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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	CASE NO. 2019-CP-40-03032
South Carolina Coastal Conservation)	
League, Inc., Elizabeth M. Smith,)	
Abraham B. Jenkins, Jr., and South)	
Carolina Public Interest Foundation,)	
)	
Plaintiffs,)	
)	
vs.)	**ORDER GRANTING DEFENDANT CHARLESTON COUNTY'S MOTION TO DISMISS**
)	
Charleston County, South Carolina,)	
South Carolina Transportation)	
Infrastructure Bank, and South)	
Carolina Department of Transportation,)	
)	
Defendants.)	
)	

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SC Court of Appeals

This Court held a hearing on January 6, 2020, to decide Defendant Charleston County's ("County") Motion to Dismiss the Plaintiffs' Second Amended Complaint. The attorneys present were as follows: W. Andrew Gowder, Jr. representing Plaintiffs South Carolina Coastal Conservation League, Inc., Elizabeth M. Smith and Abraham B. Jenkins, Jr.; Christopher K. DeScherer representing the Plaintiff South Carolina Coastal Conservation League; James Carpenter representing the Plaintiff South Carolina Public Interest Foundation; Joseph Dawson, III, Bernard E. Ferrara, Jr., and Johanna S. Gardner representing Defendant Charleston County, South Carolina; Robert E. Tyson, Jr. and Jasmine D. Smith representing the South Carolina Transportation Infrastructure Bank; and Linda McDonald representing the South Carolina Department of Transportation. The County contends *inter alia* that 1) the Plaintiffs lack standing to bring this action; 2) the Plaintiffs' 2004 and 2016 Transportation Sales Tax Referendum Ballot question declaratory judgment claims are time-barred pursuant to South Carolina Election laws; and 3) the Plaintiffs' claims fail to state facts sufficient to constitute a cause of action pursuant to

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Rule 12(b)(6) SCRCP, or in the alternative, the Plaintiffs' claims are moot by subsequent legislative acts of Charleston County Council ("Council"). Based upon a careful consideration of the pleadings, the memoranda of law submitted by the parties, oral arguments presented, and the reasons set forth below, I find and conclude that the Plaintiffs lack standing to bring their first and second cause of action and, therefore, should be dismissed. As additional grounds for this dismissal, I find that the Plaintiffs' 2004 and 2016 Transportation Sales Tax Referendum Ballot question claims and their concomitant challenge to the 2004 and 2016 Transportation Sales Tax ordinances authorizing use of Transportation Act funds for the Mark Clark Expressway are time-barred pursuant to South Carolina Election laws.

In the alternative, even if the Plaintiffs had standing or their claims were not time-barred, I find that the Plaintiffs' claims under all of their causes of action fail to state facts sufficient to constitute a cause of action regarding the County's authority or procedures used to fulfill the South Carolina Transportation Infrastructure Bank Act's ("Infrastructure Bank Act" or "Act") requirements. However, I deny the County's claim this Court lacks subject matter jurisdiction under the South Carolina Revenue Procedures Act.

FINDINGS OF FACT

The Mark Clark Expressway ("MCE") is an interstate facility, which begins at an uncompleted interchange with US 17/Savannah Highway and SC 7/Sam Rittenberg Boulevard in the West Ashley section of the City of Charleston, South Carolina. The interstate currently terminates in a partial flyover interchange onto US 17N/Johnnie Dodds Boulevard in Mount Pleasant, South Carolina. The completion of the MCE involves the construction of approximately 8 miles of highway from James Island to West Ashley. In 2006, the Infrastructure Bank approved the MCE as an eligible project under the Infrastructure Bank Act. In 2007, the County, the South

Carolina Department of Transportation ("SCDOT"), and the Bank entered a three-party Intergovernmental Agreement ("2007 IGA"), pursuant to the Infrastructure Bank Act. See, S.C. Code Ann. § 11-43-180(A).

Under the 2007 IGA, the Bank committed to provide $420 million in financial assistance to complete the MCE. The SCDOT agreed to provide project oversight, management, and accept the project into its maintenance system when completed. The County, as the project sponsor, agreed to provide a local match of $117 million from proceeds of the Charleston County Transportation Sales Tax ("Transportation Sales Tax" or "TST")[1] for highway and road construction and improvements, pursuant to the schedule attached to the 2007 IGA. In January 2019, the parties agreed to the First Amended Intergovernmental Agreement for Charleston County Mark Clark Expressway Extension Project in Charleston County, South Carolina ("2019 Amended IGA").

