THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM CALHOUN COUNTY

Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

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Appellate Case No. 2019-001016

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South Carolina Public Interest Foundation, Amy Hill, and Rebecca Bonnette, individually, and on behalf of all others similarly situated, ..... Appellants,

v.

Calhoun County Council, ..... Respondents.

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# APPELLANTS' BRIEF

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December 11, 2019

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## STATEMENT OF ISSUES ON APPEAL

1. Does a 30-day statute of limitations for challenges to the "results of the referendum" bar this action alleging that the ordinance exceeds the authorizing Act?
2. May an ordinance include projects not authorized by the Act?
3. Should this Court redraft the Ordinance to make it comply with the authorizing Act?

## STATEMENT OF THE CASE

Respondent Calhoun County Council is the governing body of Calhoun County, South Carolina. Calhoun County adopted Ordinance Number 2018-18 ("Ordinance") to levy and impose a one percent sales and use tax subject to a County referendum pursuant to S.C. Code Ann. § 4-10-300 ff., the "Capital Project Sales Tax Act." (R. pp. 18-28)

Appellant 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. (R. p. 9). Appellants Amy Hill and Rebecca Bonnette are citizens, residents, taxpayers, and registered electors of Calhoun County. (R. p. 9). Hill and Bonnette must pay the Penny Tax to Calhoun County, and therefore possess taxpayer standing to contest unlawful payments from the Penny Tax. They bring this action individually and on behalf of all others similarly situated. (R. p. 10). Appellants allege that the Ordinance exceeds the authorizing Act, SC Code Ann. § 4-10-300 ff.

To the knowledge of the Appellants, no appellate court has construed or applied the "Capital Project Sales Tax Act." Respondent County Council represented to the Circuit Court that 23 counties have used the "Capital Project Sales Tax Act," and that 10 of them have used the Act for "similar types of projects" to these that the Taxpayers challenge, projects beyond those authorized in the Act. (R. Pp. 129-143). Accordingly, this action raises issues of great public importance, and Appellants asked the Court to grant them standing based upon the great public importance of the issues this action raises.

Appellants assert jurisdiction under the "Capital Projects Sales Tax Act" and under the following decisions, which address public interest and taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas* , 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *Sloan v Friends of the Hunley,* 393 S.C. 152, 711 S.E.2d 895 (2011), *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.

The "Capital Project Sales Tax Act" authorizes counties to adopt an Ordinance and referendum imposing a sales and use tax. The Act establishes requirements for the Ordinance and referendum.

(A) The sales and use tax authorized by this article is imposed by an enacting ordinance of the county governing body containing the ballot question formulated by the commission pursuant to Section 4-10-320(C), subject to referendum approval in the county. The **ordinance must specify**:

(1) the **purpose** 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 local governmental entities, including the county, municipalities, and special purpose districts located in the county area, **and may include the following types of projects**:

(a) highways, roads, streets, bridges, and public parking garages and related facilities;

(b) courthouses, administration buildings, civic centers, hospitals, emergency medical facilities, police stations, fire stations, jails, correctional facilities, detention facilities, libraries, coliseums, educational facilities under the direction of an area commission for technical education, or any combination of these projects;

(c) cultural, recreational, or historic facilities, or any combination of these facilities;

(d) water, sewer, or water and sewer projects;

(e) flood control projects and storm water management facilities;

(f) beach access and beach renourishment;

(g) dredging, dewatering, and constructing spoil sites, disposing of spoil materials, and other matters directly related to the act of dredging;

(h) jointly operated projects of the county, a municipality, special purpose district, and school district, or any combination of those entities, **for the projects delineated in subitems (a) through (g) of this item;**

(i) any combination **of the projects described in subitems (a) through (h) of this item;**

S.C. Code Ann § 4-10-330(a)(1) (emphasis added).

