.S. Postal Serv.*, 496 F.2d 42, 44 (4th Cir.1974). The Fourth Circuit has said the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990). See also *Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir.1989); *McCargo*, 545 F.2d at 396; *Chandler Leasing Corp. v. Lopez*, 669 F.2d 919, 920 (4th Cir.1982).

McComas v. Ross, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904-05 (2006) (emphasis added).

Plaintiffs respectfully suggest that part of the Defendant's Proposed Order adopted by the Court failed to address these factors and criteria from the case law of South Carolina.

Plaintiffs participated extensively in this litigation. Plaintiffs filed and served the Summons and Complaint, consented to the intervention of the Defendant CMRTA, filed a Memorandum of Law in opposition to the Motions to Dismiss filed by both Defendants,

successfully participated in oral argument against the Motions to Dismiss, which resulted in the Court denying both Motions to Dismiss, responded to Defendants' Motion to Alter or Amend, filed a written response to Defendant's Motions for Summary Judgment, argued against Motions for Summary Judgment at oral argument, and submitted a Supplemental Memorandum of Law, and Proposed Order. In response to the Motions for Summary Judgment, Plaintiffs submitted evidence (sworn testimony, documentary evidence, and legal admissions of the Defendants), along with legal argument supporting all, or nearly all, of Plaintiffs' claims.

Plaintiffs are not accused of failing to answer Defendant's discovery requests, because neither Defendant issued any discovery requests. Plaintiffs are not accused of violating or disobeying any Court Order. Plaintiffs have not been charged with any misconduct warranting any kind of sanction at all.

The only specific argument Defendants could make in support of the Motion or Order was that Plaintiffs did not issue formal discovery requests. Plaintiffs respectfully suggest that this failure does not warrant a sanction of any kind.

Pursuant to the South Carolina Rules of Civil Procedure, discovery requests are optional, not mandatory. "Parties may obtain discovery by one or more of the following methods." SCRCP 26(a)(emphasis added). "[A]ny party may take the testimony of any person, including a party, by deposition upon oral examination." SCRCP 30(a)(1)(emphasis added). [A]ny party may serve upon any other party written interrogatories." SCRCP 33(a)(emphasis added). "In all cases the following standard interrogatories may be served by one party upon another." SCRCP 33(b)(emphasis added). "Any party may serve on any other party a request [for production of documents.]" SCRCP

34(a)(emphasis added). "A party may serve upon any other party a written request for . . . admission." SCRCP 36(a)(emphasis added).

Plaintiffs did not issue any discovery requests. However, as explained in previous filings to this Court, Plaintiffs used the Freedom of Information Act and obtained over 2000 pages of documents from the Defendant Richland County related to this litigation. Plaintiffs filed the FOIA litigation against Richland County a few months before this action. Plaintiffs spent more than a year litigating for the production of these documents and the securing of attorney's fees under FOIA.

Furthermore, some of the documents that the Plaintiffs presented in opposition to Defendant Richland County's Motion for Summary Judgment were documents Plaintiffs secured using Plaintiffs' FOIA requests in the companion FOIA action. In addition, Plaintiffs used Defendant Richland County's admissions in response to Plaintiffs' FOIA requests as evidence in opposition to the Defendant Richland County's Motion for Summary Judgment.

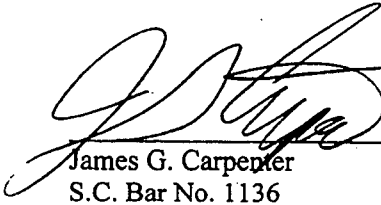
Finally, Plaintiffs respectfully suggest that Defendants have not sustained or articulated any prejudice from the Plaintiffs' failure to use the formal discovery process. Again, it should be noted that Defendants themselves failed to issue any discovery requests, subpoenas, or notices of depositions.

Accordingly, Plaintiffs respectfully suggest that for the Court to impose the harshest of all sanctions, dismissal, without any disobedience to any Order, without warning, without any prior sanction, and apparently without consideration of any lesser sanction, is not warranted; nor is it keeping with the decisional law in this State governing dismissal for failure to prosecute.

CONCLUSION

For the reasons stated herein, Plaintiffs pray the Court to reconsider its ruling dismissing this action for failure to prosecute; to alter or amend the Order and Judgment dismissing the case; to allow this case to proceed toward trial; and to grant the Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

December 8, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

v.

Richland County,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT
CASE NO: 2016-CP-40-2875

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2017 DEC 11 AM 11:55
JEANETTE W. MCBRIDE
Clerk, P. & G.S.

The undersigned attorney hereby certifies that he served a copy of the foregoing Plaintiffs' Motion to Alter or Amend the Judgment upon counsel for the Defendants by email and by first class mail postage prepaid, this December 8, 2017, addressed as follows:

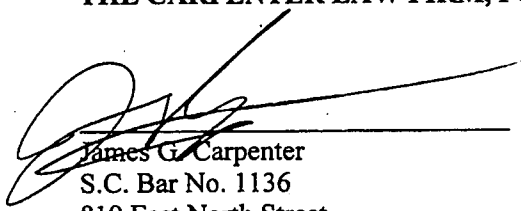
Andrew F. Lindemann
Davidson & Lindemann, PA
PO Box 8568
Columbia, SC 29202-8568

Ray N. Stevens
Ray Jones
PO Box 1509
Columbia, SC 29202

Elizabeth Gray
Rob Tyson
Alexis K. Lindsay
PO Box 11449
Columbia, SC 29211

Larry C. Smith
PO Box 192
Columbia, SC 29202

Respectfully submitted,
THE CARPENTER LAW FIRM, PC


James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

SC Public Interest Foundation et al.

Plaintiff,

vs.

Richland County, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-40-2875

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: James G Carpenter, Bar No. 1136 Address: 818 E. North St. Greenville, SC 29601 Phone: (864) 235-1269 Fax (864) 331-3083 E-mail: james.carpenter@carpenterlawfirm.net Other: _____	Defendant's Attorney: Rob Tyson, Bar No. _____ Address: PO Box 11449, Columbia, SC 29211 Phone: _____ Fax _____ E-mail: Other: _____
2017 DEC 11 AM 11:55 FILED RICHLAND COUNTY CLERK OF COURT C.C.P. & G.S. ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Alter or Amend Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☒ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☒ Plaintiff / ☐ Defendant December 8, 2017 Date submitted	
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$ _____ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

v.

Richland County,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

**PLAINTIFFS' MOTION TO
ALTER OR AMEND
THE ORDER GRANTING
SUMMARY JUDGMENT TO CMRTA
RULE 59(e)**

RICHLAND COUNTY
FILED
2017 DEC 11 AM 11:56
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

NOW COME the Plaintiffs, by their undersigned attorney, and move the Court to Alter or Amend the Order and Judgment entered November 22 and 27, 2017. The Clerk of Court did not serve the undersigned attorney with a copy of the Order and Judgment. Instead, the undersigned attorney obtained a copy via email on Wednesday, November 29, 2017 from opposing counsel, Rob Tyson, who stated that he found the Order and Judgment online, but that he had not received anything in the mail, either. Accordingly, this Motion to Alter or Amend is being served within 10 days of the undersigned Plaintiffs' attorney's receiving written notice of the entry of the Order and Judgment, in accord with Rule 59(e).

This Court granted Summary Judgment to the Defendant Central Midlands Regional Transit Authority (CMRTA). The Court adopted the Proposed Order of Defendant CMRTA. Plaintiffs respectfully suggest that the Defendant's Proposed Order, endorsed by the Court, did not address the analytical and policy arguments submitted by the Plaintiffs.

Plaintiffs argued that, as a preliminary matter, the Motion for Summary Judgment should be denied because the South Carolina Supreme Court has many of the same issues under consideration, having heard oral argument on an accelerated briefing and argument schedule, in the case between the South Carolina Department of Revenue and Richland County. On March 23, 2017, the Supreme Court certified this case pursuant to Rule 204(b), SCACR. That Supreme Court heard oral arguments in June, 2017. It is now six months past oral argument, and we should expect a decision shortly.

The issues in the DOR case overlap significantly with the issues in this case. The parties disputed whether the Penny Tax Revenues could be used for expenditures not related to transportation facilities. In the case at bar, the biggest of such issues would be the funding ongoing operations of the CMRTA. It seems plausible that the Supreme Court may rule on this issue and resolve an important issue pending in this case before this Court. Plaintiffs respectfully suggest that the Court overlooked or failed to consider the benefits to judicial economy that would ensue by waiting until the ruling from the Supreme Court addressed this issue. Plaintiffs respectfully suggest that the Defendant's Proposed Order adopted by the Court failed to address these issues in the judicial economy that could be achieved by deferring to a decision of the South Carolina Supreme Court.

Second, the Plaintiffs respectfully suggest that the Court failed to consider that the word 'operating' does not appear in the text of the statute. Any reference to "operation" or some variant of "operate" is in the context of toll roads and toll bridges, not in the context of operating a bus system. Accordingly, the Transportation Act does not authorize the use of Penny Tax Revenues for the operation of the bus system or many of the other administrative and public relations expenditures that the County has made from the Penny

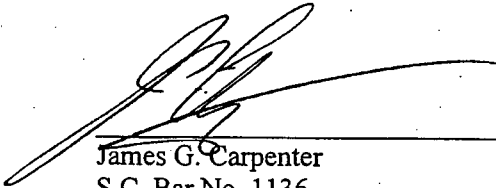
Tax Revenues. The Court Order failed to address the fact that the statutes references to "operations" were in context of toll roads, toll bridges, and the like, not in relation to the operation of mass transit system.

Third, Plaintiffs respectfully suggest that the Court's Order failed to address the fact that the statute under which the Defendants are proceeding relates to "transportation facilities." It authorize the special Penny Tax to fund such facilities. The authorizing statute establishes the kinds of "transportation facilities" for which such "optional methods of financing" may be used: "highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects" S.C. Code Ann. 4-37-30(a)(1) (emphasis added). But using the Penny Tax for the continued operation of the bus system is not funding "facilities," and therefore such use violates the purposes and strict language of the act.

CONCLUSION

For the reasons stated herein, Plaintiffs pray the Court to reconsider its ruling; to alter or amend the Order and Judgment dismissing the case; to defer to the expected forthcoming ruling of the South Carolina Supreme Court; to allow this to case to proceed toward trial; and to grant the Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

A handwritten signature in black ink, appearing to read 'JG Carpenter', is written over a horizontal line.

James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

December 8, 2017

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

v.

Richland County,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

CERTIFICATE OF SERVICE

2017 DEC 11 AM 11:56
RICHLAND COUNTY
FILED
KARENETTE W. MCBRIDE
C.C.P. & G.S.

The undersigned attorney certifies that he served a copy of the foregoing Plaintiffs' Motion to Alter or Amend the Judgment as to CMRTA upon counsel for the Defendants by email and by first class mail postage prepaid, this December 8, 2017, addressed as follows:

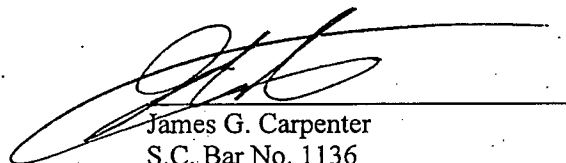
Andrew F. Lindemann
Davidson & Lindemann, PA
PO Box 8568
Columbia, SC 29202-8568

Ray N. Stevens
Ray Jones
PO Box 1509
Columbia, SC 29202

Elizabeth Gray
Rob Tyson
Alexis K. Lindsay
PO Box 11449
Columbia, SC 29211

Larry C. Smith
PO Box 192
Columbia, SC 29202

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

Richland County,

Defendant,

Central Midlands Regional Transit
Authority,

Intervenor Defendant.

) IN THE COURT OF COMMON PLEAS

)

) FIFTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-40-02875

**INTERVENOR DEFENDANT
CMRTA'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS'
MOTION TO ALTER OR AMEND**

RICHLAND COURT
FILED
2017 DEC 15 AM 10:02
CLERK OF COURT
C.C.P. & G.S.

Intervenor Defendant Central Midlands Regional Transit Authority ("CMRTA") submits this Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend the Court's Order granting Summary Judgment for CMRTA. For the reasons previously argued before the Court and for the grounds described below, CMRTA respectfully requests this Court deny the Motion to Alter or Amend.

A Rule 59(e), SCRCP, motion provides a vehicle through which a party may (1) request that the circuit court reconsider matters properly encompassed in a decision on the merits or "alter or amend" its judgment; or (2) attempt to obtain a ruling on issues or arguments previously raised to the court. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21-22, 602 S.E.2d 772, 779 (2004). A party may file a Rule 59(e) motion when it believes the court "misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Id. at 24, 602 S.E.2d at 780. Because none of these circumstances is

present in this case, the Court should deny the plaintiff's Rule 59(e) motion and allow the Court's Order granting summary judgment to stand.

The Plaintiffs assert the Court, "did not address the analytical and policy arguments submitted by the Plaintiffs." Essentially, plaintiffs want the proverbial "second bite of the apple," but Rule 59 does not afford them this opportunity.

Plaintiffs first argue the Order should not have been granted because "the Supreme Court has many of the same issues under consideration." Plaintiffs maintain judicial economy would be served by deferring a decision until the Supreme Court rules. However, as argued before this Court, the issues on appeal to the Supreme Court do not address the merits and thus, a Supreme Court decision is unlikely to have an impact on this case. Also, if Plaintiffs wanted this case to be deferred, they could have moved to stay this action pending a ruling from the Supreme Court. They did not request a stay.

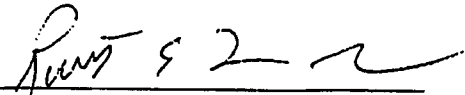
Plaintiffs next argue the Court "failed to consider that the word 'operating' does not appear in the text of the statute." Again, plaintiffs' counsel made this argument before the court and it was rejected. Further, the Order discusses the underlying statute in several paragraphs. *Order*, at pp. 6-7. In fact, the Order specifically states, "however, there is no statutory language stating penny tax revenues cannot be used for operating and administrative expenses. *Id.* at p. 7.

Lastly, Plaintiffs argue the Order "failed to address the fact that the statute under which defendants are proceeding relates to "transportation facilities." This point was argued by counsel for CMRTA and for plaintiffs. It was the crux of CMRTA's position, that "mass transit" systems are transportation related projects facilities as listed in the statute. The Order specifically concludes that mass transit systems are transportation related projects, *Order*, at 4. Plaintiffs' are

disingenuous when they argue the Court failed to address the statutory language concerning transportation facilities.

For the reasons stated above and previously made, CMRTA respectfully requests this Court deny Plaintiffs' Motion to Alter or Amend.

SOWELL GRAY ROBINSON STEPP & LAFFITTE, L.L.C.

By: 

Elizabeth Van Doren Gray (SC Bar No. 2434)

egray@sowellgray.com

Robert E. Tyson, Jr. (SC Bar No. 10820)

rtyson@sowellgray.com

Alexis K. Lindsay (SC Bar No. 78049)

alindsay@sowellgray.com

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400 Telephone

(803) 929-0300 Fax

*Attorneys for Central Midlands
Regional Transit Authority*

Columbia, South Carolina
December 15, 2017

CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Robinson Stepp & Laffitte, L.L.C., do hereby certify that I have served all counsel in this action with a copy of the motion(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Motion:

**INTERVENOR CMRTA'S MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT**

Counsel Served:

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601
Attorneys for Plaintiffs

Ray N. Stevens, Esquire
Ray E. Jones, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568

Larry C. Smith, Esquire
Richland County Attorney
Post Office Box 192
Columbia, SC 29202
Attorneys for Richland County


Valerie Hampton
Legal Assistant

RICHLAND COUNTY
FILED
2017 DEC 15 AM 10:02
JANETTE H. MCGRIDE
CLERK

December 15, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

v.

Richland County,
Defendants.

Central Midlands Regional Transit
Authority,
Intervenor.

IN THE CIRCUIT COURT

CASE NO: 2016-CP-40-2875

**PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO ALTER OR
AMEND THE ORDER GRANTING
SUMMARY JUDGMENT TO CMRTA
RULE 59(e)**

NOW COME the Plaintiffs, by their undersigned attorney, and submit this Supplemental Memorandum of Law in Support of their Motion to Alter or Amend the Order and Judgment entered November 22 and 27, 2017. This Court granted Summary Judgment to the Defendant Central Midlands Regional Transit Authority. Order and Judgment entered November 27, 2017 (CMRTA Order).

The main issue in the CMRTA Order was whether the Optional Methods for Financing Transportation Facilities Act (Transportation Act), S.C. Code Ann. §§ 4-37-10 to -50 (Supp. 2017), authorized the expenditure of Penny Tax revenues for "continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements" as called for by Richland County Ordinance No. 039-12HR (Ordinance).

In ruling for CMRTA, this Court's CMRTA Order made three primary "Conclusions of Law."

- I. Section 4-37-30 Authorizes Mass Transit Systems as a Transportation Related Project (*Id.*, p. 3).
- II. Ordinance 039-12HR Does Not Exceed the Scope of the Statute (*Id.*, p.4).
- III. Section 37-4-30 Does Not Prohibit Penny Tax Revenues to be used for Operating and Administrative Expenses (*Id.*, p. 6).

This Court understood the issue and Plaintiffs' contentions.

Plaintiffs allege CMRTA's use of penny tax revenues for operating expenses or administrative expenses is unlawful. They allege this use of funds exceeds the scope of § 4-37-30. Also, Plaintiffs take exception to the language in Section 2 of Ordinance 039-12HR describing the mass transit systems project, "continued operation of mass transit services." **Plaintiffs maintain these penny tax revenues must be used solely on capital costs for transportation facilities and not the continued operation of the system.**

* * *

But if one used the Plaintiffs' interpretation of the statute, the penny tax revenues could be used for mass transit systems, but **only for expenditures on capital costs**. This interpretation goes beyond the plain language of the statute and would result in the expenditures being used **only to buy buses or construct facilities related to the mass transit system.**

CMRTA Order, p. 7 (emphasis added). This Court's description of Plaintiffs' position was accurate.

This Court rejected Plaintiffs' interpretation of the Transportation Act. In the paragraph just prior to its Conclusion, this Court summed its findings:

The Court finds that the legislative intent is clear from the enabling Act itself. **There is no statutory language that states expenditures of penny tax revenues are limited to "capital costs"**. Further, the legislature's preamble and findings lead to an opposite result -- penny tax revenues may be expended on the operation of transportation-related projects, which the statute specifically defines to include mass transit systems, such as the CMRTA.

Id., p. 8 (emphasis added).

The South Carolina Supreme Court considered many of the same issues in *Richland County, South Carolina, and Central Midlands Regional Transit Authority v. The South*

Carolina Department of Revenue, et al., SC Supreme Court Opinion No. 27775, filed March 7, 2018 (“DOR case”). The Supreme Court ruled for the Department of Revenue on some critical issues. Plaintiffs respectfully submit that the ruling and opinion from the Supreme Court in the DOR is incompatible with this Court’s reasoning in the CMRTA Order, and, in effect, the Supreme Court overruled it.

One of the most important rulings of the Supreme Court’s opinion was which expenditures qualify as a lawful use of the Penny Tax moneys. Plaintiffs respectfully suggest that based on the DOR case, the Transportation Act does not authorize the use of Penny Tax Revenues for the “continued operation” of the bus system.¹

I. PENNY TAX FUNDS MUST BE USED ONLY FOR “CAPITAL COSTS.”

The Court quoted the language from the Transportation Act requiring that expenditures be for “*transportation-related projects*.” [S.C. Code Ann.] § 4-37-30(A)(1)(a)(i) (emphasis added).” DOR Case, p. 3. The Court continued:

The revenues generated from such a tax must be used in accordance with statutory restrictions imposed by the General Assembly—namely, proceeds must be used for the capital costs of the types of transportation projects identified in the Transportation Act. *Id.* § 4-37-30(A)(15).”

Id. (emphasis added). The Court continued: “At issue in this case is whether and to what extent certain costs qualify as “capital costs” and thus are considered proper expenditures of penny tax revenues.” *Id.* (emphasis added). The Court ruled that

¹ In addition to the ruling from the Supreme Court, Plaintiffs would invite the Court’s attention to Plaintiffs’ prior memoranda filed in this case: Plaintiffs’ Memorandum of Law in Opposition to Motions for Summary Judgment, filed on or about October 25, 2017; Plaintiffs’ Supplemental Memorandum of Law in Opposition to Motions for Summary Judgment filed on or about November 10, 2017; and Plaintiffs Motion to Alter or Amend the Judgment as to CMRTA, filed on or about December 8, 2017.

although some “administrative costs” were allowed under the Transportation Act, those “administrative costs” must be part of the “capital costs.”

Primarily, **DOR correctly asserted** the County’s expenditure of Penny Tax funds on **“administrative costs” that were unrelated to any specific transportation project were improper as they exceeded the scope of the Transportation Act.** DOR informed the County that regardless of what “administrative costs” the County’s Penny Tax Ordinance purported to allow, **only those costs allowable under the Transportation Act were proper expenditures of Penny Tax funds.** However, DOR also acknowledged this might include certain limited transportation-related administrative costs:

While some administrative costs may be appropriate expenditures under the [T]ransportation [Act], the use of the term “capital costs” in the statute gives some guidance on what administrative costs may be properly allowable under the law. The term “capital cost” is not defined in the law. However, **“capital costs” are generally considered one-time costs incurred for the creation or improvement of tangible property, either real or personal, such as buildings, infrastructure[,] and equipment....** The concept of “capitalized costs” for tax purposes is described in detail in Internal Revenue Code (IRC) §§ 263, 263A, and the accompanying regulations.... Since the [Transportation Act] does not define “capital costs,” these Internal Revenue Code principles can be used to provide guidance as to which costs are properly allowable under the [T]ransportation [Act].

DOR case p. 7 (emphasis added).

II. THE COUNTY ORDINANCE MAY NOT BE BROADER THAN THE TRANSPORTATION ACT.

The Court addressed the relationship between the enabling act, the Transportation Act, and the County Ordinance.

It is axiomatic that **the County’s Ordinance may not expand the scope of expenditures authorized in the enabling provisions of the Transportation Act, which requires a nexus between expenditures and a transportation-related capital project.** See, e.g., S.C. Code Ann. § 4-37-30(A)(1)(a)–(c); *Sinkler v. County of Charleston*, 387 S.C. 67, 76–78, 690 S.E.2d 777, 781–82 (2010) (invalidating a county ordinance that failed

to establish a development scheme as contemplated by the relevant enabling legislation and rejecting the county's argument that the flexibility and authority conferred by the enabling legislation authorized the county to employ measures beyond the scope of the enabling legislation); *Holler v. Ellisor*, 259 S.C. 283, 287, 191 S.E.2d 509, 510 (1972) (observing that local government enactments and regulations "must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power"). A proper expenditure of Penny Tax funds must be tethered to a specific transportation-related capital project or the administration of a specific transportation project.

DOR case, p. 15 (emphasis added).

The County argued that the County alone was empowered to determine which expenditures were permitted under the Transportation Act. The Supreme Court disagreed.

[W]e also find the County has woefully failed to demonstrate a likelihood of success on the merits with regard to its interpretation of the Transportation Act. *See, e.g., Sinkler v. County of Charleston*, 387 S.C. 67, 76–78, 690 S.E.2d 777, 781–82 (2010) (invalidating a county ordinance that failed to establish a development scheme as contemplated by the relevant enabling legislation and rejecting the county's argument that the flexibility and authority conferred by the enabling legislation authorized the county to employ measures beyond the scope of the enabling legislation); *Holler v. Ellisor*, 259 S.C. 283, 287, 191 S.E.2d 509, 510 (1972) (observing that local government enactments and regulations "must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power"). To the contrary, DOR has presented a compelling prima facie case that some of the County's expenditures of Penny Tax revenues are in violation of the Transportation Act.