According to the 2019 Amended IGA, the MCE's project costs have escalated to approximately $725 million. In addition, the Infrastructure Bank has conditioned its continued financial assistance for the project on the County's commitment to guarantee payment of the cost escalation to complete the MCE. Thus, the 2019 Amended IGA contractually obligates the County (among other financial considerations) to cover project costs above the Bank's $420 million commitment, to include an appropriation pledge stating, "[t]he County Council shall adopt a budget for each Fiscal Year appropriating revenues of the Sales Tax, or any federal or state grant

[1] The Optional Methods for Financing Transportation Facilities Act ("Transportation Act" or "Act") authorizes counties to impose a sales and use tax not to exceed one percent to fund transportation projects to include: highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities in Charleston County. See, S.C. Code Ann. § 4-37-10 et seq. Pursuant to the Act, the County has enacted two ordinances imposing a ½ penny tax each as a result of two voter approved referendums.

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proceeds, or any lawful source to fund the payment obligations of the County under this Agreement."

The Plaintiffs are the South Carolina Coastal Conservation League, Inc. ("CCL") and the South Carolina Public Interest Foundation ("SCPIF"), two South Carolina non-profit corporations that purport to have thousands of supporters who are citizens of South Carolina, and two named individuals. The Plaintiffs challenge (among other procedural issues) the County's authority to commit proceeds of the 2004 and 2016 Transportation Sales Tax to fund the MCE. Specifically, Plaintiffs challenge whether "either County Ordinance Number 1324 or County Ordinance Number 1907 authorize transportation sales tax expenditures for the Project due to the factual circumstances surrounding their adoption *and the ensuing referenda.*" See, Second Am. Compl. ¶ 16 (emphasis added). In addition, Plaintiffs question under the auspice of the "contract with voters" doctrine, whether ". . . S.C. Code Ann. § 4-37-10, et. seq., and the language of the aforementioned Ordinances prohibit First Half Cent and the Second Half Cent revenue from funding the Project." Further, Plaintiffs challenge whether the County violated South Carolina's Freedom of Information Act ("FOIA") closed meetings laws because it held an executive session and took action at its August 20, 2019, Special Finance Committee meeting regarding an agenda item listed as "Transportation Sales Tax Budget." I find that the Plaintiffs cannot pursue these claims for the following reasons.

CONCLUSIONS OF LAW

I. PLAINTIFFS LACK STANDING.

Based upon the foregoing Findings of Fact, I conclude that the Plaintiffs lack standing as non-profit corporations and citizens of South Carolina to present a justiciable case or controversy to challenge the validity and enforceability of the 2019 Amended IGA; and therefore, they cannot

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invoke the judicial power of this Court to adjudicate their claims. "[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." ATC S., Inc. v. Charleston Cnty., 380 S.C. 191, 198, 669 S.E.2d 337, 340-41 (2008). Under South Carolina law, a party can acquire standing: "(1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception." ATC S., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Plaintiffs do not plead standing based on a statute regarding their first and second causes of action; however, they assert they have constitutional, public importance, taxpayer, and associational standing. I find, as a matter of law, that none of the Plaintiffs' claims satisfy the standing requirements.

A. Constitutional Standing.

Plaintiffs contend they meet the common law test for constitutional standing because they "*voted on*" the 2004 and 2016 Transportation Sales Tax referendums, based on the understanding and representations of Council (and the ordinances) that 2004 and 2016 Transportation Sales Tax revenues would not be used to fund the MCE. See, Second Am. Compl. ¶¶ 59 and 63. Plaintiffs cite to comments made by individual Council members during public debates over the adoption of the 2016 Transportation Sales Tax Ordinance. Equally, the Plaintiffs claim that the expenditure of sales tax:

> . . . revenue[s] for the Project directly, materially, and substantially [*undermine*] *the goals* of improved connectivity of existing roadways, safety improvements, public transit, drainage facilities and flood control, bicycle lanes, and as a result Greenbelt funded conservation initiatives will all suffer and not be *completed as pledged* and promised by the County, [and that they] *pay First Half Cent and Second Half-Cent sales Tax on a regular basis.*

See, Second Am. Compl. ¶ 58; see also, Second Am. Compl. ¶ 60 (emphasis added).