The County gave notice in the newspaper of the 15 projects to be funded by the penny tax. Four of the proposed projects are not authorized by S.C. Code Ann. § 4-10-330. They include:

4, Calhoun County—Sandy Run Fire District Ladder Truck Project—to include the acquisition and equipping of a new ladder truck in the Sandy Run Fire District. To support the northern portion of Calhoun County, particularly industry located therein $350,000.

11. Calhoun County Emergency Communications Project—to include the constructing, acquiring, and equipping of facilities and equipment to provide 800 MHz radio service for emergency service providers in Calhoun County $500,000.

12. Calhoun County Ambulance Project—to include the acquisition and equipping of ambulances to be operated by Calhoun County Emergency Services Department $165,000.

13. Calhoun County Sandy Run Fire District Tanker Truck Project—to include the purchase of the fire truck to serve the Sandy Run area $267,000.

County Ordinance Number 2018-18 authorizes the County to collect a sales and use tax for eight years. On November 6, 2018, the County voters passed a Referendum. (R. pp. 87-121).

On November 26, 2018, County Council adopted a resolution "declar[ing] the results of the referendum." (R. pp. 19-20). After making "Findings of Fact" as to background matters, the "Declaration of Result" reads as follows:

> County Council hereby declares that the result of the Referendum was in favor of the Question, there having been 3,173 votes cast in favor of the Question and 2,370 votes cast in opposition to the Question. A copy of the official return, as provided by the Election Board, is attached at Exhibit B. This declaration is made pursuant to Section 4-10-330(F) of the Capital Project Sales Tax Act.

(R. pp. 107-108).

On April 3, 2019, Appellants ("Taxpayers") filed suit alleging that the Ordinance listed projects that exceeded the scope of the authorizing Act, and therefore is unlawful. (R. pp. 7-13). On April 10, 2019, Taxpayers filed a motion for injunctive relief. (R. pp. 29-34).

Upon information and belief, tax collections began May 1, 2019. The County planned to issue $7 million in bonds to fund these projects also effective May 1, 2019. Upon information and belief, the County has not issued the bonds.

On May 6, 2019, the County Council filed an Answer, (R. pp. 14-28), and on May 16, 2019, County Council moved for Summary Judgment. (R. pp. 35-38). On May 22, 2019, Taxpayers filed a Cross Motion for Summary Judgment. (R. pp. 39-61). On May 30, 2019, the Court heard oral argument on the Cross Motions for Summary Judgment. On June 5, 2019, the Taxpayers filed a Memorandum in Support of their Motion. (R. pp. 144-154). The County filed two Memoranda. (R. pp. 62-143).

On June 18, 2019, the court granted the County's motion for summary judgment as to all claims, ruling that the Act's statute of limitations applies to all Plaintiffs' claims, and that all Plaintiffs' claims were thereby barred. (R. pp. 1-6). The court found it unnecessary to consider the merits of the Plaintiffs' claims.

## STANDARD OF REVIEW

The Circuit Court granted summary judgment to the County and denied the Taxpayers' motion for summary judgment. In appellate review, this Court takes the case in the same posture.

> When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.;* Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming,* 350 S.C. at 493–94, 567 S.E.2d at 860 (citation omitted).

*Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011).

The parties agreed that there were no genuine issues of material fact. This Court can review and rule on either or both motions for summary judgment and must construe all factual disputes in favor of the nonmoving party.

## ARGUMENT

### I. THE 30-DAY STATUTE OF LIMITATIONS DOES NOT BAR THIS ACTION.

The Circuit Court ruled that the Act's 30-day statute of limitations for procedural challenges to the "results" of a referendum bars the Taxpayers' challenge that the Ordinance exceeds the scope of the authorizing Act. (R. pp. 4-5). The statute bars challenges to the "results of the referendum" filed more than 30 days after the County has "declared" the "results."

> (E) . . . **The election commission shall conduct the referendum** under the election laws of this State, mutatis mutandis, **and shall certify the result** no later than November thirtieth to the county governing body and to the Department of Revenue. . . . .
>
> (F) Upon receipt of the returns of the referendum, **the county governing body must**, by resolution, **declare the results** thereof. In such event, **the results of the referendum**, as declared by resolution of the county governing body, **are not open to question** except by a suit or proceeding instituted within thirty days from the date such resolution is adopted.

