RECEIVED
Feb 12 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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.

APPELLANTS' REPLY BRIEF

W. Andrew Gowder, Jr.
Austen & Gowder, LLC
1629 Meeting Street, Suite A
Charleston, South Carolina, 29405
(843)727-2229
Attorneys for the Appellants

Christopher Kaltman DeScherer
Southern Environmental Law Center
525 East Bay Street
Suite 200
Charleston, South Carolina 29403
(843)720-5270
Attorneys for the Appellant South Carolina Coastal Conservation League

TABLE OF CONTENTS

Table of Authorities ii

Argument

1. PUBLIC IMPORTANCE STANDING EXISTS IN A CASE CHALLENGING *ULTRA VIRES* ACTIONS BY LOCAL GOVERNMENT AND THE ILLEGAL USE OF TAXPAYER FUNDS. 1

2. THE APPELLANTS SEEK TO AFFIRM AND ENFORCE THE RESULTS OF THE ELECTION, NOT TO CHALLENGE IT. 7

3. THE TRIAL COURT AND THE RESPONDENTS' BRIEFS IGNORE THE DETAILED ALLEGATIONS OF THE COMPLAINT WHICH COMPELLINGLY STATE FACTS SUPPORTING ALL CAUSES OF ACTION. 8

Conclusion.....11

TABLE OF AUTHORITIES

CASES

Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947) 3

ATC South., Inc. v. Charleston Cty., 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008) 2,4

Baird v. Charleston Cnty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999).....3,5

Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) 9,10

Farmer v. CAGC Ins. Co., 424 S.C. 579, 587, 819 S.E.2d 142, 146, (Ct. App. 2018). 10

Richland Cty. v. S.C. Dep't of Revenue, 422 S.C. 292, 811 S.E.2d 758 (2018).....6

Vicary v. Town of Awendaw, 425 S.C. 350, 359-60, 822 S.E.2d 600, 604-05 (2018). 1-6

STATUTES

S.C. Code Ann. §§15-53-20, 80 (2005) 10

ARGUMENT

1. PUBLIC IMPORTANCE STANDING EXISTS IN A CASE CHALLENGING *ULTRA VIRES* ACTIONS BY LOCAL GOVERNMENT AND THE ILLEGAL USE OF TAXPAYER FUNDS.

Although the Respondents' briefs try to defend the Circuit Court's order dismissing this action for lack of standing, none of the Respondents effectively respond to the Appellants' arguments that *Vicary* and the numerous cases cited by the Appellants establishing public importance standing in various fact situations support finding public importance standing in this case, where the complaint alleges that the County has violated its own statutes and has illegally pledged and misspent taxpayer dollars. The Respondents argue that the facts alleged in this case are a routine matter involving a challenge to a contract or that there is no need for judicial guidance because a state administrative agency has exclusive responsibility for the expenditure of tax proceeds under the Penny Sales Act. These arguments are flawed and are inconsistent with clear precedent that indicates that this case is precisely what the public exception to the general standing rules were meant to address and that justifies a reversal of the Circuit Court's finding that the individual and nonprofit plaintiffs in this case lack standing.

Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600 (2018) is the most recent and compelling authority supporting the standing of the plaintiffs in this case. In *Vicary*, two interested individuals and the South Carolina Coastal Conservation League were the plaintiffs, just as they are here. *Vicary*, 822 S.E.2d at 601-602.

Those plaintiffs brought an action to challenge an illegal annexation by the Town of Awendaw, alleging that the Town based 100% annexations on contiguity afforded by its assertion that it had a petition for annexation from the Forest Service when it did not. *Vicary*, 822 S.E.2d at 602. The Town challenged the standing of the plaintiffs and fought the case on the merits. The trial court found standing based on the public importance exception, *Vicary*, 822 S.E.2d at 604, and concluded that the Town's earlier annexation was *void ab initio* because it never received a petition from the Forest Service. *Vicary*, 822 S.E.2d at 602. As a result, the Town's 2009 annexation lacked contiguity and was also *void ab initio*. *Id.*