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At the outset, Plaintiffs alleged comments from individual Council members, if accurate, are not binding on Council as a legislative body in 2004, 2016, or today.[2] The South Carolina Court of Appeals *in dicta* rejected a similar attempt to attack individual council member's comments stating:

> We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts.

Bear Enters. v. Cnty. of Greenville, 319 S.C. 137, 139 n.1, 459 S.E.2d 883, 885 (Ct.App.1995)

Moreover, Plaintiffs' reliance on aspirational goals like "improved connectivity of existing roadways, safety improvements, public transit, drainage facilities and flood control, bicycle lanes" are insufficient facts to support, let alone prove, constitutional standing. The United States Supreme Court in Lujan v. Defenders of Wildlife provided a three-part test to establish constitutional standing:

> **First**, the plaintiff must have suffered an 'injury in fact'- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical,'' **Second**, there must be a causal connection between the injury and the conduct complained of - the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' **Third**, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (emphasis added).

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[2] Of note, there could be no debates by Council in 2004 regarding the use of Transportation Sales Tax revenues for the MCE because the Project was initiated in 2006. This conundrum highlights the deficiency in the Plaintiffs' claims that only delineated and named roads (or for that matter, greenbelts and mass transit systems) voted on and/or debated by Council at the time, the ordinance was adopted are eligible for penny tax funding. I decline to construe the Transportation Act to require the same.

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The South Carolina Supreme Court in ATC S., citing Lujan, held that "[t]he principle of standing under the United States Constitution is 'an essential and unchanging part of the case-or-controversy requirement of Article III.'" ATC S., at 195, 669 S.E.2d at 339. Moreover, "[t]he party seeking to establish standing carries the burden of demonstrating each of the three elements. Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). The Plaintiffs fail to carry their burden to meet this test. Equally, Plaintiffs' claim and status as taxpayers cannot carry their burden to demonstrate each of the three elements. The South Carolina Supreme Court in ATC S., rejected a similar claim holding that:

> The injury to ATC, however, as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete and particularized injury. As the United States Supreme Court observed, a taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.' Frothingham v. Mellon, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078 (1923).

ATC S., Inc. v. Charleston Cnty., 380 S.C. 191, 198, 669 S.E.2d 337, 340-41 (2008); see also, Bodman v. State, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013) (". . . [W]e unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer for this reason.").

Similarly, the Plaintiffs' status as voters and members of associations with common interests fail to meet the common law test for constitutional standing. South Carolina law provides that:

> An organization has associational standing 'if one or more of its members will suffer an individual injury by virtue of the contested act.' (citation omitted). 'The three part test for associational standing requires that an association's members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014) (Holding that ". . . these injuries, even if actually suffered by individual complainants, are 'only generalized grievances suffered by the public as a whole which are insufficient to establish standing . . . 'By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.'").

As concluded above, the taxpayers and individual association members have not suffered a concrete, particularized injury because they fail to show a personal interest other than that shared in common by all members of the public.[3]

B. Public Importance Exception.

Plaintiffs contend they have standing under the public importance exception to the general standing requirement. I disagree.[4] "This Court has long recognized the 'public importance' exception to the general standing requirements. '[S]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.'" ATC S., 380 at 198, 669 S.E.2d at 341. Application of the doctrine requires a "cautious balancing of the competing interests presented." Id. The South Carolina Supreme Court in ATC S. explained:

> An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public

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[3] Assuming *arguendo* that the nonprofit corporation Plaintiffs survive the first prong of the constitutional standing test, they fail to satisfy the third prong of the three-part associational standing test in Carnival Corp – that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Georgetown Cnty. League of Women Voters v. Smith Land Co., 393 S.C. 350, 360, 713 S.E.2d 287, 293 (2011) (Hearn, K., dissenting) ("In my view, in order to satisfy this prong, the organization must show that the right it seeks to vindicate is common to the membership and the interests of the harmed members in the proceeding derives from their membership. (citation omitted). '[T]he association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties.").

[4] I take judicial notice of the fact that the CCL took a different stance regarding the public importance of the MCE in a companion case when it stated:

> This may be a project of significance to Charleston County Council, but that does not mean that the public supports it or that public interest considerations necessarily favor resolving this case in the Supreme Court. Not every dispute that is in some way related to an expensive transportation project merits consideration by the Supreme Court.

See, Brief of Proposed Amicus Curiae South Carolina Coastal Conservation League at 12, Case No. 2017-001606.