S.C. Code Ann. § 4-10-330(e) and(f) (*emphasis added*).

The wording of the Act demonstrates that the 30-day statute of limitations addresses matters of **procedure** relating to the election, the certification of the vote count, the validity of the referendum, and the results of the election. The statute requires, "The election commission shall . . . **certify the result**" of the referendum. *Id.* "[T]he county governing body must . . . **declare the results**" of the referendum. *Id.* "[T]he **results** of the referendum . . . are not open to question except by a suit or proceeding instituted within thirty days." *Id.* Accordingly, the 30-day statute of limitations applies to challenges to "the results of the referendum," in other words, challenges to the vote count or some other procedural deficiency.

As stated above the County "declared the results" of the referendum, including the number of votes for it and the number of votes against it. The County also recited the procedural history and required preconditions. (R. pp. 107-108).

The statute of limitations does not address challenges to the legality of the Ordinance. Taxpayers do not challenge the procedures of the referendum, the vote count, or the certification. Taxpayers argue that the Ordinance includes four illegal purposes, that the ordinance exceeds the authorizing Act. Accordingly, the 30-day statute of limitations does not bar Taxpayers' challenge.

The Circuit Court relied on two cases enforcing short statutes of limitation after elections. These cases address procedural issues governing the validity of the vote, or preconditions to the vote. First, the Circuit Court relied on *Hite v. Town of West Columbia*. The Supreme Court ruled:

> The **plaintiffs**, who have appealed, make no contest of the election, the result of which was published, or of the form of any procedure taken by the town council, or the election commissioners. They **contend that the election was held without a petition containing the signatures of a majority of the freeholders in the area to be annexed**, and that without such petition **no jurisdiction was acquired**, and therefore no authority to act, and all action taken in the matter was void.

220 S.C. 59, 63, 66 S.E.3d 427, 428 (1951) (emphasis added). The statute required that a challenge be filed within 90 days. The Court denied the plaintiffs' petition because "no protest was ever filed . . . ; nor was the suit commenced within 90 days from the time the result of the election was declared." 220 S.C. 59, 64, 66 S.E.3d 427, 429 (1951). The challenge alleged the failure of a precondition, a procedural deficiency; it was not a claim that the annexation was unlawful, in and of itself. Under the statute of limitations, the procedural challenge was time-barred.

Similarly, in *Morgan v. Feagin*, the plaintiffs contended that the publication of the notice of the special election "was not precisely timed, and the first appearance of it in that newspaper was in the form of a news item rather than an official notice." 230 S.C. 315, 316-17 95 S.E.2d 621, 622 (1956). This was also procedural challenge to a precondition to the election, not that the subject of the election was unlawful. The Supreme Court ruled that the plaintiffs had not filed their challenge within 30 days of the election and that the procedural challenge was time barred. The Court relied on the language of the act governing procedural challenges:

> neither the **results** of such election, as declared by the aforesaid resolution, nor the **manner** of holding the election shall be open to question except by a suit or proceedings instituted **within thirty days** from the date of the filing of such certified copy of such resolution.

230 S.C. 315, 317 95 S.E.2d 621, 622 (1956) (emphasis added). Accordingly, the two primary cases on which the Circuit Court relied are procedural rulings and are distinguishable from the Taxpayers' challenge in this case, which contends that the Ordinance exceeds the authorizing Act.[1]

Third, the Circuit Court cited *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 528, S.E.2d 408 (2000), in which the Attorney General challenged a City's strip or "shoestring" annexation of a piece of land five feet wide and a mile long. The statute of limitations for annexation required such a challenge to be brought within 90 days. That factual scenario is far removed from the facts of this case.