DOR case, pp.14-15 n. 7 (emphasis added).

III. "CAPITAL COSTS" DO NOT INCLUDE FUNDS FOR "CONTINUED OPERATIONS OF MASS TRANSIT SERVICES."

To provide clarity on what expenditures are permissible from the Penny Tax, the Supreme Court seemed to endorse the IRC 263/263A, at least temporarily. IRC 263/263A explains the meaning of capital expenditures.

In light of the County's many suspect expenditures of Penny Tax funds, DOR requested an injunction against the County prohibiting the further expenditure of Penny Tax funds until the County "adopts IRC 263/263A or some other acceptable alternative" as a standard to be used to determine when expenditures are proper within the [Transportation] Act." Under these compelling circumstances, we find an injunction is appropriate. To ensure objective criteria establishing compliance with the Transportation Act, the County shall be subject to guidelines for determining whether expenses are properly allocable to a specific transportation project, or the direct administration of a specific transportation project. Accordingly, the County is hereby enjoined from violating the Transportation Act. We direct the circuit court, no later than thirty days following remand, to enter the preliminary injunction in accordance with this opinion.

DOR case, p. 16 (emphasis added).

As the Department of Revenue explained to the County,

"capital costs" are generally considered one-time costs incurred for the creation or improvement of tangible property, either real or personal, such as buildings, infrastructure[,] and equipment. . . . The concept of "capitalized costs" for tax purposes is described in detail in Internal Revenue Code (IRC) §§ 263, 263A, and the accompanying regulations.

DOR case, p. 7 (emphasis added).

Plaintiffs respectfully suggest that "continued operation of mass transit services" is not a "capital cost" under Internal Revenue Code (IRC) §§ 263, 263A, or any other accepted authority.

CONCLUSION

For the foregoing reasons, Plaintiffs pray the Court to reconsider its ruling; to alter or amend the Order and Judgment; to defer to the ruling of the South Carolina Supreme Court; grant Summary Judgment to the Plaintiffs on this issue; and to grant the Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

/S/ James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

March 26, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest Foundation,	)	Civil Action No. 2016-CP-40-02875
Edward D. Sloan, Jr., and William B.	)	
DePass, Jr., individually, and on behalf of all	)	
others similarly situated,	)	
	)	
	)	INTERVENOR DEFENDANT
	)	CMRTA'S SUPPLEMENTAL
vs.	)	MEMORANDUM IN OPPOSITION TO
Richland County,	)	PLAINTIFFS' MOTION TO ALTER
	)	OR AMEND
	)	
Central Midlands Regional Transit	)	
Authority,	)	
	)	
Intervenor Defendant.	)	
	)	

Intervenor Defendant Central Midlands Regional Transit Authority ("CMRTA") submits this Supplemental Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend the Court's Order granting Summary Judgment for CMRTA. For the reasons previously argued before the Court and for the grounds described below, CMRTA respectfully requests this Court deny the Motion to Alter or Amend.

In their Supplemental Memorandum, plaintiffs raise the same arguments they had made before the Court in their Motion to Alter or Amend and at the hearing before the Court: 1) Penny tax funds must be used solely for "Capital Costs"; 2) County ordinance may not be broader than the Transportation Act; and 3) "Capital Costs" do not include funds for "continued operation of mass transit services." These arguments do not meet the standard for granting a Rule 59(e) motion since they have been raised and ruled upon. Thus, the Court should deny the plaintiffs' motion.

Plaintiffs further argue the Court's Order granting summary judgment for the CMRTA is incompatible with the recent Supreme Court opinion in *Richland County and the Central Midlands*

Regional Transit Authority v. South Carolina Department of Revenue, -- S.E.2d --, 2018 WL 1177700 (March 7, 2018). Plaintiffs misinterpret the Supreme Court opinion. The Supreme Court specifically upheld the trial court's order granting a writ of mandamus to Richland County and affirmed the Department of Revenue has standing to administer Richland County's Penny Tax program. The Supreme Court reversed the trial court's denial of an injunction requested by the Department of Revenue and ordered the "circuit court to enter the preliminary injunction within thirty days." *See, Department of Revenue*, at p. 43. The Supreme Court further mandated the Department of Revenue develop "guidelines for determining whether expenses are properly allocable to a specific transportation project, or the direct administration of a specific transportation project." *Id.* By ordering these guidelines, the Supreme Court established a mechanism for the Department of Revenue and the circuit court to move forward on determining whether certain expenditures are proper under the Transportation Act.

Per the Supreme Court mandate, the circuit court filed a temporary injunction on April 12, 2018, attached hereto as **Exhibit 1**. Per the Supreme Court ruling, the Department of Revenue promptly developed guidelines consistent with the Supreme Court opinion. The guidelines have been approved by the circuit court and are attached to the Injunction Order. *See Exhibit A*. In the guidelines, the Department of Revenue has taken the position that eligible costs for mass transit systems include those expenses "incurred ...for the operation of Mass Transit Systems..." Additionally, the Department of Revenue has declared eligible costs for mass transit systems "must be tethered to the administration of the Mass Transit System..." Therefore, the Department of Revenue, the agency with the authority and standing to administer the Transportation Tax program, maintains penny tax funds can be used not only for capital costs, but also for the operation of the

mass transit system. The Order by this Court is consistent with the guidelines of the Department of Revenue.

For the reasons stated above and previously made, CMRTA respectfully requests this Court deny Plaintiffs' Motion to Alter or Amend.

SOWELL GRAY ROBINSON STEPP & LAFFITTE, L.L.C.

By: s/Robert E. Tyson, Jr.
Elizabeth Van Doren Gray (SC Bar No. 2434)
egray@sowellgray.com
Robert E. Tyson, Jr. (SC Bar No. 10820)
rtyson@sowellgray.com
Alexis K. Lindsay (SC Bar No. 78049)
alindsay@sowellgray.com
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400 Telephone
(803) 929-0300 Fax

*Attorneys for Central Midlands
Regional Transit Authority*

Columbia, South Carolina
April 12, 2018

EXHIBIT 1

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) CIVIL ACTION NO.: 2016-CP-40-3102

Richland County, South Carolina,)
Plaintiff,)
v.)
The South Carolina Department of)
Revenue, and Rick Reames, III in)
his Official capacity as its Director,)
Defendants/Third Party)
Plaintiff,)
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,)
And)
Columbia Metro Rapid)
Transportation Authority (CMRTA),)
Intervenor.)

**ORDER GRANTING DEFENDANTS/THIRD PARTY PLAINTIFFS'
TEMPORARY INJUNCTION**

THIS MATTER came before this Court on remand from the South Carolina Supreme Court, Opinion No. 27775, filed March 7, 2018, wherein the Supreme Court enjoined Plaintiff Richland County, South Carolina ("Richland County" or the "County") from violating the

Transportation Act and held that the Department is entitled to an injunction requiring Richland County to expend the funds generated by the Penny Tax solely on transportation-related projects in accordance with the law. *See Richland Cty. v. S.C. Dep't of Revenue*, Op. No. 27775 (S.C. Sup. Ct. filed Mar. 7, 2018) (Davis Adv. Sh. No. 10 at 42-43) (the "Supreme Court Opinion").¹ The Supreme Court ordered that the injunction is effective as of March 7, 2018, and further directed this Court, no later than 30 days following remand, to issue a standalone injunction consistent with the Supreme Court's opinion. *Id.* at 43.²

Accordingly, I hereby grant Defendant/Third Plaintiff South Carolina Department of Revenue's (the "Department") Motion for Injunctive Relief and enter an injunction in accordance with the Supreme Court Opinion and for the reasons set forth below:

PROCEDURAL BACKGROUND

This matter arises from a dispute between Richland County and the Department regarding the County's use of funds appropriated pursuant to the Transportation Act. On July 18, 2012, Richland County enacted Ordinance No. 039-12HR scheduling a referendum on November 6, 2012 to seek approval from Richland County voters to implement a sales and use tax (the "Penny Tax") pursuant to the Transportation Act. The referendum passed, and the Penny Tax went into

¹ The Optional Methods for Financing Transportation Facilities Act (the "Transportation Act") authorizes the governing body of a county to impose a sales and use tax ("Transportation Tax") in an amount not to exceed one percent within its jurisdiction for a single project or for multiple projects for a specific period of time to collect a limited amount of money. S.C. Code Ann. § 4-37-30(A) (Supp. 2017). Throughout this litigation, the parties and Court have typically referred to Richland County's Transportation Tax by its common nomenclature: the Penny Tax. The Supreme Court Opinion likewise used the term "Penny Tax." For sake of ease and consistency, this Order will refer to Richland County's Transportation Tax as simply the Penny Tax.

² By Order dated March 21, 2018, the Supreme Court extended the time for serving and filing a Petition for Rehearing in this matter to April 6, 2018. Thus, because the remittitur cannot be sent prior to the expiration of the time period for filing a Petition for Rehearing, this case was not remanded to this Court and the thirty (30) day period for this Court to issue a standalone injunction did not begin until April 7, 2018. *See* Rule 221, SCACR.

effect on May 1, 2013. The Penny Tax is authorized to run through April 30, 2035, and is slated to raise over \$1 billion for transportation-related projects in Richland County.

In April 2015, the Department initiated an audit review of Richland County's Penny Tax program. Following the audit review, the Department informed Richland County that it had uncovered evidence of a variety of improper or unlawful expenditures and had determined that Richland County had used Penny Tax funds for purposes beyond the scope of allowable costs under the Transportation Act.

As a further result of the Department's audit review, the Department requested that Richland County adopt and implement a uniform standard to determine whether certain costs would be eligible to be paid out of Penny Tax funds and that all future expenditures be in strict conformity with the laws of this State.

The County objected to the Department's suggested standard. After the Department indicated it would withhold allocations of Penny Tax funds to the County, the County filed suit against the Department seeking a Writ of Mandamus, or, in the alternative, a preliminary injunction, to require the Department to remit the County's Penny Tax allocations to the State Treasurer's Office for subsequent payment to the County. Because the mass transit bus system operated by CMRTA is the largest recipient of Penny Tax funds, the CMRTA moved to intervene in this action. This Court granted the motion to intervene.

The Department answered Richland County's pleadings and filed counterclaims against the County alleging that the ordinance approved by the voters was void as exceeding the scope of the enabling statute, S.C. Code Ann. § 4-37-30, and that the County's expenditures of Penny Tax funds were inconsistent with § 4-37-30. The Department further filed counterclaims against the County (and third party claims against the Richland PDT and its individual members) alleging

civil conspiracy, fraud and constructive fraud with regard to the improper procurement of Penny Tax contracts, and the improper expenditure of Penny Tax funds. The Department also filed motions seeking an injunction and the appointment of a receiver.

On August 3, 2016 this Court entered an Amended Order issuing a Writ of Mandamus requiring the Department to remit to Richland County all Penny Tax allocations due the County (both in the past and in the future); denying both the County's and the Department's Motion(s) for Injunction; and denying the Department's Motion for the Appointment of a Receiver. The Court further found that the Department had standing to pursue its counterclaims against the County, including its declaratory judgment, civil conspiracy, fraud and constructive fraud causes of action. Both Richland County and the Department subsequently appealed the Amended Order.

On August 16, 2016, the Court issued its Order Granting Third-Party Defendant's Motions to Dismiss the Third-Party Complaint (which was not the subject of the subsequent appeal by the County or the Department).

On March 7, 2018, the South Carolina Supreme Court issued Op. No. 27775, in which the Supreme Court affirmed in all respects except that it reversed this Court's denial of the Department's request for injunctive relief and held that the Department is entitled to an injunction requiring Richland County to expend the funds generated by the Penny Tax solely on transportation-related projects in accordance with the law.

LEGAL ANALYSIS

a. Injunctive Relief Standard

"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). An injunction is appropriate where a party

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demonstrates irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. Id.

Here, the Department has demonstrated all three elements and is therefore entitled to injunctive relief in this matter as set forth in the Supreme Court Opinion.

First, without an injunction in place, Richland County could continue to spend Penny Tax funds for purposes not directly related to the planning, acquiring, constructing, or improving transportation-related projects as specified in S.C. Code Ann. § 4-37-30. The probable irreparable economic harm to the State in general, and Richland County taxpayers in general, constitutes sufficient irreparable harm.

Second, the Department has presented a compelling prima facie case that some of the County's expenditures of Penny Tax funds are in violation of the Transportation Act. Peek v. Spartanburg Regional Healthcare System, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005) (quoting Hensel v. City of North Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) ("Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.")). In particular, the Supreme Court highlighted several problematic expenditures of Penny Tax funds by Richland County, including:

- (1) the use of more than \$554,000 in Penny Tax funds to organize and staff the County's Small Local Business Enterprise (SLBE) Program, which was established as a county-wide program intended to support all facets of County operations—not just Penny Tax projects;
- (2) paying two public relations firms monthly payments of \$25,000 each for the provision of "public information services" despite the fact that a fully operational public information office already existed within Richland County and no documentation existed to detail the specific services these two firms were providing; and
- (3) the more than \$38,000 that Richland County spent under a vague and duplicative "mentor-mentee" arrangement, whereby Richland County contracted with certain

inexperienced individuals to perform more than \$400,000 in real-estate and legal services, then paid each of those individuals and an experienced contractor/vendor to "mentor" and "be mentored" and learn how to provide the very services they were contracted to provide.

Although this may not be an exhaustive list of Richland County's problematic expenditures of Penny Tax funds, the Court finds these expenditures are sufficient to establish a compelling prima facie case that Richland County has or is spending Penny Tax funds in violation of the Transportation Act. *See Richland Cty., Op. No. 27775* (S.C. Sup. Ct. filed Mar. 7, 2018) (Davis Adv. Sh. No. 10 at 47 n.7).

Finally, the Department has alleged sufficient facts to show that it has no adequate and complete remedy at law. *Knohl v. Duke Power Co.*, 260, S.C. 374, 376, 196 S.E.2d 115, 116 (1973) (citing *S.C. Pub. Service Authority v. Carolina Power and Light Co.*, 244 S.C. 466, 137 S.E.2d 507 (1964)). In particular, Richland County's Penny Tax program will last for approximately 22 years, during which time over one billion dollars (\$1,000,000,000.00) is expected to be spent. But for this injunction, the State and the taxpayers of Richland County lack an adequate remedy at law to be compensated in damages or to prevent Richland County from spending Penny Tax Funds in violation of the Transportation Act.

b. Guidelines Governing Richland County's Expenditure of Penny Tax Funds

The Transportation Act provides that the types of projects permitted to be funded with Penny Tax funds are highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities. S.C. Code Ann. § 4-37-30(A)(1)(a); *see also Richland Cty., Op. No. 27775* (S.C. Sup. Ct. filed Mar. 7, 2018) (Davis Adv. Sh. No. 10 at 29). A proper expenditure of Penny Tax funds must be tethered to a specific transportation-related capital project or the administration of a specific transportation project. *Id.*

As directed by the Supreme Court, I find that it is necessary for guidelines or standards to be established to serve as objective criteria for determining whether expenses are proper under the Transportation Act. Accordingly, I find that Richland County's expenditures of Penny Tax funds shall be subject to the "Guidelines for Use of Transportation Tax Revenue" (the "Guidelines"), which is attached hereto and incorporated fully herein as Exhibit A. These guidelines shall serve as the standard for determining whether Richland County's Penny Tax expenditures are properly allocable to a specific transportation-related capital project or the direct administration of a specific transportation project

NOW THEREFORE, based on the foregoing, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that:

- (1) The Department's Motion for Temporary Injunction is hereby **GRANTED**;
- (2) Richland County is hereby enjoined from making any further payments, expenditures, contracts, or other obligations of Penny Tax Funds in violation of the Transportation Act;
- (3) Richland County shall be subject to the Guidelines that are attached hereto as Exhibit A, and these Guidelines shall be used to determine whether all of Richland County's Penny Tax expenditures are proper under the Transportation Act;
- (4) The Department is authorized to audit Richland County's Penny Tax Program to ensure that all of the County's expenditures of Penny Tax funds comply with South Carolina law as set forth in the Guidelines; and
- (5) The temporary injunction is to remain in effect until further order of this Court or dismissal of this action.

AND IT IS SO ORDERED.

G. THOMAS COOPER, Jr.
Presiding Circuit Judge, Fifth Judicial Circuit

Columbia, South Carolina

April __, 2018

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EXHIBIT A



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211

**GUIDELINES FOR USE OF TRANSPORTATION
TAX REVENUE**

WHEREAS, the Optional Methods for Financing Transportation Facilities Act (the "Transportation Act"), codified at Title 4, Chapter 37 of the Code of Laws of South Carolina 1976, as amended, authorizes the governing body of a county to impose a sales and use tax in an amount not to exceed one percent (the "Transportation Tax," sometimes commonly referred to as the Penny Tax) within its jurisdiction for a single project or for multiple projects for a specific period of time to collect a limited amount of money, *see* S.C. Code Ann. § 4-37-30(A) (Supp. 2017); and

WHEREAS, the Transportation Act provides that the types of projects permitted to be funded with Transportation Tax revenues are highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities, *see* S.C. Code Ann. § 4-37-30(A)(1)(a); and

WHEREAS, the South Carolina Department of Revenue (the "Department") administers and collects the Transportation Tax and the revenues are periodically remitted to the county by the State Treasurer in accordance with the provisions of the Transportation Act. S.C. Code Ann. § 4-37-30(A)(15) (Supp. 2017); and

WHEREAS, the South Carolina Supreme Court in *Richland County and the Central Midlands Regional Transit Authority v. S.C. Department of Revenue*, — S.E.2d —, 2018 WL 1177700 (March 7, 2018) held that the Department has extensive administrative, oversight, and enforcement responsibilities in the Transportation Act and throughout Title 12 of the South Carolina Code, which confers upon the Department a duty to ensure that a county's expenditures of Transportation Tax revenues comply with the revenue laws the Department is charged with enforcing; and

WHEREAS, the Department is the agency statutorily tasked with administering a Transportation Tax program, and the expenditure of millions of dollars of Transportation Tax revenues is an issue of wide concern both to the Department and to the residents and taxpayers of the county implementing the Transportation Tax; and

WHEREAS, Transportation Tax revenues must be used in accordance with statutory restrictions imposed by the General Assembly, namely, proceeds must be used for the types of transportation-related projects identified in the Transportation Act; and

WHEREAS, the Supreme Court determined that a proper expenditure of Transportation Tax funds must be tethered to a specific transportation-related capital project or the administration of a specific transportation project; and

WHEREAS, the Supreme Court has determined that objective criteria are necessary to establish compliance with the Transportation Act, and has ordered that a county that has implemented a Transportation Tax program shall be subject to guidelines for determining whether expenses are properly allocable to a specific transportation project, or the direct administration of a specific transportation project; and

WHEREAS, the Department is authorized to conduct audits involving the taxes it administers and collects, including the Transportation Tax; and

WHEREAS, upon a determination that a county has expended Transportation Tax funds contrary to the Transportation Act, the county shall repay the improper expenditures from other legally available sources; and

NOW THEREFORE, a county shall be subject to the following guidelines and standards for determining whether expenditures of Transportation Tax revenues are proper:

GENERAL GUIDELINES

The revenues generated from the Transportation Tax must be used in accordance with statutory restrictions imposed by the General Assembly – namely, proceeds must be used for “capital costs” of the types of transportation projects identified in the Transportation Act or the administration of a specific transportation project.

“Capital Costs” means expenditures that are treated as “capital” expenditures under generally accepted accounting principles. In general, costs are treated as Capital Costs if they are incurred for the planning, acquisition, construction, or improvement of property having a useful life of more than one year and include, without limitation, costs related to the planning, acquisition, construction, or improvement of land, buildings, vehicles, equipment, infrastructure improvements, and intangible assets (e.g., software and intellectual property with a useful life of more than one year). Capital Costs also include costs and expenditures that increase the value of existing property with a useful life of more than one year or that extend the useful life of existing property for a period of more than one year. “Capital Costs” consist of both Direct Costs and Indirect Costs (as each term is described below).

ELIGIBLE COSTS

For purposes of these guidelines, “Eligible Costs” are Capital Costs, whether Direct Costs or Indirect Costs, and costs for Mass Transit Systems as further described in (C) below.

All Eligible Costs must be “reasonable.” A cost is reasonable if, in its nature and amount, it does not exceed that amount which would be incurred by a prudent person under the circumstances then and there prevailing in the conduct of government business; duplicative costs are not reasonable. The reasonableness standard for Eligible Costs includes, but is not limited to, a consideration of:

- Whether the cost is generally recognized as ordinary and necessary for the project;
- Whether the cost is in compliance with generally accepted sound business practices;

“Direct Costs” are expenditures for material, labor, and financing for transportation-related projects that would be properly chargeable to a capital asset account as distinguished from current expenditures and ordinary maintenance expenses.

“Project(s)” means those transportation-related projects described in the imposition ordinance and ratified in the referendum question in accordance with the provisions of the Transportation Act, specifically: highways, roads, streets and adjacent sidewalks, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets and adjacent sidewalks, bridges, and other transportation-related projects.

Examples: The following, to the extent directly related to the planning, acquiring, constructing, or improving a Project or any portion thereof, are examples of eligible Direct Costs:

- The purchase price of the property (e.g., land and interests in land, existing buildings and structures).
- The amounts paid a construction company for the construction of a Project (e.g. highways, roads, streets and adjacent sidewalks, bridges, bus terminals, train terminals, greenbelts, and other transportation-related facilities).
- Direct labor costs.
- Construction material costs (e.g., asphalt, concrete, steel, electrical wiring, and piping including related shipping, freight, and insurance charges).
- Equipment costs directly used in the construction or improvement of a Project, including lease payments and depreciation.
- Site preparation costs (e.g., demolition, environmental remediation, and utility relocation).
- Engineering, architectural, and design costs.

“Indirect Costs” are costs that benefit (i) the construction and improvement of authorized Projects or (ii) the construction and improvement of authorized Projects and other county operations. Only the portion of the Indirect Costs related to Projects are Eligible Indirect Costs.

The determination of whether an expense is an Eligible Indirect Cost must be based on a reasonable and appropriate allocation method (e.g., a burden rate or similar allocation method based on labor hours, salary costs, or material costs that are relevant to the function of the mixed service department). Eligible Indirect Costs do not include costs that are otherwise listed as Ineligible Costs (as defined and described herein below).

The following are examples of Eligible Indirect Costs:

- Portion of an employee's salary and benefits whose time is allocable to administering the planning, acquisition, construction and improvement of Projects.
- Portion of reasonable and necessary costs of office equipment and supplies, telephone, transportation, fuel, and similar daily costs for employees devoted to administering the planning, acquisition, construction and improvement of Projects.
- Where a county department provides services to employees directly engaged in the transportation program, including the provision of public information to affected citizens or communities impacted by one or more Projects, and other county departments (*i.e.* a

mixed service department), a portion of the county department's costs may be allocated as Eligible Indirect Costs based on either labor cost or labor hours.

C. Mass Transit Systems Costs

"Mass Transit System" as used herein refers only to a mass transit system.

Eligible Costs include costs incurred for the acquisition, design, construction, equipping, and operation of Mass Transit Systems, provided that such costs are consistent with the public purpose of the Transportation Act, the county's imposition ordinance and the referendum approved by voters.

Eligible Costs for Mass Transit Systems must be tethered to the administration of the Mass Transit System and must be reasonable and not excessive. Eligible Costs include purchases of capital assets. Eligible Costs also include costs and expenses paid or incurred in connection with the day to day operation of the Mass Transit System.

