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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen

Appeal Court Number: 2020-001522

Town of Hilton Head Island, South Carolina,
John J. McCann and Stephen G. Riley..... Intervenors/Plaintiffs

v.

Beaufort County, South Carolina, ... Respondent

v.

James Beckert, in his official capacity as the Beaufort Co. Auditor, ... Appellant

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND THE FACTS

On June 22, 2020, Beaufort County Council adopted a budget ordinance (Budget Ordinance 2020/22) which included millage rates for both general obligations and debt servicing. Affidavit of Hayes Williams, ¶ 5. Of issue in this appeal, the Budget Ordinance set a millage of 4.8 as to the Rural and Critical Lands Bond (RCLB)[1] indebtedness. Williams' Affidavit, ¶ 5. The total millage rate for both general operations and debt servicing *as listed in the Budget*

[1]The Budget Ordinance (2020/22) lists the debt servicing at issue as "Purchase of Real Property Program" but it is clear from the parties' treatment of this labeling that this phrase refers to the Rural and Critical Land Bond debt.

Ordinance is 65.22 mills[2]. Williams' Affidavit, ¶ 5.

On or about August 24, 2020, Beaufort County Council passed an ordinance (LESC Ordinance 2020/29) providing for the imposition of a Law Enforcement Service Charge (LESC). Ordinance 2020/29.

On September 17, 2020, the Intervenor/Plaintiff Town of Hilton Head Island (Hilton Head) filed a suit, 2020-CP-07-01840, against Respondent Beaufort County (Beaufort) seeking a declaratory judgment as to the validity and constitutionality of the LESC and injunctive relief prohibiting Respondent from collecting this fee. Complaint, 2020-CP-07-01840.

On September 18, 2020, Respondent initiated a lawsuit against Appellant Beckert seeking an order to compel Appellant Beckert to include the LESC on the tax books and duplicate. Complaint, ¶ 29, 2020-CP-07-01850.

On September 21, 2020, Plaintiff/Intervenor Hilton Head filed a motion seeking to intervene in Respondent Beaufort County's suit against Appellant Beckert, 2020-CP-07-01850, and to consolidate the two suits. Motion to Intervene.

On September 25, 2020, Respondent Beaufort County filed a motion seeking temporary relief and mandamus requiring Appellant Beckert to include the LESC on the tax books and duplicate. Beaufort County's Motion for Temporary Injunction and Writ of Mandamus.

On or about September 29, 2020, Appellant Beckert assigned debt servicing millage to the tax rolls and created a duplicate. Beckert's Affidavit, ¶¶'s 9 & 10. The tax rolls and duplicate included the LESC as to those taxpayers to whom Ordinance 2020/29 applied.

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[2]An irregularity exists on the face of the Budget Ordinance as the listed millage rates do not actually equal 65.22. It appears this may be a math error committed by County Council.

Beckert's Affidavit, ¶ 9. However, the debt servicing millage rate calculated to be proper and sufficient by Appellant Beckert was a rate of 5.8 mills as to the Rural and Critical Lands Bond debt. Beckert's Affidavit, ¶¶'s 28-30.

On October 13, 2020, Appellant Beckert filed a Motion to Dismiss indicating that Respondent Beaufort County's complaint did not state a justiciable case and controversy because the date on which he was to apply the LESC had not yet arrived as of the time of the filing of the suit and so there was no failure to perform his duties. Beckert's Motion to Dismiss.

On October 19, 2020, Respondent Beaufort County amended its suit against Appellant Beckert to add an allegation concerning the calculation of the millage rate concerning debt servicing (Debt Servicing Millage) for the RCLB debt. Amended Complaint, 2020-CP-07-01850. This amended complaint concerned both the LESC and the Debt Servicing Millage for the RCLB debt. However, the amended complaint divided the averments into two causes of action by the type of relief sought instead of the issues underlying the complaint. Amended Complaint, 2020-CP-07-01850. The first cause of action requested mandamus relief as to both the LESC issue and the Debt Servicing Millage issue. The second cause of action requested declaratory judgment as to these same two issues.

