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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CALHOUN COUNTY
COURT OF COMMON PLEAS

BRIAN M. GIBBONS, CIRCUIT COURT JUDGE

Appellate Case No. 2019-001016

South Carolina Public Interest Foundation, Amy Hill, and Rebecca Bonnett, Individually, and on behalf of all other similarly situated.....Appellant,

v.

Calhoun County Council,.....Respondent

AMICUS CURIAE BRIEF OF THE SOUTH CAROLINA ASSOCIATION OF COUNTIES

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INTEREST OF *AMICUS CURIAE*

The South Carolina Association of Counties ("Association") was founded in 1967 as an organization dedicated to improving county government for our 46 member counties and protecting the promise of Home Rule guaranteed by Article VIII of the South Carolina Constitution. This case presents a direct threat to Home Rule and counties' ability to plan, fund, and build necessary capital projects to meet the diverse and changing needs of their citizens.

South Carolina law limits the number of ways that counties can pay for essential services for their citizens. *See*, *e.g.*, S.C. Code Ann. § 6-1-320 (limiting counties ability to raise revenue through property tax millage rate increases). With limited options to raise revenue, the Capital Projects Sales Tax (CPST) is an increasingly necessary alternative that gives *voters* the ability to approve funding for essential services such as roads, fire protection, police, and necessary public safety communications infrastructure. The CPST is a statutorily created vehicle for counties to raise tax revenue to pay for the construction of specifically identified and popularly-approved projects, such as courthouses, jails, police stations, and roads. *See* S.C. Code Ann. §§ 4-10-300.

Petitioners, a small group of county residents, backed by a private foundation, ask this Court to construe the Act so as to derail a majority of Calhoun County voter's approval of a CPST designed to fund new capital projects including important public safety equipment and communications infrastructure. As of 2019, twenty-three South Carolina counties were actively using this funding mechanism

in some form. Another two counties are currently considering imposing a CPST in the future. The twenty-three CPST ordinances currently in place fund numerous projects that support essential services provided by local government to the citizens they serve. These projects include courthouses, police, fire and emergency medical services, water and sewer projects, cultural and historical facilities and educational facilities. The decision of this Court will have a lasting impact on these vital financing programs.

Pursuant to Rule 213, SCACR, the Association respectfully submits this brief in support of Respondent Calhoun County Council ("Respondent").

STATEMENT OF ISSUES ON APPEAL

The Association respectfully adopts the Statement of Issue on Appeal as set forth by Respondent and adopts those sections of Respondent's brief as if set forth verbatim herein.

STATEMENT OF THE CASE

The Association respectfully adopts the Statement of the Case as set forth by Respondent and adopts those sections of Respondent's brief as if set forth verbatim herein.

STATEMENT OF FACTS

The Association respectfully adopts the Statement of Facts as set forth by Respondent and adopts those sections of Respondent's brief as if set forth verbatim herein.

ARGUMENT

I. The circuit court properly granted Respondent's Motion for Summary Judgment because Appellants brought their action outside of the 30-day statute of limitations contained in subsection 4-10-330(F) of the Act.

The General Assembly provided straight-forward and unambiguous language limiting the time that aggrieved parties may challenge a successful CPST referendum. S.C. Code § 4-10-330(F) states:

> 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.**

(Emphasis added.)

The language of the CPST's statute of limitations provisions clearly gives any party contesting a successful referendum 30-days from the date county council adopts the resolution declaring the results of the referendum. The circuit court correctly found that the Appellants were time-barred from bringing their action after the running of the statutory 30-day limitation period.

Time periods limiting the time an aggrieved party may legally challenge otherwise successful referendum are the result of the important policy consideration. "Due process requires that the statute of limitations afford a party a reasonable time within which to commence an action, considering the situation to which it applies." *Hite v. West Columbia*, 220 S.C. 59, 66 S.E.2d 427 (1951). "In reviewing the reasonableness of a limitations period, the court will consider "the

circumstances confronting the legislature and the end which it sought to accomplish." *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989).