Additionally, the Mass Transit System must comply with certain Federal and State requirements in the operation of the Mass Transit System. The expenditures necessary to fulfill these Federal and State requirements are also Eligible Costs, provided the expenditures are reasonable and not excessive.

INELIGIBLE COSTS

"Ineligible Costs" are all costs that are not tethered to a Project or the direct administration of a Project. Furthermore, costs that are excessive or unreasonable or that do not directly benefit or are not incurred by reason of the planning, acquisition, construction or improvement of a Project are Ineligible Costs.

Examples:

The following are examples of Ineligible Costs:

- Excessive amounts not based on a competitive bidding arrangement or amounts paid in transactions involving conflicts of interest.
- County wide programs intended to support all facets of county operations.
- County costs for the routine maintenance or upkeep of roads, streets, thoroughfares, bridges and highways.
- Expenditure for training, establishment or support of programs to benefit constituents or persons.
- Any costs associated with a mentor/mentee program.
- Legal fees and other professional costs incurred in prosecuting or defending a lawsuit or claim related to an alleged improper expenditure of Transportation Tax revenues.

- County overhead costs (e.g. utilities, office supplies, telephone, office facilities, salaries).
- Costs associated with a county's normal cost of doing business (e.g., finance and accounting, procurement, executive management, human resources, budget and grants management, etc.).
- County support costs (e.g. support for the small local business enterprise program of the office of small businesses opportunities, procurement, human resources, budget and grants management, and finance-related functions).
- Professional fees (e.g. legal, accounting, and engineering) not directly related to a Project.
- Costs that are not reasonable or are duplicative.

COMPLIANCE WITH GUIDELINES

These guidelines apply to all counties and political subdivisions that receive Transportation Tax funds, including through intergovernmental agreements, contracts, or agreements with firms or a consortium of firms. Nothing herein shall be construed so as to permit a county to apply funds from the Transportation Tax revenue for other county purposes.

Based on the Department's extensive administrative, oversight, and enforcement responsibilities in the Transportation Act and throughout Title 12 of the South Carolina Code, the Department is authorized to conduct audits to ensure a county's expenditures of Transportation Tax revenues comply with the provisions of the Transportation Act and the South Carolina Code. All improper expenditures of Transportation Tax revenue shall be reimbursed from other legally available sources within the current fiscal year.

In addition, a county or political subdivision that receives any Transportation Tax funds shall conduct an independent annual audit of the financial records and transactions and expenditures of Transportation Tax funds. The results of the annual audit will be made available to the public on the county's website.



Richland Common Pleas

Case Caption: Richland County South Carolina , plaintiff, et al vs South Carolina
Department Of Revenue , defendant, et al
Case Number: 2016CP4003102
Type: Order/Temporary Injunction

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit
Judge 2126

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RECEIVED ELECTRONICALLY FILED - 2018 APR 12 11:25 AM - RICHLAND - COMMON PLEAS - CASE#2016CP4003102

1 THE COURT: THIS IS CASE #2016-CP-2875.

2 MR. CARPENTER? I FAIL TO SEE YOUR [client]. I USUALLY DO.

3 MR. CARPENTER: WELL, YOUR HONOR,
4 HE'S RECENTLY RESIGNED, MR. SLOAN HAS RECENTLY RESIGNED
5 FROM THE FOUNDATION, MADE EFFECTIVE WHEN THE FOUNDATION
6 WAS ABLE TO FIND SOMEBODY TO TAKE HIS PLACE. HE'S BEEN
7 TRYING TO FIND SOMEBODY TO TAKE HIS PLACE FOR SEVERAL
8 YEARS, HE'S BEEN THREATENING TO DO. HE'S BEEN THREATENING
9 TO DO IT SO LONG THAT WE BEGAN TO WONDER IF IT WOULD EVER
10 HAPPEN.

11 WE HAVE ACQUIRED THREE NEW BOARD MEMBERS IN
12 THE LAST COUPLE YEARS, AND FINALLY FOUND ONE WHO WAS
13 WILLING TO TAKE OVER THE ADMINISTRATION OPERATION OF THE
14 FOUNDATION. SO HE RESIGNED AS CHAIRMAN AND PRESIDENT AND
15 TREASURER, EFFECTIVE UPON THE BOARD ELECTING SOMEBODY TO
16 BE HIS SUCCESSOR. WE HAD A BOARD MEETING A WEEK AND A HALF
17 AGO,
18 AND ELECTED LARRY MINER* TO BE THE NEW PRESIDENT AND
19 CHAIRMAN, AND BOB LLOYD* TO BE THE TREASURER. AND MR. SLOAN
20 IN AN EFFORT TO MAKE IT CLEAR THAT HE'S PASSING THE TORCH,
21 DECLINED TO COME TODAY, NOT OUT OF ANY LACK OF INTEREST
22 BUT IN AN EFFORT, I THINK, TO MAKE SURE THAT THE FOUNDATION
23 SURVIVES HIS POSSIBLE PASSING. HE'S 88 YEARS OLD, AND HE'S
24 BEEN WANTING TO DO THIS FOR YEARS, WANTING TO PASS THE
25 TORCH, AND HE'S FINALLY ABLE TO DO THAT.

1 I TRIED TO GET LARRY MINER TO COME DOWN, HIS WIFE
2 HAD OPEN HEART SURGERY RECENTLY, HE'S TAKING CARE OF HER
3 ON A FULL TIME BASIS.

4 THE COURT: WILL YOU PASS THE WORD ON
5 TO HIM THAT WE WILL MISS HIM, INCLUDING EVERYBODY IN
6 RICHLAND COUNTY? ALL RIGHT, MR. LINDEMANN, YOUR MOTION.

7 MR. LINDEMANN: YOUR HONOR, MAY IT
8 PLEASE THE COURT? ON BEHALF OF DEFENDANT RICHLAND
9 COUNTY, WE HAVE MOVED TO DISMISS UNDER RULE 40-1-B AS WELL
10 AS ALTERNATIVELY A MOTION FOR SUMMARY JUDGMENTS AS TO ALL
11 SEVEN CAUSES OF ACTION THAT HAS BEEN ASSERTED BY THE
12 PLAINTIFFS IN THIS PARTICULAR CASE. I KNOW YOUR HONOR
13 KNOWS THE BACKGROUND OF THIS LITIGATION. I KNOW YOUR
14 HONOR'S HANDLED THE DOR CASE THAT IS CURRENTLY ON APPEAL
15 TO THE SOUTH CAROLINA SUPREME COURT AS WELL.

16 FIRST LET ME TOUCH ON THE MOTION TO DISMISS FOR
17 FAILURE TO PROSECUTE. I KNOW THAT'S SOMEWHAT OF AN
18 UNUSUAL MOTION TO MAKE IN A CASE WHERE THERE'S
19 REPRESENTATION BY COUNSEL. BUT I THINK THIS IS AN
20 ABSOLUTELY APPROPRIATE CASE FOR THE COURT TO CONSIDER
21 DISMISSING FOR FAILURE TO PROSECUTE.

22 THIS CASE WAS FILED, I BELIEVE IN MAY OF 2016. WITH
23 THE EXCEPTION OF A MOTION TO DISMISS THAT WAS FILED BY BOTH
24 THE COUNTY AND BY THE INTERVENER, THERE HAS BEEN NO OTHER
25 ACTIVITY ON THIS CASE UP UNTIL THE PRESENT TIME; ABSOLUTELY

1 NO DISCOVERY HAS BEEN DONE BY ANY OF THE PARTIES. THE
2 COURT DID ENTER A SCHEDULING ORDER LAST NOVEMBER, IT WAS A
3 CONSENT ORDER THAT SET IT A JULY 17, 2017 DEADLINE FOR
4 DISCOVERY.

5 YOUR HONOR ALSO DENIED OUR MOTION TO DISMISS IN PART IN
6 FEBRUARY BASED UPON THE FACT THAT YOU BELIEVED THAT THE
7 ISSUES REQUIRED BEING FLESHED OUT BY DISCOVERY.

8 NONE HAS BEEN DONE BY THE PLAINTIFF. NO
9 WRITTEN DISCOVERY WAS SERVED, NO DEPOSITIONS HAVE BEEN
10 TAKEN. IN RESPONSE TO THAT I GOT MR. CARPENTER'S
11 MEMORANDUM LAST NIGHT AT EIGHT-THIRTY, HE RESPONDS TO
12 THAT BY INDICATING THAT PRIOR TO ME FILING HE DID FILE A FOIA
13 REQUEST ON THE COUNTY, WHICH IS TRUE. AND THEN SUBSEQUENT
14 TO THE COUNTY AS WELL AS THE INTERVENER FILED DISPOSITIVE
15 MOTIONS A FEW WEEKS AGO. DESPITE THE FACT THAT DISCOVERY
16 RAN IN JULY, MR. CARPENTER SERVED BOTH A FIRST SET OF
17 INTERROGATORIES ON SEPTEMBER 22ND, AS WELL AS A
18 SUPPLEMENTAL FOIA REQUEST ON SEPTEMBER 22ND.

19 AND I KNOW THAT THE FOIA REQUEST IS NOT BEFORE
20 YOU, IT'S GOING TO OBVIOUSLY BE LITIGATED SEPARATELY BECAUSE
21 THE COUNTY'S TAKEN THE POSITION THAT YOU CAN'T USE FOIA TO
22 CIRCUMVENT A JUDGE'S SCHEDULING ORDER AND THE
23 MANAGEMENT OF LITIGATION THROUGH A SCHEDULING ORDER.

24 BUT THE BOTTOM LINE IS, YOUR HONOR, THERE'S BEEN
25 NOTHING DONE IN THIS PARTICULAR CASE. AND SO CLEARLY IT

1 WARRANTS CONSIDERATION OF THIS COURT TO DISMISS UNDER
2 RULE
3 40-1-B FOR FAILURE TO PROSECUTE. THAT SORT OF TIES THEN IN TO
4 THE MOTION FOR SUMMARY JUDGMENT BECAUSE OUR POSITION ON
5 THE MOTION FOR SUMMARY JUDGMENT, WHICH WE'RE PERMITTED
6 TO DO UNDER THE CELETEC* STANDARD, WHICH WAS ADOPTED
7 UNDER THE BOWMAN* CASE BY THE SOUTH CAROLINA SUPREME
8 COURT, WE CAN SIMPLY POINT OUT THAT THERE'S NO EVIDENCE TO
9 SUPPORT THE PLAINTIFF'S CLAIMS. AND THE PLAINTIFF HAS DONE
10 NO DISCOVERY IN THIS CASE AND PRESENTED ABSOLUTELY NO
11 EVIDENCE TO THIS COURT TO SUPPORT HIS CLAIMS.

12 NOW LAST NIGHT WITH HIS MEMORANDUM IN A LAST
13 DITCH EFFORT TO TRY TO, I SUPPOSE, CREATE SOME ISSUE OF FACT
14 IN DISPUTE, HE SUBMITTED ATTACHED TO HIS MEMORANDUM
15 SEVERAL DOCUMENTS, YOUR HONOR. AND IF I COULD JUST TOUCH
16 ON THOSE INITIALLY BEFORE I GOT INTO THE MERITS OF THE
17 ARGUMENTS. YOU KNOW, THE BOTTOM LINE IS THE PRIMARY
18 ATTACHMENT TO HIS MEMORANDUM THAT HE RELIES ON IS AN
19 AFFIDAVIT OF TIM DONOVAN.*

20 AND IT'S NOT AN AFFIDAVIT THAT WAS EVEN CAPTIONED
21 FOR THIS CASE OR GIVEN INTO THIS CASE, IT'S AN AFFIDAVIT THAT
22 WAS FILED BY THE DEPARTMENT OF REVENUE IN THE RICHLAND
23 COUNTY VERSUS DOR LITIGATION. MR. DONOVAN, I DON'T KNOW
24 WHAT HE DOES NOW OR WHETHER HE'S STILL EMPLOYED BY THE
25 DEPARTMENT OF REVENUE, I DON'T KNOW ANYTHING ABOUT HIM.

1 BUT AT THAT TIME HE CLAIMED HE WAS THE AUDIT MANAGER FOR
2 THE DEPARTMENT OF REVENUE. HE SUBMITTED AN AFFIDAVIT TO
3 THE COURT.

4 AS PART OF THAT LITIGATION RICHLAND COUNTY MOVED
5 TO STRIKE THAT AFFIDAVIT AS WELL AS OTHERS THAT WERE FILED,
6 AND YOUR HONOR ACTUALLY ISSUED AN ORDER THAT I WOULD LIKE
7 TO HAND UP AND MAKE PART OF THIS RECORD, YOUR ORDER OF
8 JULY 15TH, 2016 GRANTING THE PLAINTIFF RICHLAND COUNTY'S
9 MOTION TO STRIKE PORTIONS OF THE VARIOUS AFFIDAVITS,
10 INCLUDING MR. DONOVAN'S AFFIDAVIT. IF I COULD HAND THAT UP
11 AND JUST NOTE FOR THE RECORD THAT I'M ASKING THE COURT TO
12 MAKE THAT PART OF THE RECORD IN THIS PARTICULAR CASE.

13 THE COURT: I'LL TAKE IT.

14 MR. LINDEMANN: AND OBVIOUSLY IN THIS
15 CASE THE PLAINTIFF'S HAVE AN OBLIGATION TO FOLLOW NOT JUST
16 RULE 56, BUT RULE 6=D AS WELL, WHICH DEALS WITH THE TIMING OF
17 AFFIDAVITS AND FILING OF OTHER MATTERS IN OPPOSITION TO ANY
18 TYPE OF MOTION, INCLUDING DISPOSITIVE MOTIONS SUCH AS THIS.

19 RULE 6-D MAKES IT VERY CLEAR THAT NOT LATER THAN
20 TWO DAYS PRIOR TO THE HEARING THERE MUST BE AFFIDAVITS
21 FILED, AND THAT OBVIOUSLY GIVES SOME TIME TO THE MOVING
22 PARTY TO BE ABLE TO FILE REPLY AFFIDAVITS. IN THIS PARTICULAR
23 INSTANCE, KIND OF PAR FOR THE COURSE GIVEN THE LACK OF
24 ACTIVITY AND LACK OF ANY TYPE OF DISCOVERY IN THIS CASE, THE
25 PLAINTIFF'S FAILED TO COMPLY WITH RULE 6-D.

1 AS YOUR HONOR'S WELL AWARE, THIS CASE WAS SET
2 FOR A HEARING ON TUESDAY. WE APPEARED AND MR. CARPENTER
3 DID NOT APPEAR AND INDICATED HE HAD NOT GOTTEN NOTICE EVEN
4 THOUGH IT WAS ON THE ROSTER. HE HAD NOT FILED ANYTHING IN
5 OPPOSITION TO THE MOTIONS PRIOR TO THAT TUESDAY DATE WHEN
6 YOUR HONOR RESCHEDULED AT HIS CONVENIENCE THIS HEARING
7 FOR TODAY, HE STILL HAD THE OPPORTUNITY TO FILE AND HE STILL
8 DIDN'T UNTIL LAST NIGHT, LIKE I SAID I RECEIVED IT AT EIGHT-THIRTY
9 LAST NIGHT BY EMAIL. SO THAT WOULD BE ANOTHER GROUND FOR
10 STRIKING MR. DONOVAN'S AFFIDAVIT AS WELL AS THE OTHER
11 ATTACHMENTS AS BEING UNTIMELY.

12 LASTLY, YOUR HONOR, I WOULD ALSO POINT OUT TO THE
13 COURT THAT MR. DONOVAN'S AFFIDAVIT IS NOT CURRENT. THIS IS A
14 CASE FOR PROSPECTIVE RELIEF, SO OBVIOUSLY AT THE POINT IN
15 TIME THAT THE COURT RULES IS THE SNAPSHOT OF THE EVIDENCE
16 THAT IS RELEVANT TO THIS CASE. WHAT IS NOT RELEVANT TO THIS
17 CASE IS WHAT HAS OCCURRED NECESSARILY IN THE PAST.

18 MR. DONOVAN'S AFFIDAVIT, I'LL POINT OUT FOR THE
19 RECORD, WAS SIGNED JUNE 27TH, 2016, SO IT'S CERTAINLY NOT A
20 CURRENT AFFIDAVIT THAT REFLECTS THE CURRENT SITUATION. AND
21 LASTLY I WOULD POINT OUT THAT MANY OF THE OPINIONS THAT MR.
22 DONOVAN OFFERS IN HIS AFFIDAVIT, MANY OF WHICH HAVE ALREADY
23 BEEN STRICKEN BY YOUR HONOR, BUT THERE ARE OTHERS AS WELL
24 THAT HAVE NOT YET BEEN STRICKEN IN THE DOR CASE THAT WE
25 WOULD MOVE TO STRIKE IN THIS PARTICULAR CASE BECAUSE IT

1 SIMPLY HAS NO FOUNDATION. HE HASN'T BEEN IDENTIFIED AS AN
2 EXPERT IN THIS CASE, HE HAS NOT BEEN QUALIFIED AS AN EXPERT
3 BY THE COURT. AND IN PARTICULAR WHAT I'M FOCUSING ON IS THE
4 AREA OF PROCUREMENT. THERE IS ABSOLUTELY NO INDICATION IN
5 THAT AFFIDAVIT THAT MR. DONOVAN HAS ANY SPECIALIZED
6 KNOWLEDGE IN THE AREAS OF PROCUREMENT, PARTICULARLY
7 LOCAL GOVERNMENT PROCUREMENT, THAT WOULD ALLOW HIM TO
8 OFFER ANY TYPE OF OPINIONS SPECIFICALLY WITH RESPECT TO THE
9 SECOND CAUSE OF ACTION, WHICH I'LL GET TO IN A MOMENT. BUT I
10 DID WANT TO RESERVE MY OBJECTIONS TO MR. DONOVAN'S
11 AFFIDAVIT ON THE RECORD.

12 ONE OTHER POINT I WOULD MAKE IS THERE IS ALSO A
13 NEWSPAPER ARTICLE THAT'S BEEN ATTACHED TO THIS
14 MEMORANDUM OF LAW. AND I KNOW I DON'T HAVE TO EDUCATE YOU
15 ON THE ADMISSIBILITY ON A NEWSPAPER ARTICLE WHEN IT'S
16 ABSOLUTELY OBVIOUS. IT'S KIND OF SILLY THAT THIS WAS EVEN
17 ATTACHED, ASKING THE COURT TO CONSIDER IT AS EVIDENCE. IT IS
18 CLEARLY HEARSAY, IT'S AN ARTICLE FROM THE STATE NEWSPAPER
19 DATED OCTOBER 14TH, 2017.

20 THE COURT: IT WAS HEADLINES.

21 MR. LINDEMANN: AND SO THE BOTTOM LINE
22 IS EVEN WHAT IS BEING COMMUNICATED BY THE REPORTER IT'S
23 CLEARLY HEARSAY, IT'S FROM UNIDENTIFIED SOURCES, THERE'S NO
24 EXCEPTION TO THE HEARSAY RULE THAT APPLIES, YOUR HONOR,
25 AND IF THE COURT WILL INDULGE ME, I HAVE A COUPLE OF CASES

1 THAT I WILL SITE TO YOU ON THAT PARTICULAR POINT.

2 I SITE A COUPLE OF APPELLATE DECISIONS IN SOUTH
3 CAROLINA DEALING WITH NEWSPAPER ARTICLES, TRUSTEES FOR
4 ERSKINE COLLEGE VERSUS CENTRAL MUTUAL INSURANCE
5 COMPANY, WHERE THE SOUTH CAROLINA SUPREME COURT
6 INDICATED THAT NEWSPAPER ARTICLES COULD NOT BE ADMITTED
7 INTO EVIDENCE UNLESS THEY ACTUALLY QUALIFIED AS HEARSAY.
8 ALSO, YOUR HONOR, THE CASE OF WILLIAMSON VERSUS THE
9 COUNTY OF ORANGEBURG, WHICH ADMITTEDLY IS AN UNPUBLISHED
10 DECISION FROM THE COURT OF APPEALS DECIDED FEBRUARY 10TH,
11 2011, AND IN THAT CASE AT THE TIME CHIEF JUDGE, JOHN FEW,*
12 GOES THROUGH THE ANALYSIS OF NEWSPAPER ARTICLES IN THE
13 CASE DOES NOT FALL WITHIN AN EXCEPTION TO THE HEARSAY RULE.
14 I THINK THAT REALLY GOES WITHOUT SAYING.

15 THE COURT: IF IT WAS WRITTEN BY JOHN
16 MONK, WOULD THAT MAKE ANY DIFFERENCE?

17 MR. LINDEMANN: I WOULD SUBMIT IT DOES
18 NOT, YOUR HONOR. SO THE BOTTOM LINE IS OUR POSITION IS THAT
19 THIS COURT SHOULD TAKE THE RECORD FOR WHAT IT WAS PRIOR TO
20 EIGHT-THIRTY LAST NIGHT, THAT THERE IS ABSOLUTELY NO
21 EVIDENCE THAT HAS BEEN SUBMITTED IN OPPOSITION TO OUR
22 MOTION, WHICH IS PAR FOR THE COURSE AS I'VE INDICATED, WITH
23 ABSOLUTELY NO DISCOVERY WITH THE EXCEPTION OF A PRE-FILING
24 FOI REQUEST THAT WAS DONE. AND I WOULD SUBMIT THAT THAT'S
25 NOT DISCOVERY AS WELL.

1 THE COURT: MOVE ON TO YOUR SUMMARY
2 JUDGMENT MOTION.

3 MR. LINDEMANN: THE PRIMARY ISSUES
4 RAISED IN THE SUMMARY JUDGMENT MOTION BY THE PLAINTIFFS IN
5 THIS PARTICULAR CASE IS PURELY A LEGAL ISSUE. AND THE
6 QUESTION AS TO WHETHER OR NOT CERTAIN OF THE EXPENDITURES
7 BY THE COUNTY USING THE PENNY TAX REVENUES IS APPROPRIATE
8 UNDER THE STATED LEGISLATION, SPECIFICALLY 4-37-30, AND THAT'S
9 THE PRIMARY SECTION OF WHAT WE HAVE BEEN CALLING THE
10 TRANSPORTATION ACT IN THIS LITIGATION AS WELL AS THE OTHER
11 CASE.

12 YOUR HONOR, THE PLAINTIFF ASSERTS THAT SEVERAL
13 DIFFERENT EXPENDITURES DO NOT CONSTITUTE PROPER
14 EXPENDITURES UNDER THE STATE STATUTE. SPECIFICALLY THEY'RE
15 REFERRING TO MONEY SPENT FOR THE OPERATION OF THE COMET
16 MASS TRANSIT SYSTEM, WHICH IS OPERATED BY THE INTERVENER IN
17 THIS CASE, CENTRAL MIDLANDS REGIONAL TRANSIT AUTHORITY.
18 AND I KNOW MR. TYSON WILL PROBABLY HAVE SOMETHING TO ADD
19 ON THAT PARTICULAR POINT.

20 THEY HAVE ALSO RAISED ISSUES WITH THE FACT THAT
21 THE PROGRAM HAS BEEN SET UP TO EXPEND CERTAIN AMOUNTS OF
22 FUNDS FOR UPGRADING AND BUILDING PEDESTRIAN SIDEWALKS, AS
23 WELL AS BIKE LANES AND BIKE PATHS. YOUR HONOR, THERE'S ALSO
24 THEN THE ISSUE IN THE THIRD CAUSE OF ACTION ABOUT WHETHER
25 OR NOT THE PENNY TAX REVENUES MAY BE USED FOR

1 ADMINISTRATIVE OR OPERATING COSTS IN THESE PARTICULAR
2 TRANSPORTATION PROJECTS OR FACILITIES.

3 THE COURT: DOESN'T THE COMPLAINT GO A
4 LITTLE BEYOND THAT, NOT JUST ADMINISTRATIVE EXPENSES BUT
5 GET INTO OTHER EXPENDITURES?