The Town appealed, and the Court of Appeals reversed, concluding that the South Carolina Supreme Court's jurisprudence on standing to challenge annexations pursuant to the 100% petition method afforded standing only to the State and private parties suffering from an actual infringement of their own rights. *Id.* The court granted certiorari to determine whether the plaintiffs had standing to challenge the Town's annexation. *Id.*

The court noted that the circuit court found that the plaintiffs had standing under the public importance exception, which confers standing to a party "when an issue is of such public importance as to require its resolution for future guidance." *Vicary*, 822 S.E. 2d at 604, citing *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). The Supreme Court noted that the "linchpin" of the public importance exception is the need for future guidance, and that in ascertaining the parameters of that need, while noting that the framework

is not inflexible, the court has repeatedly cautioned against its routine use. *Vicary*, 822 S.E. 2d at 604. The court then stated that its jurisprudence has tended to favor flexibility, leading to the public importance doctrine's "expansive reach." *Id.* The opinion emphasized that the need for "future guidance" is the key to transcending a purely private matter and rising to the level of public importance and "but that the court must look at that need *in the context of the case. Id. (*emphasis added*).*

The Supreme Court then cited *Baird v. Charleston Cty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (holding the need for future guidance existed where doctors alleged a county committed *ultra vires* acts when issuing hospital bonds) and *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88 (1947) (noting questions of public interest should be answered where future guidance is needed to resolve the issue before the court) as examples of cases showing public importance linked to the need for future guidance. The court then found that, like the county in *Baird* and the governmental entity in *Ashmore*, future guidance was needed in *Vicary* to determine the validity of the Town's repeated use of a decade-old letter ostensibly not related to the properties at issue as a valid petition. In fact, the town administrator testified that the Town had repeatedly used the letter without objection and fully intended to use it again in the future, if necessary, to support further annexations. *Vicary*, 822 S.E. 2d at 604-605. Given that fact circumstance, the court found that the plaintiffs satisfied the "future guidance" prong of the public importance exception. *Id.*

The court found the need for future guidance supporting a finding of public importance standing even in a zoning and annexation case where it had previously declined to find such standing. One of those cases, *ATC S., Inc.*, 380 S.C. at 200, 669 S.E.2d at 341, held that the public importance exception did not apply in a zoning dispute where the "local government followed proper procedure and rezoned a single piece of property for a narrow purpose and the only complaint comes from a non-adjoining landowner which just happens to be a competitor." *ATC S, Inc.* is the one case that was relied on chiefly by the Circuit Court in this case in refusing to find standing based on public importance. The key difference identified by the Supreme Court was that, unlike the local government in *ATC South, Inc.*, the Town of Awendaw allegedly did not comply with its own ordinances, instead representing to the public that it had received a signed petition from the Forest Service when in fact it had not. *Vicary*, 822 S.E. 2d at 605.

The need for judicial guidance and the finding of public importance standing was based on the fact that local government had allegedly acted illegally, ignoring its own ordinances, and judicial guidance was needed to make sure it would not do so again.

Likewise, in this case, the complaint alleges the South Carolina Transportation Infrastructure Bank (SCTIB), Charleston County, and the South Carolina Department of Transportation (SCDOT) entered into a contract in which the County promises to unlawfully appropriate money raised by the Half-Cent sales tax, contravening the will of the voters, and unlawfully binds future county council

members to use their legislative authority to commit Half-Cent revenue. Second Amended Complaint (SAC) ¶¶ 13-41.

Furthermore, the Complaint alleges Charleston County violated public notice requirements in both executing the Amended IGA and in misappropriating the Half-Cent revenue. SAC ¶¶ 42-52. As stated in the Appellants' Brief, the public has a substantial interest in seeing that governments act in a transparent manner and comply with state law and its own ordinances. Appellant's Brief, pages 17-18. Without future guidance, this County Council and other local governments may continue to violate state public notice laws, unlawfully bind future county councils, and disregard the explicit will of the voters in future referenda. Appellant's Brief, pages 18-19, citing *Vicary*, 822 S.E.2d 604-05, *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 118-19, 804 S.E.2d 854, 859 (2017) (finding future guidance needed when Department of Transportation planned to continue challenged conduct in the future), and *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69, 75-76 (1999) ("[B]y virtue of the immense public interest at stake here, [plaintiffs] have standing to bring the present action, and any further determination of imminent prejudice is unnecessary.").