On October 25, 2020, Plaintiff/Intervenor Hilton Head amended its suit to add two plaintiffs who are individual taxpayers who reside within the Town of Hilton Head Island. Amended Complaint 2020-CP-07-01840. The basis of the suit remained the same as did the prayer for relief.

On or about October 29, 2020 and with the consent of all parties, the trial court granted Hilton Head's motion to intervene and consolidate the cases. Order to Consolidate.

On October 30, 2020, Respondent Beaufort County amended its motion for temporary relief to include a request for temporary relief through injunction and mandamus as to both the LESC and the Debt Servicing Millage. Respondent's Supplemental and Amended Motion for Temporary Injunction and Writ of Mandamus.

On November 3, 2020, Respondent Beaufort County filed an amended answer to Plaintiff/Intervernor Hilton Head's amended complaint. Respondent's Amended Answer, 2020-CP-07-01840.

Also on November 3, 2020, Appellant Beckert filed an answer to the amended complaint filed by Respondent Beaufort County. Appellant's Answer to Respondent's Amended Complaint, 2020-CP-07-01840.

On November 5, 2020, Appellant Beckert filed an Amended Motion to Dismiss Pursuant to SCRCP Rule 12(b) as to both the LESC issue and the Debt Servicing Millage issue. Amended Motion to Dismiss.

In support of its amended motion for temporary relief, Respondent Beaufort County submitted the affidavit of the county's chief financial officer. Williams' Affidavit. This affidavit confirmed that the 4.8 mill rate would not produce sufficient funds to pay the principal and interest payments due in the tax year 2021 without resorting to use of the sinking fund. Williams' Affidavit, ¶¶'s 8 & 10. This affidavit indicates these revenues would total approximately $600,000.00 less than the amount of the principal and interest due on the RCLB debt.

Appellant opposed the motion for temporary relief concerning the mill rate on two grounds. Appellant's opposition was based upon the concern that the mill rate will produce a

deficiency in taxes for the RCLB debt. According to Appellant's calculations, the 4.8 mill rate legislated by Beaufort County will produce a nearly $2,000,000.00 shortfall. Beckert's Affidavit, ¶ ¶'s 28-29. Appellant Beckert determined the RCLB mill rate provided by the budget ordinance would only produce $9,049,555. Beckert's Affidavit, ¶ 29.

Appellant Beckert explained in an affidavit that he reached the 5.8 mill rate calculation by first determining the value of the mill to be $1,885,324. Beckert's Affidavit, ¶ 28. He then divided the amount of the payment due on the bond, $11,019,124, by the value of the mill arriving at the 5.84 mill rate. He rounded this rate to 5.8 as mill rates to comply with state law indicating mill rates can not be expressed in hundredths of a percent. SC Code Section 12-39-170. Appellant estimated the 5.8 mill rate would generate $11,915,125. Beckert's Affidadvit, ¶ 30.

Appellant's opposition was also based upon the concern that the injunction represented judgment as to a non-justiciable political question. Appellant's Memo in Opposition to Respondent's Amended Motion for Temporary Injunction and Mandamus.

On November 12, 2020, the Honorable Carmen T. Mullen presided over hearings involving the three amended motions. Transcript, 11.12.20. She indicated at the end of the hearing that she would grant the Respondent's Amended Motion for a Temporary Injunction as to the Debt Servicing Millage issue requiring Appellant Beckert to amend the tax rolls and duplicate from the debt millage rate he calculated at 5.8 to the debt millage rate of 4.8 mills contained within the Budget Ordinance. Transcript, p. 24, l. 17-24. Judge Mullen also denied the Intervenor Town of Hilton Head's Amended Motion for Temporary Injunction as to the LESC. Transcript p. 53, l. 13-19. She took Appellant Beckert's Amended Motion to Dismiss

concerning the LESC under advisement and did not rule upon this motion as to the Debt Servicing issue for the RCLB millage rate[3]. Transcript p. 61, l. 3-5.

A proposed Order granting the temporary relief was provided to Judge Mullen by Beaufort County on November 13, 2020. Attachment to Appellant's Objections to Proposed Order Granting Temporary Injunction and Mandamus. Objections to this proposed Order were filed, along with the proposed Order, by Beckert on November 16, 2020. On November 20, 2020, Judge Mullen signed the proposed Order as slightly amended to correct typographical errors. Order Granting Temporary Injunction and Mandamus.