[1] In oral argument, the County also cited *W.J. Douan v. Charleston County Council*, 357 S.C. 601, 594 S.E.2d 261 (2003) and *Taylor v. Roche*, 271 S.C. 505, 248 SE2d 580 (1978) but neither case addressed the 30-day statute of limitations.

Accordingly, all the cases cited by the Circuit Court are distinguishable. The statute of limitations governing procedural challenges to the results a referendum does not govern these Taxpayers' claim that a county Ordinance exceeds the authorizing Act.

## II. AN ORDINANCE MAY INCLUDE ONLY PROJECTS AUTHORIZED BY THE ACT.

**"It is axiomatic that the County's Ordinance may not expand the scope of expenditures authorized in the enabling provisions of the . . . Act."** *Richland Co. v. Dept. of Revenue,* 422 S.C. 292, 311, 811 S.E.2d 758, 768 (2018) (emphasis added).

The General Assembly enacted the Capital Projects Sales Tax Act in 1997. The Act contains a list of permissible uses. The Act states, "The ordinance must specify . . . the purpose for which the proceeds of the tax are to be used, . . . and may include the following types of projects." S.C. Code Ann. § 4-10-330(A)(1). The Act lists such projects in paragraphs (a) through (i). The permitted projects all relate to real property, not personal property, supplies, personnel, or equipment.

The Ordinance included funding for fire trucks, an ambulance, and communications equipment. The Capital Projects Sales Tax Act does not authorize these projects.[2] When the Act says the Ordinance "may include" certain projects, it also holds that the Ordinance may **not** include projects not listed.

[2] The neighboring county, Orangeburg County, agrees with the Taxpayers' position. In its Capital Projects Sales Tax "Facts and Figures," the Orangeburg County website says: "Proceeds must be used for capital/infrastructure projects only: *for example, Roads, Water, Sewer, Municipal Buildings, Community Facilities* - **Cannot be used for operations, personnel, or equipment."**
https://orangeburgcounty.org/depts/commDev/cpst/cpst.asp (italics and bold in original).

### A. The Act's Amendments Demonstrate that the List of Permissible Uses is Exclusive.

The "Capital Project Sales Tax Act" was initially enacted in 1997. The initial act contained a list of permissible projects. On two occasions since its enactment, the General Assembly explicitly expanded the list of permissible projects. In 2004, General Assembly enacted Act 244, which added public parking garages, beach access, and beach re-nourished as permissible uses for the Act. (R. pp. 57-58). In 2012, the General Assembly enacted Act 268, which again expanded the list of permissible uses to include dredging, dewatering, construction of spoil sites, and disposal of spoil materials. (R. pp. 59-61). These statutory amendments demonstrate that the list of permissible uses must be expanded by statute, and not by decisions of the individual counties, nor by expansive readings from the courts. Counties must act only within the confines of the authorizing Act.

Thus, the General Assembly recognized a need to expand the list of projects permissibly financed by this tax **by statute**, and they did so on two separate occasions. The legislative amendments broaden the list of permissible projects and demonstrate that the list of projects is not open-ended. These enactments demonstrate that the General Assembly intended that any type of permissible purpose must be specifically stated in the statute. If the General Assembly had intended the list to be expansive and not limiting from the beginning, it would not have needed to amend the Act twice to expand the list of permissible uses.

### B. The Act's Wording and Structure Demonstrates that the List of Permissible Uses is Exclusive.

The structure and wording of the Act also demonstrates that the list is exclusive and may not be expanded by individual counties. S.C. Code Ann. § 4-10-330(A)(1)(a)–(g) contain a list of authorized uses. In addition, sub-item (h) allows counties to join with municipalities and special purpose districts for projects; however, the combination must be "for the projects **delineated** in subitems (a) through (g)." § 4-10-330(A)(1)(h) (emphasis added).

In addition, the statute allows "any combination of the projects **described** in subitems (a) through (h) of this item." *Id.* Accordingly, sub-items (h) and (i) emphasize that the counties are not free to expand the list of projects or uses; they must be "delineated" or "described" in the paragraphs (a) through (g). The General Assembly explicitly limited the combination of projects to those specifically listed in the previous paragraphs in the statute.