6 MR. LINDEMANN: WELL WHAT THE THIRD
7 CAUSE OF ACTION ACTUALLY ADDRESSES, AND IT'S SOMEWHAT
8 VAGUE, IT'S TALKING ABOUT PUBLIC RELATIONS CONTRACTS, I
9 WOULD SUBMIT THAT THAT'S ADMINISTRATIVE. CLEARLY IN THIS DAY
10 AND AGE TO HAVE – AND OF COURSE GIVEN THE ROLE OF
11 GOVERNMENT, THAT THIS IS TAX MONEY BEING SPENT, THERE'S A
12 ROLE FOR GOVERNMENT TO KEEP THE PUBLIC INFORMED, SO
13 WHAT'S BEING REFERENCED THERE IS MONIES THAT ARE BEING
14 SPENT FOR THE WEBSITE, FOR ANY TYPE OF PUBLIC RESPONSES.
15 THERE HAVE BEEN A NUMBER OF COMMUNITY MEETINGS THAT HAVE
16 BEEN HELD, THOSE SORTS OF THINGS. WE WOULD SUBMIT THAT
17 THAT FALLS UNDER THE UMBRELLA OF ADMINISTRATIVE OR
18 OPERATING COSTS. THAT WOULD BE A TOTALLY APPROPRIATE
19 EXPENDITURE UNDER 4-37-30.

20 THEY ALSO REFER TO CONTRACTS FOR ADMINISTRATION
21 NOT RELATED TO SPECIFIC TRANSPORTATION FACILITIES. AGAIN,
22 THERE'S BEEN NO DISCOVERY TO ACTUALLY SHOW WHAT THEY'RE
23 TALKING ABOUT THERE. THERE'S BEEN ABSOLUTELY NOTHING IN
24 RESPONSE TO SUMMARY JUDGMENT THAT IDENTIFIES ANY
25 CONTRACTS THAT THEY BELIEVE FALLS WITHIN THAT SCOPE THAT

1 WOULD NOT BE APPROPRIATE FOR THE EXPENDITURE OF ANY TAX
2 REVENUES.

3 THEY TALK ABOUT TRAINING PROGRAMS, AND THAT IS,
4 I'M ASSUMING FROM THE MEMORANDUM THAT WAS FILED THAT
5 THERE WAS A CHALLENGE TO THE MENTOR/MENTEE PROGRAM.
6 YOUR HONOR, MENTOR/MENTEE ARE PART OF CONSTRUCTION
7 CONTRACTS, PARTICULARLY TRANSPORTATION CONTRACTS ALL
8 OVER THE STATE AND NATION. IN FACT THE SOUTH CAROLINA
9 DEPARTMENT OF TRANSPORTATION REQUIRES AND HAS A
10 MENTOR/MENTEE TRAINING PROGRAM. AND MANY FEDERAL LAWS
11 ACTUALLY REQUIRE THAT AS PART OF GRANTS AND FEDERAL
12 HIGHWAY LOANS. SO CLEARLY WE WOULD SUBMIT THAT THAT FALLS
13 WITHIN THE SCOPE OF ADMINISTRATIVE OR OPERATING COSTS.

14 AND LASTLY THEY DO SPECIFICALLY ALLEGE AN
15 EXPENDITURE OF \$619,000 FOR THE SMALL LOCAL BUSINESS
16 ENTERPRISE PROGRAM. THAT PROGRAM WAS IMPLEMENTED AS
17 PART OF THE PENNY TAX PROGRAM, THERE'S NO EVIDENCE TO
18 SUGGEST IT HASN'T BEEN OPERATED AS PART OF THE PENNY TAX
19 PROGRAM. AND IT WAS IMPLEMENTED TO MAKE SURE THAT IT
20 WASN'T ONLY THE BIG COMPANIES, BIG CONTRACTORS THAT
21 BENEFITED FROM THESE MILLIONS OF DOLLARS OF TAX MONEY. SO
22 THERE WAS ALSO LOCAL BUSINESSES AND SMALLER LOCAL
23 BUSINESS AS WELL, MINORITY OWNED BUSINESSES, THAT MAY ALSO
24 PARTICIPATE IN THIS. SO THAT AS WELL, WE WOULD SUBMIT,
25 CLEARLY FALLS WITHIN THE EXPENDITURES OR THE SCOPE OF

1 OPERATING OR ADMINISTRATIVE EXPENDITURES.

2 AND, YOUR HONOR, ONE OF THE THINGS I WANT TO
3 POINT OUT TO THE COURT, BECAUSE I NOTICED THIS IN THE
4 MEMORANDUM THAT WAS SUBMITTED LAST NIGHT, YOU KNOW
5 SEVERAL IMES IN THAT MEMORANDUM, I KNOW IT WAS ONCE, THE
6 USE OF THE WORD UNWISE WAS USED SUGGESTING IT WAS AN
7 UNWISE USE OF EXPENDITURES. FRANKLY, YOUR HONOR, THE
8 PLAINTIFF DOESN'T HAVE STANDING, TAX PAYER STANDING, PUBLIC
9 STANDING DOESN'T GIVE THE PLAINTIFF'S THE OPPORTUNITY TO
10 RAISE POLITICAL ISSUES AND CHALLENGE EXPENDITURES OF FUNDS
11 THAT ARE WITHIN THE SCOPE OF STATE LAW, AND WHETHER OR NOT
12 THEY'RE WISE OR PRUDENT. AND THE COURT DOESN'T HAVE THAT
13 ABILITY, AS YOUR HONOR WELLS KNOW. I MEAN THE COURT IS
14 LIMITED BY SEPARATION OF POWERS NOT TO DECIDE POLITICAL
15 ISSUES, AND WHETHER OR NOT THE EXPENDITURE FUNDS ON A
16 PARTICULAR PROGRAM WERE WISE OR NOT, OR A GOOD USE OF
17 FUNDS, IS TOTALLY A POLITICAL QUESTION, NOT FOR THE
18 PLAINTIFF'S TO CHALLENGE IN THE FORUM OF – THEY CAN
19 CHALLENGE IT AT THE BALLOT BOX, BUT THEY CAN'T CHALLENGE IT
20 IN THE COURTROOM, AND OBVIOUSLY THE COURT IS RESTRAINED BY
21 SEPARATION OF POWERS ON THAT AS WELL.

22 SO IT BOILS DOWN TO A PURELY LEGAL QUESTION, I
23 WOULD SUBMIT; WHAT DOES 4-37-30 ALLOW? AND YOUR HONOR, WE
24 HAVE GONE THROUGH AN ANALYSIS, AND OBVIOUSLY THERE'S NO
25 CASE LAW FROM THE SOUTH CAROLINA SUPREME COURT OR THE

1 COURT OF APPEALS THAT ADDRESSES THIS, BUT WE WENT
2 THROUGH THE NORMAL PROCESS OF HOW YOU INTERPRET
3 STATUTES. AND IN THIS PARTICULAR CASE, UNLIKE MOST STATUTES
4 IN SOUTH CAROLINA, WE ACTUALLY LEGISLATED IT, AND I THINK IT'S
5 VERY, VERY IMPORTANT TO FOCUS ON WHEN 4-37-30 WAS ADOPTED
6 IN 1995 AS PART OF ACT NUMBER 52. AND THEN AT THE FIRST
7 SECTION OF THAT ACT INCLUDE THE LEGISLATIVE FINDINGS BY THE
8 COURT AND SECTION ONE OF THE ACT INCLUDES – AND I'VE ARGUED
9 THIS TO YOUR HONOR BEFORE – THE BOTTOM LINE IT SAYS "IN
10 FURTHERANCE OF THE POWERS GRANTED TO THE COUNTIES OF
11 THIS STATE AND PURSUANT TO, " AND IT SITES SEVERAL PROVISIONS
12 INCLUDING HOME RULE, SAYS "EACH OF THE COUNTIES OF THIS
13 STATE IS AUTHORIZED TO ESTABLISH TRANSPORTATION
14 AUTHORITIES AND TO FINANCE FOLLOWING THE PUBLIC HEARING
15 AND REFERENDUM REQUIRED IN THIS ACT," AND HERE'S THE KEY
16 LANGUAGE, YOUR HONOR, "THE COST OF ACQUIRING, DESIGNING,
17 CONSTRUCTING, EQUIPPING, AND OPERATING HIGHWAYS, ROADS,
18 STREETS AND BRIDGES, AND OTHER TRANSPORTATION RELATED
19 PROJECTS."

20 IN THE YEAR 2000 THE STATUTE, SPECIFICALLY 4-37-30
21 WAS AMENDED TO INCLUDE MASS TRANSIT SYSTEMS. THERE WERE
22 NOT ANY SEPARATE FINDINGS AT THAT PARTICULAR TIME. BUT
23 THERE WAS ALSO NO NEGATION FROM THE COURT'S OR
24 LEGISLATIVE FINDINGS OF 1995. SO IT'S NOT JUST THE LEGISLATIVE
25 FINDINGS THERE, YOUR HONOR, IT'S ALSO IF YOU LOOK AT THE

1 ACTUAL LANGUAGE OF THE ACT ITSELF, WHICH OF COURSE OUR
2 SUPREME COURT HAS ALWAYS SAID IS A GOOD SOURCE OF
3 INFORMATION IN ORDER TO DETERMINE WHAT THE LEGISLATIVE
4 INTENT IS, THE COURT FOLLOWS THE LANGUAGE FROM THE FINDING
5 ITSELF.

6 AND IT SAYS THAT THE ACT WAS INTENDED, SKIPPING
7 DOWN TO THE KEY LANGUAGE, "INCLUDING THE ACQUISITION,
8 CONSTRUCTION, EQUIPMENT, AND OPERATION OF HIGHWAYS,
9 ROADS, STREETS, BRIDGES, AND OTHER TRANSPORTATION RELATED
10 PROJECTS." SO IT DOES FOCUS ON THE USE OF THE WORD
11 OPERATION TO OPERATE SOMETHING, SUCH AS A MASS TRANSIT
12 SYSTEM, FOR INSTANCE, REQUIRES THE EXPENDITURE OF
13 OPERATING AND ADMINISTRATIVE COSTS.

14 NOW YOUR HONOR IN THE DOR CASE ISSUED AN
15 AMENDED ORDER WHERE YOUR HONOR, AT LEAST IT APPEARS
16 BASED UPON THE LANGUAGE WHICH WAS SITED BY MR. CARPENTER
17 IN HIS MEMORANDUM, TO AGREE WITH THE COUNTY'S POSITION, AND
18 FOUND THAT THE COUNTY WAS ABLE TO EXPEND FUNDS FOR THE
19 PURPOSES THAT ARE DESCRIBED IN THE ORDINANCE ITSELF. AND
20 THE ORDINANCE ITSELF SPECIFICALLY PROVIDES NOT JUST FOR
21 FUNDING THE OPERATION OF THE COMET BUT ALSO FOR
22 ADMINISTRATIVE COSTS. IT SPECIFICALLY USES THAT TERM.

23 SO IT'S OUR POSITION, YOUR HONOR, QUITE CLEARLY,
24 THAT THE LEGISLATIVE FINDINGS AS WELL AS THE ACT ITSELF,
25 WHICH AGAIN OUR COURTS HAVE INDICATED MAY SERVE AS GUIDES

1 TO DETERMINE LEGISLATIVE INTENT. ALSO CASES THAT TALK ABOUT
2 HOW THOSE LEGISLATIVE FINDINGS ARE ACCORDED QUOTE "GREAT
3 WEIGHT." I'M CITING THE *BENJAMIN VERSUS HOUSING AUTHORITY*, A
4 DARLINGTON COUNTY CASE. THERE'S NO CONTRA* LEGISLATIVE
5 FINDING, THERE'S NO CONTRA-EVIDENCE THAT WOULD SUGGEST A
6 DIFFERENT LEGISLATIVE INTENT THAN WHAT WE ARE ARGUING IN
7 THIS PARTICULAR CASE.

8 THIS IS PURELY A LEGAL ISSUE. I KNOW YOUR HONOR,
9 WHEN YOU DENIED OUR MOTION TO DISMISS AND INDICATED THAT
10 YOU WANTED DISCOVERY TO BE COMPLETED BEFORE RULING ON IT,
11 EVEN THOUGH NO DISCOVERY HAD BEEN DONE, YOUR HONOR, I
12 WOULD SUGGEST THAT SINCE THE SCHEDULING ORDER HAS RUN,
13 THE PLAINTIFF HAS MADE A DETERMINATION THAT NO DISCOVERY IS
14 NECESSARY FOR THIS AS WELL, AND THAT THIS ISSUE IS RIPE FOR
15 THE COURT'S LEGAL DETERMINATION.

16 TO TOUCH ON A COUPLE OF ADDITIONAL POINTS, THE
17 PLAINTIFF SPECIFICALLY TARGETED NOT JUST THE COMET, AND
18 AGAIN I THINK THAT'S CLEAR BASED UPON THE AMENDMENTS OF
19 2000 INCLUDING MASS TRANSIT SYSTEMS, BUT THEY ALSO TARGET
20 BIKE PATHS AND SIDEWALKS. AND THAT'S SOMEWHAT CURIOUS TO
21 ME. I DON'T THINK IT WAS REALLY REFERENCED IN MR.
22 CARPENTER'S MEMORANDUM THAT WAS FILED LAST NIGHT.

23 BUT THE BOTTOM LINE IS YOUR HONOR, FROM A
24 PRACTICAL STANDPOINT, BIKE PATHS TYPICALLY CIRCLE
25 TRANSPORTATION RELATED PROJECTS. I DON'T THINK ANYBODY IS

1 DENYING THAT USE OF A BICYCLE IS TRANSPORTATION. AND THE
2 SIDEWALKS THEMSELVES, I THINK IT'S IMPORTANT THAT THE COURT
3 FOCUS ON HOW SIDEWALKS HAVE BEEN HANDLED IN SOUTH
4 CAROLINA. SIDEWALKS ARE CONSIDERED PART OF THE ROADWAY.

5 IN NUMEROUS CASES, WE'VE SITED SOME, *VAUGHN**
6 *VERSUS TOWN OF LYMAN, BRYANT* VERSUS CITY OF NORTH*
7 *CHARLESTON*, THERE'S NUMEROUS SIDEWALK CASES THAT HAVE
8 COME UP, AND IT'S THE PARTIES THAT OWNS AND MAINTAINS THAT
9 ROADWAY THAT'S RESPONSIBLE FOR THE SIDEWALKS. THEY GO
10 HAND IN HAND.

11 I ACTUALLY FOUND A CASE CALLED *MAULDIN VERSUS*
12 *CITY COUNSEL OF GREENVILLE*. IN MY MEMORANDUM I
13 ERRONEOUSLY LEFT OUT THE DATE OF THAT OPINION, IT WAS FROM
14 THE LATE 1,800'S. I DON'T NORMALLY CITE THINGS QUITE THAT OLD,
15 BUT IT WAS PRETTY TELLING. IT SAID SIDEWALKS ARE AFTER ALL
16 NOTHING BUT A PART OF THE HIGHWAY OR ROADWAY. I CITE OUR
17 SOUTH CAROLINA STATUTORY LAW AS INTERPRETED BY OUR
18 APPELLATE COURTS THAT SIDEWALKS ARE PART OF THE HIGHWAYS
19 AND ROADWAYS. THEN THE MORE RECENT CASES SUCH AS *VAUGHN*
20 AND *BRYANT*.

21 SO THE BOTTOM LINE, YOUR HONOR, IS OUR
22 POSITION IS ON THAT FIRST CAUSE OF ACTION THAT THE
23 EXPENDITURE
24 OF FUNDS FOR THE AREAS THAT THEY'RE CHALLENGING CLEARLY
25 FALL WITHIN THE SCOPE OF 4(37)30, NUMBER ONE. AND NUMBER

1 TWO, GOING TO THE THIRD CAUSE OF ACTION TO THE AREAS THAT
2 THEY ARE CHALLENGING SUCH AS THE EXPENDITURE OF FUNDS
3 THAT WE'VE TALKED ABOUT FOR THE SMALL LOCAL BUSINESS
4 ENTERPRISE PROGRAM, FOR PUBLIC RELATIONS, FOR
5 MENTOR/MENTEE PROGRAMS, THOSE ARE ADMINISTRATIVE COSTS
6 THAT ARE PART OF THE PENNY TAX PROGRAM AND CLEARLY FALL
7 WITHIN THE SCOPE OF 4(37)30.

8 SO ON THOSE TWO CAUSES OF ACTION WE BELIEVE THAT THE
9 COUNTY IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

10 TOUCHING REAL QUICKLY ON THE OTHER CAUSES OF
11 ACTION, THE SECOND CAUSE OF ACTION IS VERY VERY
12 CONCLUSIVELY PLED. IT DEALS PROCUREMENT. IT DOESN'T
13 IDENTIFY ANY SPECIFIC PART OF A RICHLAND COUNTY ORDINANCE
14 THAT THEY ARE CHALLENGING. THEY SIMPLY CITE A STATE LAW
15 THAT SAYS IT'S AN OVER-REACHING PROPOSITION, THAT LOCAL
16 GOVERNMENTS ARE REQUIRED TO ADOPT ORDINANCE AND
17 PROCEDURES EMBODYING SOUND PRINCIPALS OF APPROPRIATELY
18 COMPETITIVE PROCUREMENT.

19 AGAIN, THEY DO NOT ADDRESS SPECIFICALLY ANY PARTICULAR
20 PROVISION OF THE RICHLAND COUNTY PROCUREMENT CODE THAT
21 THEY ARE CHALLENGING. THEY SIMPLY SAY IN PARAGRAPH 22 THAT
22 PROCUREMENT FROM THE PROCEEDS OF THE PENNY TAX SALES
23 ARE NOT MADE BY THE CHIEF PROCUREMENT OFFICER, BUT RATHER
24 MADE BY MEMBERS OF THE COUNTY COUNSEL.

25 AGAIN, THEY DON'T CITE ANY TYPE OF ORDINANCE, AND I

1 CAN TELL YOUR HONOR THE ORDINANCE DOESN'T PROVIDE FOR
2 THAT. THE ORDINANCE DOES INCLUDE IN CREATING THE PROGRAM A
3 SIGNIFICANT EXPENDITURE PROVISION THAT I ASSUME THAT MIGHT
4 BE WHAT THEY ARE CHALLENGING IN THIS PARTICULAR CASE THAT
5 ALLOWS FOR THE AWARD OF THE CONTRACT TO PDT,* WHICH IS
6 ADMINISTERING THE PENNY TAX PROGRAM UNDER THE COUNTY'S
7 SUPERVISION. BUT THAT CONTRACT WAS LEFT, THERE'S NOTHING
8 ILLEGAL, NOTHING HAS BEEN SHOWN.

9 YOUR HONOR, WE CITE TWO CASES THAT I THINK ARE
10 RIGHT ON POINT; ONE IS THE *GLASSCOCK COMPANY VERSUS*
11 *SUMTER CASE*, A 2004 DECISION FROM THE SOUTH CAROLINA COURT
12 OF APPEALS. JUST REAL BRIEFLY IN THAT CASE, YOUR HONOR, A
13 CONTRACT HAD BEEN ISSUED BY SUMTER COUNTY FOR WASTE
14 MANAGEMENT PICKUP AND THAT CONTRACT ULTIMATELY WENT TO
15 WASTE MANAGEMENT COMPANY WAS ADMINISTERING THAT
16 CONTRACT, CAME BACK TO THE COUNTY SEEKING SOME CHANGES,
17 AGREEING TO MAKE CERTAIN CHANGES, IN EXCHANGE FOR
18 EXTENDING THAT PARTICULAR CONTRACT THROUGH 2021, WHICH
19 WAS A LENGTHY POINT IN TIME. THE DECISION CAME OUT IN 2004,
20 AND THOSE DECISIONS CAME OUT IN 2004 AND THOSE
21 NEGOTIATIONS OCCURRED IN 2001.

22 SO ULTIMATELY WHAT THE SUMTER COUNTY COUNSEL
23 DID IN THAT PARTICULAR CASE IS THEY DID NOT PUT IT UP FOR
24 COMPETITIVE BID. THEY WENT AHEAD AND EXTENDED THE
25 CONTRACT FIRST BY RESOLUTION AND THEN BY ORDINANCE.

1 GLASSCOCK COMPANY WHO IS A COMPETITOR OF WASTE
2 MANAGEMENT IN THAT PARTICULAR BUSINESS CHALLENGED THAT
3 CONTRACT AS NOT BEING IN COMPLIANCE WITH THE PROCUREMENT
4 ORDINANCE, AND ALSO NOT BEING COMPLIANT WITH STATE
5 STATUTORY PROCUREMENT LAW, SPECIFICALLY 11-35-50 THAT HAS
6 BEEN CITED IN THIS CASE.

7 LET ME READ A COUPLE OF KEY POINTS. THE COURT OF
8 APPEALS RULED IN FAVOR OF SUMTER COUNTY AND FOUND THAT
9 PARTICULAR CONTRACT DID NOT HAVE TO GO THROUGH THE BID,
10 THAT IT WAS APPROPRIATE FOR SUMTER COUNTY TO HANDLE THAT
11 MATTER THROUGH A CONTRACT APPROVED BY COUNSEL ITSELF.
12 AND THEY DIDN'T EVEN HAVE AN EXTENSIVE ORDINANCE LIKE
13 RICHLAND COUNTY DOES TO DEAL WITH SIGNIFICANT PURCHASES
14 SUCH AS THAT.

15 THE COURT OF APPEALS SAID, "WE KNOW THAT SECTION
16 11-35-50 DOES NOT IMPOSE A SPECIFIC REQUIREMENT THAT ALL
17 PUBLIC PROCUREMENT IN OUR STATE BE CARRIED OUT BY WAY OF A
18 SINGULAR NARROWLY DEFINED PROCEDURE. WHILE IT'S MANDATED
19 IN ALL GOVERNMENT BODIES ADOPT SOME FORM OF COMPETITIVE
20 PROCUREMENT PROCEDURES, IT'S UNAMBIGUOUS. THE STATUTE
21 BROADLY RECKONS THAT THE PROCESS THAT'S CHOSEN EMBODIES
22 SOUND PRINCIPALS OF APPROPRIATELY COMPETITIVE
23 PROCUREMENT, CLEARLY WAS INTENDED TO AFFORD LOCAL
24 GOVERNMENTS NEEDED FLEXIBILITY TO DETERMINE WHAT IS
25 APPROPRIATELY COMPETITIVE IN LIGHT OF PUBLIC BUSINESS THEY

1 MUST TRANSACT."

2 THEY ALSO WENT ON TO SAY THAT – I'M CITING HOME
3 RULE, WHICH IS VERY KEY TO THIS, THAT "LOCAL GOVERNMENT
4 SHOULD BE AFFORDED A REASONABLE DEGREE OF LATITUDE IN
5 DESIGNING AND DEVISING THEIR OWN INDIVIDUAL PROCUREMENT
6 ORDINANCES AND PROCEDURES IS ENTIRELY CONSISTENT WITH
7 OUR STATE'S NOW FIRMLY ROOTED CONSTITUTIONAL PRINCIPAL OF
8 HOME RULE."