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> officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Id. 380 S.C. at 199, 669 S.E.2d at 341 (citing Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)).

Plaintiffs point to several appellate cases in South Carolina namely where SCPIF was a litigant and where the court applied the exception. However, the cases cited by the Plaintiffs are distinguishable from this case because they involve constitutional challenges and there was *no* judicial guidance addressing the issues. South Carolina law requires that:

> . . . when deciding whether to confer public importance standing, courts must . . . also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed. (citation omitted). However, as this Court has acknowledged, since many issues may be of public interest, or importance, '[t]he key . . . is whether a resolution is needed for future guidance.'

S.C. Pub. Interest Found. v. S.C. DOT, 421 S.C. 110, 118-19, 804 S.E.2d 854, 859 (2017)

While it is correct that the South Carolina Supreme Court in S.C. DOT found that inspecting bridges within private, gated communities was of public importance because it involved both the conduct of a governmental entity and the expenditure of public funds. Id. However, the Court further held that "[a]dditionally, future guidance is needed since there is no judicial guidance addressing the issues . . . ." Id. 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017). "Although a close call, we find the policy concerns that we must balance in determining whether to confer public importance standing weigh in Petitioners' favor given the factors already mentioned and the issue involved implicates both statutory and *constitutional* provisions." Id. (emphasis added).

In this case, Plaintiffs do not allege a constitutional infirmity. More importantly, future guidance is not needed through this Court. South Carolina law provides that the South Carolina Department of Revenue ("SCDOR") has a statutory duty to administer and enforce the Act. See, Richland Cnty. v. S.C. Dep't of Revenue, 422 S.C. 292, 306, 811 S.E.2d 758, 765 (2018) ("Based on these authorities, the circuit court properly found that DOR's extensive administrative,

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oversight, and enforcement responsibilities in the Transportation Act and throughout Title 12 of the South Carolina Code confer upon DOR a duty in ensuring the County's expenditures of Penny Tax revenues comply with the revenue laws DOR is charged with enforcing.").

Equally, several courts have construed the Transportation Act's enabling legislation, requirements, and permissible expenditures, to include permissible expenditures under the County's referendum. See, Douan v. Charleston Cnty. Council, 356 S.C. 602, 590 S.E.2d 484 (2003) (finding that the referendum question failed to comply with the statutory form referendum question in the Transportation Act); Douan, W.J. v. Charleston County, before the Charleston County Board of Elections and Voter Registration (Nov. 15, 2004), aff'd, South Carolina Election Commission (Dec. 3, 2004), cert. denied, South Carolina Supreme Ct., (Jan. 20, 2005) (challenging the County's statutory compliance with the Transportation Act's form referendum question and its concomitant delineation of projects derived from the 2004 Transportation Sales Tax ordinance); Richland Cnty., 422 S.C. 292, 811 S.E.2d 758, (2018), South Carolina Public Interest Foundation et al., v. Richland County et al, 2016-CP-40-02875, (appeal docketed, No. 2018-000794 (Ct.App. Apr. 30, 2018) (finding that a project which lists "mass transit systems" complies with the Transportation Act). Since there is judicial guidance on the question, I find that the public importance exception should not be applied in this case.

II. PLAINTIFFS FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

Notwithstanding this Court's decision finding that the Plaintiffs lack standing, I equally find that the Plaintiffs fail to state facts sufficient to constitute a cause of action regarding the causes of action in their Complaint. A motion to dismiss under Rule 12(b)(6), SCRCP, "must be granted if the facts and inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." Gray v. State Farm Auto. Ins. Co., 327 S.C. 646, 651, 491

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S.E.2d 272, 275 (Ct.App.1997). In a motion to dismiss, the Court must accept "well pled facts" as true, but it need not accept "unsupported conclusions" of law. Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 426, 559 S.E.2d 362, 364–65 (Ct.App.2001); see also, Sec'y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007) ("In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record."). The test for sufficiency of a declaratory judgment action "is not whether the complaint shows that the plaintiff is entitled to a declaration of rights according to his theory, but whether he is entitled to a declaration of rights at all." Dimukes v. Carletta, 269 S.C. 110, 112, 236 S.E.2d 421, 422 (1977). The United States Supreme Court in Ashcroft v. Iqbal opined:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. (citation omitted). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. (citation omitted). The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ibid. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. (citation omitted).

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

"Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id., 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009).

