THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2020-001189

South Carolina Coastal Conservation League, Inc., Elizabeth M. Smith and Abraham B. Jenkins, Jr, and .....Plaintiffs/Appellants,

South Carolina Public Interest Foundation, ...Plaintiff,

v.

Charleston County, South Carolina; South Carolina Transportation Infrastructure Bank, and South Carolina Department of Transportation, ...Respondents.

INITIAL BRIEF OF RESPONDENT CHARLESTON COUNTY, SOUTH CAROLINA

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT CORRECTLY DISMISSED THE PLAINTIFFS' DECLARATORY JUDGMENT AND INJUNCTION CAUSES OF ACTION AGAINST CHARLESTON COUNTY BECAUSE THEY LACKED STANDING.

II. WHETHER THE TRIAL COURT CORRECTLY HELD THAT THE PLAINTIFFS' CLAIMS CHALLENGING THE SUFFICIENCY OF THE 2004 AND 2016 TRANSPORTATION SALES TAX BALLOT REFERENDUM QUESTIONS ARE TIME BARRED.

III. WHETHER THE TRIAL COURT PROPERLY DISMISSED THE PLAINTIFFS' COMPLAINT BECAUSE THE PLAINTIFFS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

STATEMENT OF THE CASE

Respondent Charleston County ("County") incorporates Appellants' Statement of the Case set forth in their Initial Brief Filed on December 2, 2020, with the following exception. By Order Denying Plaintiffs' Motions to Alter or Amend Order Granting Defendant Charleston County's Motion to Dismiss, dated August 3, 2020, the trial court found that although the Appellants timely filed their motions to alter or amend pursuant to Rule 59(e), SCRCP, they failed to provide the trial court with a copy of the motions in accordance with Rule 59(g), SCRCP. The trial court cited to Smith v. Fedor as a basis for denying the Appellants' motions to alter or amend for failure to comply with Rule 59(g), SCRCP. 422 S.C. 118, 126 (Ct.App.2017) (". . . trial court may deny the motion solely on the basis of the rule").

STATEMENT OF FACTS

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 South Carolina Transportation Infrastructure Bank Act ("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) ("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.").

Under the 2007 IGA, the Bank committed to providing $420 million in financial assistance to complete the MCE. The SCDOT agreed to provide project oversight, management, and to 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 an Amended Intergovernmental Agreement ("2019 Amended IGA"). See, Ex. C, 2019 Amended IGA. However, the Bank's financial assistance has not changed (i.e., provide $420 million to complete the MCE). The SCDOT's role has not changed (i.e., manage/administer the project and when completed accept the road into its maintenance system).

Instead, the MCE's project costs have escalated to approximately $725 million. Conversely, the Infrastructure Bank conditioned its continued financial assistance for the project on the County's commitment to guarantee payment of the cost escalation to complete the MCE. See, S.C. Code Ann. §11-43-130(8) ("The term 'financing agreement' includes, without limitation, a loan agreement, trust indenture, *security agreement*, reimbursement agreement, *guarantee agreement*, bond or note, ordinance or resolution, or similar instrument.") (emphasis added). As a result, 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,

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[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. See, Second Am. Compl. Ex. B, County Ordinance Number 1324 – 2004 Transportation Sales Tax, and Ex. D, County Ordinance Number 1907 – 2016 Transportation Sales Tax.

or any federal or state grant proceeds, *or any lawful source* to fund the payment obligations of the County under this Agreement." 2019 Amended IGA, Article III, Section 3.2(C) (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, and, in the case of a governmental unit, its project revenues, revenues derived from a special source or ad valorem taxes, to secure its obligations as provided in this chapter . . . to meet its obligations under a *financing agreement* . . . .) (emphasis added), and S.C. Code Ann. §11-43-190(A) ("Qualified borrowers [may] . . . make and carry out any contracts or agreements with the bank as may be agreed to by the bank and any qualified borrower . . . .").

The Appellants are the South Carolina Coastal Conservation League Inc. ("CCL") and two named individuals. The Appellants, along with the South Carolina Public Interest Foundation ("SCPIF") and two South Carolina non-profit corporations that purport to have thousands of supporters who are citizens of South Carolina, filed the underlying action challenging (among other procedural issues) the County's authority to commit proceeds of the 2004 and 2016 Transportation Sales Tax to fund the MCE. Specifically, Appellants 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.*" (emphasis added).[2] Second Am. Compl. ¶ 16. In addition, Appellants question under the auspice of

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[2] Appellants' characterization of the facts regarding the ordinances is inconsistent with the documents they incorporated into their Complaint. Appellants state, "Both the First Half Cent and Second Half Cent ordinances included specific project lists, which did not include the Project." App. Br. p. 7. However, Ordinance 1324 simply authorized a referendum question regarding whether a sales and use tax would be imposed by voters for "Project (1) For financing the costs of highways, roads, streets, bridges, and other transportation-related projects facilities, and drainage facilities related thereto..." and whether voters would authorize the issuance of $113,000,000 in general obligation bonds of the projected $1,081,788,800 revenue over twenty-five years. Second Am. Compl. Ex. B. The facts as presented by the Appellants fail to distinguish the difference between the imposition of the sales tax under the Act and the corresponding authorization to issue bonds to partially fund projects.