Future judicial guidance is needed to resolve the ongoing issue of whether the County may permissibly use Half-Cent revenue to fund the Project in violation of its own ordinance, and in violation of its contract with voters.

In its Respondent's Brief, Charleston County argues that there is no need for judicial guidance (and therefore no public importance) in this case because the South

Carolina Department of Revenue (DOR) has exclusive jurisdiction and oversight over the expenditure of taxes collected under "Penny Tax revenues." The problem with this argument is that the case the County cites for that proposition, *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 306, 811 S.E. 758, 765 (2018) says no such thing.

Rather, in that case, Richland County argued that public importance standing does not apply to an executive branch agency like DOR and that "special interest" standing was neither available to nor established by DOR in that case. *Richland Cty*., 811 S.E. 2d at 765. The Supreme Court, just months before it issued the *Vicary* decision, rejected that argument, finding that because DOR is the agency statutorily tasked with administering the Penny Tax program, and the expenditure of millions of dollars of Penny Tax revenues is an issue of "wide concern" both to DOR and to the residents and taxpayers of Richland County, the circuit court correctly determined DOR had standing, *Id*.

The *Richland Cty*. decision is entirely consistent with *Vicary* and with the reversal of the Circuit Court's decision in this case. Contrary to Charleston County's argument and the Circuit Court's erroneous decision, this Court did not find that DOR has exclusive jurisdiction to challenge expenditures under the Penny Sales Tax enabling act, but rather found that, since DOR administers the program, and that the expenditure of millions of dollars of Penny Tax revenue is an issue of wide concern both to DOR ***and the residents and taxpayers of Richland County***, DOR had standing under the public importance exception. *Id*. (emphasis added).

Here, too, the expenditure of millions of dollars of public funds collected from the taxpayers of Charleston County makes this a "matter of wide concern" to these plaintiffs who are taxpayers, residents, and voters, as well as the Coastal Conservation League, which represents impacted taxpayers, residents and voters. This matter, every bit as much as the annexation petition in *Vicary* and the many different fact situations represented in the cases cited in Appellant's Brief, involve a matter of vital public concern. Appellant's Brief pages 16-17.

It is the policy of this state, as described explicitly in this Court's jurisprudence, to allow the State's citizens to bring matters that affect the legitimacy and transparency of local government and the expenditure of public money to the courts of this State for review. This Court, consistent with its longstanding precedents, must reverse the erroneous decision of the Circuit Court and find that these Plaintiffs have standing in a matter of vital public importance.

2. **THE APPELLANTS SEEK TO AFFIRM AND ENFORCE THE RESULTS OF THE ELECTION, NOT CHALLENGE IT**.

This complaint does not protest or contest an election. In fact, the Plaintiffs seek to protect and confirm the results of the referendum that authorized use of Half-Cent tax revenue for infrastructure projects listed and described in the County's ordinance as required by statute. The error in the Circuit Court's order, and the fallacy in the County's argument trying to defend it, is found in the Order's statement that "the Transportation Sales Tax ballot questions are lawful and valid." Order, p. 13.

The Appellants agree with that statement completely. It is the County that is ignoring the ballot question and the ordinance it authorizes, by pledging and spending those funds on a project, the Mark Clark Expressway extension, not listed or described in the ordinance and which construction County Council expressly told voters the sales tax appropriation would not fund.

Accordingly, it was clear error to apply the statute of limitations found in a ballot challenge ordinance, requiring a challenge within days of the election, to this challenge of the unlawful pledging and expenditure of those Half Cent sales tax funds authorized by the election, years after the election occurred.

This case was timely filed, and this Court should reverse the Circuit Court on this finding.

3. THE TRIAL COURT AND THE RESPONDENTS' BRIEFS IGNORE THE DETAILED ALLEGATIONS OF THE COMPLAINT WHICH COMPELLINGLY STATE FACTS SUPPORTING ALL CAUSES OF ACTION.

