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

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

Appellants,

v.

Richland County, Respondent,

and

Central Midlands Regional Transit Authority Intervenor/Respondent.

INTERVENOR/RESPONDENT CENTRAL MIDLANDS REGIONAL TRANSIT AUTHORITY'S RESPONSE TO AMICUS BRIEF FILED BY THE SOUTH CAROLINA DEPARTMENT OF REVENUE

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STATEMENT OF THE ISSUE ON APPEAL

The issue on appeal addressed in this Response is the same as the issue addressed in the Final Brief of Intervenor/Respondent Defendant Central Midlands Regional Transit Authority ("CMRTA"): Did the circuit court properly grant CMRTA's Motion for Summary Judgment when S.C. Code Section 4-37-30 permits counties to collect and expend tax funds for transportation related projects, which is defined to specifically include "mass transit systems?"

STATEMENT OF THE CASE

CMRTA incorporates by reference its Statement of the Case from its Final Brief.

STATEMENT OF FACTS

A full recitation of the facts can be found in the Statement of Facts in CMRTA's Final Brief. For purposes of responding to the South Carolina Department of Revenue's Brief of *Amicus Curiae*, a review of the relevant procedural history of the related case captioned *Richland County v. S.C. Department of Revenue* (the "DOR Case") is necessary.[1]

In the DOR Case, Richland County filed suit against the South Carolina Department of Revenue ("DOR") seeking various forms of relief, including (1) a declaration that the County was not "subject to [DOR's] directives, demands, or orders on any matter related to [the] County's spending of Penny Tax Revenues," (2) an injunction prohibiting DOR from issuing directives regarding Penny Tax expenditures, and (3) a writ of mandamus forcing the Department of Revenue to make its quarterly distribution of Penny Tax revenues to the County. *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 304, 811 S.E.2d 758, 764 (2018). DOR brought a counterclaim against the County and sought an injunction to prohibit the County from its continued use of the

[1] Much of this factual recitation is contained in the Statement of Facts in CMRTA's Final Brief. For ease of reference, CMRTA is repeating and expanding upon this procedural history to provide context surrounding the DOR's arguments in its Brief of *Amicus Curiae*.

Penny Tax revenues. *Id.* Richland County also asserted that DOR did not have standing to challenge the County's use of the revenues. *Id.* at 304, 811 S.E.2d at 764-65. CMRTA intervened in this action to protect its interest in continuing to receive Penny Tax revenues, which make up a large portion of its overall budget.

Following a hearing, the circuit court in the DOR Case (1) granted Richland County's writ of mandamus, (2) ruled DOR had standing to oversee the County's Penny Tax program, and (3) denied both parties requests for injunctive relief. *Id.* at 304, 811 S.E.2d at 765. Both parties appealed this decision to the Court of Appeals. *Id.* at 304-05, 811 S.E.2d at 765. Subsequently, upon a joint request of the parties, the appeal in the DOR Case was transferred to the Supreme Court. *Id.* at 305, 811 S.E.2d at 765.

Following oral arguments, the Supreme Court issued its opinion in the DOR Case that affirmed the portions of the circuit court's order that (1) granted a writ of mandamus to Richland County, (2) ruled that DOR had standing to oversee Richland County's Penny Tax program, and (3) denied Richland County's request for an injunction. *Id.* at 305-311, 811 S.E.2d. at 765-68. However, the Supreme Court reversed the trial court's denial of DOR's request for an injunction. *Id.* at 311-312, 811 S.E.2d. at 768-69. In doing so, the Supreme Court remanded the case to the circuit court and directed the circuit court "to enter the preliminary injunction in accordance with [its] opinion" within 30 days after remand. *Id.* at 312, 811 S.E.2d. at 769. The Supreme Court mandated that going forward, "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." *Id.* at 312, 811 S.E.2d. at 768. By ordering these guidelines, the Supreme Court established a mechanism for DOR and the circuit court to "ensure objective criteria [for] establishing compliance with the Transportation Act." *Id.*

Following remand, the circuit court in the DOR Case filed a temporary injunction pursuant to the Supreme Court mandate. [R. 312-26]. Pursuant to the Supreme Court's instructions, this order included guidelines that specify eligible and ineligible costs under the Transportation Act (the "Guidelines"). [R. 321-26]. The Guidelines were drafted by the DOR and issued on DOR letterhead. [R. 321]. Admittedly, both Richland County and CMRTA had input into the Guidelines. *See* Ex. A to DOR's Brief of *Amicus Curiae*. However, the DOR was the party who decided what was ultimately presented to the circuit court. In fact, the DOR specifically declined to include certain language requested by Richland County and CMRTA, which resulted in Richland County and CMRTA submitting alternate drafts of the Guidelines for the circuit court's consideration. These alternate drafts were ultimately rejected by the circuit court.