Similarly, Ordinance 1454 authorized a referendum question regarding whether voters would authorize the issuance of "$205,000,000 of general obligation bonds of Charleston County, payable from the ½-cent special sales and use tax" approved by referendum authorized in Ordinance 1324. Contrary to the Appellants' suggestion, these bonds were not issued pursuant to the Transportation Sale Tax Act, S.C. Code Ann. § 4-37-10 *et seq.*, but rather pursuant to

the "contract with voters" doctrine whether ". . . S.C. Code Ann. § 4-37-10, et. seq., and the language of the aforementioned Ordinances prohibit the First Half Cent and the Second Half Cent revenue from funding the Project." Second Am. Compl. ¶ 34, citing, 16 MCQUILLIN MUN. CORP. § 44:238 (3d ed.). Lastly, Appellants contend that ". . . Paragraph 3.2(C) of the Amended IGA is void and unlawful to the extent it purports to bind future County Councils and require them to use their legislative authority to commit First Half-Cent and Second Half-Cent revenue. Paragraph 3.2(C) is unenforceable by the Bank, the SCDOT, or others against future County Councils." Second Am. Compl. ¶ 41.

The trial court found that the Appellants lack standing – public importance, taxpayer, or associational – to bring the underlying action; that the 2004 and 2016 Transportation Sales Tax Referendum Ballot question claims and the Appellants' 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; that the Appellants' 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 requirements.

Section 14 of Article X of the South Carolina Constitution and S.C. Code §11-27-40, as amended, as stated in Ordinance 1454. Second Am. Compl. Ex C. Finally, like Ordinance 1324, Ordinance 1907 again authorized referendum questions regarding a sales and use tax "For financing the costs of highways, roads, streets, bridges, and other transportation-related projects facilities, and drainage facilities related thereto, and mass transit systems operated by Charleston County or jointly operated by the County and other governmental entities, *which may include, but are not limited to...*," (emphasis added) as well as the issuance of $200,000,000 of the projected $2,100,000,000 in revenues. Second Am. Compl. Ex. D. Appellants ignore the expansive language of Ordinances 1324 and 1907 regarding the projects to be financed by the sales and use tax and equally ignore the context of all three ordinances authorizing general obligation bonds for small portions of the total revenues generated by the sales and use taxes. Therefore, none of the ordinances preclude sales and use tax revenues from being used to fund the Project.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED THE PLAINTIFFS' DECLARATORY JUDGMENT AND INJUNCTION CAUSES OF ACTION AGAINST CHARLESTON COUNTY BECAUSE THEY LACKED STANDING.

A. Standard of Review.

The Trial Court correctly ruled 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 invoke the judicial power of this Court to adjudicate their claims." Order at p. 4. "[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). Before the Plaintiffs can initiate a lawsuit against the County, they must demonstrate that they have standing to do so. "A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy." Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998). "Standing to sue is a fundamental requirement in instituting any action." Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). "No justiciable controversy is presented unless the plaintiff has standing to maintain the action." Lennon, 330 at 415, 498 S.E.2d at 906.

To have standing, "one must generally have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. A real party in interest is one with a real, material, or substantial interest." Baird v. Charleston Cnty., 333 S.C. 519, 530 511 S.E.2d 69, 75 (1999); see, Baird supra, n.7 ("The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.") (citation omitted). 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).

> The party seeking to establish standing carries the burden of demonstrating each of the three elements. (citation omitted) At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice to withstand a motion to dismiss. (citation omitted) Elements of standing, however, 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case'; therefore, 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stage of the litigation.'

Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013).

The Appellants do not assert standing based on a statute; however, they contend that the Trial Court erred in holding that they did not have public importance, taxpayer, or associational standing. App. Brief at p. 15. The Appellants' claims and legal arguments do no satisfy the standing requirements.

B. Constitutional Standing.

Appellants mistakenly contend they meet the common law test for constitutional standing. App. Brief at p.15, n.3. Appellants advance this theory because they "*voted on*" the 2004 and 2016 Transportation Sales Tax referendums, based on the understanding and representations of County 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. Appellants cite to comments made by individual Council members during public debates over the adoption of the 2016 Transportation Sales Tax Ordinance. However, there were no debates by Council in 2004 regarding the use of Transportation Sales Tax revenues for the MCE because the Project was initiated in 2006. See, Ex. Second Am. Compl. Ex. A, 2019 Amended IGA. Equally, the Plaintiffs claim that the expenditure of sales tax ". . . revenue[s] for the Project directly, materially, and substantially *undermines 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).