In the case at bar, the Plaintiffs espouse *inter alia* the following legal theories to support their declaratory judgment causes of action: 1) the "contract with voters" doctrine prohibits the expenditure of Transportation Act revenues for the MCE, 2) the 2004 and 2016 Transportation Sales Tax ballot questions and ordinances do not authorize the expenditure of Transportation Sales Tax revenues for the MCE, 3) the County's appropriation pledge unlawfully binds future councils,

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and 4) the County's Fiscal Year 2019 appropriations of Transportation Sales Tax revenues were unlawful.[5]

A. Contract with Voters Doctrine and Use of Transportation Sales Tax Revenues for the MCE.

Plaintiffs ask this Court to take judicial notice of a circuit court case (Estes v. Berry, 2017-CP-17-00351) incorporating the concept of a "contract with voters" citing 16 MCQUILLIN MUN. CORP. § 44:238 (3d ed.), which states:

> Funds raised by taxation may legally be spent only for public purposes. If there is no specific provision relating to the disposition of revenues they may be applied in any manner not inconsistent with the governing statute or charter provision. . . A city violates its' 'contract' with voters only if it uses tax proceeds approved by voters in a way that the voters did not approve.

Id. at § 44:238 (3d ed.).

The provision referenced above is not applicable to this case because the Transportation Act governs the permissible uses of the penny tax revenues. Even if it were applicable, all the Plaintiffs are not voters (i.e., CCL and SCPIF) or eligible to vote in Charleston County, let alone voted to support the imposition of the Transportation Sales Tax. Furthermore, if the ordinance incorporating the referendum question created a "contract with voters," the referendum ballot question did not preclude the expenditure of revenues on the MCE. The 2004 and 2016 Transportation Sales Tax referendum questions do not itemize lists of individual roads, greenbelts, or mass transit system projects to legitimize the Plaintiffs' claims that the MCE is *not* an authorized

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[5] Plaintiffs contend that the County failed to properly appropriate funds to pay its initial draw request from the SCDOT. However, Plaintiffs note in their Second Amended Complaint that the County rescinded this action and simultaneously approved funding from its approved Fiscal Year 2019 Transportation Sales Tax operating budget. Given these allegations in Plaintiffs complaint, I find that the County's action of rescinding the earlier approval and simultaneously approving funding from its approved Fiscal Year 2019 Transportation Sales Tax operating budget moots Plaintiffs' declaratory judgment claim on this matter and, therefore, dismiss the same. See, S.C. Pub. Interest Found. v. S.C. DOT, 421 S.C. 110, 120, 804 S.E.2d 854, 860 (2017) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy.").

project. Therefore, the ballot questions do not limit the County's discretion to finance unspecified roads over the twenty-five-year collection period of the Transportation Sales tax.[6]

Moreover, under South Carolina's Election laws, the deadline to challenge the imposition of the 2004 or 2016 Transportation Sales Tax referendums or its enabling question has expired; and therefore, the Transportation Sales Tax referendum ballot questions are lawful and valid. See, S.C. Code Ann. § 7-17-30; see also, Sims v. Ham, 275 S.C. 369, 371, 271 S.E.2d 316, 318 (1980) ("Generally, a protest must be lodged within the statutory time period *or it is barred.*") (emphasis added). Accordingly, the 2004 and 2016 Transportation Sale Tax referendum questions do not preclude the use of Transportation Sales Tax revenues to fund the MCE project. Therefore, the Plaintiffs fail to show how they are entitled to a declaration of a right under State law.

Since the Plaintiffs failed to timely challenge the County's compliance with the Transportation Act to impose a tax for non-individually named projects in the 2004 and 2016 Transportation Sales Tax referendum questions, I equally find that the Plaintiffs are precluded from collaterally attacking the same issue in the 2004 and 2016 Transportation Sales Tax ordinances. While I am mindful of the fact that the Plaintiffs claim that their challenge did not ripen until after the passage of the referendums, that fact does not alter the gravamen of the Plaintiffs' claim. The Plaintiffs claims clearly target the ordinances' delineation of non-individually named projects, which the legislature directly tied to the questions presented to the voters in the statutory form ballot question. See, S.C. Code Ann. § 4-37-30.

Furthermore, I find that the 2004 and 2016 Transportation Sales Tax ordinances on their face do not limit or restrict the use of penny tax funds for any road, to include the MCE; and

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[6] I note that the Plaintiffs do not challenge the expenditure of Transportation Sales Tax revenues on greenbelts or mass transit systems in the County's 2004 or 2016 Transportation Sales Tax ordinances or referenda, which does not delineate individually listed greenbelt or mass transit projects.

