

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

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S.C. SUPREME COURT

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.

APPELLANTS' RESPONSE TO AMICUS BRIEF

March 20, 2020

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Appellants, by their undersigned attorney, submit this brief in opposition to the Amicus Brief filed by the South Carolina Association of Counties (“Association” or “amicus”).

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

Appellants seek declaratory judgment that Calhoun County’s violated S.C. Code Ann. § 4-10-330 and its amendments, which guide and limit the uses of the Penny Sales Tax funds. The County exceeded those limits. This is a matter of great public importance and requires future guidance from this Court. Accordingly, the public importance and necessity for guidance from a declaratory judgment on this issue overcome general standing, mootness and other procedural and judicial limits. Appellants only seek injunction against these expenditures in this particular case that will guide all future expenditures under this statute in South Carolina.

First, the Association argues that the Circuit Court properly invoked the 30-day statute of limitations to dismiss the Appellants’ case. (Amicus brief, p. 3). 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. S.C. Code Ann. § 4-10-330(F). (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.” S.C. Code Ann. § 4-10-330(F).

Appellants rely on their argument in their initial brief for this response. The General Assembly enacted a statute of limitations to limit the amount of time available to challenge the procedure and results of penny tax elections. Accordingly 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 County Election Commission certified the results of the referendum, and the appellants have no issue with their certification nor

with their declaration of the results of the referendum. Appellants contend that the **substance** of Calhoun County Ordinance Number 2018-18 exceed and violate the limits of the authorizing statute, not that the results of the election **procedure** are invalid. Appellants know of no statute of limitations argument that would diminish affect that legal contention.

Second, the Association argues that good public policy justifies general application of the 30-day statute of limitations. (Amicus brief, pp. 4-6). The Appellants do not disagree with this assertion, in the abstract. However, the 30-day statute of limitations is for procedural and voting issues; it has no application to the Appellants petition to enforce the limits of the enabling statute in this case.

II. UNDER THE CAPITOL PROJECT SALES TAX ACT, AN ORDINANCE MAY INCLUDE ONLY PROJECTS IT AUTHORIZES..

The Association argues that this Court should liberally construe the powers of a local government to utilize the Capital Projects Sales Tax Act to allow flexibility. (Amicus brief, p. 7). Accordingly, the Association contends that utilizing the special statute is one of the “general powers” of the County, which should be broadly construed under Home Rule. S.C. Code Ann. § 4-9-25. However, Section 4-9-25 contains an important limitation. County ordinances must not be “inconsistent with the Constitution and general laws of this State.”

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, **not inconsistent with the Constitution and general law of this State**, including the exercise of these powers in relation to **health and order** in counties or respecting any subject as appears to them necessary and proper for the **security, general welfare, and convenience** of counties or for preserving **health, peace, order, and good government** in them. The 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.

Id. (emphasis added). The general powers that must be broadly construed are those that address the health and order” or “security, general welfare,” and “preserving health, peace, order, and good government.” *Id.* safety, and good government of the county. The Capital Projects Sales Tax Act does not establish the general powers of a County. It’s a special and specific power granted by a unique statute, and the terms of the statute govern the grant of the power and how it should be construed and applied. The presumption from Home Rule has no application when an ordinance violates the Capital Projects Sales Tax Act or any other state statute. *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 563 S.E.2d 651 (2002).

The Supreme Court set out the rule that governs the special powers: “**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). In support of this “axiomatic” proposition the Supreme Court cited two cases:

See, . . . 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, 311-312, 811 S.E.2d 758, 768 (2018) (emphasis added).

Accordingly, the proper analytical framework for applying the Capital Projects Sales Tax Act is that set out in *Richland County v. Department of Revenue. Id.* The Act contains a specific list of projects. When the General Assembly wanted to expand that specific list, they did so by statutory amendment adding specific items to that list. The Association of Counties may properly appeal to the General Assembly for an amendment allowing flexibility in choosing projects. However, to this point the General Assembly has chosen specific limits. The Act does not allow counties to be creative or expansive in their use of the Act.

As the Appellants have previously argued,, on two occasions since its enactment, the General Assembly explicitly and very specifically expanded the list of permissible projects. In 2004, the General Assembly enacted Act 244, which added public parking garages, beach access, and beach re-nourishment 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.

Furthermore, the language of the Act itself counsels against the Association's broad reading. 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.* (emphasis added). 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 Act.

Finally, 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.

“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).

III. THE APPELLATE RECORD SHOULD NOT CONTAIN NEW FACTS OR NEW EXPERT OPINION.

Testimony not presented to the lower court is not appropriate for consideration by the appellate court. “The Record shall not, however, include any matter which was not presented to the lower court or tribunal.” SCACR 210(c). “[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.” SCACR 210(h).

[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that **all issues and arguments are presented to the lower court** for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that **an issue cannot be raised for the first time on appeal**, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (**Supreme Court will not consider any point which was not presented and considered below** unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (**record on appeal shall not include matter which was not presented to lower court**). *Elam v. South Carolina Dep’t. of Transportation*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004) (emphasis added). The amicus brief seeks to supplement the factual record contrary to the South Carolina Appellate Court Rules and contrary to “reported cases in South Carolina for at least four generations.” *Id.* Pages 11-12 of the Amicus Brief discuss use of penny tax funds to purchase 800 Mhz radio equipment. These facts are introduced for the first time in this Amicus Brief on the eve of oral argument. (Amicus Brief, pp. 11-12).