9 THEY WENT ON TO SAY – AND THIS WILL BE THE LAST
10 QUOTE I READ YOUR HONOR – IN GLASSCOCK URGES THIS COURT
11 TO CONSTRUE SECTION 11-35-50 AS MANDATING SEALED
12 COMPETITIVE BIDS IN VIRTUALLY EVERY INSTANCE OF PUBLIC
13 PROCUREMENT. THE COURT SAID "THIS APPROACH WOULD
14 EFFECTIVELY STRIP OUR STATE'S LOCAL GOVERNMENT OF ANY
15 FLEXIBILITY IN DETERMINING THE COMPETITIVE PROCUREMENT
16 POLICIES AND PROCEDURES APPROPRIATE FOR THEM TO ADOPT.
17 INDEED SUCH A READING OF SECTION 11-35-50 RUNS WHOLLY
18 CONTRARY TO THE HOME RULE AUTHORITY VESTED IN LOCAL
19 GOVERNMENT BY OUR CONSTITUTION."

20 I ALSO SITE IN OUR MEMORANDUM A MORE RECENT
21 CASE FROM 2010 BROUGHT BY MR. SLOAN AGAINST GREENVILLE
22 HOSPITAL SYSTEM WHERE VERY SIMILAR ALLEGATIONS WERE MADE
23 AS ARE BEING MADE IN THIS PARTICULAR CASE. THAT CASE IS
24 SIGNIFICANT BECAUSE NUMBER ONE, THE SOUTH CAROLINA
25 SUPREME COURT SITES TO THE SUMTER COUNTY CASE VERY

1 FAVORABLY, IN FACT THEY SAY CITING FROM THAT CASE, SAYS "OUR
2 COURTS HAVE RECOGNIZED SECTION 11-35-50 DOES NOT SPECIFY
3 ANY PARTICULAR PROCEDURES THAT ARE CONSIDERED TO EMBODY
4 THE APPROPRIATELY COMPETITIVE STANDARD, RATHER THE
5 STATUTE CLEARLY WAS INTENDED TO AFFORD LOCAL
6 GOVERNMENTS NEEDED FLEXIBILITY TO DETERMINE WHAT IS
7 APPROPRIATELY COMPETITIVE IN LIGHT OF THE PUBLIC BUSINESS
8 THEY MUST TRANSACT."

9 AND IN BOTH OF THOSE CASES, YOUR HONOR, THE
10 APPELLATE COURT SIDED WITH THE GOVERNMENTAL ENTITIES.
11 ULTIMATELY IN THIS PARTICULAR CASE IT'S UNCLEAR FROM THE
12 PLAINTIFF'S COMPLAINT WHAT IT IS THEY'RE CHALLENGING. BUT AS I
13 INDICATED, THEY'RE SUGGESTING IN THEIR COMPLAINT THAT EVERY
14 CONTRACT WITH EVERY PAVER, EVERY ENGINEERING FIRM,
15 ETCETERA, EVERY SUB-CONTRACTOR WHO'S DOING ANY WORK ON
16 ANY ROADS BEING PAID FOR WITH PENNY TAXES, ARE BEING
17 PROCURED OR APPROVED BY RICHLAND COUNTY COUNSEL IS NOT
18 CORRECT. AND THEY HAVE NOT PRESENTED ANY EVIDENCE OF
19 THAT. THE ONLY CONTRACT THAT COULD BE REFERENCED IS THE
20 PDT CONTRACT, WHICH I INDICATED AN ACTUAL ORDINANCE FOR
21 SIGNIFICANT PURCHASES WAS ADOPTED. AND CERTAINLY THEY ARE
22 UNABLE TO SHOW THAT THAT PARTICULAR ORDINANCE DOES NOT
23 EMBODY SOUND PRINCIPALS OF APPROPRIATELY COMPETITIVE
24 PROCUREMENT. THEY HAVE NOT IDENTIFIED AN EXPERT ON
25 PROCUREMENT TO OFFER THOSE OPINIONS. TO THE EXTENT THEY

1 CITE A COUPLE OF PARAGRAPHS OF MR. DONAVAN'S* AFFIDAVIT
2 THAT DOES NOT QUALIFY AS EVIDENCE IN THIS CASE. MR. DONOVAN
3 HAS NOT INDICATED THAT HE HAS ANY EXPERTISE WHATSOEVER IN
4 PROCUREMENT OR EVEN KNOWING WHAT SOUND PRINCIPALS OF
5 APPROPRIATELY COMPETITIVE PROCUREMENT WOULD BE.

6 SO, YOUR HONOR, THERE'S ABSOLUTELY NO BASIS IN
7 THIS RECORD FOR YOUR HONOR TO RULE THAT THE PROCUREMENT
8 MANNER THAT THE COUNTY HAS USED IN THIS PARTICULAR CASE DO
9 NOT MEET THE BROAD ASSESSMENT OR DIRECTIVE OF 11-35-50. THE
10 PLAINTIFF HAS CLEARLY NOT CARRIED THEIR BURDEN OF PROOF ON
11 THAT PARTICULAR CAUSE OF ACTION, THE SECOND CAUSE OF
12 ACTION.

13 THE THIRD CAUSE OF ACTION WE'VE ALREADY TOUCHED
14 ON. THE FOURTH CAUSE OF ACTION, INDEPENDENT PUBLIC AUDITS--
15 IN THE RESPONSE TO OUR MOTION FOR SUMMARY JUDGMENT IN THE
16 MEMORANDUM THAT WAS FILED LAST NIGHT, THERE WAS
17 ABSOLUTELY NO DISCUSSION OF THAT PARTICULAR CAUSE OF
18 ACTION. THERE WAS NO EVIDENCE THAT'S BEEN PRESENTED EVEN
19 BY ATTACHMENT TO THAT MEMORANDUM. THERE'S ABSOLUTELY NO
20 SHOWING TO THIS COURT AND NOTHING IN THIS RECORD THAT
21 SHOWS THAT RICHLAND COUNTY IS NOT COMPLYING WITH THAT
22 PROVISION OF THE ORDINANCE.

23 THAT'S THE SAME WITH THE FIFTH CAUSE OF ACTION,
24 THERE IS NOTHING THAT HAS BEEN PRESENTED TO YOUR HONOR,
25 NOTHING ARGUED IN THE MEMORANDUM. THERE IS NO EVIDENCE

1 FOR THIS COURT TO CONCLUDE THAT THE PLAINTIFF HAS
2 SUSTAINED THEIR BURDEN OF PROVING ANY VIOLATION OF THAT
3 PARTICULAR ORDINANCE BASED UPON THE RECORD THAT IS
4 BEFORE YOUR HONOR.

5 SAME ARGUMENT AS FAR AS THE SIXTH CAUSE OF
6 ACTION, THAT IS DEALING WITH A PROVISION IN THE ORDINANCE
7 REGARDING ORGANIZATIONS OR AGENCIES THAT RECEIVE
8 APPROPRIATIONS, THERE HAS BEEN NO SHOWING WHATSOEVER,
9 YOUR HONOR, BY ANY EVIDENCE THAT'S ADMISSIBLE IN THIS COURT,
10 THAT RICHLAND COUNTY IS NOT CURRENTLY OR HASN'T IN THE PAST
11 COMPLIED WITH THAT PARTICULAR PROVISION.

12 IT WAS THEIR BURDEN OF PROOF, YOUR HONOR, AND
13 THEY SUBMITTED A PARAGRAPH IN MR. DONOVAN'S AFFIDAVIT AND
14 THE AFFIDAVIT DOESN'T SHOW THAT HE HAS THE BACKGROUND
15 KNOWLEDGE OR ABILITY TO TESTIFY ON THAT PARTICULAR AREA.
16 SO ON THE SIXTH CAUSE OF ACTION WE WOULD SUBMIT THAT THEY
17 HAVE NOT CARRIED THEIR BURDEN OF PROOF.

18 AND THEN LASTLY ON THE SEVENTH CAUSE OF ACTION,
19 YOUR HONOR, AGAIN, THAT IS A PROCUREMENT TYPE QUESTION. IT
20 APPEARS THAT THE PLAINTIFFS HAVE PROBABLY ABANDONED THAT,
21 AND IF THEY HAVEN'T, THEY SHOULD. THERE'S NOTHING IN THE
22 OPPOSING MEMORANDUM FILED LAST NIGHT THAT EVEN ADDRESSES
23 IT. THE GIST OF THAT PARTICULAR CAUSE OF ACTION, YOUR HONOR,
24 IS THAT RICHLAND COUNTY HAS VIOLATED SECTION 4-37-25 OF THE
25 TRANSPORTATION ACT.

1 THAT PARTICULAR PROVISION IS ENTITLED
2 TRANSPORTATION AUTHORITY PROCUREMENT METHODS AND
3 REQUIREMENTS. AND IT STARTS BY SAYING, "AN AUTHORITY
4 CREATED PURSUANT TO THIS CHAPTER MUST COMPLY WITH
5 SECTION 11-35-50." THE PROBLEM WITH THAT ISSUE FOR THE
6 PLAINTIFF, AND YOUR HONOR CAN DECIDE THIS AS A MATTER OF
7 LAW, THE COUNTY DID NOT ADOPT THE TRANSPORTATION
8 AUTHORITY.

9 THE STATUTE BY THE GENERAL ASSEMBLY GAVE
10 COUNTIES THE OPTION UNDER HOME RULE AS TO WHETHER TO SET
11 UP A TRANSPORTATION AUTHORITY OR TO HANDLE THESE MATTERS
12 THEMSELVES. IN FACT IF YOU LOOK AT 4-37-10(A) IT SAYS "THE
13 GOVERNING BODY OF A COUNTY MAY BY ORDINANCE ESTABLISH THE
14 TRANSPORTATION AUTHORITY."

15 RICHLAND COUNTY CHOSE NOT TO GO THAT ROUTE.
16 THERE IS NO TRANSPORTATION AUTHORITY. BECAUSE THERE'S NO
17 TRANSPORTATION AUTHORITY, 4-37-25 HAS ABSOLUTELY NO
18 APPLICATION TO RICHLAND COUNTY OR THE RICHLAND COUNTY
19 PENNY TAX PROGRAM. IT SIMPLY IS A NON ISSUE. THAT STATUTE
20 SIMPLY DOESN'T APPLY TO RICHLAND COUNTY.

21 THAT COVERS ALL SEVEN CAUSES OF ACTION, YOUR
22 HONOR. AS INDICATED, I BELIEVE THAT CERTAINLY THE PRIMARY
23 ISSUES ARE MATTERS OF LAW, STATUTORY INTERPRETATION. I'D
24 ASK THAT THE COURT AGAIN LOOK AT WHAT IS AVAILABLE TO
25 DETERMINE LEGISLATIVE INTENT. I BELIEVE THAT THE LEGISLATIVE

1 FINDINGS ARE CLEAR, I BELIEVE THAT THE TITLE TO THE ACT IS
2 CLEAR. THE LEGISLATURE WOULDN'T HAVE USED THE WORD
3 OPERATE IF THEY DIDN'T INTEND FOR OPERATIONAL COSTS TO BE
4 PAID FOR WITH PENNY TAX REVENUES.

5 THE OTHER ISSUES, THE PLAINTIFF HAS THE BURDEN OF
6 PROOF, AND THERE IS NO PROOF BEFORE YOUR HONOR. NO
7 DISCOVERY HAS BEEN DONE IN THIS CASE. AND THE ATTACHMENTS
8 AND AFFIDAVIT SUBMITTED LAST NIGHT SHOULD NOT EVEN BE
9 CONSIDERED. SO ON THOSE BASES WE WOULD ASK THE COURT TO
10 EITHER GRANT OUR MOTION TO DISMISS FOR FAILURE TO
11 PROSECUTE OR IF THE COURT REACHES THE MERITS, TO ADDRESS
12 THE MERITS OF THE CASE AND GRANT SUMMARY JUDGMENT TO
13 RICHLAND COUNTY ON ALL SEVEN CAUSES. THANK YOU.

14 MR. TYSON: GOOD MORNING, YOUR
15 HONOR, ROB TYSON HERE ON BEHALF OF THE COMET CENTRAL
16 MIDLANDS REGIONAL TRANSIT AUTHORITY. I'D JUST START OFF THAT
17 AS IN OUR MOTION FOR SUMMARY JUDGMENT WE REITERATE OUR
18 POSITION AND INCORPORATE IN FULL THE ARGUMENTS MADE BY THE
19 COUNTY.

20 I'D JUST SAY AGAIN, THIS IS A MATTER OF LAW. YOUR
21 HONOR, UNFORTUNATELY THE PLAINTIFF'S DON'T GET TO MOVE
22 FORWARD. MR. CARPENTER IS GOING TO TRY TO TELL YOU WHY HE
23 GETS TO, BUT THERE IS NO EVIDENCE BEFORE YOU THAT ALLOWS
24 YOU TO DO THAT. THE QUESTION OF LAW FOR OUR CLIENT IS SIMPLY
25 CAN WE USE THE PENNY TAX REVENUES FOR THE OPERATION OF

1 THE MASS TRANSIT SYSTEMS. WE BELIEVE THE STATUTE ALLOWS
2 THAT, AND WE'D ASK THIS COURT TO DISMISS THAT CLAIM AGAINST,
3 OR ANY ALLEGATION OR PROHIBITION THAT PLAINTIFFS SEEK FOR
4 THE USE OF THOSE DOLLARS.

5 YOUR HONOR, SPECIFICALLY I'M TALKING ABOUT THE
6 FIRST CAUSE OF ACTION, PARAGRAPHS 15 AND 16. THIS IS THE ONE
7 THAT MR. LINDEMANN SPENT SOME TIME ON, BECAUSE I BELIEVE IT'S
8 THE MOST IMPORTANT – THE BUDGET AND ALL OF THOSE, THE
9 KITCHEN SINK THAT MR. CARPENTER THREW OUT THERE – THIS IS
10 THE REAL RELEVANT MATTER IS HOW CAN THESE REVENUES BE
11 USED.

12 HE SPECIFICALLY STATES IN 15 – OR HE DOESN'T
13 SPECIFICALLY STATE, THAT'S THE PROBLEM, BUT WHAT HE DOES
14 SAY IS THAT THE ORDINANCE PURPORTED TO ADOPT ONE PERCENT
15 OF THE TAX FOR CONTINUED OPERATION OF THE MASS TRANSIT
16 SYSTEMS INCLUDES IMPLEMENTATION OF LONG TERM SERVICE
17 IMPROVEMENTS. THEN HE CITES IN THE NEXT PARAGRAPH, "USING
18 THE PROCEEDS FOR THE CONTINUED OPERATION OF MASS TRANSIT
19 SERVICE DOESN'T COMPORT WITH THE STATUTE, STATED
20 STATUTORY PURPOSE BEING THE ONE PERCENT TAX."

21 SO I'D BRIEFLY ASK US TO GO TO THAT SECTION, 4-37-3.
22 YOU KNOW THIS WELL AND HAVE SEEN THIS. AS I WAS SITTING
23 DOWN TRYING TO MAKE AN ARGUMENT, I THINK THIS SECTION IS
24 INSTRUCTIVE FOR HOW WE SHOULD LOOK AT THIS. IN SECTION A
25 THERE'S NUMBER ONE THAT SAYS SIMPLY "THE GOVERNING BODY

1 OF A COUNTY MAY VOTE TO IMPOSE THE TAX AUTHORIZED BY THIS
2 SECTION SUBJECT TO A REFERENDUM BY AN ACT OR ORDINANCE."
3 AND THEN IT SPECIFICALLY SAYS, "THE ORDINANCE MUST SPECIFY,"
4 THEN GIVES FOUR THINGS; A, B, C, D THAT THE ORDINANCE MUST
5 SPECIFY. (A) SAYS THE ORDINANCE MUST SPECIFY THE PROJECT
6 AND A DESCRIPTION OF THE PROJECT. (B) THE TIME STATED IN
7 CALENDAR YEARS. (C) THE ESTIMATED CAPITAL COST OF THE
8 PROJECT OR PROJECTS. AND THEN (D) THE ANTICIPATED YEAR THE
9 TAX WILL END.

10 SO IN THIS, THE ONLY GUIDANCE THAT WE'VE BEEN
11 GIVEN BY THE GENERAL ASSEMBLY IS WHAT MUST BE IN THE
12 ORDINANCE. IT DOESN'T EVEN GET TO THE POINT OF HOW ANY
13 PROJECT'S GOING TO BE USED, WHAT COSTS SHOULD BE USED,
14 WHETHER OPERATING COSTS ARE DISALLOWED OR NOT, THIS
15 SECTION DOESN'T SAY THAT.
16 SO AS YOU READ THAT, IT SPECIFICALLY SAYS YOU'VE GOT TO DO
17 A,B,C, AND D IN YOUR COUNTY'S ORDINANCE. THE PLAINTIFFS IN THIS
18 CASE HAVEN'T CHALLENGED WHETHER IT MEETS THOSE FOUR
19 REQUIREMENTS.

20 BUT, THE FIRST REQUIREMENT, RULE A SAYS IT
21 REQUIRES A DESCRIPTION OF THOSE PROJECTS, AND THEN GOES
22 ON AND SAYS "WHICH MAY INCLUDE," AND THEN GOES ON AND
23 DEFINES WHICH OF THESE PROJECTS, WHAT ARE THESE PROJECTS.
24 SO IT'S GIVING US THE DEFINITION, IT'S TELLING US WHAT IS
25 ALLOWED. YOU READ IT, SAYS, HIGHWAYS, ROADS, STREETS,

1 BRIDGES, MASS TRANSIT SYSTEMS. I DON'T UNDERSTAND THERE'S
2 ANY WAY THAT THE PLAINTIFF'S CAN MAKE AN ARGUMENT THAT
3 MASS TRANSIT SYSTEMS ARE NOT DEFINED AS A TRANSPORTATION
4 PROJECT PURSUANT TO THIS STATUTE. IT IS RIGHT THERE IN THE
5 STATUTE.

6 THEN IT GOES ON FURTHER TO SAY "AND OTHER
7 TRANSPORTATION RELATED PROJECT FACILITIES." BY THE USE OF
8 THE WORDS "AND OTHER TRANSPORTATION RELATED PROJECTS,"
9 CLEARLY IT'S SAYING THAT THE ONES THAT I'VE JUST LISTED ARE
10 TRANSPORTATION RELATED PROJECTS. SO, YOUR HONOR, WE
11 BELIEVE THAT THE STATUTE IS QUITE CLEAR ON WHAT IS ALLOWED.

12 THE COURT: HOW ABOUT THE ORDINANCE?

13 MR. TYSON: WHEN YOU FIND IT, WHAT DOES
14 IT SAY; THAT A LIST OF SPECIFIC PROJECTS – THIS IS PROJECT
15 NUMBER TWO. IN THE ORDINANCE, AS YOU WORK YOUR WAY
16 THROUGH IT, IT GIVES THE SPECIFIC LANGUAGE THAT'S GOING TO BE
17 INCLUDED IN THE REFERENDUM. AND IT SAYS PURSUANT TO THAT
18 STATUTE, LIST THE PROJECT. THEN IT SAYS, "PROJECT NUMBER
19 TWO; CONTINUED OPERATION OF MASS TRANSIT SERVICES
20 PROVIDED BY THE CENTRAL MIDLANDS REGIONAL TRANSIT
21 AUTHORITY, INCLUDING IMPROVEMENTS, IMPLEMENTATION OF LONG
22 TERM SERVICE IMPROVEMENT," AND THEN SPELLS OUT THE AMOUNT
23 OF THAT. WE BELIEVE THAT MEETS THE STATUTORY SECTION THAT I
24 JUST READ. IT SAYS WHAT THE PROJECT IS, CONTINUED OPERATION
25 OF THE MASS TRANSPORTATION SERVICES INCLUDING

1 IMPLEMENTATION OF THE SERVICE IMPROVEMENTS.

2 IF THE PLAINTIFFS ARE GOING TO COMPLAIN ABOUT
3 THAT AND SAY THAT THAT EXCEEDS THE SCOPE OF THE STATUTE,
4 CLEARLY THEY'VE GOT A BURDEN TO PUT SOME EVIDENCE BEFORE
5 YOU SO THAT YOU CAN GET TO THAT. AS MR. LINDEMANN SPENT A
6 LONG TIME EXPLAINING, THEY'VE DONE NOTHING.

7 SO YOU'RE IN A DIFFICULT POSITION BECAUSE THERE IS
8 NO EVIDENCE BEFORE YOU TO RULE THAT THERE ARE ANY GENUINE
9 ISSUES OF MATERIAL FACT. IT WOULD BE DIFFERENT IF THERE WAS,
10 BUT THERE'S NOT IN THIS CASE. AND SO WE BELIEVE THE DIFFICULT
11 PART IS THE PLAINTIFFS WANT TO INTERPRET THAT STATUTE AS
12 WHAT THEY WANT IT TO SAY VERSUS WHAT IT ACTUALLY SAYS.

13 YOUR HONOR, THAT ORDINANCE THAT YOU HAVE THERE,
14 IF YOU GO BACK IT'S CONSISTENT WITH THE LAW THAT WE JUST
15 READ, "WHICH MAY INCLUDE MASS TRANSIT SYSTEMS." THE
16 REFERENDUM LANGUAGE IS SPELLED OUT THAT SAYS THAT.

17 YOUR HONOR, A REFERENDUM IS TREATED JUST LIKE A
18 STATUTE. IT IS PRESUMED VALID AND CONSTITUTIONAL UNTIL
19 THERE IS A CHALLENGE MADE BEHIND IT, AND THE ONLY WAY YOU
20 GET TO LOOK BEHIND IT IS IF IT'S AMBIGUOUS. AND WE WOULD
21 ARGUE THAT THAT IS NOT AMBIGUOUS AS TO CONTINUED
22 OPERATION OF MASS TRANSIT SERVICE AS TO WHETHER IT'S
23 CONSISTENT WITH THE STATUTE.

24 BUT IF YOU DO LOOK BEHIND IT, AND IF YOU DO BELIEVE
25 IT'S AMBIGUOUS, THEN AS MR. LINDEMANN SPELLED OUT, THERE'S

1 LEGISLATIVE FINDINGS TO SHOW EXACTLY WHAT THEY WERE
2 INTENDING. MR. CARPENTER, AGAIN. IN HIS BRIEF THAT WE
3 RECEIVED LAST NIGHT, SAYS THAT REFERENDUM LANGUAGE ISN'T IN
4 THE STATUTE. WE'VE GONE THROUGH THAT. MR. CARPENTER'S
5 STATEMENT IN HIS BRIEF, I THINK ON PAGE SIX, THE MIDDLE
6 PARAGRAPH SAYS, "THIS TAX WAS AUTHORIZED FOR CAPITAL
7 PROJECTS FACILITIES."

8 SO, YOUR HONOR, I PULLED THAT WHOLE CHAPTER UP
9 AND EARLIER THIS MORNING I WENT THROUGH 4-37-10, AND THE
10 WORD CAPITAL IS NOT USED IN THERE EXCEPT FOR ONE TIME. AND
11 IT WAS IN WHERE IT SAYS WHAT THE ORDINANCE MUST CONTAIN. IT
12 SAYS, "IT MUST CONTAIN THE ESTIMATED CAPITAL COST OF THE
13 PROJECT OR PROJECTS." SO WHEN MR. CARPENTER SAYS THAT THE
14 TAX WAS AUTHORIZED FOR CAPITAL PROJECTS FACILITIES, I THINK
15 THAT'S A LITTLE DISINGENUOUS.

16 THE STATUTE IS JUST SAYING THAT YOU'VE GOT TO
17 SPELL IT OUT. CLEARLY IT DOESN'T GO TO WHETHER A PROJECT CAN
18 USE THESE PENNY TAX REVENUES FOR CAPITAL COSTS. THE
19 STATUTE DOESN'T SAY THAT, THERE'S NO OTHER USE OF THAT
20 WORD. MR. CARPENTER ALSO WILL SAY EXCEPT FOR IN THAT
21 LEGISLATIVE FINDING, THERE'S NOTHING THAT SAYS THAT IT
22 AUTHORIZED IT FOR THE OPERATION OF ADMINISTRATIVE COSTS,
23 EITHER.