First, the Appellants' alleged comments from individual Council members, if accurate, are not binding on Council as a legislative body in 2004, 2016, or in the future. The South Carolina Court of Appeals *in dicta* rejected a similar attempt to attack individual council member's comments[3] 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, Appellants' reliance on aspirational goals like "improved connectivity of existing roadways, safety improvements, public transit, drainage facilities and flood control, bicycle lanes"

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[3] Appellants allege in their Complaint that comments made by members of Charleston County Council creates an agreement with voters regarding the passage of the Half Cent referenda and that agreement was violated by the Amended IGA. App. Brief at p. 26. Appellants cite Estes v. Berry, C/A No. 2017-CP-17-351 for the proposition that the trial court should "look beyond the text of the referendum at (sic) evidence of legislative intent in holding that representations by Dillon County created a contract with voters" and that application should apply in this case. See, App. Brief at p. 26.

Even if Estes were binding precedence, it is distinguishable from the case at bar. The trial court in Estes found that "this Court is invited to explore parol evidence of legislative intent given the breadth of susceptible meanings created by the ballot usage of 'county and municipal operations in the Dillion County area.'" Id., citing, Ga.-Carolina Bail Bonds, Inc v. Cty. of Aiken, 354 S.C. 18, 25, 579 S.E.2d 334, 337-38 (Ct. App. 2003) (If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself.); see also, Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("Where a statute is ambiguous, the Court must construe the terms of the statute."). The fallacy here is there is no ambiguity in the 2004 and 2016 Transportation Sales Tax referendum questions or ordinances, and Appellants do not allege an ambiguity either. Therefore, a court cannot rewrite the ballot questions or the ordinances. See, Ga.-Carolina Bail Bonds, Inc v. Cty. of Aiken, 354 S.C. 18, 25, 579 S.E.2d 334, 337-38 (Ct. App.2003) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language.). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.")

are insufficient facts to support, let alone prove, standing. See, Second Am. Compl. ¶ 58. 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).

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). Since the Appellants failed to allege a personal concrete injury in fact, the Trial Court correctly ruled that the Appellants "fail[ed] to carry their burden to meet this test." Order at p. 6.

C. Taxpayer/Associational Standing.

South Carolina precedence does not support the Appellants' claim that citizens may have standing based on their status as taxpayers. App. Brief at p. 19. Appellants cite Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985) generally and Sloan v. Sch. Dist. of Greenville Cnty., 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000) for this proposition. To the contrary, the South Carolina Court of Appeals in Sloan did not find that Mr. Sloan had standing to challenge the procurement process to construct three new schools solely because he was a taxpayer in Greenville County. Rather, ". . . a court may confer standing upon a party when an issue is of such public

importance as to require its resolution for future guidance." Sloan v. Sch. Dist., 342 S.C. 515, 522, 537 S.E.2d 299, 303 (Ct. App. 2000). Appellants' singular claim and status as taxpayers falls short of meeting the standing threshold under South Carolina law. The Trial Court, relying on ATC.S, rejected this claim. The ATC.S, Court held 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).

The South Carolina Supreme Court has reaffirmed this principle in Bodman v. State, holding that "[h]ere, to the extent Bodman has suffered or will suffer any harm as a result of this tax scheme, this harm is shared by all taxpayers in the State. In ATC S., we unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer for this reason." Bodman v. State, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013).

Similarly, the Appellants' status as voters[4] and members of associations with common interests do not meet the common law test for constitutional standing. As a threshold matter, Appellants mention the phrase "associational standing" only once in their complaint. Moreover, the Appellants' claims fail to meet the common law test for associational 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

[4] Appellants do not allege that they voted to support (let alone were even eligible to vote on) the imposition of the 2004 and 2016 Transportation Sales Tax. In fact, the CCL indicated that it "withdrew support for the ordinance after County Council amended the project list without public support and later made the project list non-binding . . ." See, CCL Motion for Leave to File Amicus Curiae Brief, Case No. 2017-001606. Therefore, the Appellants have not established a factual basis to support standing to challenge the alleged promise they claim was made to induce their support.