### C. The County May Not Enact Beyond the Authorizing Act.

The appellate courts of this state have not addressed the Capital Projects Sales Tax Act. However, the South Carolina Supreme Court addressed a similar Penny Tax act in *Richland Co. v. Dept. of Revenue,* the Optional Methods for Financing Transportation Facilities Act (Transportation Act), S.C. Code Ann. § 4-37-30. That Penny Tax act, like the Act in the case at bar, requires, "The ordinance **must specify** . . . the project or projects . . . for which the proceeds of the tax are to be used, . . . which **may include**" projects listed thereafter in the statute. *Id.* (emphasis added).

The Supreme Court ruled: "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)." *Richland Co. v. Dept. of Revenue,* 422 S.C. 292, 298, 311, 811 S.E.2d 758, 761 (2018) (emphasis added). The Supreme Court also ruled,

> 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**").

*Richland Co. v. Dept. of Revenue,* 422 S.C. 292, 311-12, 811 S.E.2d 758, 768 (2018) (emphasis added).

The Supreme Court found "many suspect expenditures of Penny Tax funds." *Id.,* 422 S.C. at 312, 811 S.E.2d at 768 (2018). The Court ruled that under those circumstances "an injunction is appropriate." *Id.* The Supreme Court, itself, issued an injunction and ruled, "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." *Id.,* 422 S.C. at 311-12, 811 S.E.2d at 768 (2018).

Finally, the Supreme Court ordered repayment of the unauthorized uses.

> In addition to the challenged expenditures that gave rise to this litigation, we further recognize **it may be contended that the County expended Penny Tax funds contrary to the Transportation Act during the**

> **pendency of this appeal**. If the circuit court determines the County violated the Transportation Act during the pendency of the appeal by expending Penny Tax funds on matters unrelated to a transportation project or unrelated to the direct administration of a transportation project, **the circuit court shall order the County to repay the improper expenditures from the County's general fund**.

*Id.,* 422 S.C. 292, 313, n. 9, 811 S.E.2d 758, 769 (2018) (emphasis added).

**D. The Act does not authorize the purchase of personal property.**

The County Council **conceded** that the Capital Projects Sales Tax Act does not explicitly authorize fire trucks, or ambulances. "So, absolutely, fire trucks aren't listed, ambulances aren't listed." (Transcript, p. 34, ll. 3-4). If the General Assembly had intended to include personal property, equipment, and supplies in the Act, the General Assembly would have specifically listed them.

The County contends that the statute refers to "the following *types* of projects." (R. pp. 72-75). But in determining what is an appropriate "type" of project, the Court must use the authorized projects .**specifically listed** as references. All permissible uses are related to real estate, not equipment. Accordingly, equipment is not of a similar "type" of project as the projects permissible under the statute.

The County further argued that the Act is permissive, because it uses the phrase "may include." (R. pp. 74-75).

The Supreme Court ruled that "may" sometimes means "shall" and may be mandatory and not permissive. It depends on the context of the verbiage, and upon the legislative intent.

> A basic rule of statutory construction is that words in a statute must be given their plain and ordinary meaning. *Adkins v. Varn,* 312 S.C. 188, 439 S.E.2d 822 (1993). Ordinarily, the use of the word "may" in a statute signifies permission and generally means the action spoken of is optional or discretionary. *Robertson v. State,* 276 S.C. 356, 278 S.E.2d 770 (1981).

> **But, when the question arises whether "may" is to be interpreted as mandatory or permissive in a particular statute, legislative intent is controlling**. *Id.* And the use of the word "may" in a statute can be interpreted to mean "shall" *Id.* This is especially so where the original statute used the term "shall" but a later amendment uses the term "may", and there is no explanation for the change in terminology. *Id.* In interpreting the interchangeability of the word "may" and "shall" in statutes, other jurisdictions have held that "may" will be construed as "shall" or as imposing an imperative duty **whenever it is employed in a statute to delegate a power, the exercise of which is important for the protection of a public or private interest**. *Puckett v. Sellars,* 235 N.C. 264, 69 S.E.2d 497 (1952). Accord, *Independent Bankers Assoc. of Ga., Inc. v. Dunn* 230 Ga. 345, 197 S.E.2d 129 (1973).