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therefore, the ordinances comply with the Transportation Act. See, S.C. Code Ann. § 4-37-10 et seq.; see also, Richland Cnty., 422 S.C. at 298, 811 S.E.2d at 761, 768 ("The types of projects permitted to be funded with such a tax are 'highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects.'")("A proper expenditure of Penny Tax funds must be tethered to a specific transportation-related capital project or the administration of specific transportation project."). It is clear from the language of the ordinances that Council listed two projects (i.e., Project 1 and Project 2) and its intent in Project 1 was to finance the costs of "highways, roads, streets, bridges, and other transportation-related projects facilities, and drainage facilities related thereto."[7] Equally, Council provided that the tax would be imposed for 25 years and for a maximum total cost. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." Charleston Cnty. Assessor v. LMP Props., 403 S.C. 194, 198-99, 743 S.E.2d 88, 90 (Ct.App.2013). "If a statute's language is plain, unambiguous, and conveys a clear meaning 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). Since Council's legislative intent is clear from the plain words of the ordinances, the Plaintiffs have no right to impose another meaning; and therefore, it is not enough for the Plaintiffs to say the expenditure of sales tax revenues on the MCE is not permissible, and pass muster in a motion to dismiss pursuant to Rule 12(b)(6). See, Gray v. State Farm Auto. Ins. Co., 327 S.C. 646, 651, 491 S.E.2d 272, 275 (Ct.App.1997)

B. Binding Future Councils and Authority to Execute the 2019 Amended IGA.

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[7] The 2016 Sales Tax Ordinance description of projects differs from the 2004 Sales Tax Ordinance description in that the 2016 ordinance projects provides a non-exhaustive list of roads prefaced by the phrase "which may include but not limited to . . . ."

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Plaintiffs ask this Court to find, as a matter of law, that it is an *ultra vires* act for Council to agree by contract to appropriate funding every year to meet the terms of a financing agreement with the Infrastructure Bank because the financing agreement extends beyond the terms of the members who approved the agreement. The Plaintiffs reason that neither the 2019 Amended IGA nor the MCE project implicates the County's business or proprietary powers, rather they involve the County's legislative or governmental powers.[8] I disagree. First, the County is not building the MCE or contracting away a police power. Therefore, Council is not exercising a governmental or legislative function. Second, the County has entered a financing agreement with the Bank, a political subdivision of the State, to obtain $420 million as matching funds for a project that the SCDOT is contractually obligated to construct and accept into the State Highway system. The County is empowered pursuant to Home Rule "to make and execute contracts," which is a business power. See, S.C. Code Ann.§ 4-9-30(3). Furthermore, the legislature adopted the Infrastructure Bank Act, which authorizes the Bank to provide financial assistance to local governments for ". . . constructing and improving highway and transportation facilities necessary for public purposes." S.C. Code Ann. § 11-43-120(C). The legislature also promulgated the maximum term for financial assistance. S.C. Code Ann. § 11-43-180(A) ("The term of the loan or other financial assistance must not exceed the useful life of the project.").

More importantly, the legislature has authorized the Bank and local governments to exercise their business powers to do the following:

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[8] I also disagree that Council's approval of the 2019 Amended IGA was a legislative act that required a public hearing and the adoption of an ordinance to execute the agreement. First, S.C. Code Ann. § 4-9-130 provides an exhaustive list of actions which require a public hearing before final council action. Authorizing and executing intergovernmental agreements and contracts are not enumerated in the list. See, S.C. Code Ann. § 4-9-130. Secondly, S.C. Code Ann. § 4-9-120 does not specify contracts as legislative acts that require an ordinance to approve. See also, S.C. Code Ann. § 4-9-30(3).

> *The bank may require the government unit* or private entity *to enter into a financing agreement* in connection with its loan obligation or other financial assistance. The board shall determine the form and content of loan applications, financing agreements, and loan obligations including the term and rate or rates of interest on a financing agreement. The terms and conditions of a loan or other financial assistance from federal accounts shall comply with applicable federal requirements.

S.C. Code Ann. § 11-43-180(A) (emphasis added).