> 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).[5]

Under South Carolina law, the nonprofit corporations' associational standing claims do not create a safe harbor for their generalized and aspirational injuries *vis a vis* a concrete and particularized injury. 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. The Appellants assert that the County's expenditures of the Transportation Sales Tax revenues on the MCE "directly threaten the CCL's and its supporters' interests" because the expenditures "will inevitably come at the expense of the specific projects identified in Charleston County Ordinance Numbers 1324, 1454, and 1907." In addition, the Appellants assert that the County's expenditures of the Transportation Sales Tax revenues on the MCE ". . . undermines 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." Second Am. Compl. ¶¶ 57-58. To the extent the above-referenced claims are injuries, these injuries are suffered by the public at large. The South Carolina Supreme Court

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[5] The plaintiffs in the Carnival Corp. case consisted of four citizens' groups, which included the South Carolina Coastal Conservation League, Inc., one of the Plaintiffs in this case. In the Carnival Corp. case, the Historic Ansonborough Neighborhood Association made numerous allegations to the effect that they suffer harm that would adversely affect their quality of life because of noise, pollution emissions, traffic congestion, particulate soot emissions from ships burning diesel fuel, and the visual disruption of Charleston's historic integrity and aesthetic beauty. Carnival Corp., 407 S.C. at 76-77, 753 S.E.2d at 851. The Supreme Court decided that the plaintiffs in Carnival Corp. failed to establish the first element of associational standing. The Court stated, "We hold 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.'" Id.; see also, Lujan, 504 U.S. at 560, n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."). Carnival Corp., 407 S.C. at 72, 753 S.E.2d at 849.

has already determined that generalized, and aspirational allegations of injury are insufficient to establish standing. Furthermore, the Trial Court ruled that:

> 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.").

Order at p.7 n.3.

Accordingly, the factual basis raised by the Appellants are simply complaints about inconveniences suffered broadly by all persons residing in or passing through Charleston County, and therefore, fails to establish the first element of standing. See, Carnival Corp., 407 S.C. at 77, 753 S.E.2d at 851. The Trial Court correctly ruled that the Appellants do not meet the associational standing test because the Appellants have not suffered a particularized harm.

D. Public Importance Exception.

Notwithstanding Appellants' lack of constitutional standing, they mistakenly contend that they meet the public importance exception to the general standing requirement. The Appellants contend that they meet the public importance test because they have alleged an "illegal expenditure of public funds by government entities . . . ." App. Brief at p. 17; see also, S.C. Pub. Interest Found. v. S.C. DOT, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017). The Trial Court rejected this supposition and found that the Appellants' reliance on S.C. Pub. Interest Found. v. S.C. DOT was misplaced. The Trial Court ruled that,

> 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).[6]

Order at p. 9.

South Carolina courts have ". . . 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 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)).

"The key to public importance analysis is whether a resolution is needed for future guidance." Id.

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[6] Appellants cite in their Brief several cases in South Carolina where appellate courts have applied the exception. App. Brief at pp. 16-17. However, the cases cited by the Appellants 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).

In the case at bar, the Appellants do no raise a constitutional infirmity, and the Trial Court rejected Appellants' claim that judicial guidance is needed. See, Order at p. 9-10.

In this case, the Appellants lack a sufficient basis to establish standing by the public importance exception because by their own admission "[n]ot every dispute that is in some way related to an expensive transportation project merits consideration[.]"[7] Notwithstanding the Appellants' specious view of the project's public importance, future guidance is not needed through this Court because the Trial Court applied South Carolina Supreme Court precedence that the South Carolina Department of Revenue ("SCDOR") has statutory oversight of the Transportation 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, 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.").

The South Carolina Supreme Court in Richland County opined regarding Transportation Act expenditures that, "[a] proper expenditure of Penny Tax funds must be tethered to a specific transportation-related capital project or the administration of a specific transportation project." Richland Cnty., 422 S.C. at 311, 811 S.E.2d at 768. To the extent the Plaintiffs believe the MCE is not a specific transportation project eligible under the Transportation Act or the County's enabling ordinances, that is a matter for the SCDOR to review and enforce, not the Plaintiffs.

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[7] The Trial Court took judicial notice of the fact that the CCL took a different stance regarding the public importance of the MCE when it filed a brief in response to the County Petition for Original Jurisdiction regarding the 2007 IGA. The CCL 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.

Further, the Trial Court found that several courts have construed the Transportation Act's enabling legislation, requirements, and permissible expenditures, to include permissible expenditures under the County's referendum. See, Order at pp. 9-10. Therefore, a resolution is not needed for future guidance. As demonstrated above, the South Carolina Supreme Court has already provided guidance – it is the DOR's duty and responsibility to determine whether the County's 2004 and 2016 Transportation Act expenditures are properly allocable to a specific transportation project, such as the MCE, just as the DOR did for the Richland County penny sales tax.

II. THE TRIAL COURT CORRECTLY HELD THAT THE PLAINTIFFS' CLAIMS CHALLENGING THE SUFFICIENCY OF THE 2004 AND 2016 TRANSPORTATION SALES TAX BALLOT REFERENDUM QUESTIONS ARE TIME BARRED.