*T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 402, 450 S.E.2d 87, 95 (1994) (emphasis added) (attached).

The *Morton Builders* factors are present in this case, and therefore the *Morton Builders* rule applies. The Act in this case "delegate[s] a power," *i.e.*, the power to raise money by a special taxation. Furthermore, the limited list is "important for the protection of a public . . . interest," *i.e.*, the limitation of the permitted uses of the tax and the protection of the taxpayers' fiscal interests. Accordingly, even though the Act uses the words "may include," the legislative intent is to limit the permissible uses to those listed in the Act.

"Legislative intent is controlling." *Id.* The legislative intent is made clear in SC Code Ann. § 4-10-330 (h) and (i). In both paragraphs, the Act **limits** the permissible uses to those **delineated** or **described** in the previous paragraphs: "(a) through (g)" and "(a) through (h)." *See* Section II.B. *supra*. Accordingly, the Act limits permissible project to those articulated in the Act.

The "may include" language means that the counties need not include **all** these listed projects, but it **does** mean that they are **not** allowed to go beyond the "delineated" or

"described" types of permissible purposes. The counties "may not" include the types of projects not listed.

This statute should be strictly construed. "It is elementary that no tax can be imposed without **express statutory authority**, that such authority is to be construed **strictly against the state**." *Wingfield v. South Carolina Tax Commission*, 147 S.C. 116, 144 S.E. 846, 855 (1928), *quoting East Livermore v. Livermore Falls Trust & Banking Co.,* 103 Me. 418, 69 A. 306, 15 L. R. A. (N. S.) 952, 13 Ann. Cas. 631 (emphasis added).

> [T]ax statutes cannot be extended by implication beyond the clear import of the language used and any substantial doubt must be resolved against the government and in favor of the taxpayer. *Fuller et al. v. S. C. Tax Commission*, 128 S.C. 14, 121 S.E. 478; *Hadden et al. v. S. C. Tax Commission*, 183 S.C. 38, 190 S.E. 249; *Phillips v. S. C. Tax Commission*, 195 S.C. 472, 12 S.E.2d 13.

*South Carolina Electric & Gas Co. v. Pinckney*, 217 S.C. 407, 412, 60 S.E.2d 851,857 (1950).

The County Ordinance unlawfully authorized projects not permitted by the Act, and therefore, the Ordinance is unlawful. The County's proposed use of bond proceeds for the unauthorized projects is likewise unlawful. It is impossible to tell whether the Referendum would have passed if the unlawful projects had not been included.

Calhoun County's violation of the Act is an irreparable injury to the County citizens and taxpayers. In *Richland Co. v. Dept. of Revenue,* 422 S.C. 292, 298, 311, 811 S.E.2d 758, 761 (2018), the Supreme Court found that County violations of a similar penny tax act would lead to irreparable harm to the County taxpayers. "[A]s DOR asserted to the circuit court, the taxpayers of Richland County would suffer **irreparable harm** if the County is not required to follow the law. We **agree**." *See also Myers v Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993) (the Circuit Court had denied an injunction to the taxpayer

plaintiff, who alleged an unlawful diversion of taxpayer funds, finding that he had not shown an "irreparable injury," and the Supreme Court reversed.) Accordingly, the Circuit Court erred in not ruling that the County must follow the statutory requirements for permissible projects set out in the authorizing Act.

Just as the Supreme Court issued an injunction in *Richland County* when the County spent penny tax funds in violation of the strictures of the enabling act, so too, this Court should enjoin the unlawful expenditure of penny tax revenues in this case.