On November 20, 2020, Appellant Beckert filed and served his Notice of Appeal and Proof of Service along with the Order Granting Temporary Injunction as to the Rural and Critical Lands Debt Service Millage Rate, with the Court of Appeals. Notice of Appeal and Proof of Service. A Motion for Certification was filed with the South Carolina Supreme Court on this date as well. A Petition for a Writ of Supersedeas was filed on November 23, 2020 with the Court of Appeals.

The Court of Appeals denied the Petition for a Writ of Supersedeas on November 23, 2020. The South Carolina Supreme Court denied the Motion for Certification in an Order issued on January 22, 2021. This brief follows.

STANDARD OF REVIEW

The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the decision of the trial court is unsupported

[3]The granting of the Amended Motion for Temporary Injunction as to the Debt Servicing would appear to function as a denial of Appellant Beckert's Amended Motion to Dismiss pursuant to SCRCP Rule 12(b)(1) and (6) concerning the Debt Servicing Millage issue.

by the evidence or controlled by an error of law. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 626 S.E.2d 34, 36 (SC Ct. App. 2005), holding modified by *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 694 S.E.2d 15 (SC 2010).

"The question of subject matter jurisdiction is a question of law. An appellate court may decide questions of law with no particular deference to the trial court. Lack of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal." *Gantt v. Selph*, 814 S.E.2d 523, 525–26 (2018) (internal quotations and citations omitted).

ARGUMENT

This Court should reverse the trial court's Order Granting Temporary Injunction as to the Rural and Critical Lands Debt Service Millage Rate (Order) because the ruling was beyond the subject matter jurisdiction of the trial court and because the Order was controlled by errors of law. The trial court erred by making a value determination concerning the sufficiency of debt millage rates even though state law delegated such value determination to a separate branch of government. The non-justiciable nature of this political question deprived the trial court of subject matter jurisdiction.

The trial court's ruling was controlled by an error of law concerning the authority to set the debt millage rate. Further, the Order was controlled by an error of law because the trial court determined that the debt millage rate set by the auditor was limited by a county ordinance. Finally, the trial court's ruling was also controlled by an error of law because the determination of sufficiency was made by consideration of money held in the sinking fund.

The Law Concerning Temporary Injunctions

In the South Carolina state court system, an injunction is considered a "drastic remedy

issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 603 S.E.2d 905, 907 (SC 2004). A complaint seeking injunction must "allege facts sufficient to constitute a cause of action for injunction." *AJG Holdings, LLC v. Dunn*, 674 S.E.2d 505, 508–09 (SC Ct. App. 2009). Further a plaintiff must demonstrate the injunction "is reasonably necessary to protect the legal rights of the plaintiff pending in the action." *AJG Holdings, LLC*, citing *Peek v. Spartanburg Reg'l Healthcare Sys.*, 626 S.E.2d 34, 36 (SC Ct.App.2005); *County of Richland v. Simpkins*, 560 S.E.2d 902, 904 (SC Ct.App.2002).

To establish entitlement to a preliminary injunction, the plaintiff must show: 1) he would suffer irreparable harm if the injunction is not granted; 2) he will likely succeed on the merits of the litigation; and 3) there is an inadequate remedy at law. *Scratch Golf Co.*, at 908; *Peek*, at 36. To "balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief." *Peek*, at 36–37. An injunction is intended to "preserve the status quo and prevent possible irreparable injury to a party pending litigation." *Id*.

The plaintiff must present a reasonable question as to the existence of a legal right to the relief. *Peek*, at 37. To determine whether this relief is appropriate, the trial court may consider the merits of the case. *AJG Holdings, LLC*, at 509, citing *Helsel v. City of N. Myrtle Beach*, 413 S.E.2d 824, 826 (SC 1992). The burden is on the plaintiff to make a prima facie showing entitling him to this relief. *Id*.

The Law Concerning Debt Millage Rates

The South Carolina code contains multiple provisions addressing the levying of taxes.

Succinctly, the levying of operational budget taxes is left to the county government, in this case the Beaufort County Council. See SC Code Section 4-9-30. However, as to bonded indebtedness, the levying is the duty of the auditor. See SC Code Section 4-15-150.