Within the Guidelines, DOR included a standalone section regarding mass transit systems. [R. 325]. That section reads:

> **C. Mass Transit Systems Costs**
>
> "Mass Transit System" as used herein refers to only 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 Cost include purchase of capital assets. ***Eligible Costs also include costs and expenses paid or incurred with the day to day operation of the Mass Transit System.***
>
> Additionally, Mass Transit Systems 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 that such expenditures are reasonable and not excessive.

[R. 325] (emphasis added). After the injunction order was issued, DOR then issued these same guidelines to the general public in the form of an information letter. S.C. DEP'T OF REVENUE, INFO. LETTER NO. 18-10, GUIDELINES FOR USE OF TRANSPORTATION TAX REVENUE (2018) (available at: https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/IL18-10.pdf).

ARGUMENT

I. The DOR's Information Letter is an interpretation of the Transportation Act and should be given deference by this Court under South Carolina's deference doctrine.

The DOR's Brief of *Amicus Curiae* argues that the Guidelines, which were submitted to and adopted by the circuit court in the DOR Case and later restated in an information letter published to the general public, are not the DOR's interpretation of the Transportation Act and should not be given deference by this Court under South Carolina's deference doctrine. This position is unsupported both factually and under South Carolina law.

Under South Carolina's deference doctrine, "[t]he construction of a statute by an agency charged with its administration will be accorded most respectful consideration and will not be overturned absent compelling reasons." *Montgomery v. Spartanburg Cnty. Assessor*, 419 S.C. 77, 82, 795 S.E.2d 866, 868 (Ct. App. 2016) (quoting *Jasper Cnty. Tax Assessor v. Westvaco Corp.*, 305 S.C. 346, 348, 409 S.E.2d 333, 334 (1991)); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ."). "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners*, 411 S.C. at 33, 766 S.E.2d at 717 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def.*

Council, Inc., 467 U.S. 837, 843 (1984)). "Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts . . . will defer to the agency's interpretation absent compelling reasons." *Id.* at 34, 766 S.E.2d at 717. Courts will "defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 34-35, 766 S.E.2d at 717 (citing *Chevron,* 467 U.S. at 844).

The DOR now argues that because the Guidelines were issued as part of a temporary injunction that is not given precedential value and then as an information letter, they are not an agency interpretation of the Transportation Act that should be afforded deference by the Court.

By definition, an interpretation is "the process of determining what something, esp[ecially] the law or a legal document, means; the ascertainment of meaning to be given to words or other manifestation of intent." BLACK'S LAW DICTIONARY 894 (9th Ed. 2009). The Guidelines fit squarely within this definition. They are a practical explanation of what is permitted under the Transportation Act and what is not. They are an "ascertainment of meaning to be given to [the] words" and intent of the Transportation Act.

Further, there is no requirement that an interpretation take any certain form, such as a regulation or a formal written opinion. Indeed, South Carolina courts have given deference to interpretations taking many different forms, including oral testimony and unwritten office procedures. *See e.g.*, *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) (considering the at-trial testimony of a DHEC Project Manager about DHEC's interpretation of regulations on the issuance of a water quality certification as an interpretation for purposes of the deference doctrine); *Trowell v. S.C. Dep't of Pub. Safety*, 384 S.C. 232, 236, 681 S.E.2d 893, 896 (Ct. App. 2009) (considering State Human Resources

Director's unwritten "rule that the time for an appeal began to toll upon the service by facsimile," rather than when the correspondence was delivered by mail, an "interpretation of agency's grievance procedure" for purposes of the deference doctrine). The fact that the Guidelines were attached to an injunction order and issued as an information letter does not foreclose this Court from finding they are an interpretation entitled to deference.

Moreover, it is disingenuous for the DOR to now disclaim ownership of the Guidelines. Both the Guidelines attached to the injunction order and Information Letter #18-10 are on DOR letterhead. While other parties in the DOR Case made suggestions as to what should be included in the Guidelines, the DOR was the party who ultimately decided which of these suggestions were incorporated and submitted to the circuit court. Further, by publishing the Guidelines as an information letter, the DOR has encouraged the public to rely on these guidelines to comply with the law. The DOR has created the expectation that it will use the Guidelines in analyzing whether future spending would be appropriate under the Transportation Act.

In fact, that is exactly what has happened. In fulfilling its duty to ensure spending of penny tax funds complies with the Transportation Act, the DOR has been actively using the Guidelines to enforce the Transportation Act in the DOR Case. That case has been stayed since April 18, 2019 in order to allow the DOR to complete an audit of Richland County and CMRTA's spending to determine if any of the spending violated the Transportation Act. In conducting this audit, the DOR used the Guidelines to determine what spending was allowed. In the preliminary audit report containing the DOR's findings, every finding about improper spending specifically references the Guidelines. Accordingly, these Guidelines are not just an academic or hypothetical exercise concerning what spending might be allowed under our State's revenue laws. Instead, the DOR is

currently using the Guidelines to analyze the appropriateness of penny tax spending under the Transportation Act.