The state's courts have long recognized the public policy concerns behind a reasonable time limit for challenging governmental decisions. This court held that "[m]any questions connected with municipal government, including that of taxation, would need to be known with reasonable promptness." *Hite v. West Columbia*, 220 S.C. 59 at 66, 66 S.E. 2d 427 at 430 (1951). The 30-day statute of limitations provided in the CPST and similar local option tax statutes balance the right of aggrieved taxpayers and the legitimate need local governments require as to finality so that they can conduct business without fear of a subsequent, delayed challenge to the election outcome. *See* Ex *parte State ex rel. Wilson*, 391 S.C. 565, 578, 707 S.E.2d 402, 409 (2011) ("enforcing a statute of limitations in an annexation case due to the "greater importance [assigned] to the policy of finality of an annexation, with its attendant consequences.") This Court applied these same policy considerations in local government revenue bond issuances where they held that "[p]urchasers of bonds could hardly be found if the bonds were subject in their hands to attack for alleged illegality in the proceedings upon the issuance of them." *Morgan v. Feagin*, 230 S.C. 315 at 317, 95 S.E.2d 621 at 622 (1956).

Further, under Appellants' interpretation of the statute of limitations provision, every CPST ordinance would be subject to challenge on its compliance with the Act at any time. Appellants argue that the statute of limitations contained in subsection (F) of § 4-10-330 applies only to "matters of procedure relating to the election, the certification of the vote count, the validity of the referendum, and the

results of the election." Brief of App., p. 8. If this interpretation was to be accepted, a challenge to the substance of an ordinance could be brought at any time, even years following the ordinance's approval by the voters and millions of dollars in CPST revenue has been spent on the projects approved in the referendum, and in many instances revenue bonds have been issued for. This absurd result presents a host of practical challenges, including but not limited to the fact that there is no mechanism to refund CPST revenue to those who paid the tax, and the fact that CPST revenue expended by a county are paid to third parties for goods and services towards the projects listed in an ordinance.

This is precisely the reason the General Assembly provided a short statute of limitations in the Act. Because of the very nature of the types of projects to be funded by CPSTs, there is no practical way to put the proverbial genie back in the bottle. Notably, there is no other statute of limitations provided in the Act and the Association is unaware of any other provision of the South Carolina Code that would impose a different statute of limitations on the type of challenge brought by the Appellants. If the General Assembly had meant for the statute of limitations currently included in the Act to apply only to procedural matters as argued by Appellants, the Legislature would have presumably included a second statute of limitations related to substantive challenges to avoid the complications outlined above.

It should be noted that the CPST statute of limitations did not limit the Appellants to a thirty-day window after the council's adoption of the resolution declaring the results of the referendum. This Court recognized in *Glaze v Grooms*,

324 S.C. 249, 254, 478 S.E.2d 841,844 (1996), that "[i]f an action is required by statute within a certain time "after" an event, the general rule is that the action may be taken before the event, since the statute will be considered as fixing the latest, but not the earliest, time for taking the action." In this case, the Appellants should have reasonably been aware well before the general election what projects the county CPST program was to fund. In fact in their December 11, 2019 brief, the Appellants admitted the following sequence of events: county council adopted an ordinance to impose the CPST, pursuant to referendum; that the county gave notice in the newspaper of the 15 projects to be funded by the penny tax; that the CPST was subject to referendum on November 6, 2018 and that a resolution declaring the results was adopted on November 26, 2018. *Brief of App.*, pp 2-5. State statute requires all county ordinances be read on three separate days, with at least seven days between the second and third readings. *See* S.C. Code § 4-9-120. The referendum ballot question would have required to be filed with the State Election Commission by August 15, 2018 to be properly placed on the general election ballot. *See* S.C. Code § 7-13-355. The ordinance would have to have been introduced no later than late June or early July 2018. Clearly the Appellants should have reasonably been aware of the CPST referendum and all of the projects to be funded well before the end of December 2019. There was no reasonable justification for the Appellants to delay three full months after the end of the statute of limitations to file their challenge to the referendum. Accordingly, this Court should affirm the circuit court's order granting summary judgment to Respondent.

II. The Act should be interpreted to authorize funding for project equipment and materials "tethered" to the types of projects provided for in the statute.

To the extent this Court determines that the statute of limitations is inapplicable to Appellants' claims this Court should nevertheless affirm the circuit court's grant of summary judgment for Respondents because the Act authorizes the individual items challenged by Appellants.

This Court should reject the statutory interpretation offered by the Appellants for two reasons. First, the South Carolina Constitution requires that any law "concerning local government shall be liberally construed in their favor. Second, the CPST, like many other local government statutes, provides for broad interpretation of what constitutes a "project" under the statute.