SC Code Section 4-15-150 states that as to county bond debt "... there shall be levied annually *by the county auditor* and collected by the county treasurer in the same manner as other county taxes are levied and collected, a tax, without limit, on all taxable property in the county sufficient to pay the principal and interest of such bonds as they respectively mature and to create such sinking fund as may be necessary therefor." (emphasis added).

On its face, the statute placing the duty to levy taxes for bond debt upon the auditor states that the taxes levied must be *sufficient* to pay the principal and interest payments on that debt. The statute also indicates that the taxes shall be sufficient to create a sinking fund as necessary. Nowhere does the statute indicate that a determination of sufficiency allows resort to a sinking fund.

To the contrary, the plain language of the statute indicates that the sufficiency relates to the amount needed to pay principle and interest in addition to creating a sinking fund. Further, the statute plainly states that the amount of taxes levied for sufficiency of bond debt was "without limit." This is in contrast to the plain language of other statutes concerning the generation of taxes. See *Charleston Cty. Parents for Pub. Sch., Inc. v. Moseley*, 541 S.E.2d 533 (SC 2001)(discussing the function of a statutory mill rate cap concerning school district operational budgets).

The appellate courts have indicated the simple nature of calculations concerning sufficiency as to a mill rate. See *County of Lee v Stevens*, 289 SE2d 155, at 156 (SC 1982).

Further, the appellate courts have discussed events which may effect the actual collections beyond any calculations of sufficiency. See *Angus v City of Myrtle Beach*, 609 SE2d 808, at 810 (SC 2005)(Pleicones dissenting opinion). These include valuation appeals and collection rates. Other events include exemptions and property devaluation. In the context of municipal budgeting, then Justice Pleicones referred to tax levying as an "inexact science, relying as it must upon estimates and 'best guesses.'" *Angus*, at 810.

Government authorities caution that because of these uncertainties, an excess is always desired and that an insufficiency should never occur. Beckert Affidavit, Ex. A, p. 9-18. During a presentation made by the South Carolina Department of Revenue at a June 27, 2019 Beaufort County Council Millage Workshop, Government Affairs Administrator Sanford Houck provided his advice to this effect. Beckert's Affidavit, Ex. A, p. 4, l. 25- p. 5, l. 1 ("David, I honestly, if I am sitting there, I want excess collections every year."). Administrator Houck explained that insufficiency can cause lasting economic impact upon taxpayers.

In contrast, Mr. Houck explained that excess can be either credited in the future back to taxpayers or refunded directly. Beckert's Affidavit, Ex. A, p. 5, l. 24-25 ("[i]f you're rolling it forward every year, the citizens haven't been harmed."). Mr. Houck also opined when questioned as to an appropriate level of excess, that an overage of five percent (5%) would be acceptable but that twenty five percent (25%) would not.

At this same presentation, Mr. Houck indicated that it is the auditor's job to determine the sufficient mill rate for bond debt. Specifically, Mr. Houck stated: "Millage for bonded indebtedness has no limitation. ... The county auditor is authorized to set millage to make that bond payment. That's one of the things that the auditor is tasked with doing by state law."

Beckert's Affidavit, Ex. A, p. 3, l. 13-17 and

https://beaufortcountysc.new.swagit.com/videos/64634, at minute mark 23:15-23:55.

Finally as to the law concerning debt servicing and millage calculations, the Supreme Court has recognized this delegation of authority in its opinion in *Stackhouse v Floyd*, 149 SE2d 437 (SC 1966). In *Stackhouse*, the Supreme Court stated that the auditor's job to set millage rate for bond indebtedness is an act reserved to the auditor in his ministerial duty as an agent of the General Assembly. *Stackhouse*, at 445-446. Specifically, the *Stackhouse* Court stated that an auditor is compelled to levy annually "a tax sufficient to pay principal and interest of the bonds" and that the auditor "acts in a ministerial fashion as the agent of the General Assembly in this matter." *Id*.

Two decades later, *Stackhouse* was cited in favor of debt servicing millage rate setting powers being vested with the auditor. See *In Re Betty J. Catoe*, Opinion No. 85-24 (SC Atty Gen Op. March 20, 1985)(relying upon *Stackhouse* to conclude "[t]he auditor, however, is to determine the mills necessary to produce the tax revenue.").