24 BUT, YOUR HONOR, HE HAS THE BURDEN TO SHOW THAT
25 THOSE FUNDS CAN'T BE USED THAT WAY. AND, AGAIN, I BELIEVE

1 WHEN HIS ARGUMENT IS MADE THAT IT SOLELY IS RELATED FOR THE
2 CAPITAL TAX FACILITIES, THAT'S NOT SUPPORTED BY THE
3 STATUTORY LANGUAGE. AND HE'S GOT NO EVIDENCE TO
4 DEMONSTRATE THAT IT IS. IN FACT, YOUR HONOR, IT'S NOT EVEN A
5 LOGICAL ARGUMENT THAT IT IS USED IN THE STATUTE AS A
6 REQUIREMENT FOR WHAT THE ORDINANCE MUST HAVE IN IT. BUT TO
7 THEN EXTRAPOLATE INTO THAT THAT THAT TELLS YOU HOW IT CAN
8 OR CAN'T BE USED, THAT DOESN'T SEEM TO MAKE SENSE TO US.

9 YOUR HONOR, THE OTHER CAUSES OF ACTION THAT ARE
10 IN THE COMPLAINT - LIKE I SAID THE KITCHEN SINK; PROCUREMENT,
11 BUDGET, ALL OF THOSE THINGS, I DON'T BELIEVE THEY APPLY TO
12 THE COMET. AND IN THE THIRD CAUSE OF ACTION, IT'S KIND OF
13 HARD TO TELL WHAT HE'S ARGUING ABOUT, AS MR. LINDEMANN SAID,
14 BASED ON WHAT'S IN THE COMPLAINT, WE'D MAKE THE SAME
15 ARGUMENT. THANK YOU, YOUR HONOR.

16 MR. CARPENTER: THANK YOU, YOUR
17 HONOR. WHAT OCCURS TO ME IN LISTENING TO OPPOSING COUNSEL
18 ARGUE IS THEY'RE ACTING LIKE IT'S MY MOTION, TALKING ABOUT MY
19 BURDEN OF PROOF AND MY BURDEN TO DO THIS, THAT, AND THE
20 OTHER.

21 THE MOTIONS ARE THEIRS, AND THEY DIDN'T FILE A
22 MEMORANDUM UNTIL THIS MORNING. CMRTA DIDN'T FILE ONE AT ALL,
23 AND THE COUNTY FILED ONE THIS MORNING. ACCORDINGLY WHEN I
24 FILED MY MOTION AND MEMO LAST NIGHT, I HAD TO TAKE AN
25 EDUCATED GUESS AS TO WHAT THEY WERE GOING TO BE ARGUING.

1 THEY BOTH FILED MOTIONS WITHOUT MEMORANDUM. AND THEY
2 KEEP TALKING ABOUT MY BURDEN THIS, MY BURDEN THAT, BUT IT'S
3 THEIR MOTION.

4 THEY KEEP TALKING ABOUT THIS BEING A LEGAL ISSUE.
5 THE SECOND THING THAT OCCURS TO ME IS THEY KEEP TALKING
6 ABOUT HIS BEING AN ISSUE OF LAW. BUT WHAT THEY DIDN'T SAY IS
7 WHAT I REFER TO AS THE ELEPHANT IN THE ROOM. THAT ISSUE OF
8 LAW, THE BEST I UNDERSTAND IT, HAS BEEN ARGUED BEFORE THE
9 SOUTH CAROLINA SUPREME COURT FOUR MONTHS AGO IN THE
10 DEPARTMENT OF REVENUE CASE. AND WE'RE ALL SITTING HERE
11 WAITING FOR THE SUPREME COURT TO COME DOWN WITH SOME
12 KIND OF DECISION ON ANY NUMBER OF THE ISSUES THAT ARE BOTH
13 IN THE REVENUE CASE AND IN OUR CASE, ONE OF THEM BEING, AS
14 THEY MENTIONED, DOES THE ENABLING STATUTE AUTHORIZE THE
15 EXPENDITURE OF PENNY TAX MONIES FOR THE CONTINUED
16 OPERATION OF THE BUS SYSTEM. WE CONTEND IT DOES NOT.

17 FUNDAMENTALLY IF YOU LOOK AT THE STATUTE 4-37-30,
18 CHAPTER 37 IS CALLED OPTIONAL METHODS FOR FINANCING
19 TRANSPORTATION FACILITIES. THIS WHOLE STATUTE IS ABOUT
20 FACILITIES, AND IT TALKS ABOUT PROJECT OR PROJECTS.
21 OPPOSING COUNSEL LIKES TO READ PARAGRAPH A1, A-1, WHERE IT
22 SPECIFICALLY MENTIONS MASS TRANSIT SYSTEMS. BUT THEY LEAVE
23 OFF A VERY CRITICAL WORD AT THE END OF THAT CLAUSE.
24 HIGHWAYS, ROADS, STREETS, BRIDGES, MASS TRANSIT SYSTEMS,
25 BELTWAYS, AND OTHER TRANSPORTATION RELATED PROJECTS.

1 THAT'S WHERE THEY STOP, BUT THAT'S NOT WHERE THE SENTENCE
2 STOPS.

3 IT SAYS, "TRANSPORTATION RELATED PROJECTS
4 FACILITIES." THIS STATUTE IS ALL ABOUT FACILITIES. AND
5 OPERATING THE BUS SYSTEM AND GIVING THEM THREE AND A HALF
6 MILLION DOLLARS EVERY QUARTER TO RUN THE BUS SYSTEM IS NOT
7 ABOUT FACILITIES, IT'S VERY CLEARLY ABOUT THE OPERATIONS.
8 AND THAT ORDINANCE FROM THE BEGINNING WAS IN VIOLATION OF
9 THE AUTHORIZING PACT. THAT'S ONE OF THE ISSUES THAT I THINK IS
10 GOING TO BE DECIDED BY THE SUPREME COURT.

11 NOW THE OTHER SIDE ARGUED IN THEIR BRIEF TO THE
12 SUPREME COURT ARGUED THAT YOUR HONOR MADE A RULING ON
13 THAT POINT. I READ THE PARAGRAPH, AND ONLY YOU KNOW FOR
14 SURE WHAT YOU MEANT. I HAVE MY DOUBTS ABOUT THEIR
15 INTERPRETATION OF WHAT YOUR HONOR MEANT IN THAT
16 PARAGRAPH.

17 THE DEPARTMENT OF REVENUE SPENT MANY PAGES OF
18 THEIR APPELLATE BRIEF ARGUING ABOUT WHETHER THE OPERATION
19 OF THE BUS SYSTEM IS ONE OF THE AUTHORIZED USES OF THE
20 PENNY TAX FUNDS. THEY SPENT A LOT OF TIME TALKING ABOUT THE
21 WORDING OF THE STATUTE, AND GRANTED WE HAVE BORROWED A
22 LOT OF THEIR IDEAS, IMITATION IS THE SINCEREST FORM OF
23 FLATTERY, I THINK THEY MADE A GOOD ARGUMENT. WHEN THIS
24 STATUTE IS TALKING ABOUT OPERATIONS, IT 'S TALKING ABOUT
25 OPERATIONS OF TOLL ROADS AND TOLL BRIDGES AND TURNPIKES.

1 AND THOSE KIND OF OPERATION JOINTLY OPERATED WITH A COUNTY
2 OR JOINTLY OPERATED WITH THE DOT, THAT'S WHERE THE FOCUS
3 OF OPERATIONS IS IN THE STATUTE. IT IS NOT IN PAYING OPERATING
4 COSTS OF THE BUS SYSTEM. SO THE STATUTE DOESN'T AUTHORIZE
5 THAT PARTICULAR EXPENDITURE EVEN THOUGH IT IS IN THE
6 ORDINANCE. THE ORDINANCE IS CONTRARY TO THE STATUTE, AND
7 OF COURSE THE STATUTE CONTROLS---

8 THE COURT: THE STATUTE DOES SAY
9 PROCEEDS FROM THE TAX ARE TO BE USED...."PROJECTS WHICH
10 MAY INCLUDE HIGHWAYS, ROADS, STREETS, BRIDGES, MASS
11 TRANSIT SYSTEM." READING FROM THE STATUTE.

12 MR. CARPENTER: MY RECOLLECTION WAS
13 THAT PART DIDN'T MAKE IT INTO THE STATUTE. BUT THE WORDING
14 OF THE STATUE IS THIS IS ALL RELATED TO FACILITIES. THEY DIDN'T
15 USE THE PENNY TAX TO PROVIDE FACILITIES FOR MASS TRANSIT
16 SYSTEMS, THEY CAN FOR ROADS, STREETS, BRIDGES, AND SO ON,
17 BUT NOT THE OUTGOING OPERATIONS. THAT'S NOT THE PURPOSE
18 OF THE PENNY TAX STATUTE. BUT THIS ISSUE IS BEFORE THE
19 SUPREME COURT
20 AND WE'VE SUGGESTED TO THIS COURT THAT IT WOULD BE
21 PRUDENT, AND A GOOD USE OF JUDICIAL RESOURCES TO WAIT AND
22 SEE WHAT THE SUPREME COURT SAYS BEFORE DUPLICATION OR
23 CONFLICTING.
24 THAT WOULD BE THE WAY IT IS IN A LOT OF THESE THINGS. I THINK A
25 LOT OF THESE ISSUES ARE IN THE SUPREME COURT.

1 THE BIG ISSUE THERE IS THE STANDING THERE OF THE
2 DOR TO BRING THE ACTION.
3 SO IT'S A RISKY BUSINESS TO GUESS WHAT THE SUPREME COURT'S
4 GOING TO DO, BUT I HAVE TO BELIEVE THAT THEY'RE GOING TO SAY
5 THAT THE DOR AND THE DIRECTOR HAVE AUTHORITY TO BRING THE
6 CAUSE OF ACTIONS. IN THAT CASE THIS CASE WOULD BE PROPERLY
7 REMANDED TO THIS COURT, AND THE ISSUES ARE HEAVILY
8 OVERLAPPED. THE PARTIES ARE LARGELY THE SAME. AND IT WOULD
9 MAKE SENSE, I SUGGEST, TO HAVE THIS CASE TEMPORARILY ON
10 HOLD UNTIL THE RULING OF THE SUPREME COURT COMES DOWN,
11 AND IF REMANDED THEN PERHAPS CONSOLIDATE THE TWO CASES
12 TOGETHER AND THAT THE ISSUES COULD BE TRIED IN ONE HEARING
13 INSTEAD OF TWO HEARINGS FOR PURPOSES OF JUDICIAL
14 EFFICIENCY.

15 NOW GETTING BACK TO THE OTHER ARGUMENTS THAT
16 WERE RAISED BY THE OTHER SIDE, I THINK AS A PRACTICAL MATTER
17 BOTH SIDES HAVE BEEN WAITING FOR THE SUPREME COURT TO DO
18 SOMETHING IN THE OTHER CASE. THE OPPOSING SIDE SAYS WE
19 DIDN'T ISSUE ANY DISCOVERY. WHAT THEY FAILED TO SAY IS THEY
20 DIDN'T ISSUE ANY DISCOVERY EITHER. IF THEY'D WANTED TO KNOW
21 WHO OUR EXPERT WITNESSES WERE THEY COULD HAVE ASKED US.

22 WE DID GET DOCUMENTS FROM THEM THROUGH THE
23 FOIA, THAT WAS ENFORCED, THE PRODUCTION OF THE PUBLIC
24 RECORDS AND THE AWARDING OF OUR ATTORNEY'S FEES. BOTH
25 SIDES ARGUED THE ISSUES IN THE MOTION TO DISMISS. BUT THERE

1 WAS NO MEMORANDUM FROM THEIR SIDE AT ALL UNTIL THIS
2 MORNING. I TRIED TO READ IT AS QUICKLY AS I COULD, BUT THE
3 MOTION HAS BEEN THEIRS. I THINK THEY FAILED TO SUSTAIN THEIR
4 BURDEN ON THE MOTION FOR SUMMARY JUDGMENT TO ESTABLISH
5 AS A MATTER OF LAW TO THIS COURT THAT THERE IS NO GENUINE
6 ISSUE OF MATERIAL FACT. I THINK THEY'VE FAILED TO DO THAT, AND
7 THE PRUDENT COURSE OF ACTION WOULD BE AT LEAST WAIT UNTIL
8 THE SUPREME COURT RULES.

9 NOW AS TO THE SPECIFIC CAUSES OF ACTION, WE'VE
10 TALKED ABOUT THE OPERATION OF THE CMRTA. WE HAVE PUT THIS
11 IN OUR MEMORANDUM THIS MORNING THAT THE PEDESTRIAN
12 SIDEWALKS, BIKE PATHS, AND SO ON, WE HAVE ARGUED THAT THOSE
13 ARE NOT TRANSPORTATION FACILITIES IN THE COMMONLY
14 UNDERSTOOD SENSE OF THE WORD.

15 THEY SITED A COUPLE OF CASES IN THEIR MOTION THAT
16 HAVE TO DO WITH SLIP AND FALLS ON SIDEWALKS, WHICH REALLY I
17 DON'T THINK ADDRESSES THE ISSUE AT ALL ONE WAY OR THE
18 OTHER. THIS MORNING THEY SAY THEY SAY SITED THE BOWMAN*
19 VERSUS THE CITY OF GREENVILLE CASE, I DIDN'T READ THAT CASE, I
20 DID READ THE OTHER TWO AND THOSE ARE JUST SLIP AND FALL
21 CASES.

22 THE TRAINING PROGRAMS, THE MENTOR/MENTEE
23 PROGRAMS, WE'VE ADDRESSED THAT IN OUR MEMORANDUM OF
24 LAW. PUBLIC RELATION CONTRACTS, WE'VE ADDRESSED THAT AS TO
25 WHETHER THAT CAN BE IN THE DEFINITION OF TRANSPORTATION

1 FACILITY. I DON'T THINK IT CAN. FACILITIES ARE NOT PUBLIC
2 RELATIONS CONTRACTS. THIS WHOLE STATUTE IS ABOUT
3 FACILITIES.

4 ESTABLISHING THE SLEB PROGRAM. THEY'VE ADMITTED
5 CORRESPONDENCE TO THE DOR THAT THIS APPLIES BROADLY, NOT
6 JUST THE PENNY TAX, BUT THEY HAVE STATED THAT THEY'RE A
7 CANDIDATE -- THIS IS GOING TO BE A BROAD BASED PROGRAM,
8 THERE AGAIN THIS IS NOT RELATED TO TRANSPORTATION FACILITIES
9 AND NOT AUTHORIZED BY THE STATUTE.

10 WE HAVE ARGUED THAT THEY HAVE ADOPTED
11 PROCUREMENT PROCESSES THAT VIOLATE THE STATE STATUTE
12 THAT REQUIRES MUNICIPALITIES ADOPT PROCEDURES AND POLICIES
13 EMBODY SOUND PRINCIPALS APPROPRIATE TO PROCUREMENT. IN
14 THIS CASE THE PROCESSES THEY HAVE ADOPTED DO NOT ALLOW
15 FOR ANY PROTESTS OR PROCEDURES THAT DON'T ALLOW ANY KIND
16 OF REVIEW BY AN INDEPENDENT REVIEW BODY, THEY'VE ADOPTED
17 PROCESSES THAT ALLOW LITTLE OVERSIGHT BY ANYBODY, AND
18 THOSE I THINK ARE DEFECTS THAT DO NOT EMBODY SOUND
19 PRINCIPLES OF APPROPRIATELY COMPETITIVE PROCUREMENT.
20 BECAUSE THERE'S NO PARTICULAR COMPETITION IN THESE
21 PROCESSES.

22 OPPOSING COUNSEL SUGGESTED THAT WE HAVE FAILED
23 TO ADDRESS THE FOURTH CAUSE OF ACTION, INDEPENDENT PUBLIC
24 AUDITS, BUT IF LOOK AT PAGE 17 OF OUR MEMORANDUM, WE DO
25 ADDRESS THAT. THERE ARE TWO KINDS OF AUDIT, ONE IS THE AUDIT

1 OF THE PENNY TAX PROGRAM. THEY HAVE CONTENDED OTHER
2 PLACES THAT OH, THAT'S PART OF OUR CAFR, WE THROW THAT IN
3 WITH THE REST OF OUR AUDITS. THE PROGRAM CONTEMPLATES AN
4 INDEPENDENT AUDIT SPECIFICALLY RELATED TO THE PENNY TAX.
5 THAT HAS NOT BEEN FORTHCOMING INASMUCH AS WE CAN.

6 IN ADDITION THERE ARE REQUIRED AUDITS OF
7 ORGANIZATIONS THAT RECEIVE PENNY TAX FUNDS. THE DONOVAN
8 AFFIDAVIT SAYS THEY HAVEN'T DONE THAT. AND IN RESPONSE TO
9 MY FOIA REQUEST I SPECIFICALLY ASKED FOR THOSE, AND THEY
10 SAID WE DON'T HAVE ANY AUDITS OF PEOPLE WHO HAVE RECEIVED
11 APPROPRIATIONS FROM THE PENNY TAX FUNDS. SO THERE AGAIN
12 WE HAVE ADDRESSED BOTH THE FOURTH CAUSE OF ACTION AND
13 THE SIXTH CAUSE OF ACTION.

14 THE SEVENTH CAUSE OF ACTION ABOUT THE
15 TRANSPORTATION AUTHORITY, I PRETTY MUCH HAVE TO CONCEDE
16 TO MR. LINDEMANN ON THAT ONE. FOR WHATEVER REASON
17 RICHLAND COUNTY DID NOT ADOPT THE AUTHORITY UNLESS YOU
18 CONSIDER THE COUNTY COUNSEL TO HAVE BEEN THE DE FACTO
19 AUTHORITY. I THINK THAT WAS PART OF OUR THEORY WHEN WE
20 ALLEGED THAT CAUSE OF ACTION. BUT THERE IS NO INDEPENDENT
21 TRANSPORTATION AUTHORITY IN RICHLAND COUNTY, SO I PRETTY
22 MUCH HAVE TO CONCEDE ON THE SEVENTH CAUSE OF ACTION.

23 BUT THE OTHERS, I THINK, ARE ESTABLISHED BY THE
24 EVIDENCE WE'VE PRESENTED, BY THE ARGUMENTS IN OUR
25 MEMORANDUM. AND THE POINT IS, THE DEFENDANTS HAVE FAILED

1 IN THEIR BURDEN TO SHOW THERE'S NO GENUINE ISSUE OF
2 MATERIAL FACT AND THEY'RE ENTITLED TO JUDGMENT AS A MATTER
3 OF LAW. THAT'S THEIR BURDEN. AND THEY DIDN'T EVEN FILE A
4 MEMORANDUM UNTIL THIS MORNING. SO I THINK THEIR MOTION
5 SHOULD BE DENIED ON THAT BASIS, AN ON THE BASIS THAT IT
6 WOULD BE MORE PRUDENT FOR ALL OF US TO WAIT FOR THE SOUTH
7 CAROLINA SUPREME COURT RULES ON ANY OF THESE SAME ISSUES
8 WHICH ARE PENDING IN OUR CASE, AND WE DON'T HAVE THE
9 DUPLICATION AND POSSIBLY CONFLICT OF INITIAL RULINGS, AND WE
10 CAN ALL BENEFIT FROM THE WISDOM OF THE SUPREME COURT. SO
11 WE REQUEST THAT THE MOTION BE DENIED.

12 THE COURT: THANK YOU. ANY RESPONSE?

13 MR. LINDEMANN: TAKING THE POINTS IN THE
14 ORDER OF MR. CARPENTER; FIRST OF ALL, IT'S CRITICAL IF THE
15 COUNTY FOR IF AS HE SAYS NOT SUBMITTED ANY MEMORANDUM
16 PRIOR TO THIS MORNING, OF COURSE I HAD THE MEMORANDUM ON
17 TUESDAY WHEN THE HEARING WAS TO BE SCHEDULED, AND I
18 APOLOGIZE THAT I DIDN'T GET IT — WHEN HE DIDN'T SHOW UP FOR
19 THAT PARTICULAR HEARING.

20 THE POINT I WANT TO MAKE, YOUR HONOR, IS MY
21 MOTION IS SIX PAGES LONG. THE FIRST OF IT DEALING WITH THE
22 MOTION TO DISMISS, A FULL PAGE. THEN THE GROUND DEALING
23 WITH THE FIRST CAUSE OF ACTION AND THE LEGAL ISSUES WE'VE
24 BEEN TALKING ABOUT, IT'S A PAGE AND A HALF CITING
25 CONSIDERABLE CASE LAW VERY SIMILAR. IN FACT THE

1 MEMORANDUM BARELY EXPOUNDS ON WHAT'S ACTUALLY IN THE
2 MOTION.

3 THEN AS FAR AS THE OTHER CAUSES OF ACTION GO, I
4 MADE IT VERY CLEAR THAT OUR POSITION WAS THAT THE PLAINTIFF
5 HAS THE BURDEN OF PROOF IN THIS CASE. WE DON'T HAVE THE
6 BURDEN OF PROOF JUST BECAUSE WE'RE THE MOVING PARTY, HE
7 HAS THE BURDEN OF PROOF. HE HAS TO SUSTAINED HIS BURDEN OF
8 PROOF IN THIS PARTICULAR CASE. MR. CARPENTER IS NOT ASKING
9 THIS COURT TO CORRECTLY APPLY THE STANDARD FOR SUMMARY
10 JUDGMENT, WHICH WAS ADOPTED FROM THE SOLOTECH* STANDARD
11 FROM THE UNITED STATES SUPREME COURT.

12 AND IF I COULD READ FROM IT, THERE ARE TWO WAYS
13 THAT A MOVING PARTY FOR SUMMARY JUDGMENT CAN OBTAIN
14 SUMMARY JUDGMENT; NUMBER ONE, THEY CAN NEGATE, PRESENT
15 EVIDENCE TO THE COURT TO NEGATE AN ESSENTIAL ELEMENT OF
16 THE PLAINTIFF'S CASE, OR THEY CAN POINT OUT TO THE COURT
17 THAT THERE ISN'T EVIDENCE IN THE RECORD TO SUPPORT THE
18 PLAINTIFF'S CLAIMS, AND HOLD THE PLAINTIFF TO THEIR BURDEN OF
19 PRODUCTION AND THEIR BURDEN OF PERSUASION ON THESE
20 CAUSES OF ACTION THAT THEY HAVE PLED.

21 SO IF I COULD QUICKLY READ A COUPLE OF QUOTES TO
22 MAKE MY POINT, IT SAYS, "WITH RESPECT TO THE ISSUE UPON
23 WHICH THE NON MOVING PARTY BEARS THE BURDEN OF PROOF, HE
24 BEARS THE BURDEN OF PROOF ON HIS ENTIRE CASE." WE HAVE NOT
25 RAISED ANY AFFIRMATIVE DEFENSES BEING ARGUED HERE TODAY.

1 LEGAL STANDING, THE STATUTE OF LIMITATIONS, THESE ARE NOT
2 BEING ASSERTED, YOUR HONOR TODAY. "SO WITH RESPECT TO ANY
3 ISSUE UPON WHICH THE NON MOVING PARTY BEARS THE BURDEN OF
4 PROOF,

5 THIS INITIAL RESPONSIBILITY MAY BE DISCHARGED BY SHOWING,
6 THAT IS POINTING OUT TO THE TRIAL COURT THAT THERE IS
7 ABSENCE OF EVIDENCE TO SUPPORT THE NON MOVING PARTIES
8 CASE."

