

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Circuit Court

L. Casey Manning, Circuit Court Judge

Case No.: 2019-CP-40-03032
Appellate Case No. 2020-001189

RECEIVED

Jan 04 2021

SC Court of Appeals

South Carolina Costal Conservation League, Inc., Elizabeth M. Smith,
Abraham B. Jenkins, Jr. Appellants,

and

South Carolina Public Interest Foundation Plaintiff,

v.

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

**INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA
TRANSPORTATION INFRASTRUCTURE BANK**

Robert E. Tyson, Jr.
Samuel J. Wellborn
Jasmine D. Smith
Post Office Box 11449
Columbia, South Carolina 29201
(803) 929-1400

*Attorneys for Respondent South
Carolina Transportation
Infrastructure Bank*

TABLE OF CONTENTS

Table of authorities	3
Statement of Issues	5
Statement of the Case.....	6
Facts	7
Standard of Review.....	9
Argument	10
Conclusion	13

TABLE OF AUTHORITIES

Cases

Ashley River Props. I, L.L.C. v. Ashley River Props. II, L.L.C., 374 S.C. 271, 648 S.E.2d 295 (Ct. App. 2007) 10

ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 669 S.E.2d 337 (2008)..... 12-13

Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001) ... 10

Bodman v. State, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013) 12

Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (2009) 13

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009) 9-10

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 753 S.E. 2d 846, 407 S.C. 67 (2014)..... 12

Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992) 10

Cole Vision Corp. v. Hobbs, 348 S.C. 283, 680 S.E.2d 923 (Ct. App. 2009) 9

Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007)..... 9

Friends of the Earth v. Laidlaw Envt'l Servs., 528 U.S. 167 (2000)..... 10

Lewis v. Casey, 518 U.S. 343 (1996)..... 10

Lujan v. Defenders of Wildlife 504 U.S. 555 (1992) 10-11

Michael P. v. Greenville Cnty. Dep't of Soc. Servs., 385 S.C. 407, 684 S.E.2d 211 (Ct. App. 2009) 10

Plyer v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007) 9

Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011)..... 11

Sea Pines Ass'n for the Protection of Wildlife v. S.C. Dep't. of Natural Res. & Cmty. Servs. Assocs., Inc., 345 S.C. 594, 550 S.E.2d 287 (2001) 10-12

Sloan v. Sch. Dist. of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000)..... 10

Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) 11

State Statutes

S.C. Code Ann. §11-43-120 through -180 6

STATEMENT OF ISSUES

Whether the trial court correctly dismissed Appellants' Complaint because Appellants lack standing and the facts Appellants alleged in the Complaint, even if true, do not support relief under any theory of law.

STATEMENT OF THE CASE

This is an appeal from an Order, filed February 24, 2020, granting a Motion to Dismiss the Complaint under Rule 12(b)(6), SCRCP, and an Order denying the Motion to Alter or Amend the Judgment, filed August 3, 2020. On June 3, 2019, the South Carolina Coastal Conservation League, Inc. (the League), Michelle Renee Orth (Orth), Elizabeth M. Smith (Smith), and Abraham B. Jenkins, Jr. (Jenkins) filed a Complaint against Charleston County (the County), the South Carolina Transportation Infrastructure Bank (the Bank), and the South Carolina Department of Transportation (SCDOT) seeking a declaratory judgment, injunctive relief, and attorneys' fees.

On August 2, 2019, the League, Smith, Jenkins, and the South Carolina Public Interest Foundation (the Foundation), filed a First Amended Complaint against the same defendants. The Amended Complaint added the Foundation and removed Orth as plaintiffs in the action.

On November 25, 2019, the League, Smith, Jenkins, and the Foundation filed a Second Amended Complaint, disputing (1) language in an agreement between the County, the Bank, and SCDOT, (2) certain County appropriations, and (3) the County's authority to execute the agreement. The County filed a Motion to Dismiss and a memorandum in support of its Motion. The Foundation and the League filed memorandums in opposition to the Motion.

The trial court held a hearing on January 6, 2020. Thereafter, the trial court granted the Motion to Dismiss on various independent grounds, finding the following: (1) the plaintiffs lacked standing; (2) the plaintiffs failed to state facts sufficient to constitute a cause of action because their claims were time-barred; (3) the County's contractual obligations with the Bank and SCDOT did not violate state law; and (4) the plaintiffs failed to show a violation in their Freedom of Information Act claim. The League, Smith, and Jenkins (collectively, "Appellants") and the Foundation filed Motions to Alter or Amend, which the trial court denied. This appeal followed.

The Foundation is not an appellant in this appeal.