Thus, the law requires the mill rate be sufficient to produce at least enough revenue to pay the principle and interest on the RCLB debt. The rate necessary to produce sufficient revenue is without limit. The determination of sufficiency is to be made by the auditor.

I. The trial court lacked subject matter jurisdiction to issue the temporary injunction concerning a county debt millage rate.

The trial court improperly issued the temporary injunction in this case because the authority to determine the necessary and proper debt millage rate is exclusively granted to the county auditor, an executive branch position.

The valuation of the sufficiency and propriety of a debt millage rate raises a political question not subject to adjudication. A determination delegated to the executive branch should not be second guessed by either the legislative county council or the judiciary.

Such a concern is quintessentially non-justiciable, triggers separation of power concerns, and deprives a court of subject matter jurisdiction.

A) The nature of a non-justiciable political question deprives a court of subject matter jurisdiction

The appellate courts in South Carolina recognize that "[a] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy" and that "[t]he concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." *Eagle Container Co., LLC v. Cty. of Newberry*, 622 S.E.2d 733, 744 (SC Ct. App. 2005) reversed on other grounds by *Eagle Container Co., LLC v. Cty. of Newberry*, 666 S.E.2d 892, 894 (SC 2008)(internal quotations omitted).

The South Carolina Supreme Court has indicated that the "nonjusticiability of a political question is primarily a function of the separation of powers." *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 632 S.E.2d 277, 278 (SC 2006) citing *Baker v. Carr*, 369 U.S. 186, 210–11 (1962). The Court continued to state that "[t]he fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *Id*. The South Carolina Supreme Court cited US Supreme Court authority for the proposition that the political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the ... confines of the executive branch. *Id*.

More recently, the South Carolina Supreme Court analyzed the characteristics of political question analysis in the case of *Segars-Andrews v. Judicial Merit Selection Comm'n*, 691 S.E.2d 453, 460 (SC 2010). The *Segars-Andrews* Court indicated that "[i]n the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Segars-Andrews*, at 460, quoting *Baker v Carr*, 369 U.S. at 198. When determining justiciability as to a political question concern, "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Segars-Andrews*, at 460, quoting *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939).

Justiciability questions as to ripeness, mootness, and standing are no longer considered jurisdictional questions in South Carolina. *Eagle Container Co., LLC v. Cty. of Newberry*, 622 S.E.2d 733, 744 (SC Ct. App. 2005), rev'd, 666 S.E.2d 892 (SC 2008) ("the concepts of subject matter jurisdiction and ripeness are separate and distinct."). However, the interplay between subject matter jurisdiction and the justiciability as to political questions was not discussed in *Eagle Container Co., LLC*. This omission suggests the court does not have subject matter jurisdiction over a matter delegated to a co-equal branch due to the interplay between nonjusticiability as to political questions and the separation of powers doctrine. See *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 632 S.E.2d 277 (SC 2006). This is also suggested by the fact that a grant of a 12(b)(6) motion is appropriate if a complaint on its face only presents a political question. See *S.C. Pub. Interest Found. v. Judicial Merit Selection*

Comm'n, 632 S.E.2d 277 (SC 2006).

The South Carolina Supreme Court has discussed the policy underpinning the separation of powers doctrine. The Supreme Court indicated that: "[o]ne application of the general principle as to the separation of the powers of government is the rule that on judges as such no functions can be imposed except those of a judicial nature. It has been said that the policy and intent of the constitutional system is that the courts and judges not only shall not be required, but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to, or connected with, the administering of the judicial function, and that the exercise of any power or trust or the assumption of any public duty other than such as pertains to the exercise of the judicial function is not only without constitutional warrant, but is against the constitutional mandate in respect of the powers they are to exercise and the character of the duties they are to discharge." *State ex rel. McLeod v. Yonce*, 261 S.E.2d 303, 306 (1979) quoting 16 Am.Jur.2d, Constitutional Law, under VIII, Departmental Separation of Governmental Powers, § 223.