9 IF YOU LOOK AT WAY I PLED MY MOTION, I MADE THAT
10 VERY CLEAR WITH THOSE CAUSES OF ACTION THAT ARE NOT
11 PURELY LEGAL QUESTIONS. BUT THEY HAVE NOT SUPPORTED WITH
12 EVIDENCE THEIR CASE. IT GOES ON TO SAY, THIS IS A QUOTE FROM
13 OUR SUPREME COURT, "THE MOVING PARTY NEED NOT SUPPORT ITS
14 MOTION WITH AFFIDAVITS OR OTHER SIMILAR MATERIALS NEGATING
15 THE OPPONENT'S CLAIM." THE BURDEN IS NOT ON US TO PRESENT
16 ANY EVIDENCE WHEN WE MOVE FOR SUMMARY JUDGMENT.

17 IT GOES ON TO SAY "ONCE THE MOVING PARTY CARRIES
18 ITS INITIAL BURDEN" – I SUBMIT THAT WE HAVE – THERE IS NO
19 EVIDENCE BEFORE YOUR HONOR, AND THERE CERTAINLY WASN'T
20 ANY EVIDENCE UNTIL THAT AFFIDAVIT FROM THE DOR CASE WAS
21 SUBMITTED LAST NIGHT. IT GOES ON TO SAY THAT "OPPOSING
22 PARTY UNDER RULE 56-D MUST DO MORE THAN SIMPLY SHOW THAT
23 THERE IS SOME METAPHYSICAL DOUBT AS TO THE MATERIAL FACTS,
24 BUT MUST COME FORWARD WITH SPECIFIC FACTS SHOWING THAT
25 THERE IS A GENUINE ISSUE FOR TRIAL." IT'S THEIR BURDEN TO

1 SHOW THAT THERE IS A GENUINE ISSUE FOR TRIAL. THEY HAVEN'T
2 DONE IT.

3 IT GOES ON TO SAY "RULE 56 E SPECIFICALLY PROHIBITS
4 THE NON MOVING PARTY FROM RESTING UPON THE MERE
5 ALLEGATIONS OR DENIALS IN THE PLEADINGS. THAT'S WHAT THEY'VE
6 DONE, THAT'S WHAT THIS CASE IS ABOUT. WE ARE TOTALLY IN
7 ACCORD WITH RULE 56. AND TO SUGGEST THAT WE HAVE A
8 RESPONSIBILITY TO DO DISCOVERY IN A CASE WHERE THE PLAINTIFF
9 HAS SUED US AND CHOOSES NOT TO PROSECUTE THEIR CASE, FIRST
10 OF ALL, THAT'S NOT HOW I OPERATE. I'VE GOT PLENTY OF FILES TO
11 WORK, I DON'T DO DISCOVERY UNLESS THE PLAINTIFF IS PURSUING A
12 CASE. I WAIT, I WAIT UNTIL THE SUMMARY JUDGMENT DEADLINE AND
13 THEN MOVE FOR SUMMARY JUDGMENT, WHAT I'VE DONE IN THIS
14 CASE.

15 PARTICULARLY, AS IS OUR PRACTICE -- WE REPRESENT A
16 LOT OF GOVERNMENTAL ENTITIES, TAX PAYERS ARE PAYING FOR
17 THIS LITIGATION. WE'RE NOT GOING TO UNNECESSARILY USE TAX
18 PAYERS FUNDS TO CHIN UP LITIGATIONS WHEN THE PLAINTIFF
19 SHOWS ABSOLUTELY NO INTEREST IN PURSUING IT. SO TO SUGGEST
20 THAT WE DIDN'T DO DISCOVERY SOMEHOW PREVENTS US FROM
21 GETTING SUMMARY JUDGMENT WHEN THEY CAN'T MEET THEIR
22 BURDEN OF PROOF, THAT IS ABSURD.

23 NEXT, YOUR HONOR, LOOKING AT 4-37-30, MR. TYSON
24 MADE A POINT THAT I THINK IS WORTH ELABORATING ON. YOU LOOK
25 AT SECTION A-1-A, THE GENERAL ASSEMBLY USES THE WORD MAY

1 INCLUDE, AND FOR SOME REASON THAT DIDN'T STRIKE ME UNTIL HE
2 SAID THAT. IT SAYS MAY INCLUDE. SO IT'S NOT EVEN AN EXHAUSTIVE
3 LIST; HIGHWAYS, ROADS, STREETS, STREETS, MASS TRANSIT
4 SYSTEMS, GREEN BELTS, IT'S NOT EVEN AN EXHAUSTIVE LIST THAT
5 THE GENERAL ASSEMBLY HAS PROVIDED. BUT IT'S SIMPLY – AND MR.
6 TYSON MADE AN EXCELLENT POINT – SIMPLY SAYS, WHAT'S
7 REQUIRED TO BE IN THAT ORDINANCE, OR WHAT'S REQUIRED TO BE
8 IN THAT REFERENDUM SO TAX PAYERS KNOW WHAT THEY ARE
9 VOTING ON.

10 AND THERE'S NO QUESTION THAT IS SPELLED OUT IN OUR
11 ORDINANCE.

12 ONE OTHER POINT WITH THAT PARTICULAR STATUTE; HE
13 FOCUSES ON THIS LANGUAGE, OTHER TRANSPORTATION RELATED
14 TO PROJECTS FACILITY. WELL FROM THE FIRST DAY I READ THAT I
15 REALIZED THE WORD OR WAS MISSING. *WELLS* VERSUS THE CITY*
16 *OF LYNCHBURG*, THE GENERAL ASSEMBLY LEFT THE WORD OUT
17 FROM THE TORT CLAIMS ACT AND THE SUPREME COURT GOT IT. BUT
18 THAT'S CLEAR THAT OTHER TRANSPORTATION RELATED PROJECTS
19 FACILITIES WAS INTENDED TO MEAN PROJECTS OR FACILITIES.

20 AND QUITE FRANKLY, THIS IS A GAME OF SEMANTICS.
21 WHAT IS INCLUDED IN THE REFERENDUM IS CLEARLY PROJECT, IT'S
22 CLEARLY FACILITIES. AND IT SHOULD HAVE INCLUDE OPERATION AND
23 COSTS, AND ADMINISTRATIVE COSTS.

24 AS FAR AS THE SUPREME COURT, I WANT TO SAY THIS;
25 THE PRIMARY ISSUE BEFORE THE SUPREME COURT ON THE

1 COUNTY'S APPEAL IS WHETHER OR NOT DOR HAD STANDING TO
2 EXERCISE OVERSIGHT OF THIS. YES, THE ISSUE DEALING WITH THE
3 INTERPRETATION OF 4-37-30 AND WHETHER IT APPLIES TO
4 ADMINISTRATIVE COSTS, THAT HAS BEEN BRIEFED AND ARGUED TO
5 THE SUPREME COURT. I DON'T HAVE A LOT OF CONFIDENCE THAT
6 THE SUPREME COURT IS GOING TO REACH THAT ISSUE. IT WOULD
7 BE GREAT IF THEY DO, I WISH THEY WOULD.

8 BUT THE BOTTOM LINE IS WE CAN'T WAIT TO HEAR THAT.
9 I'VE EXPRESSED IN A PREVIOUS HEARING ABOUT THE BONDING
10 ISSUES IN THE COUNTY, AND YOUR HONOR, BASICALLY THE SUNSET
11 THING – AND I'M NOT A BOND LAWYER, THANK GOD THE COUNTY HAS
12 VERY VERY CAPABLE BOND LAWYERS REPRESENTING THEM, BUT
13 THE SUNSET DAY IS THIS COMING MARCH BECAUSE IT'S THE FIVE
14 YEAR MARK. AND PART OF THE PROBLEM WITH THIS LITIGATION IS
15 CONCERN THAT IT'S AN ATTACK ON THIS PROGRAM IN HOPES TO GET
16 THIS CASE BEYOND THE ABILITY WHERE BONDS CAN BE ISSUED. WE
17 ASKED THE SUPREME COURT TO EXPEDITE THAT APPEAL, THEY
18 HELD ORAL ARGUMENT VERY QUICKLY, THEY HAVEN'T RULED.
19 FRANKLY I WAS HOPING THAT THEY WOULD RULE BY NOW.

20 BUT THE BOND ISSUE, NOT ONLY THAT LITIGATION BUT
21 THIS LITIGATION MAY HAVE AN IMPACT ON IT, AS I UNDERSTAND IT.
22 SO I HAVE TO OPPOSE ANY REQUEST FOR A STAY. I KNOW THERE
23 HASN'T BEEN A FORMAL MOTION MADE FOR A STAY. THIS IS NOT THE
24 SAME LAWSUIT AS THE DOR CASE SO THERE'S NOT A STAY. QUITE
25 FRANKLY THIS IS AN ISSUE OF LAW THAT YOUR HONOR COULD RULE

1 ON. AND THEN OBVIOUSLY IF THE SUPREME COURT DISAGREES
2 WITH YOU, RICHLAND COUNTY IS A PARTY TO THE DOR CASE, AND
3 RICHLAND COUNTY WOULD BE BOUND BY WHATEVER DECISION THE
4 SUPREME COURT MAKES.

5 BUT THIS IS NOT A SITUATION WHERE HONESTLY WE
6 HAVE A LOT OF TIME TO ALLOW TO SIMPLY WAIT AND SEE WHAT THE
7 SUPREME COURT WILL DO. AND THERE HAS NOT BEEN A FORMAL
8 REQUEST FOR A STAY, IF THERE WERE I WOULD CERTAINLY OPPOSE
9 IT WITH AFFIDAVITS. I KNOW FRANNIE HEIZER, THE BOND LAWYER
10 FOR THE COUNTY WOULD BE ABLE TO EXPLAIN THIS TEN TIMES
11 BETTER THAN MYSELF, SHE IS OUT OF THE COUNTRY RIGHT NOW.

12 BUT IF YOUR HONOR'S ACTUALLY GOING TO ENTERTAIN
13 A STAY MOTION, I WOULD ASK THAT YOUR HONOR REQUIRE IT TO BE
14 FORMAL SO THAT I COULD THEN PROVIDE THE EVIDENCE AND
15 RESPONSE TO IT. BUT THERE IS REALLY NO REASON TO NOT GO
16 AHEAD AND DECIDE THIS CASE. IT'S A PURELY LEGAL ISSUE. IF THE
17 SUPREME COURT THEN WEIGHS IN ON THAT AND DECIDES IT
18 DIFFERENTLY THAN YOUR HONOR, I THINK WE'RE ALL GOING TO
19 RECOGNIZE THAT THE SUPREME COURT'S DECISION IS GOING TO
20 TAKE PRECEDENCE. BUT I DON'T BELIEVE THIS IS A SITUATION
21 WHERE IT WOULD BE APPROPRIATE FOR YOUR HONOR TO SIMPLY
22 WAIT ANY FURTHER TO WAIT ANY FURTHER FOR A DECISION FROM
23 THE SUPREME COURT.

24 I BELIEVE THAT IS ALL THE POINTS I HAD TO MAKE. I DO
25 BELIEVE, YOUR HONOR, THAT THE PLAINTIFF DOES HAVE THE

1 BURDEN OF PROOF IN THIS CASE UNDER THE BOWMAN AND
2 CELETECH STANDARD, JUST CLEARLY HAS TO CARRY. CERTAINLY
3 HAS NOT DONE THE DISCOVERY TO EVEN TRY TO SHOW THIS COURT
4 THAT IT TAKES THIS CASE SERIOUSLY AND WANTS TO PROSECUTE IT.
5 I WOULD SUBMIT, YOUR HONOR, THAT IT'S TIME FOR THIS CASE TO
6 BE RESOLVED AND THAT THE PLAINTIFF'S SIMPLY HAVEN'T CARRIED
7 THEIR BURDEN, AND THAT YOUR DECISION ON THE LEGAL ISSUES
8 SHOULD BE IN FAVOR OF THE COUNTY. THANK YOU, YOUR HONOR.

9 MR. CARPENTER: THE URGENCY IS THIS
10 BONDING ISSUE, AND IT'S PUBLICLY REPORTED THAT THE COUNTY
11 ADMINISTRATOR DIDN'T WANT THESE BONDS. SOME PEOPLE WANT
12 THE BONDS, SOME PEOPLE DON'T. BUT THE COUNTY
13 ADMINISTRATOR AS PUBLICLY REPORTED DOESN'T EVEN WANT THE
14 BONDS. AND EVEN IF THEY DON'T USE BONDS THAT DOESN'T MEAN
15 THEY WON'T BE ON THE LINE IN FUTURE YEARS INSTEAD OF
16 IMMEDIATELY, SO I DON'T THINK THAT'S THE CRITICAL ISSUE.

17 THE COURT: IT'S NOT BEFORE THIS COURT
18 ANYTHING TO DO WITH BONDS. COUNSEL, TEN DAYS.

19 -----END OF HEARING-----

20 *PHONETIC

21

22 -----END OF HEARING-----

23

24 *PHONETIC

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4003102

Richland County South Carolina

South Carolina Department Of Revenue

CMRTA

Richard Reames III

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried and heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Benjamin Edward Nicholson V
Mary Elizabeth (Liz) Crum
Larry Cornell Smith

Ray Nelson Stevens
Ray E. Jones

James Emerson Smith Jr.
Elizabeth Van Doren Gray

Milton Gary Kimpson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

SCRPC Form 4C (10/2011)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Richland County, South Carolina,

Plaintiff,

v.

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

Defendants/Third Party
Plaintiff.

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.

IN THE COURT OF COMMON PLEAS

Docket No.: 2016-CP-40-3102

ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE

FILED
2016 JUL 15 PM 4:39
JERILYNN VANSTORY
CLERK OF COURT
RICHLAND COUNTY

This matter came before the Court on June 28, 2016, by way of Plaintiff's Motion to Strike certain portions of the Affidavits of Tim Donovan and Jerilynn VanStory (collectively "Affidavits") filed by Defendants, the South Carolina Department of Revenue ("SCDOR" or "Department") and Rick Reames, III in his official capacity as the Director of SCDOR ("the Director") (collectively "Defendants") on June 21, 2016. Specifically, Plaintiff moved to strike on the grounds that the Affidavits contain statements that lack evidentiary foundation for admission into evidence, inadmissible hearsay in violation of S.C. Rule of Evidence Rule 801, and inadmissible legal opinions.

1

Benjamin E. Nicholson, IV, Esquire, M. Elizabeth Crum, Esquire, Ray N. Stevens, Esquire and Ray E. Jones, Esquire, appeared for Richland County. James E. Smith, Esquire, Dylan W. Goff, Esquire, Dana R. Krajack, Esquire, and Nichole M. Wooten, Esquire appeared for Defendants.

For the reasons set forth below, I GRANT Plaintiff's Motion to Strike.

LEGAL ANALYSIS

A. Rule 65 Requirements

Rule 65, SCRCP, specifically states that Temporary Restraining Orders (TRO) must be based on "specific facts shown by affidavit or by a verified complaint" and that requirement does not change once the TRO moves to the Temporary Injunction phase. Thus, the standard for Rule 65 relief evidence is no different from that of Rule 56(e), SCRCP. Rule 56(e), SCRCP, provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." See *Saro Invs. V. Ocean Holiday P'ship*, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). The Court will consider only those portions of the Affidavits that contain admissible evidence.

The Affidavits contain statements that lack evidentiary foundation for admission into evidence, inadmissible hearsay in violation of Rule 801 S.C. Rule of Evidence ("SCRE"), and legal opinions. Rule 602, SCRE, states in pertinent part that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." By definition, any statement by a witness "upon information and belief" is not admissible as that qualification does not allow a court to determine that the witness has personal knowledge of the statement.

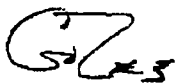


Rule 801, SCRE defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See *Bowers v. Bowers*, 349 S.C. 85, 561 S.E.2d 610 (Cl. App. 2002).

B. Legal Conclusions

It is well established in South Carolina that legal arguments are not proper in an affidavit. The responsibility to make such a legal conclusion is within the exclusive authority of the court, and testimony offered by a witness which purports to make a legal conclusion should be properly excluded as evidence. *O'Quinn v. Beach Associates*, 272 S.C. 95, 107, 249 S.E.2d 734, 740 (1978). See also *Dawkins v. Fields*, 354 S.C. 58, 65, 580 S.E.2d 433, 437 (2003) (an affidavit primarily consisting of legal arguments and conclusions "inappropriately attempted to usurp the trial court's role" and was thus properly excluded by the trial court); *Adelman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986) ("under our system is it the responsibility - the duty - of the court to state . . . the meaning and applicability of the appropriate law"); and *Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (holding that expert's opinion as to inadequacy of trial counsel's actions was legal argument, not testimony within the scope of Rule 702, SCRE).

Specifically, the admissibility of opinions of law affidavits similar to the VanStory Affidavit was addressed by the Supreme Court in *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). In *Dawkins*, the Court held that an affidavit of John Freeman, a law professor at the University of South Carolina School of Law, on the topics of corporations and securities "primarily contained legal arguments and conclusions," and as such, was properly rejected by the trial court. *Id.* at 65, 580 S.E.2d at 437. Such an affidavit "inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment" and



read "as if it could have been respondents' oral argument to the trial court at the summary judgment hearing." *Id.* at 65-66, 580 S.E.2d at 437.

C. Conclusion

Based on the above legal conclusions, I find that the following portions of the Affidavits should be stricken:

1. The Donovan Affidavit.

The following sentences of the Donovan Affidavit are ordered stricken for stating legal conclusions:

Paragraph 4 – Second and Third Sentences.

Paragraph 8 – First Sentence.

Paragraph 9 – Third, Fifth, and Sixth Sentences.

Paragraph 10 – Second and Third Sentences.

Paragraph 13 – First and Third Sentences.

Paragraph 14 – First Sentence.

Paragraph 15 – First and Second Sentences.

The following sentences of the Donovan Affidavit are ordered stricken because they are not based on personal knowledge and are inadmissible:

Paragraph 9 – Seventh and Eleventh Sentences.

Paragraph 11 – Eighth Sentence.

Paragraph 14 – Second and Third Sentences.

CT

2. The VanStory Affidavit.

The following sentences of the VanStory Affidavit are ordered stricken for stating legal conclusions:

Paragraph 4 – First, Second, and Third Sentences.

Paragraph 5 – Second Sentence.

Paragraph 7 – First Sentence.

Paragraph 8 – First Sentence.

Paragraph 9 – First and Fourth Sentences.

Paragraph 10 – First, Second, and Third Sentences.

Paragraph 11 – First, Second, Third, Fourth, Fifth, and Sixth Sentences.

Paragraph 12 – First Sentence.

Paragraph 13 – First Sentence.

AND IT IS SO ORDERED.



Judge G. Thomas Cooper, Jr.
Fifth Judicial Circuit

June 15, 2016
Columbia, SC

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

South Carolina Public Interest
Foundation,)

Plaintiff.)

v.)

Richland County,)

Defendant.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 17-CP-40-_____

Complaint for FOIA Enforcement

FILED
2017 OCT 16 AM 11:17
JEANETTE W. MCARDLE
C.C.P. & G.S.

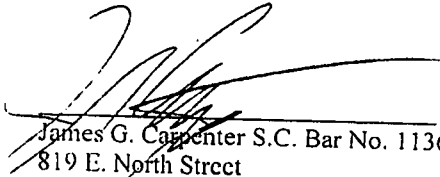
Plaintiff, complaining of the Defendant, would show unto the Court:

1. Plaintiff South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.* ("FOIA").
2. Defendant Richland County is a political subdivision of the State of South Carolina.
3. This Court has jurisdiction under FOIA.
4. Venue is properly placed in Richland County.
5. Plaintiff served a FOIA request on the Defendant dated September 22, 2017 (**Exhibit A**).
6. On October 6, 2017, Defendant responded, but refused to produce the public records and asserted that it was not obligated to produce the records (**Exhibit B**).
7. Defendant failed to comply with Plaintiff's request, make the requested records available for copying, or furnish the records, all in violation of § 30-4-30(c), and as a result Plaintiff's "request must be considered approved." *Id.*

WHEREFORE. Plaintiff prays the Court for an Order:

1. Declaring that Defendant violated FOIA;
2. Declaring that the request is approved;
3. Enjoining Defendant to provide Plaintiff a copy of all requested documents;
4. Awarding the Plaintiff attorney's fees and costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b); and
5. Granting Plaintiff such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorneys for Plaintiff



WHEN IT'S WORTH FIGHTING FOR

JAMES G. CARPENTER
james.carpenter@carpenterlawfirm.net
SERVING S.C. AND N.C.

September 22, 2017

Andrew Lindemann
PO Box 8568
Columbia, SC 29202-8568

Re: Freedom of Information Act—*Supplemental Request*

Dear Andrew:

On behalf of my client, South Carolina Public Interest Foundation and pursuant to the South Carolina Freedom of Information Act, SC Code Ann. § 30-4-10 et seq., and 5 U.S.C. § 552 et seq., I respectfully request that your client Richland County mail me a copy of the following public records in your possession, custody, or control, related to the penny sales tax and referendum in November, 2012.

You may omit any Public Records your client already provided in response to our previous FOIA request on these matters.

1. All contracts for procurement entered into by Richland County, paid in whole or in part from the penny sales tax proceeds.
2. All records of expenditures exceeding \$10,000 paid from the penny sales tax proceeds.
3. All reports of audits of expenditures related to the penny sales tax.
4. Each budget for expenditures of sales and use tax revenues for each year since the adoption of the penny sales tax.
5. All reports of audits of any outside agency receiving an appropriation of the sales and use tax.
6. Determinations made pursuant to Section 2-591 of the Richland County Code.

THE CARPENTER LAW FIRM, P.C. • 819 EAST NORTH STREET • GREENVILLE, SC 29601
TELEPHONE (864) 235-1269 • FACSIMILE (864) 331-3083 • WWW.CARPENTERLAWFIRM.NET



7. Minutes of County Council meetings recording a Richland County Council vote pursuant to Section 2-591 (a).
8. Requests for Qualifications prepared pursuant to Section 2-591 (B) (1).
9. Documents relating to a short list evaluation committee established pursuant to Section 2-591 (B) (2).
10. Determinations by the County Administrator related to a short list evaluation committee established pursuant to Section 2-591 (B) (2).
11. Requests for Qualifications prepared pursuant to Section 2-591 (B) (3).
12. Determinations prepared pursuant to Section 2-591 (B) (3).
13. Notices of Request for Qualification published in a newspaper pursuant to Section 2-591 (B) (4).
14. Records of the public opening of responses to RFQ's issued pursuant to Section 2-591 (B) (6).
15. Determinations by the Director of Procurement related to the waving or curing of any information or irregularity in a response to Request for Qualifications pursuant to Section 2-591 (B) (7).
16. Determinations by County Council pursuant to Section 2-591 (B) (10).
17. Shortlist report, with rankings, referred to in Section 2-591 (B) (11).
18. Determinations by County Council pursuant to Section 2-591 (B) (13).
19. Record of the rankings of offerors pursuant to Section 2-591 (B) (13).
20. Changes made to a scope of the Request for Qualifications pursuant to Section 2-591 (B) (14) d.
21. Requests for Proposals prepared or issued pursuant to Section 2-591 (c) (1).
22. Record of the opening of a response to Request for Proposals pursuant to Section 2-591 (c) (3).
23. Record of a short list evaluation committee established by the County Administrator pursuant to Section 2-591 (c) (5).

24. Determinations issued pursuant to Section 2-591 (c) (5).
25. Determinations made pursuant to Section 2-591 (c) (6).
26. Determinations regarding the waving or cure of a deficiency issued by the director of procurement pursuant to Section 2-591 (c) (6).
27. Notification or offeror's response relating to the waiver or curing of any deficiency issued pursuant to Section 2-591 (c) (6).
28. Determinations of County Council issued pursuant to Section 2-591 (c) (9).
29. Shortlist report issued pursuant to Section 2-591 (c) (10).
30. Determinations issued by County Council pursuant to Section 2-591 (c) (12).
31. Direction issued by County Council pursuant to Section 2-591 (c) (13).
32. Determinations issued by County Council pursuant to Section 2-591 (c) (13) a or e.