STATEMENT OF FACTS

In 2004, the County implemented a 1/2-cent sales tax by referendum under Section 4-37-30 of the South Carolina Code. It was imposed for a period not exceeding twenty-five years from the date of imposition, or a maximum of \$1.3 billion in proceeds derived from the referendum. **(Compl. Ex. B).**

On June 8, 2007, the Bank, the County, and SCDOT entered into an Intergovernmental Agreement for the funding and construction of Mark Clark Expressway/I-526 Extension (the Project). *See Compl. Ex. A., 2019 Amended Intergovernmental Agreement* (referencing the 2007 Intergovernmental Agreement). Pursuant to the South Carolina Transportation Infrastructure Bank Act, the Bank may provide loans and other financial assistance to a governmental unit to pay for all or part of the eligible cost of a qualified project, subject to the review and approval of the Joint Bond Review Committee (JBRC). S.C. Code Ann. §11-43-120 through -180 (2016); **(Compl. Ex. A)**. Under the Act, the Bank may require the government unit to enter into a financing agreement, and the Bank's Board of Directors must determine the form and content of loan applications, financing agreements, and loan obligations securing the term and rate or rates of interest on a financing agreement. *Id.* The Bank's Board determines which projects are eligible projects and selects those qualified to receive a loan or other financial assistance. *Id.*

In its 2007 agreement with the County and SCDOT, the Bank committed to financial assistance for the Project for a total of \$420 million. *Id.* The JBRC approved the Bank's financial assistance for the Project described in the 2007 agreement. In 2015, SCDOT produced new cost estimates for the Project, which reflected a significant increase to over \$700 million for completion of the Project. *Id.* Thereafter, the Bank adopted a resolution to reserve the balance of the \$420

million subject to the County meeting certain conditions, including the County's plan to fund or secure funding for the shortfall of approximately \$280 million from specified, dedicated revenue sources.

In 2016, the County implemented another 1/2-cent sales tax by referendum. It was imposed for a period not exceeding twenty-five years from the date of imposition, or a maximum of \$2.1 billion in proceeds derived from the referendum. **(Compl. Ex. D.)**.

On January 10, 2019, following identification of a funding source and negotiation of terms, the Bank, SCDOT, and the County executed the Amended Intergovernmental Agreement (the Agreement). **(Compl. Ex. A.)**. The Agreement terminates, with certain exceptions, whenever the Bank makes its final disbursement and the County makes its final payment or SCDOT declares the Project completed, in its full scope as defined in the Agreement. *Id.* Any party may terminate the Agreement if any party is unable to obtain necessary approvals, authorizations or permits from a federal or state regulatory agency that is required to commence or complete construction of the Project. *Id.*

The Bank's financial commitment for the project was limited to \$420 million, including past disbursements. *Id.* The County agreed to pay from the proceeds of the sales tax or any lawful source all the costs incurred or to be incurred to complete the entire scope of the Project in excess of the \$420 million in financial assistance from the Bank. *Id.* SCDOT agreed to administer the Project for the County. *Id.* The Agreement provides that "[b]y executing this Agreement, the undersigned each affirms and certifies that he or she has authority to bind hereto the Party he or she represents and that all necessary acts have been taken to duly authorize this Agreement under applicable law." *Id.*

In June 2019, the plaintiffs filed the initial Complaint in this action. The trial court granted

the Motion to Dismiss the Complaint with prejudice. This appeal followed.

STANDARD OF REVIEW

“The appellate court applies the same standard of review as the trial court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRC.P.” *Cole Vision Corp. v. Hobbs*, 348 S.C. 283, 287, 680 S.E.2d 923, 925 (Ct. App. 2009) (citing *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)). “In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.” *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citing *Doe*, 373 S.C. at 395, 645 S.E.2d at 247).

Although a court generally must limit itself to the facts alleged on the face of a complaint in considering a motion to dismiss, the court may take judicial notice of any matters of public record in considering a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding a court can “consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice”); *Sec’y of State for Defence v. Tremble 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.”); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955) (noting that a court may take judicial notice of public records).

“The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Capital City*, 382 S.C. at 99, 674 S.E.2d at 528 (citing *Plyer v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)). A reviewing court will sustain a trial court’s grant of a motion to dismiss “if the facts alleged in the

complaint do not support relief under any theory of law.” *Capital City*, 382 S.C. at 99, 674 S.E.2d at 528 (citing *Ashley River Props. I, L.L.C. v. Ashley River Props. II, L.L.C.*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007)).

ARGUMENT

The trial court correctly found and concluded Appellants lack standing to sue because Appellants failed to meet the elements of constitutional, public importance, taxpayer, or associational standing as asserted by Appellants.

Standing is a fundamental prerequisite to a legal action. *Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000). Standing refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right. *Michael P. v. Greenville Cnty. Dep’t of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009). To have standing, a party must therefore have a personal stake in the subject matter of a lawsuit. *Sloan*, 342 S.C. at 518, 537 S.E.2d at 301; *Sea Pines Ass’n for the Protection of Wildlife v. S.C. Dep’t. of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). “[S]uch imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public.” *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992).

To have standing, “[a] plaintiff must allege an actual controversy in which he has a personal stake.” *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). Moreover, a party must demonstrate standing for each form of relief sought. *Friends of the Earth v. Laidlaw Env’tl Servs.*, 528 U.S. 167, 185 (2000); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (“[S]tanding is not dispensed in gross.”). In *Lujan v. Defenders of Wildlife*, the United States Supreme Court articulated the “irreducible constitutional minimum” that standing requires:

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.

504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted).¹ The party seeking to establish standing “carries the burden of demonstrating each of the three elements.” *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 290.