Justice Scalia pointed out the inherent defects and the legal and logistical flaws in accepting factual data or other assertions in the nature of testimony, untested by the rules of evidence or the adversary process.

Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery. See Fed. Rule Crim. Proc. 16(a)(1)(F), (G); Fed. Rules Evid. 702–703, 705. **An adversarial process in the trial courts can identify flaws in the methodology** of the studies that the parties put forward; here, we accept the studies’ findings on faith, without examining their methodology at all.

Sykes v United States, 131 S.Ct. 2267, 2286, 180 L.Ed.2d 60 (2011) (Scalia, *dissenting*) (emphasis added). The facts alleged in an amicus brief have none of the safeguards of the litigation process.

The amicus brief attempts to infuse additional fact and opinion testimony (not tested by cross-examination) (Amicus brief, pp. 11-12). The County had failed to present such evidence to the Circuit Court. The parties have already submitted their briefs and designated matters for the Record on Appeal. The amicus attempts to supplement the record improperly with new information.

“The [amicus] brief shall be **limited to argument** of the issues on appeal **as presented by the parties.**” Larson, Allison Orr, (emphasis added). The amicus briefs in this action go well beyond “argument of the issues on appeal as presented by the parties. The amicus briefs present new factual assertions and opinions, which are **not argument** and were **not presented** by the parties or considered by the trial court.

IV. AN AMICUS CURIAE SHOULD BE A FRIEND OF THE COURT, NOT A FRIEND OF THE COUNTY.

A recent law review article addresses the problem of the new factual and expert testimony that was not presented to the lower court and is not a part of the lower court record. *The Trouble with Amicus Facts*, by Allison Orr Larson, Associate Professor of Law, the College of William and Mary School of Law, 100 Va.Law.Rev. (2014). Professor Larson’s article begins by tracing the history and development of the amicus brief.

The amicus curiae – or “friend of the court”– is in no way a newfangled idea. Dating back to Roman law, the original amicus was a “bystander, who without having an interest in the case, of his own knowledge make a suggestion on a part of law or of fact for the information of the presiding judge.” In pre-18th-century England, the amicus was a neutral lawyer physically present in the courtroom who would engage in impromptu “oral ‘shepardizing’ – the bringing up of cases not known to the judge.” Early courts welcomed this form of amici curiae, on the theory that such neutral aids helped to avoid error and “served to maintain judicial honor and integrity.”

Interestingly, the original amicus was the lawyer not client — the amicus curiae stood in “an essentially professional relation to the court.” Organizations could not serve as amici curiae. The word amicus really describes a professional relationship between a judge and a lawyer. It was not until the early 1900s the courts began to attribute amicus briefs to the organization that sponsored it rather than the lawyer who submitted it.

Once the amicus arrived in America, the adversary system took hold of it and it became common for an amicus to represent interests of another.

* * *

The turn of the twentieth century, then, brought dramatic change in the Amicus business – a total shift, as one scholar frames it, from “neutral assistance to partisan advocacy.” . . . **Now amici are often compared to lobbyists.** Many interest groups are established atleast in part for the purpose of participation as amici in appellate cases

The evolution of the amicus from neutral bystander to “adversarial weapon” has generated a fair amount of criticism — both past and present. In 1949, Justice Frankfurter complained that the amicus briefs were “embarrassing” the court: “I do not like to have the Court exploited as a soapbox or as advertising medium or as the target not of arguments but of mere assertions that this or that group has this or that interest in the question to be decided.”

* * *

Political scientists and legal scholars now tell us that “more than any other type of brief filed that an appellate court, those drafted by amici contain a significant portion of new evidence.” **These briefs are filed after the record was closed, and the new information they present is not subject to cross-examination below.**

Id., pp. 7-15 (footnotes omitted) (emphasis added): The amicus brief in this case is similar to those described by Professor Larson. The Association of Counties amicus brief seems like a last-minute filing of a lobbyist or advocate, like an “adversarial weapon.” The amicus brief does not come

from a neutral or disinterested “bystander, who without having an interest in the case, of his own knowledge makes a suggestion on a part of law or of fact for the information of the presiding judge.”

Amicus briefs, such as this one, with their untested assertions, could fundamentally alter the adversarial process under the South Carolina Appellate Court Rules. Instead of being a “friend of the court,” the amicus in this case appears to be a “friend of the County.”

CONCLUSION

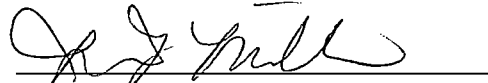
The 30-day statute of limitations for challenging the results of the referendum does not bar Appellants’ challenge to the inherent illegality of Calhoun County Ordinance Number 2018-18. The Ordinance exceeds the authorizing Act and violates its intent, and this Court should declare the Ordinance to be unlawful. Finally, Appellants object to new testimony and new arguments from the Amicus brief.

WHEREFORE, Appellants pray the Court to:

1. Grant the Taxpayers Summary Judgment,
2. Rule that Calhoun County Ordinance Number 2018-18 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,

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A handwritten signature in black ink, appearing to read "J.G. Carpenter", is written over a horizontal line.

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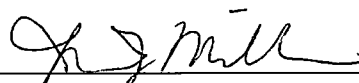
Calhoun County Council, Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that he served a copy of the foregoing Appellants' Brief in
Opposition to the Amicus Brief on counsel for Respondents and Amici by US Mail, postage
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