Furthermore, the DOR consistently has taken the position that it is the agency charged with ensuring that expenditures of penny tax funds comply with Transportation Act. *See* INFO. LETTER NO. 18-10 at 1 (stating in the introductory clauses that "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 . . . 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"). In fact, it is the very first statement of their amicus brief to this Court. *See* DOR's Brief of *Amicus Curiae*, p. 1 ("The South Carolina Department of Revenue ("Department" or "DOR") is authorized to 'administer and enforce the revenue laws of this State.' This authority extends to revenues generated in accordance with the Optional Methods for Financing Transportation Facilities Act, better known as the Transportation Act." (internal citations omitted)). If the DOR thought that any of the spending outlined in the Guidelines is not permitted under the Transportation Act, then under it's "duty to ensure that a county's expenditures of Transportation Tax revenues comply with the revenue laws," it should have edited the Guidelines to state what spending it believes is not permitted.

The DOR's attempt to suggest that certain portions of the Guidelines were only included because of the circuit court judge who entered the injunction order also rings hollow. *See* DOR's Brief of *Amicus Curiae* at 7 ("Because Judge Cooper would be entering the temporary injunction and because he had already ruled that Penny Tax revenue could be used for CMRTA's operational

for expenses, the Department concluded that, for purposes of a temporary injunction only, it would not contest the propriety of using the Penny Tax for CMRTA's operations costs.") If the DOR disagreed with any of the circuit court's rulings, it could have appealed those decisions. It did not. The DOR cannot now insinuate that it did not agree with the circuit court's injunction order adopting the Guidelines that it drafted and submitted.

Finally, the fact that the Guidelines were issued as an information letter does not mean that they are not an interpretation of the Transportation Act. In support on its position that an information letter cannot serve as an interpretation of a statute, the DOR cites to Revenue Procedure #09-3 for the proposition that that the DOR "does not issue an Information Letter '[w]hen the primary purpose is to provide *interpretations* or procedural guidance . . . ." However, this section containing the quoted language reads: "The Department *may exercise its discretion* not to issue an Information Letter for any reason, including: (1) When the primary purpose is to provide interpretations or procedural guidance . . . ." S.C. DEP'T OF REVENUE, SC REVENUE PROCEDURE #09-3, ADMINISTRATION OF ADVISORY OPINIONS (2009) (available at: https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/RP09-3.pdf) (emphasis added). Nothing in this Revenue Procedure prevents the DOR from issuing an information letter containing its interpretation of a law or statute. This revenue procedure does not include an instruction that the DOR shall not issue an information letter where the sole purpose is to provide an interpretation or that the DOR will only use other forms of advisory opinions to provide an interpretation of a statute. Instead, this section merely states the DOR may, in its discretion, decline to issue an information letter on the basis that the purpose of the letter is to provide an interpretation.

CONCLUSION

The DOR is the administrative agency tasked with administering the Transportation Act and Penny Tax program. *Richland Cnty.*, 422 S.C. at 306, 811 S.E.2d at 765 (noting the "DOR is the agency statutorily tasked with administering the Penny Tax program"). The Guidelines, which were attached to the injunction order and restated in Information Letter #18-10, are an interpretation of Transportation Act and specifically state that "costs and expenses paid or incurred with the day to day operation of the Mass Transit System" are "eligible costs" that are permitted under the Transportation Act. [R. 325]. Under South Carolina's deference doctrine, this Court "must give deference to the agency's interpretation." *Kiawah Dev. Partners*, 411 S.C. at 33, 766 S.E.2d at 717 (internal quotation marks omitted). Unless this Court determines that this interpretation is "arbitrary, capricious, or manifestly contrary to the statute," it must defer to this interpretation. *Id.* at 34-35, 766 S.E.2d at 717 (internal quotation marks omitted).

The DOR's Brief of *Amicus Curiae* does not contain any reason that would prevent this Court from finding that the Guidelines are the DOR's interpretation of the Transportation Act. To argue that these Guidelines are not an interpretation is contrary to both the obvious facts surrounding their drafting and the law of this State. The DOR has published the Guidelines for other counties to rely on in complying with the Transportation Act and recently used the Guidelines to review spending by the CMRTA and Richland County. To the extent the DOR is now having second thoughts on interpreting the Transportation Act to permit funding of the day-to-day operations of mass transit systems, the time for changing its opinion has long passed.

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