## III. THE ORDINANCE SHOULD BE DECLARED UNLAWFUL AS A WHOLE.

The final issue is whether the Court should declare the entire Ordinance should be unlawful, or judicially modify it to remove the four impermissible projects. Taxpayers respectfully suggest that the Ordinance must stand or fall as a whole. The impermissible uses constitute 4 of the 15 uses in the Ordinance. The impermissible uses constitute approximately 1/5 of the dollars to be raised by taxation. The taxpayers of Calhoun County did not vote on an Ordinance as edited by this Court. They voted on the Ordinance as presented by the County Council.

Taxpayers respectfully suggest that this Court's redrafting legislation would violate the Separation of Powers provisions of the South Carolina Constitution, Art. I, Sec. 8: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." This Court must rule on judicial matters presented to it, but not redraft legislation, nor impose upon the taxpayers of Calhoun County an Ordinance that they did not adopt.

This Court must not sever portions of a unitary ordinance and preserve other portions. By way of illustration, on several occasions the South Carolina Supreme Court has addressed legislation that violates South Carolina Constitution, Art. III, Sec. 17: "Every Act or resolution having the force of law shall relate to but one subject." This analysis and reasoning is appropriate for the case at bar. County Council added 4 illegal uses to 11 legal uses, like the General Assembly added unrelated matters to a pending bill, a practice called bobtailing or logrolling. When ruling on challenges to the unconstitutional practice, the Supreme Court initially ruled that it would determine the "one subject" of the Act and strike from the Act everything that did not relate to that "one subject." *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *SCPIF v. Harrell,* 378 S.C. 441, 663 S.E.2d 52 (2008).

Justice Pleicones, in dissent in *Sloan v. Wilkins*, objected to the Court's severance of only parts of that Act:

> Severing certain provisions of an act neither prevents nor corrects log rolling, but rather "creates uncertainty and promotes arbitrary and uneven enforcement" of the one-subject rule. *State ex rel. Ohio AFL–CIO v. Voinovich,* 69 Ohio St.3d 225, 249–50, 631 N.E.2d 582, 599–600 (Ohio 1994) (William Sweeney, J., concurring in part and dissenting in part); *see also State ex rel. Hinkle v. Franklin County Bd. of Elections,* 62 Ohio St.3d 145, 153, 580 N.E.2d 767, 773 (Ohio 1991) (Douglas, J., dissenting) (asking, "[H]ow does the majority know which part of the Act is defective? The Act is a promulgation of the General Assembly **in package form**. Can we break into the package and excise what we perceive (or want to be) the offending part?"); *Heggs v. State,* 759 So.2d 620, 630 (Fla.2000) (stating it is "manifestly unsound to employ severability"). **Employing the severability clause in Act 187 turns the Court into a super-legislature**.

*Id.*, 362 S.C. 430, 444-445, 608 S.E.2d 579, 587 (2005).

In *American Petroleum Inst. v. S.C. Dept. of Rev.*, the Supreme Court re-examined the practice of severing certain statutory provisions and reversed its prior holdings.

Having found a violation of the constitution, we must consider whether any

> portion of the Act is severable. Both Petitioners and Respondents urge us to sever section 3 from the Act, as the "offending provision," if we find that the one subject rule is violated. **However, we find that to sever only part of the unconstitutional act would require this Court to go beyond its proper role and to intrude into the province of the legislature**. We therefore are constrained to find **the entire Act** violative of Article III, § 17.
>
> Recent precedent from this Court stands for the proposition that an Act which offends Article III, § 17 of the South Carolina Constitution may merely be shorn of its "offending provision" where "the constitutional portion of the legislation remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution." *Wilkins,* 362 S.C. at 439, 608 S.E.2d at 584. We take this opportunity to reconsider the remedy for violations of the one subject rule.
>
> First, we find that the notion that the Court may excise an "offending provision" is **inherently flawed** since all provisions in an act which does not address one subject are "offending" provisions. In the instant case, sections 1 and 2 offend the one subject provision of our constitution equally as much as section 3.
>
> Second, in order to sever the "unconstitutional portion" of an act so as to bring it into harmony with the one subject rule, this Court must ascertain which subject is the "proper" subject, that is, the one actually intended by the General Assembly. In the instant case, while this Court may find that the three provisions of the statute do not concern the same subject, current practice would require the Court to decide whether the proper subject is, for example, sales tax exemptions or fuel blending in order to determine which provision(s) to sever. To examine an act passed in package form, and **to then choose which portion to excise and which to keep would require the Court to usurp the prerogative of the General Assembly and thus act as a super-legislature**.
>
> **We therefore hold that Act 338 is unconstitutional in its entirety**.