In addition, the Act authorizes local governments to perform the obligations of the financing agreement, which provides:

> Qualified borrowers entering into financing agreements and issuing loan obligations to the bank *may perform any acts, take any action, adopt any proceedings, and make and carry out any contracts or agreements with the bank as may be agreed to by the bank and any qualified borrower for the carrying out of the purposes contemplated by this chapter.*

S.C. Code Ann.§ 11-43-190(A) (emphasis added); see also, S.C. Code Ann.§ 11-43-190(C) ("A qualified borrower may . . . pledge, assign, and grant security interest in project revenues . . . to secure its obligations as provided in this chapter . . . to meet its obligations under a financing agreement . . . .).

It is clear from the 2019 Amended IGA that the Infrastructure Bank required the County to agree to the revised terms to secure and maintain its $420 million funding for the MCE project. The Act clearly authorizes the Bank to require a financing agreement without regard to County Council member's terms. Nevertheless, Plaintiffs ask this Court to construe the County's roles and responsibilities under the 2019 Amended IGA as an exercise of its legislative or governmental powers, rather than its business or proprietary powers. The Plaintiffs cite City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth. as authority for this proposition. The South Carolina Supreme Court in City of Beaufort held that:

> The general rule is that, if the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality. However, if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils.

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City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth., 325 S.C. 174, 178-79, 480 S.E.2d 728, 731 (1997).

The Plaintiffs' reliance on City of Beaufort is misplaced when harmonized with the Infrastructure Bank Act; and therefore, I decline to do so. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. (citation omitted) (where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason)." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). "The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." Charleston Cnty. Assessor v. Univ. Ventures, LLC, 427 S.C. 273, 285, 831 S.E.2d 412, 418 (2019). It would lead to an absurd result to construe the aforementioned enabling authority to require local government to agree to terms that exceed the terms of the legislative body who approved it only to find that as a matter of law it was an *ultra vires* act. Therefore, I find that the County's contractual obligations under the 2019 Amended IGA do not violate State law, rather, they are consistent therewith.

C. S.C. Freedom of Information Act ("FOIA").

As an alternative ground for relief, Plaintiffs contend that the County violated FOIA's closed meetings authorization at its August 20, 2019, Special Finance Committee meeting. I find that the Plaintiffs pleadings fail to show a legal deficiency on this claim. Plaintiffs admit in their complaint that Council held a Special Finance Committee meeting, and it had an agenda that listed "Transportation Sales Tax Budget". However, Plaintiffs challenge whether Council lawfully went into executive session to discuss the agenda item because the agenda item "Transportation Sales Tax Budget" is not a statutory reason for going into executive session. South Carolina law provides in pertinent part:

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> (a) A public body may hold a meeting closed to the public for one or more of the following reasons: . . .
>
> (2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, *the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege,* settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.

S.C. Code Ann. § 30-4-70(a)(2) (emphasis added).

Plaintiffs assert in their Second Amended Complaint that the County stated the following reason for going into executive session:

> There is a need for an Executive Session to talk about *this agenda item associated with a lawsuit that was filed by the Coastal Conservation League against Charleston County* and I would ask that you entertain an Executive Session to discuss that matter and to receive legal advice. And I also believe you said there is a need to address a personnel matter.

Based on the above-referenced statement alleged by the Plaintiffs, I find that the County properly held a closed meeting, and the Plaintiffs have failed to show how they could prevail on this theory; and therefore, I dismiss this cause of action. See, Gray v. State Farm Auto. Ins. Co., 327 S.C. 646, 651, 491 S.E.2d 272, 275 (Ct.App.1997) ("A motion to dismiss under Rule 12(b)(6), SCRCP 'must be granted if the facts and inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case.'").[9]

THEREFORE, IT IS ORDERED that the Plaintiffs' Second Amended Complaint be dismissed.

IT IS FURTHER ORDERED that this case be ended and stricken with prejudice from the calendar.

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[9] Plaintiffs also suggest that the County violated FOIA because it acted on an unnoticed item it placed on its Special Finance Committee agenda. See, Brock v. Town of Mount Pleasant, 415 S.C. 625, 785 S.E.2d 198 (2016). I equally find that the Plaintiffs cannot prevail of this theory either because no unnoticed item was added to the Special Finance Committee agenda. Therefore, no additional notice requirements were triggered under FOIA, and Brock is not applicable to this case.

AND IT IS SO ORDERED.

Honorable L. Casey Manning
Fifth Judicial Circuit

Columbia, South Carolina
2-24, 2020

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