Appellants mistakenly contend that the case at bar does not involve a challenge to the sufficiency of the referenda ballot questions. See, App. Brief at p. 21. Appellants raise this argument as a defense to the Trial Court's finding that they are time barred from "challeng[ing] 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." Order at p. 13. The Appellants 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.*" (emphasis added). Second Am. Compl. ¶ 16. In fact, the Appellants' Complaint seeks an Order declaring:

> a. The County cannot legally spend First Half-Cent and Second Half-Cent revenue on the project *because the referenda* and the ordinances that authorized them *do not comply with the express language of S.C. Code Ann. § 4-37-30(A)(1)* . . . .
>
> b. The County cannot legally spend First Half-Cent and Second Half-Cent revenue on the project *because the referenda* and the ordinances that authorized them *listed projects other than the Project*, and the Project was never the subject of an ordinance passed by Council or the subject of a referendum submitted to the voters;

Second Am. Compl. . ¶ 82

The Appellants claim in their Brief that they "take no issue with the County's use of the Half-Cent revenue for projects which were appropriately specified in the referenda or ordinances;" however, the gravamen of their claim strikes at the heart of the ballot question. App. Brief at p. 21. Based on the Appellants' claims, the Trial Court held,

> 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.

Order at p. 13.

Therefore, the Appellants have failed to meet their burden on appeal showing an error by the trial court on this issue.

III. THE TRIAL COURT PROPERLY DISMISSED THE PLAINTIFFS' COMPLAINT BECAUSE THE PLAINTIFFS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

A. Standard of Review.

The Trial Court correctly ruled that "[n]otwithstanding 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." Order at p. 10. A party may move to dismiss a complaint under Rule 12(b)(6), SCRCP, based on failure to state facts sufficient to constitute a cause of action. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering motions to dismiss, trial courts must base their rulings "solely upon the allegations set forth on the face of the complaint." Charleston Cnty. Sch. Dist. v. Harrell, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011); see also, Sec'y of State for Defense 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."); see also, SCRCP Rule 10(c) ("A copy of any plat, photograph, diagram, document, or *other paper which is an exhibit to a pleading is a part thereof for all purposes* if a copy is attached to such pleading.") (emphasis added). On 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). 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 S.E.2d 272, 275 (Ct.App.1997).

To state a claim under the Declaratory Judgment Act, the plaintiff must establish a justiciable controversy. Brown v. Wingard, 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985). A justiciable controversy exists when a concrete issue is present, meaning there is a definite assertion of legal rights and a positive legal duty that is denied by the adverse party. Power v. McNair, 255 S.C. 150, 153–54, 177 S.E.2d 551, 553 (1970). 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 Plaintiffs fail to show where they are entitled to a declaration of a right. Instead, they are nothing more than disgruntled citizens and taxpayers who philosophically prefer their tax dollars be spent on other initiatives.

In evaluating a motion to dismiss under Rule 12(b)(6), the United States Supreme Court in Ashcroft v. Iqbal laid out two principles that lie beneath its two-pronged approach in its decision in Bell, to consider a motion to dismiss. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)(citing Bell Atl.

Corp. v. Twombly, 127 S. Ct. 1955 (2007)). The Supreme Court stated that the rule of accepting all well-pled facts as true and construing them in the light most favorable to the plaintiff does not apply to legal conclusions; therefore, pleadings that are no more than conclusions are not entitled to the assumption of truth. Second, only a complaint that states a plausible claim survives a motion to dismiss – where well-pled facts do not permit an inference of more than the possibility of misconduct, is nothing more than an allegation, not a showing that the pleader is entitled to relief. Id. 556 U.S. at 678-79.

The Appellants suggest in their brief that they have stated facts sufficient to constitute a cause of action to advance their legal theories in their Brief (i.e., Plain Language of the Ordinance, Contract with Voters, Binding Future Councils, Violation of State Law Procedures, and Violation of the Freedom of Information Act). App. Brief at p. 22. Therefore, by implication, the Trial Court must have erred. Although the Appellants point to facts to support their contention, these facts do not support applicable South Carolina law and/or they are inconsistent with their pleadings and exhibits. Accordingly, the Appellants fail to meet the test for sufficiency of a declaratory judgment action or that they could prevail on any theory of the case for the following reasons. See, Dimukes, 269 S.C. 110, 112, 236 S.E.2d 421, 422 (1977); see also, Gray, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (Ct.App.1997).