382 S.C. 572, 578-79, 677 S.E.2d 16, 19 (2009) (emphasis added).

Similarly, in this case, for this Court to strike illegal provisions from the Ordinance "would require this Court to go beyond its proper role and to intrude into the province of the legislature." *Id.* [3]

[3] More recently, the Supreme Court addressed this issue again and ruled that when the General Assembly added a proviso to the Appropriations Act, the Court could rely on the General Assembly's determination

If this Court rules that the Ordinance is unlawful, the consequences to the County are not overly dire. The projects would be delayed, but the County caused the delay by listing the illegal projects, and the delay can be relatively short. The County may simply adopt a new ordinance, with a lawful list of projects and conduct another referendum. This Court should rule that County Ordinance violated the enabling Act, and that that the Ordinance is unlawful in its entirety.

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that the "one subject" of the Appropriations Act was appropriations, and the Court could strike from the Appropriations Act any proviso that was not germane to the "one subject" of appropriations, without invalidating the entire Appropriations Act. *SCPIF v. Lucas,* 416 S.C. 269, 786 S.E.2d 124 (2016).

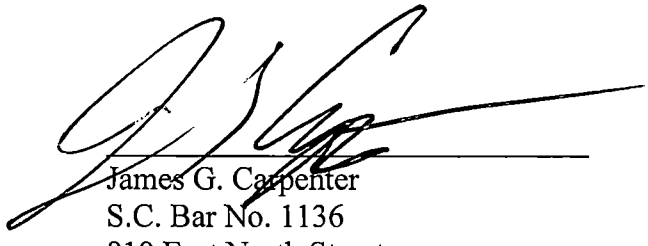
## CONCLUSION

The 30-day statute of limitations for challenging the results of the referendum does not bar this claim challenging the inherent illegality of the Ordinance. The Ordinance exceeds the authorizing Act, and this Court should declare the Ordinance to be unlawful in its entirety.

**WHEREFORE**, Appellants pray the Court to:

1. Grant the Taxpayers Summary Judgment,
2. Rule that the Ordinance exceeds the authorizing Act and is therefore unlawful,
3. Enjoin the continued collection and expenditure of the tax revenues,
4. Enjoin the issuance of the bonds,
5. Grant the Taxpayers costs and attorneys' fees under S.C. Code Ann. § 15-77-300, et seq., and
6. Grant the Taxpayers such other and further relief as the Court deems just and proper.

Respectfully submitted,
**THE CARPENTER LAW FIRM, PC**



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CERTIFICATE OF COUNSEL

Pursuant to Appellate Rule 211(a), the undersigned hereby certifies that Appellants Final Brief and Appellants Reply Brief comply with Rule 211(b).

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December 12, 2019

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM CALHOUN COUNTY

Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

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Appellate Case No. 2019-001016

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South Carolina Public Interest Foundation, Amy Hill, and Rebecca Bonnette, individually, and on behalf of all others similarly situated, ..... Appellants,

v.

Calhoun County Council, ..... Respondents.

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**CERTIFICATE OF SERVICE**

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The undersigned attorney certifies that he served a copy of the foregoing Appellants' Brief and Appellants' Reply Brief on counsel for Respondents by US Mail, postage prepaid on the 12 day of December, 2019 to the following:

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