The complaint contains pages of very detailed factual allegations regarding the history of the Half Cent Sales Tax ordinances in Charleston County, SAC ¶¶ 13-35, the public deliberations surrounding the 2016 Second Half Cent, SAC ¶¶ 24-29, a Council member's op-ed representations to the public about what the money would be spent for (and what it would not), SAC ¶¶ 30-31, the lack of public notice prior to an appropriations action by County Council, SAC ¶¶ 42-46, and the details of a meeting by Council when Council went into executive session in violation of FOIA. SAC ¶¶ 87-96. All of these allegations and any inferences from them are regarded as true for purposes reviewing whether the Circuit Court was correct in finding that the

complaint failed to state facts sufficient to support any cause of action alleged in the complaint. See, *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). As argued in the Appellants' brief, this was clear error.

In its attempt to defend the Circuit Court's decision the Respondents argue that general language in the ballot question allows the County to spend money on any transportation related project it chooses, that appropriating funds for a local match to fund the Mark Clark Expressway extension through the Amended IGA is a business, not a governmental function, so its provision does not unlawfully bind future councils, and that the Charleston County Attorney's statement that the stated agenda item was connected to pending litigation allowed the County Council to go into executive session under FOIA.

All of these arguments are directly contrary to the allegations of the Complaint. Since a motion to dismiss under Rule 12(b)(6) is not the place to decide questions of fact, and in fact, the allegations of the complaint are taken to be true, it was reversible error for the Circuit Court to dismiss any of these causes of action under Rule 12(b)(6). Here, not only did the Circuit Court ignore the facts of the Complaint, which must be accepted as true for purposes of this motion, but it relied on facts from outside the record, not found in the Complaint or its exhibits. In fact, one document upon which it relied, an Amicus Brief it cites in footnote 4, page 8 of the Order, was filed in a completely different case. This is clear error. The County

compounds this error by citing that unrelated document, again, in its Respondents Brief, footnote 4, page 10.[1]

If the factual allegations of the Complaint are proven, a fact finder would be justified in finding for the plaintiff in each instance. That the Respondents might disagree or argue against these facts at this stage is irrelevant. If in the light most favorable to the plaintiffs and with every result resolved in their behalf, the Complaint states any valid claim for relief, the Circuit Court must deny a Motion to Dismiss under Rule 12(b)(6). *Doe*, 645 S.E.2d at 247-248. To find otherwise was error. This Court must reverse the Circuit Court on each of those findings.

Finally, both the SCDOT and STIB argue that there are no allegations in the Complaint that they did anything wrong and that they should be dismissed. The Declaratory Judgment Act (DJA) commands that "[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration . . .," and empowers courts to "declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. §§15-53-20, 80 (2005). *Farmer v. CAGC Ins. Co*., 424 S.C. 579, 587, 819 S.E.2d 142, 146, (Ct. App. 2018).

Under the DJA, those state agencies which are parties to the Amended IGA have an interest that would be affected by the declaration and must be included for

[1] The amicus brief cited by the Trial Court and the County was submitted when the County was seeking to file an action in the original jurisdiction of the South Carolina Supreme Court when it could have filed the case in the court of common pleas. That is a very different inquiry and context than determining whether plaintiffs have standing to challenge an illegal action on a nearly $1 billion project.

full relief to be granted. Though the Complaint does not seek relief against those parties, both should remain in the case based on their being parties to the Amended IGA, so that complete relief can be afforded when the case is decided on the merits.

CONCLUSION

For the reasons stated in the Appellants' Brief and this Reply, this Court should reverse the judgment of the Court of Common Pleas and remand this matter to the trial court for discovery and trial.

Respectfully submitted,

/s/ W. Andrew Gowder, Jr.

W. Andrew Gowder, Jr.
Austen & Gowder, LLC
1629 Meeting Street, Suite A
Charleston, South Carolina, 29405
(843)727-2229
Attorneys for the Appellants

Christopher Kaltman DeScherer
Southern Environmental Law Center
525 East Bay Street
Suite 200
Charleston, South Carolina 29403
(843)720-5270
Attorneys for the Appellant South Carolina Coastal Conservation League

February 12, 2021
Charleston, South Carolina