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

Appellants suggest that the County has broken a contract with voters and taxpayers because the 2004 and 2016 Referendum ballot questions did not authorize the use of transportation sales tax proceeds to be used for the MCE if approved. Appellants cite Cornelius v. Oconee Cnty. for this proposition. See, App. Brief at p. 25; see also, Cornelius v. Oconee Cnty., 369 S.C. 531, 633 S.E.2d 492 (2006). Notwithstanding Cornelius v. Oconee Cnty., which does not establish the contract with

voters doctrine[8], the 2004 and 2016 Referendum ballot questions do not support this claim factually or legally. See, Resp. Brief at p. 7 n.2. In response to a challenge questioning whether Oconee County could expand its sewerage system beyond the expressed terms and limitation of the referendum, the Cornelius court held, " . . . a county seeking to expand a utility cannot ignore the express terms of the Article VIII, § 16 referendum that initially authorized the county to own and operate the utility." The Cornelius court further held that:

> The Constitution forbids a county from owning and operating a sewer system unless county electors have approved the county's assumption of this function by referendum. While nothing in Article VIII, § 16 requires that the referendum be phrased to restrict the sources of funding a county may use for a sewer system, here Oconee County chose to include such a restriction in the referendum it presented to the voters. Accordingly, the voters of Oconee County approved the referendum, but only on the condition that specific, non-tax based financing be used to construct, operate, and maintain the sewer system. To now permit the County to use the fact of a favorable vote as a license *to ignore the express terms of that referendum* and deploy its general taxing power to finance expansion of the system *would subvert the popular will* and deprive 'the people [of the right] to protect themselves against the rule of man....' (emphasis added).

Cornelius v. Oconee Cnty., 369 S.C. 531, 537, 633 S.E.2d 492, 495 (2006).

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[8] The Trial Court rejected Appellants' request to adopt the "contract with voters" doctrine as a defense to the County's Rule 12(b)(6), SCRCP, motion to dismiss challenging whether the Appellants are entitled to a declaration of rights at all. See, Dimukes, 269 S.C. 110, 236 S.E.2d 421 (1977). Although there is no South Carolina authority establishing a "contract with voters," Appellants cite 16 MCQUILLIN MUN. CORP. § 44:238 (3d ed.) for the doctrine 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.).

However, this common law principle does not create a "contract with voters" under South Carolina law. Even if it did, all the Appellants are not voters (i.e., CCL) or eligible to vote in Charleston County, let alone vote to support the imposition of the Transportation Sales Tax.

Furthermore, the referendum ballot question approved by the voters did not preclude the expenditure of revenues on the MCE. For instance, the 2004 Transportation Sales Tax Referendum ballot question stated:

> CHARLESTON COUNTY SPECIAL SALES AND USE TAX
>
> QUESTION 1
>
> I approve a special sales and use tax in the amount of one-half (1/2) of one percent to be imposed in Charleston County for not more than 25 years, or until a total of $1,303,360,000 in resulting revenue has been collected, whichever occurs first. The sales tax proceeds will be used for the following projects:
>
> Project (1) For financing the costs of highways, roads, streets, bridges, and other transportation- related projects facilities, and drainage facilities related thereto, and mass transit systems operated by Charleston County or jointly operated by the County and other governmental entities. $1,081,788,800.
>
> Project (2) For financing the costs of greenbelts. $221,571,200.
>
> YES
>
> NO

See, Ex. E, 2004 Transportation Sales Tax Referendum Ballot Question; see also, Ex. F, 2016 Transportation Sales Tax Referendum Ballot Question (seeking substantially similar sales tax approval).

The above-referenced language is what the voters considered in approving the imposition of the transportation sales tax. The ballot questions do not itemize lists of individual roads, greenbelts, or mass transit system projects to legitimize the Appellants' claims that the MCE is *not* an authorized 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.[9]

[9] It is interesting to note that the Appellants do not challenge the expenditure of Transportation Sales Tax revenues on greenbelts or mass transit systems. The ballot questions do not delineate exhaustive lists of greenbelt projects or mass transit projects which can be lawfully purchased or developed. Rather, they challenge the roads component of the program which was equally presented to the voters in more generalized terms (i.e., highways, roads, streets, bridges and other transportation-related projects facilities).

Moreover, Appellants' mere factual contention that the 2004 and 2016 Transportation Sales Tax ordinances do not authorize the expenditure of Transportation Sales Tax revenues for the MCE when reconciled with the language in the ordinance is insufficient to survive a Rule 12(b)(6), SCRCP, motion. See Charleston Cnty. Sch. Dist., 348 S.C. 420, 426, 559 S.E.2d 362, 364–65 (Ct.App.2001) (On a motion to dismiss, the Court must accept "well pled facts" as true, but it need not accept "unsupported conclusions" of law.) The 2004 Transportation Sales Tax Ordinance provides in pertinent part that:

> 2.4 The Sales and Use Tax shall be expended for the costs of the following projects, including payment of any sums as may be required for the issuance of and debt service for bonds, the proceeds of which are applied to such projects, for the following purposes:
>
> (i) For financing the costs of highways, roads, streets, bridges, and other transportation-related projects facilities, and drainage facilities related thereto, and mass transit systems operated by Charleston County or jointly operated by the County and other governmental entities. The amount of the maximum total funds to be collected which shall be expended for these projects and purposes shall be no more than $1,081,788,800.
>
> (ii) For financing the costs of greenbelts. The amount of the maximum total funds to be collected which shall be expended for these projects and purposes shall be no more than $221,571,200.