In the event you determine that a requested document contains material or information within the statutory exemptions to mandatory disclosure, I request you review such material for discretionary disclosure. Similarly, in the event you determine a document contains material or information within the statutory exemptions to mandatory disclosure, I request, in accordance with the provisions of S.C. CODE ANN. § 30-4-40(b), you produce any and all reasonably segregable portions of such document.

If you determine that all documents responsive to any individual requested item (or portion thereof) have been disclosed or specifically identified and withheld under the claim of authority, I request specific written confirmation of such fact. In the event you determine you have no document responsive to an individual request item (or portion thereof), I request specific written confirmation of that fact.

This request constitutes notice of demand for production of all described documents. If, for any reason, you determine that you will not send us any document (or portion thereof), or that this request will not, in whole or in part, be complied with, I request prompt notice of any action taken. In addition, I request such notice include complete identification of the withheld documents (or portions thereof) by title, author, date, nature of such material, and a thorough explanation of all legal and factual bases for your determination to deny disclosure. I request that in responding to this request you adhere to the time limitations set forth in S.C. CODE ANN. § 30-4-30(c).

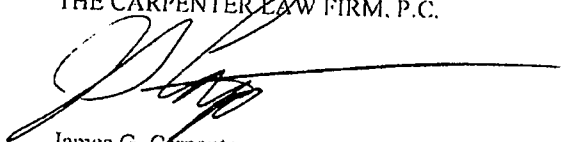
FOIA Request to
Richland County Council
September 22, 2017
Page 4

I request that you mark the back of each copy of a public record with the corresponding number of the request, listed above. If you have no public record corresponding to a request, I request that you so state.

I will pay the reasonable and direct costs of locating and reproducing the requested documents to the extent required by S.C. CODE ANN. § 30-4-30(b). However, I request prior notice should you determine that such costs will exceed \$500.

Thank you for your assistance. Should you have any questions, please do not hesitate to call my office at (864) 235-1269.

Sincerely yours,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.*
Robert D. Garfield
Michael B. Wren

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

Daniel C. Plyler
Joel S. Hughes
David A. DeMasters
Steven R. Sprcuwers
Brandon M. Briggs
Jasmine D. Wyman

*Also Admitted In North Carolina
*Certified Mediator

October 6, 2017

Of Counsel
Kenneth P. Woodington

Writer's Email: alindemann@dml-law.com

Via Email and US Mail

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, South Carolina 29601

RE: South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr., individually, and on behalf of all others similarly situated v. Richland County v. Central Midlands Regional Transit Authority
Civil Action Number: 2016-CP-40-2875
Our File Number: 314.9965

Dear Jim:

This will confirm receipt of your request pursuant to the South Carolina Freedom of Information Act (FOIA) dated September 22, 2017, which was directed to me as counsel for Richland County in this litigation. Based upon my representation in this litigation, I am providing this response to your request on behalf of Richland County pursuant to FOIA.

In your September 22nd email forwarding this FOIA request, you specifically referenced the above-referenced litigation and included as well an email that you had sent to Judge G. Thomas Cooper, Jr. outlining your desire to conduct discovery in this litigation. You also copied Judge Cooper on the email forwarding the FOIA request. Thus, it is indisputable that this FOIA request is designed to conduct discovery that you deem relevant to this litigation. However, as you are well aware, there has been a discovery deadline set in this litigation pursuant to the Consent Scheduling Order signed by Judge Cooper and filed on November 18, 2016. That deadline was July 17, 2017, which has long since passed.

As a result, Richland County objects to your FOIA request because it clearly represents an attempt to circumvent the scheduling order established by the Court in this litigation as well as circumvent the inherent authority of the Court to manage the litigation consistent with Rule 16. SCRCP. In *State v. Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991), the South Carolina Supreme Court has recognized that "the FOIA does not supplement or displace the applicable



James G. Carpenter, Esquire
October 6, 2017
Page Two

rules of discovery." 409 S.E.2d at 409. The County submits that the reference to "rules of discovery" necessarily includes discovery deadlines established by court order.

Please note that the County's position is further supported by federal case law. For instance, in *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the United States Supreme Court explained that "FOIA was *not* intended to function as a private discovery tool." 437 U.S. at 242. (Emphasis in original). Moreover, in *Environmental Crimes Project v. Environmental Protection Agency*, 928 F.Supp. 1 (D.D.C. 1995), the district court ordered a stay of a FOIA case "pending the resolution of the discovery disputes" in the parties' related lawsuit in order to foreclose the requester's attempt to "end run" or interfere with discovery 928 F.Supp. at 2. See also, *Vento v. Internal Revenue Service*, 2010 WL 1375279, *8 (D. Virgin Islands 2010) ("FOIA is not intended a tool to circumvent the normal rules of discovery to gain an advantage in litigation"); *United States v. U.S. District Court, Central District of California*, 717 F.2d 478, 480 (9th Cir. 1983) (holding that "the FOIA was not intended as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure"); *Martinez v. EEOC*, 2004 WL 2359895, *6 (W.D. Tex. 2004) (concluding that the requester "may not use the FOIA to circumvent the discovery process").

Please advise if you have any questions.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/

cc: Ray N. Stevens, Esquire (via Email only)
Ray E. Jones, Esquire (via Email only)
Elizabeth Van Doren Gray, Esquire (via Email only)
Robert E. Tyson, Jr., Esquire (via Email only)

STATE OF SOUTH CAROLINA
COUNTY COUNCIL FOR RICHLAND COUNTY
ORDINANCE NO. 039-12HR

AN ORDINANCE TO LEVY AND IMPOSE A ONE PERCENT (1%) SALES AND USE TAX, SUBJECT TO A REFERENDUM, WITHIN RICHLAND COUNTY PURSUANT TO SECTION 4-37-30 OF THE CODE OF LAWS OF SOUTH CAROLINA 1976, AS AMENDED; TO DEFINE THE PURPOSES AND DESIGNATE THE PROJECTS FOR WHICH THE PROCEEDS OF THE TAX MAY BE USED; TO PROVIDE THE MAXIMUM TIME FOR WHICH SUCH TAX MAY BE IMPOSED; TO PROVIDE THE ESTIMATED COST OF THE PROJECTS FUNDED FROM THE PROCEEDS OF THE TAX; TO PROVIDE FOR A COUNTY-WIDE REFERENDUM ON THE IMPOSITION OF THE SALES AND USE TAX AND THE ISSUANCE OF GENERAL OBLIGATION BONDS AND TO PRESCRIBE THE CONTENTS OF THE BALLOT QUESTIONS IN THE REFERENDUM; TO PROVIDE FOR THE CONDUCT OF THE REFERENDUM BY THE RICHLAND COUNTY ELECTION COMMISSION; TO PROVIDE FOR THE ADMINISTRATION OF THE TAX, IF APPROVED; TO PROVIDE FOR THE PAYMENT OF THE TAX, IF APPROVED; AND TO PROVIDE FOR OTHER MATTERS RELATING THERETO.

Pursuant to the authority by the Constitution of the State of South Carolina and the General Assembly of the State of South Carolina, BE IT ENACTED BY RICHLAND COUNTY COUNCIL:

SECTION 1. Findings and Determinations. The County Council (the "County Council") of Richland County, South Carolina (the "County"), hereby finds and determines:

(a) The South Carolina General Assembly has enacted Section 4-37-30 of the Code of Laws of South Carolina 1976, as amended (the "Act"), pursuant to which the county governing body may impose by ordinance a sales and use tax in an amount not to exceed one percent, subject to the favorable results of a referendum, within the county area for a specific purpose or purposes and for a limited amount of time to collect a limited amount of money.

(b) Pursuant to the terms of Section 4-37-10 of the Code of Laws of South Carolina 1976, as amended, the South Carolina General Assembly has authorized county government to finance the costs of acquiring, designing, constructing, equipping and operating highways, roads, streets, bridges, greenways, pedestrian sidewalks, bike paths and lanes, and other transportation-related projects either alone or in partnership with other governmental entities. As a means to furthering the powers granted to the County under the provisions of Section 4-9-30 and Sections 6-21-10, *et. seq* of the Code of Laws of South Carolina 1976, as amended, the County Council is authorized to form a transportation authority or to enter into a partnership, consortium, or other contractual arrangement with one or more other governmental entities pursuant to Title 4, Chapter 37 of the Code of Laws of the South Carolina 1976, as amended. The County Council has decided to provide funding for highways, roads, streets, bridges, mass transit, greenways, pedestrian sidewalks, bike paths and lanes, *inter alia*, without the complexity of a transportation authority or entering into a partnership, consortium, or other contractual arrangements with one or more other governmental entities at this time; provided that nothing herein shall preclude County Council from entering into partnerships, consortiums, or other contractual arrangements in the future. County Council may utilize such

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provisions in the future as necessary or convenient to promote the public purposes served by funding highways, roads, streets, bridges, mass transit, greenways, pedestrian sidewalks, and bike paths and lanes as provided in this Ordinance.

(c) The County Council finds that a one percent sales and use tax should be levied and imposed within Richland County, for the following projects and purposes: For financing the costs of highways, roads, streets, bridges, greenways, pedestrian sidewalks, and bike paths and lanes and other transportation-related projects facilities, and drainage facilities related thereto, and mass transit systems operated by Richland County or (jointly) operated by the County, other governmental entities and transportation authorities.

For a period not to exceed twenty-two (22) years from the date of imposition of such tax, to fund the projects at a maximum cost not to exceed \$1,037,900,000 to be funded from the net proceeds of a sales and use tax imposed in Richland County pursuant to provisions of the Act, subject to approval of the qualified electors of Richland County in referendum to be held on November 6, 2012. The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenue established by the Act, the provisions of this Ordinance, and other applicable law. Subject to annual appropriations by County Council, sales and use tax revenues shall be used for the costs of the projects established in this Ordinance, as it may be amended from time to time, including, without limitation, payment of administrative costs of the projects, and such sums as may be required in connection with the issuance of bonds, the proceeds of which are applied to pay costs of the projects. All spending shall be subject to an annual independent audit to be made available to the public.

(d) County Council finds that the imposition of a sales and use tax in Richland County for the projects and purposes defined in this Ordinance for a limited time not to exceed twenty-two (22) years to collect a limited amount of money will serve a public purpose, provide funding for roads and transportation, mass transit, and greenbelts to facilitate economic development, promote public safety, provide needed infrastructure, promote desirable living conditions, enhance the quality of life in Richland County, and prepare Richland County to meet present and future needs of Richland County and its citizens.

Section 2. Approval of Sales and Use Tax Subject to Referendum.

(a) A sales and use tax (the "Sales and Use Tax"), as authorized by the Act, is hereby imposed in Richland County, South Carolina, subject to a favorable vote of a majority of the qualified electors voting in a referendum on the imposition of the Sales and Use Tax to be held in Richland County, South Carolina on November 6, 2012.

(b) The Sales and Use Tax shall be imposed for a period not to exceed twenty-two (22) years from the date of imposition.

(c) The maximum cost of the projects to be funded from the proceeds of the Sales and Use Tax shall not exceed, in the aggregate, the sum of \$1,037,900,000, and the maximum amount of net proceeds to be raised by the Sales and Use Tax shall not exceed \$1,070,000,000, which includes administrative costs and debt service on bonds issued to pay for the projects. The estimated principal amount of initial authorization of bonds to be issued to pay costs of the projects and to be paid by a

portion of the Sales and Use Tax is \$450,000,000. The proceeds of these bonds shall be used for a portion of the following projects:

- Project 1: Improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements.
Amount: \$656,020,644
- Project 2: Continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements.
Amount: \$300,991,000
- Project 3: Improvements to pedestrian sidewalks, bike paths, intersections and greenways.
Amount: \$80,888,356

A list of the 2012 Roadway Projects and the 2012 Pedestrian/Bike/Greenway Projects are attached hereto as Appendix A and incorporated herein by reference.

(d) The Sales and Use Tax shall be expended for the costs of the following projects, including payment of any sums as may be required for the issuance of and debt service for bonds, the proceeds of which are applied to such projects, for the following purposes:

- (i) Improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements. Amount: \$656,020,644;
- (ii) Continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements. Amount: \$300,991,000; and
- (iii) Improvements to pedestrian sidewalks, bike paths, intersections and greenways.
Amount: \$80,888,356.

(e) The Sales and Use Tax, if approved in the referendum conducted on November 6, 2012, shall terminate on the earlier of:

- (i) April 1, 2035; or
 - (ii) the end of the calendar month during which the Department of Revenue determines that the Sales and Use Tax has raised revenues sufficient to provide the greater of either the costs of the projects as approved in the referendum or the cost to amortize all debts related to the approved projects.
- (f) The amounts of Sales and Use Tax collected in excess of the required proceeds must first be applied, if necessary, to complete each project for which the Sales and Use Tax was imposed. Any additional revenue collected above the specified amount must be applied to the reduction of debt principal of Richland County on transportation infrastructure debts only.

(g) The Sales and Use Tax must be administered and collected by the South Carolina Department of Revenue in the same manner that other sales and use taxes are collected. The Department may prescribe amounts that may be added to the sales price because of the Sales and Use Tax.

(h) The Sales and Use Tax is in addition to all other local sales and use taxes and applies to the gross proceeds of sales in the applicable area that is subject to the tax imposed by Chapter 36 of Title 12 of the Code of Laws of South Carolina, and the enforcement provisions of Chapter 54 of Title 12 of the Code of Laws of South Carolina. The gross proceeds of the sale of items subject to a maximum tax in Chapter 36 of Title 12 of the Code of Laws of South Carolina are exempt from the tax imposed by this Ordinance. The gross proceeds of the sale of food lawfully purchased with United States Department of Agriculture Food Stamps are exempt from the Sales and Use Tax imposed by this Ordinance. The Sales and Use Tax imposed by this Ordinance also applies to tangible property subject to the use tax in Article 13, Chapter 36 of Title 12 of the Code of Laws of South Carolina.

(i) Taxpayers required to remit taxes under Article 13, Chapter 36 of Title 12 of the Code of Laws of South Carolina must identify the county in which the personal property purchased at retail is stored, used, or consumed in this State.

(j) Utilities are required to report sales in the county in which the consumption of the tangible personal property occurs.

(k) A taxpayer subject to the tax imposed by Section 12-36-920 of the Code of Laws of South Carolina 1976, as amended, who owns or manages rental units in more than one county must report separately in his sales tax return the total gross proceeds from business done in each county.

(l) The gross proceeds of sales of tangible personal property delivered after the imposition date of the Sales and Use Tax, either under the terms of a construction contract executed before the imposition date, or written bid submitted before the imposition date, culminating in a construction contract entered into before or after the imposition date, are exempt from the Sales and Use Tax provided in this ordinance if a verified copy of the contract is filed with the Department of Revenue within six months after the imposition date of the Sales and Use Tax provided for in this Ordinance.

(m) Notwithstanding the imposition date of the Sales and Use Tax with respect to services that are billed regularly on a monthly basis, the Sales and Use Tax authorized pursuant to this ordinance is imposed beginning on the first day of the billing period beginning on or after the imposition date.

Section 3. Remission of Sales and Use Tax; Segregation of Funds; Administration of Funds; Distribution to Counties; Confidentiality.

(a) The revenues of the Sales and Use Tax collected under this Ordinance must be remitted to the State Treasurer and credited to a fund separate and distinct from the general fund of the State. After deducting the amount of any refunds made and costs to the Department of Revenue of administering the Sales and Use Tax, not to exceed one percent of such revenues, the State Treasurer shall distribute the revenues quarterly to the Richland County Treasurer and the revenues must be used only for the purposes stated herein. The State Treasurer may correct misallocations by adjusting

subsequent distributions, but these distributions must be made in the same fiscal year as the misallocation. However, allocations made as a result of city or county code errors must be corrected prospectively.

(b) Any outside agencies, political subdivisions or organizations designated to receive funding from the Sales and Use Tax must annually submit requests for funding in accordance with procedures and schedules established by the County Administrator. The County Administrator shall prepare the proposed budget for the Sales and Use Tax and submit it to the County Council at such time as the County Council determines. At the time of submitting the proposed budget, the County Administrator shall submit to the County Council a statement describing the important features of the proposed budget.

County Council shall adopt annually prior to the beginning of each fiscal year a budget for expenditures of Sales and Use Tax revenues. County Council may make supplemental appropriations for the Sales and Use Tax following the same procedures prescribed for the enactment of other budget ordinances. The provisions of this section shall not be construed to prohibit the transfer of funds appropriated in the annual budget for the Sales and Use Tax for purposes other than as specified in the annual budget when such transfers are approved by County Council. In the preparation of the annual budget, County Council may require any reports, estimates, and statistics from any county agency or department as may be necessary to perform its duties as the responsible fiscal body of the County.

Except as specifically authorized by County Council, any outside agency or organization receiving an appropriation of the Sales and Use Tax must provide to County Council an independent annual audit of such agency or organization financial records and transactions and such other and more frequent financial information as required by County Council, all in form satisfactory to County Council.

(c) The Department of Revenue shall furnish data to the State Treasurer and to the Richland County Treasurer for the purpose of calculating distributions and estimating revenues. The information which must be supplied to the County upon request includes, but is not limited to, gross receipts, net taxable sales, and tax liability by taxpayers. Information about a specific taxpayer is considered confidential and is governed by the provisions of S.C. Code Ann. §12-54-240. Any person violating the provisions of this section shall be subject to the penalties provided in S.C. Code Ann. § 12-54-240.

Section 4. Sales and Use Tax Referendum; Ballot Question.

(a) The Commission shall conduct a referendum on the question of imposing the Sales and Use Tax in the area of Richland County on Tuesday, November 6, 2012, between the hours of 7 a.m. and 7 p.m. under the election laws of the State of South Carolina, *mutatis mutandis*. The Commission shall publish in a newspaper of general circulation the question that is to appear on the ballot, with the list of projects and purposes as set forth herein, and the cost of projects, and shall publish such election and other notices as are required by law.

(b) The referendum question to be on the ballot of the referendum to be held in Richland County on November 6, 2012, must read substantially as follows:

RICHLAND COUNTY SPECIAL SALES AND USE TAX

QUESTION 1

I approve a special sales and use tax in the amount of one percent (1%) to be imposed in Richland County, South Carolina (the "County") for not more than twenty-two (22) years, or until a total of \$1,070,000,000 in sales tax revenue has been collected, whichever occurs first. The sales tax revenue will be used to pay the costs of administrative expenses and the following projects:

- Project 1: Improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements.
Amount: \$656,020,644
- Project 2: Continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements.
Amount: \$300,991,000
- Project 3: Improvements to pedestrian sidewalks, bike paths, intersections and greenways.
Amount: \$80,888,356

YES

NO

Instructions to Voters: All qualified electors desiring to vote in favor of levying the special sales and use tax shall vote YES and

All qualified electors opposed to levying the special sales and use tax shall vote NO

QUESTION 2

I approve the issuance of not exceeding \$450,000,000 of general obligation bonds of Richland County, payable from the special sales and use tax described in Question 1 above, maturing over a period not to exceed twenty-two (22) years, to fund projects from among the categories described in Question 1 above.

YES

NO

Instructions to Voters: All qualified electors desiring to vote in favor of the issuance of bonds for the stated purposes shall vote YES and

All qualified electors opposed to the issuance of bonds for the stated purposes shall vote NO

(c) In the referendum on the imposition of the Sales and Use Tax in Richland County, all qualified electors desiring to vote in favor of imposing the tax for the stated purposes shall vote "yes" and all qualified electors opposed to levying the tax shall vote "no." If a majority of the electors voting in the referendum shall vote in favor of imposing the Sales and Use Tax, then the Sales and Use Tax is imposed as provided in the Act and this Ordinance. Expenses of the referendum must be paid by Richland County government.

(d) In the referendum on the issuance of bonds, all qualified electors desiring to vote in favor of the issuance of bonds for the stated purpose shall vote "yes" and all qualified electors opposed to the issuance of bonds shall vote "no." If a majority of the electors voting in the referendum shall vote in favor of the issuance of bonds, then the issuance of bonds shall be authorized in accordance with S.C. Constitution Article X, Section 14, Paragraph (6). Expenses of the referendum must be paid by Richland County government.

Section 5. Imposition of Tax Subject to Referendum.

The imposition of the Sales and Use Tax in Richland County is subject in all respects to the favorable vote of a majority of qualified electors casting votes in a referendum on the question of imposing the Sales and Use Tax in the area of Richland County in a referendum to be conducted by the Board of Elections and Voter Registration of Richland County on November 6, 2012, and the favorable vote of a majority of the qualified electors voting in such referendum shall be a condition precedent to the imposition of a sales and use tax pursuant to the provisions of this Ordinance.

Section 6. Miscellaneous.

(a) If any one or more of the provisions or portions hereof are determined by a court of competent jurisdiction to be contrary to law, then that provision or portion shall be deemed severable from the remaining terms or portions hereof and the invalidity thereof shall in no way affect the validity of the other provisions of this Ordinance; if any provisions of this Ordinance shall be held or deemed to be or shall, in fact, be inoperative or unenforceable or invalid as applied to any particular case in any jurisdiction or in all cases because it conflicts with any constitution or statute or rule of public policy, or for any other reason, those circumstances shall not have the effect of rendering the provision in question inoperative or unenforceable or invalid in any other case or circumstance, or of rendering any other provision or provisions herein contained inoperative or unenforceable or invalid to any extent whatever; provided, however, that the Sales and Use Tax may not be imposed without the favorable results of the referendum to be held on November 6, 2012.

(b) This Ordinance shall be construed and interpreted in accordance with the laws of the State of South Carolina.

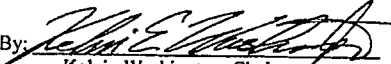
(c) The headings or titles of the several sections hereof shall be solely for convenience of reference and shall not affect the meaning, construction, interpretation, or effect of this ordinance.

(d) This Ordinance shall take effect immediately upon approval at third reading.

(e) All previous ordinances regarding the same subject matter as this ordinance are hereby repealed.

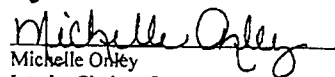
Enacted this 18th day of July, 2012.

RICHLAND COUNTY, SOUTH CAROLINA

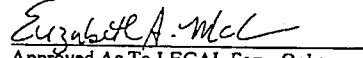
By: 
Kelvin Washington, Chairman
Richland County Council

(SEAL)

ATTEST THIS 20th DAY OF
July, 2012:


Michelle Onley
Interim Clerk to County Council

RICHLAND COUNTY ATTORNEY'S OFFICE

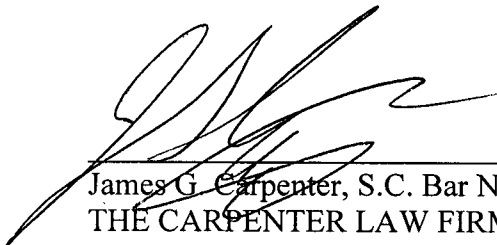

Approved As To LEGAL Form Only
No Opinion Rendered As To Content

Date of First Reading:	June 5, 2012
Date of Second Reading:	June 19, 2012
Date of Public Hearing:	June 19, 2012
Date of Third Reading:	July 18, 2012

CERTIFICATE OF COUNSEL

Pursuant to Appellate Rule 210(g), the undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

December 5, 2018



James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 E. North Street
Greenville, South Carolina 29601
(864) 235-1269 (telephone)
(864) 331-3083 (facsimile)
Jim@CarpenterLawFirm.net
Attorney for Appellants

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