A. The South Carolina Constitution requires the Act be liberally construed in favor of local government.

The Appellants erroneously argue that the Act should be narrowly interpreted to hold that no item can be funded by CPST revenue, unless the item has been specifically listed in the Act. This interpretation must be rejected. The S.C. Constitution requires that "any law concerning local government must be liberally construed in their favor." S.C. Constitution Art. VIII, Section 17. This section further mandates that the "[p]owers, duties, and responsibilities granted local government ... shall include those fairly implied and not prohibited by this Constitution." *Id.* Additionally, § 4-9-25, the county Home Rule provision granting counties broad police powers to address health, safety and good government reflects the constitution's mandate by providing that "[t]he powers of a county must be liberally construed in favor of the county and the specific mention of particular

powers may not be construed as limiting in any manner the general powers of counties." S.C. Code § 4-9-25. This court in, concluded that the constitutional provisions of Article VIII, in conjunction with local government home rule statutes authorized local government to enact regulations for government services or for preserving health, peace, order, and good government not inconsistent with the constitution or state law. *Williams v. Town of Hilton Head Island*, S.C. 311 S.C. 417, 429 S.E.2d 802 (1993). Because the Act grants local governments the power to enact CPSTs in order to fund projects that directly impact governmental services, the Act must be liberally construed in favor of Respondent Calhoun County Council.

B. **The liberal interpretation of the term "project" contained in the Act authorizes South Carolina counties to include ambulances, fire trucks and public safety radio communication equipment on a CPST referendum ballot.**

The Act does not limit the individual items or facilities that may be funded via a CPST. The General Assembly designed the CPST program, and other similar local option tax programs, to allow flexibility for individual communities to determine which specific projects were most important to that community. It may be helpful to this court to provide a review of the process a county must follow to impose a CPST. The Associations directs the Court's attention to the excellent overview offered by Respondents that provides in great detail the process Calhoun County followed to properly impose the CPST. *Brief of Resp't*, pp 2-6. The General Assembly developed a statutory scheme for the imposition and project funding of a CPST and intended it to be followed. Calhoun County, and other counties have complied with the General Assembly's intended scheme.

It is interesting to note that the "purpose" of the CPST, as well as the projects to be funded with CPST revenue is determined by a commission of citizens of the county and municipalities considering imposing a CPST. It is doubtful to believe that had the General Assembly intended for the CPST statute to be interpreted in the strict and narrow manner the Appellants have suggested that they would have left the ultimate decision of projects and the ballot question to unelected citizens. The General Assembly clearly recognized that flexibility was necessary to allow commission members to fully evaluate the funding proposals important to their specific community. The needs of a fast-growing county such as York or Charleston, are vastly different than the needs of a rural county like Calhoun. It is axiomatic that a program applicable to all 46 counties but designed to meet the needs of each county individually must be interpreted to allow for a broad range of general projects. S.C. Code § 4-10-330(A)(1) illustrates the flexibility the General Assembly intended. Here, the statute refers only in general terms to the "purpose" of the imposition of the CPST and then provides for the "types of projects" authorized for funding. The General Assembly neither provided a specific list of authorized items of capital infrastructure or "buildings" that would be considered a lawful purpose under the statute, nor did they provide a definition of "project."

Appellants mistakenly rely upon *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (2018), to support their proposition that the project types contained in the CPST statute should be strictly and narrowly interpreted to include only the individual specifically listed facilities. Appellants argue that counties may not include anything in the referendum that is not "delineated" or

"described" in the statute as permissible purposes. *Brief of App.*, pp 16-17. The tax statute at issue in the Richland County case is similar to the Act. That case involved the Optional Methods for Financing Transportation Facilities Act (the "Transportation Act") *See* S.C. Code Ann. § 4-37-30(A)(l)(a). The Transportation Act pertains to transportation-related projects, and like the CPST, contains a general list of transportation type projects that may be funded through a one-percent sales tax. In analyzing whether the Department of Revenue could enjoin the use of penny sales tax funds until the Department could implement guidelines concerning what spending was permitted, this Court construed the Transportation Act to permit the use of sales tax proceeds on costs that are "tethered to a specific transportation-related capital project or the administration of a specific transportation project." *Richland Cnty*, 422 S.C. at 312, 811 S.E.2d at 769. The ultimate issue in that case was whether certain expenses were properly related to the projects included in the county's referendum, not as in this case, a challenge to the actual projects approved by the voters. This Court recognized that in order to give effect to the statute, it must be construed to permit the expenditure of funds on expenses beyond the mere construction costs of the specifically listed transportation projects, but also on items related to a transportation project or the direct administration of a transportation project. *Id* at 314, 770 footnote 9.