Second Am. Compl. Ex. B, A, County Ordinance Number 1324 – 2004 Transportation Sales Tax.[10] "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 Appellants have no legal right

[10] 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 . . . ." See, Ex. B, County Ordinance Number 1907 – 2016 Transportation Sales Tax.

to a presumption of truth to legal conclusions in defense of a Rule 12(b)(6), SCRCP, motion. See, Ashcroft, 556 U.S. at 678-79. It is clear from the language of the ordinance that Council intended to finance the costs of "highways, roads, streets, bridges, and other transportation-related projects facilities, and drainage facilities related thereto." State law expressly authorizes this intent.

The Transportation Act permits 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.; see also, Richland Cnty., 422 S.C. at 298, 811 S.E.2d at 761 ("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.'"). Therefore, it is not enough for the Appellants to say the expenditure of sales tax revenues on the MCE is not permissible, and it does not 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) (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."); see also, supra note 6 (Plaintiffs do not challenge the sufficiency of the greenbelt and mass transit components of the Transportation Sales Tax ordinances).

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

The Appellants contend in their Brief that they are not challenging whether entering into the Amended IGA is an exercise of the County's business power, rather "the question turns on whether the subject matter of the Amended IGA implicates the business or government powers of the Council."[11] App. Brief at p. 27; see also, Second Am. Compl. ¶39. The Plaintiffs cite City of

[11] Appellants also contend that Council's approval of the 2019 Amended IGA was a legislative act, which required a public hearing and the adoption of an ordinance to execute the agreement. Appellants cite

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.

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

The Appellants' reliance on City of Beaufort is misplaced. The County is not building the MCE; and therefore, it is not exercising its governmental functions. Appellants' mistaken belief cannot be reconciled or harmonized with the Amended IGA and the South Carolina Transportation Infrastructure Bank Act's ("Infrastructure Bank Act" or "Act") requirements. The County has entered a financing agreement with the Bank, a political subdivision of the State, to obtain $420

S.C. Code Ann. § 4-9-120 and 130 for this proposition. As a threshold matter, this argument is not preserved for appellate review. By Order Denying Plaintiffs' Motions to Alter or Amend Order Granting Defendant Charleston County's Motion to Dismiss, dated August 3, 2020, the trial court found that although the Appellants timely filed their motions to alter or amend pursuant to Rule 59(e), SCRCP, they failed to provide the trial court with a copy of the motions in accordance with Rule 59(g), SCRCP. The trial court cited to Smith v. Fedor as a basis for denying the Appellants' motions to alter or amend for failure to comply with Rule 59(g), SCRCP. 422 S.C. 118, 126 (Ct.App.2017) ("Because the trial court did not err in denying Smith's motion for reconsideration, the arguments presented in that motion are unpreserved.").

Even if the argument was preserved for appellate review, 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 which require an ordinance to approve. See also, S.C. Code Ann. § 4-9-30(3). In fact, S.C. Code Ann. § 4-9-110 specifically authorizes Council to determine its own rules and order of business, for which Charleston County Council approves contracts (other than the selling of land) by a single Council action, after committee recommendation. Therefore, Appellants' argument that the Amended IGA *would* be considered an appropriation ordinance is specious at best. Accordingly, the Trial Court properly dismissed Appellants claim because it was not required to accept unsupported conclusions of law. See, Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 426, 559 S.E.2d 362, 364–65 (Ct.App.2001).

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 so the Infrastructure Bank could "select and assist in financing major qualified projects by providing loans and other financial assistance to government units . . . 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."). To that end, the legislature enumerated two provisions authorizing both the County and the Infrastructure Bank to exercise their business powers. First, the Act provides that:

> *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).

Second, 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 . . . .).

The Infrastructure Bank required the County to execute the 2019 Amended IGA to secure and maintain its $420 million funding for the MCE project. One of the terms of the financing agreement was an appropriation pledge. See, supra pp. 3-4 ("[t]he County Council shall adopt a budget for each Fiscal Year appropriating revenues of the Sales Tax, or any federal or state grant proceeds, *or any lawful source* to fund the payment obligations of the County under this Agreement.") 2019 Amended IGA, Article III, Section 3.2(C) (emphasis added). The Act clearly authorizes the Bank to require a financing agreement to secure the terms of payment without regard to County Council member's term of office. Conversely, the CCL conceded in its Amicus Curie brief that:

> The Bank has clear authority in Section 4.1 of the Intergovernmental Agreement to request that the County provide documentation that the Bank determines is 'reasonably necessary to evidence or establish the County's . . . obligations to the Bank," including the County's obligation in Section 5.5 to cover any project funding deficit.