Injury-in-fact means that the injury must be “certainly pending.” *Lujan*, 504 U.S. at 563, n.2. In other words, an injury-in-fact “must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is “‘distinct and palpable’ as distinguished from merely ‘abstract,’ and the alleged harm must be actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal citations omitted). Allegations of possible future injury are not enough to survive a motion to dismiss.

Allegations of ‘possible future injury’ are not sufficient to satisfy Article III. Instead, ‘[a] threatened injury must be certainly impending,’ and ‘proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all[.]’ A plaintiff therefore lacks standing if his ‘injury’ stems from an indefinite risk of future harms inflicted by unknown third parties.

Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3d Cir. 2011) (internal citations omitted).

As the trial court found, Appellants’ reliance upon the comments of individual County Council members and aspirational goals of “improved connectivity of existing roadways” is

¹ South Carolina has adopted and applied with equal force the standard articulated by the United States Supreme Court in *Lujan*. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

insufficient facts to support constitutional standing. The Complaint does not allege actual or imminent harm derived from or associated with the County's use of funds, and therefore Appellants lack constitutional standing.

Likewise, the taxpayers and individual association members have not suffered a concrete, particularized injury that would grant associational standing because they failed to show a personal interest other than that shared in common by all members of the public and they failed to show the alleged injury is germane to the organization's purpose. "An organization has associational standing 'if one or more of its members will suffer an individual injury by virtue of the contested act.'" *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 753 S.E. 2d 846, 851, 407 S.C. 67 (2014) (quoting *Sea Pines*, 345 S.C. at 600-01, 550 S.E.2d at 291).

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, 753 S.E. 2d 846, 407 S.C. 67.

As to taxpayer standing, our Supreme Court "unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer." *Bodman v. State*, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013). "[A] taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'" *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). The individual plaintiffs are no different than all the other citizens of Charleston County.

Appellants also lack public importance standing because they do not allege a constitutional infirmity and no future guidance is warranted in this case. As to public importance standing, "[t]he key to the public importance analysis is whether a resolution is needed for future guidance. It is

this concept of future guidance that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.” *Id.* at 199, 669 S.E.2d at 341 (quotation marks and citation omitted). There are no unique public importance matters raised in the Complaint that require future guidance. Appellants simply challenge the Project and the terms of the Agreement supporting the Project; therefore, no future guidance is necessary.

The Second Amended Complaint failed to meet any of these threshold tests for standing. Furthermore, the facts Appellants alleged in the Second Amended Complaint, even if true, do not support relief against the Bank under any theory of law. The Second Amended Complaint does not allege any wrongdoing on the part of the Bank. Accordingly, this Court should affirm the trial court’s order granting the Motion to Dismiss the Complaint with prejudice. *See Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009) (“In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief.”).

CONCLUSION

The trial court correctly dismissed Appellants' Complaint against Respondent South Carolina Transportation Infrastructure Bank, and this Court should affirm the trial court's Order granting the Motion to Dismiss the Second Amended Complaint.

[Signature to Follow]

Respectfully,

/s/ Robert E. Tyson, Jr.

Robert E. Tyson, Jr.

Samuel J. Wellborn

Jasmine D. Smith

Robinson Gray Stepp & Laffitte, LLC

Post Office Box 11449

Columbia, South Carolina 29201

(803) 929-1400

*Attorneys for South Carolina Transportation
Infrastructure Bank*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Circuit Court

L. Casey Manning, Circuit Court Judge

Case No.: 2019-CP-40-03032
Appellate Case No. 2020-001189

RECEIVED

Jan 04 2021

SC Court of Appeals

South Carolina Costal Conservation League, Inc., Elizabeth M. Smith,
Abraham B. Jenkins, Jr. Appellants,

and

South Carolina Public Interest Foundation Plaintiff,

v.

Charleston County, 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 South Carolina Transportation Infrastructure Bank* and the *Designation of Matter to be included in the Record on Appeal* on the following counsel of record by email on January 4, 2021.

W. Andrew Gowder, Jr., Esquire
Austen & Gowder, LLC
Email: andy@austengowder.com

Christopher K. DeScherer, Esquire
Angela M. Kilbert, Esquire
Southern Environmental Law Center
Email: cdescherer@selcsc.org
Email: akilbert@selcsc.org

Johanna S. Gardner, Esquire
Bernard E. Ferrara, Jr., Esquire
Email: jgardner@charlestoncounty.org
Email: bferrara@charlestoncounty.org

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
Email: james.carpenter@carpenterlawfirm.net

Linda C. McDonald, Esquire
General Counsel
South Carolina Department of Transportation
Email: mcdonaldlc@scdot.org

/s/ Robert E. Tyson, Jr.
Robert E. Tyson, Jr.
Samuel J. Wellborn
Jasmine D. Smith
Robinson Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, South Carolina 29201
(803) 929-1400
rtyson@robinsongray.com
swellborn@robinsongray.com
jsmith@robinsongray.com

*Attorneys for South Carolina Transportation
Infrastructure Bank*

Columbia, South Carolina
January 4, 2021