This Court should apply this same reasoning when interpreting the Act. The projects specifically provided for in the referendum approved by the voters of Calhoun County are necessary components of and directly tethered to the types of projects authorized by the Act. All the projects funded by the Calhoun County

program are projects have been traditionally financed by other South Carolina counties and included in similar CPST programs. A recent survey of counties found that, as of 2019, voters in twenty-three counties have approved CPST referendum. Of those counties 43% funded new or upgraded 800-MHZ radio communications infrastructure, 22% have included funding for new EMS ambulance vehicles, and 26% have included funding for fire response vehicles and equipment.

Subsection 4-10-330(A)(1)(b) provides that penny sales tax funds can be used for, among other uses, police stations, and fire stations. It cannot be argued that a fire station is useful to the community only when it is equipped with fire trucks and firefighting equipment. The same holds true for medical emergency facilities. An EMS facility necessarily requires ambulances and their accompanying equipment to operate. Ambulances, fire trucks and accompanying equipment must be construed as necessary components of the physical facilities they serve. If this Court were to accept the statutory interpretation argued for by the Appellants, the Act would allow a county to construct a police or fire station, or an EMS facility, but then prohibit it from furnishing and equipping that same facility. The 800-MHz radio communications infrastructure is just as vital to public safety operations as fire trucks and ambulances are to their facilities. The 800-MHz radio wave spectrum has been set aside for public safety agencies by the U.S. Federal Communications Commission (FCC). The 800-MHz radio system is designed to reduce or eliminate commercial radio interference with public safety communications that in the words of the FCC "plagued" many public safety agencies for decades. As described by the FCC the "public safety spectrum serves

the mission-critical communications needs of First Responders charged with the protection of life and property, such as police, fire fighters and Emergency Medical Service (EMS) providers." See, *Improving Public Safety Communications in the 800 MHz Band,* FCC Docket WT 02-55, January 13, 2005.

The infrastructure of an 800-MHZ radio system is more than a set of radios. It includes the physical hardware for a primary and backup communications controller, microwave equipment for use in connecting facilities and radio dispatch console equipment at key first-responder locations such as 911 centers, Sheriff's offices and EMS centers.) All of this equipment should be construed as vital components to a public safety purpose.

It is absurd to imagine that the CPST statute would permit the counties to build a needed police or fire station, but not provide the equipment to operate it. Under this Court's longstanding statutory interpretation, this Court should not construe statutes so as to lead to an absurd result. *See*, e.g., *Duke Energy Corp. v. S.C. Dep't of Rev.*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001).

This Court should interpret the Act to permit other costs reasonably "tethered to" to projects permitted under the Act, such as those additional costs necessary to make the project useful for its intended purpose. See *Richland Cnty,* 422 S.C. at 302, 811 S.E.2d at 763-64. This construction is necessary to allow for adequate funding to make these projects beneficial to the voters who approved them in the referendum. Applying the term "project" to the CPST statute as it has been traditionally applied by the General Assembly in the other statutes dealing with

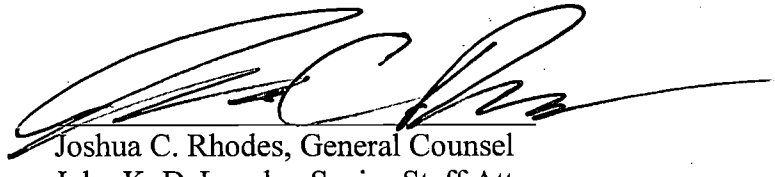
similar subject matter, it is clear that the General Assembly intended for the types of projects challenged by the Appellants to be included in a CPST referendum. Each project is a vital component of the types of projects provided for in subsection 4-10-330(A)(1) of the Act.

This Court should reject the narrow interpretation of the Act advanced by Appellants and permit the use of penny sales tax proceeds to fund vehicles, equipment and infrastructure that are directly tethered to the types of projects provided for in the CPST statute.

CONCLUSION

South Carolina law limits the number of ways that counties can pay for essential services for their citizens. With limited options to raise revenue, local option tax programs like the CPST is an increasingly necessary alternative that gives *voters* the ability to approve funding for essential services such as roads, fire protection, police, and necessary public safety communications infrastructure. Reversing the circuit court's thoughtful and well-developed decision would first, unduly hamper local governments and the Department of Revenue in completing time-sensitive statutory duties by allowing for unnecessarily delayed legal challenges, and second needlessly restricting their ability to fund projects of vital infrastructure with CPST funds directly related to otherwise lawful projects. This in turn would undermine Home Rule and its promise of local government.

Respectfully submitted,



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February 21, 2020

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the South Carolina Association of Counties' *Amicus Curiae* Brief was mailed this 21st day of February 2020 via United States Postal Service, First Class Postage Prepaid, to the following counsel of record:

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