See, Brief of Proposed Amicus Curiae South Carolina Coastal Conservation League at 6, Case No. 2017-001606.[12]

"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). The Appellants' reliance on City of Beaufort to support their claim that the County is without authority to secure its payment obligation with a promise to appropriate funds in the future is

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[12] See also, Brief of Proposed Amicus Curiae South Carolina Coastal Conservation League at 15 ("The Bank is within its rights to demand that the County and SCDOT execute 'any other documents' that are "reasonably necessary to evidence or establish [their] obligations set forth in th[e] Agreement").

misplaced. To assume the County cannot promise to appropriate tax dollars to pay its bills in the future through an appropriation clause would eviscerate a local government's ability to obtain financial assistance from the Infrastructure Bank because the terms of any agreement would be capped at two years. The Appellants' application of the City of Beaufort decision to the Act cannot be reconciled with the legislature's clear meaning and intent regarding financing agreements.[13] Equally, the Appellants' assertion that any act that transcends a sitting council's tenure would lead to an absurd result; and therefore, this Court should reject the same. This Court should affirm the Trial Court's dismissal of the Appellants claim.

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

Appellants contend that the Trial Court erred by dismissing their FOIA claim because they alleged sufficient allegations in their Complaint. Appellants suggest that the County violated FOIA's closed meetings authorization because the County's August 20, 2019, Special Finance Committee ("Special Finance Committee") meeting's agenda listed "Transportation Sales Tax Budget" as an agenda item, which Plaintiffs allege is not an enumerated reason for going into executive session. See, Second Am. Compl. ¶ 91; see also, S.C. Code Ann. § 30-4-70(a)-(b) (2007). Furthermore, Appellants contend that the County violated FOIA when it returned to open session and took action on the Transportation Sales Tax Budget item listed on the Special Finance Committee's meeting agenda and discussed in executive session. See, Second Am. Compl. ¶¶ 93-95. However, the Trial Court found:

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[13] South Carolina courts have opined that there is no bright line test to determine the difference between a proprietary power and a governmental function. "Thus, when determining whether a contract is binding on successor boards, it appears that 'the true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.'" Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 132-33, 459 S.E.2d 876, 881 (Ct. App. 1995). The South Carolina General Assembly has decided that financing agreements under the Act do not deprive local governments of that discretion.

> . . . 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.

Order at p. 17.

South Carolina law provides in pertinent part:

> (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).

Moreover, the Trial Court found that the Appellants asserted 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.

Order at p. 17.

"It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings . . . ." Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). Accordingly, the Trial Court ruled, "[b]ased 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." Order at p. 18 (citing 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.'")).[14] Therefore, based on the Plaintiffs' own allegations, the Trial Court did not err.

CONCLUSION

For the reasons discussed in the above arguments, this Court should affirm the Trial Court's Order dismissing the Appellants' complaint in its entirety.

Respectfully submitted,

CHARLESTON COUNTY, SOUTH CAROLINA

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Charleston, South Carolina
December 18, 2020

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[14] The Trial Court also rejected Appellants argument 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). The Trial Court ruled, "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." Therefore, the Trial Court committed no reversible error. Accordingly, this Court should affirm the same.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2020-001189

South Carolina Coastal Conservation League, Inc., Elizabeth M. Smith, and Abraham B. Jenkins, Jr, and..... Plaintiffs/ Appellants,

South Carolina Public Interest Foundation,..... .Plaintiff,

v.

Charleston County, South Carolina, South Carolina Transportation Infrastructure Bank, and South Carolina Department of Transportation,..... Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent Charleston County, South Carolina, and Designation of Matter to be Included in the Record of Appeal upon the counsel of record as follows:

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December 18, 2020

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk
Post Office Box 11629
Columbia, SC 29211

Re: South Carolina Coastal Conservation League, Inc.; Elizabeth M. Smith; Abraham B. Jenkins, Jr; and South Carolina Public Interest Foundation v. Charleston County, South Carolina; South Carolina Transportation Infrastructure Bank and South Carolina Department of Transportation
Appellate Case No. 20-001189

Dear Ms. Kitchings:

I have enclosed for filing pursuant to Rules 208 and 209, SCACR, the original and one (1) copy of the Initial Brief of Respondent Charleston County and the Designation of Matter to be included in the Record on Appeal in the above referenced appellate case. I would appreciate your acknowledging receipt of these documents by date-stamping the extra copies of the enclosed and returning them to me in the enclosed envelope.

By copy of this letter, I am serving counsel for Appellants South Carolina Coastal Conservation League, Inc., Elizabeth M. Smith, and Abraham B. Jenkins, Jr, and South Carolina Public Interest Foundation with these documents and have enclosed Proof of Service. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

CHARLESTON COUNTY ATTORNEY'S OFFICE

Johanna S. Gardner

JSG/adt
Enclosures
cc: Mr. W. Andrew Gowder, Jr., Esquire
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