Subject matter jurisdiction has been described as "a court's constitutional or statutory power to adjudicate a case." Stated differently, "subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *First Citizens Bank & Tr. Co., Inc. v. Taylor*, 847 S.E.2d 249, 256 (SC Ct. App. 2020) (Internal citations and quotations omitted).

As these two concepts involve nearly identical definitions except that one involves power and authority within the judicial branch while the other involves power and authority between branches of government as a whole. In this way, subject matter jurisdiction can be thought of as

its own subtype of a separation of power doctrine within the judicial system. The courts should not distinguish between a circuit court's lack of power as to a subject areas such as divorce or probate and the court's lack of power as to legislative acts or executive branch enforcement when reviewing a ruling as to a nonjusticiable political question.

Thus, unlike non-justiciability concerns related to ripeness, mootness, and standing, a court is without subject matter jurisdiction to address a political question.

B) The trial court's determination of the sufficiency of a debt millage rate presented a non-justiciable political question

The South Carolina Supreme Court has previously discussed the type of valuation issues which are considered nonjusticiable political questions. See *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 632 S.E.2d 277 (SC 2006). In that opinion, the South Carolina Supreme Court cited US Supreme Court authority for the proposition that the political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the ... confines of the executive branch." *Id*, at 278 citing *Baker v. Carr*, 369 U.S. 186, 210–11 (1962). Undersigned suggests that the most simple and basic type of valuation is one involving a mathematical calculation such as the determination of a mill rate. See *County of Lee v Stevens*, 289 SE2d 155, at 156 (SC 1982).

It is worth noting that not only is the mill rate determination at issue but that the underlying value of the mill upon which this calculation is involved is also at issue. Both of these valuations are reserved to the auditor as to bond indebtedness. See *In Re Betty J. Catoe*, Opinion No. 85-24 (SC Atty Gen Op. March 20, 1985)(relying upon *Stackhouse* to conclude

"The auditor, however, is to determine the mills necessary to produce the tax revenue."). This Court has also recognized that the value of a mill may change. See *County of Lee v Stevens*, 289 SE2d 155 (SC 1982).

As noted in his affidavit, Appellant made a mathematical determination based upon his training. This calculation indicated that the 4.8 mill rate contained in the Budget Ordinance failed to produce enough money to cover the principal and interest payments for the RCLB debt. Beckert's Affidavit, ¶ 24. The Affidavit of Mr. Williams, submitted by Beaufort County, confirmed the same. In paragraph 8 of Mr. Williams' affidavit, he indicates the annual debt servicing for the RCLB is $10.8 million. Williams' Affidavit. Paragraph 10 indicated that the 4.8 mill rate would only produce $10.2 million. Williams' Affidavit. Relying solely upon the calculations made by Respondent, the 4.8 mill rate was projected to result in a $600,000.00 shortfall. Williams' Affidavit, ¶¶'s 8 & 10.

The record indicates that Respondent's concern regarding the 5.8 mill rate calculated by Appellant Beckert was that it raised too much money for the political style of certain members of County Council. In the October 19, 2020 council meeting, County Council debated whether the mill rate increase could be spun as a tax increase imposed by popular referendum when the RCLB was passed. Beckert's Affidavit, Ex. E, p. 11, l. 5-7 ("And so, if you treat that as being approved by the voters everything else seemed to stay within our wanting to have no tax increase.") This is legislative second guessing followed by an attempt at judicial intervention into executive branch decisions. However, these types of valuations and policy determinations involve political questions, are nonjusticiable, and are only subject to correction at the polls during election season.

Other councilpersons opined as to the political nature of the controversy concerning the debt mill rate. During the same meeting, the efforts of Respondent Beaufort County were referred to as a "power play between elected officials." Beckert's Affidavit, Ex. E, p. 7, l. 8-9. This councilman indicated that he does not "get" "[w]hy we're using and why we're hiring attorneys to do something that is already in accordance with what we wanted, a neutral budget." In response, the Chairman said: "You've got a fair point." Because the issuance of the injunction required the judiciary to resolve a political question, the issuance of the temporary injunction was improper.

Further proof that the Order *sub judice* involved a substitution of a valuation made by the judiciary for one reserved to the executive branch auditor is confirmed by the trial court's own words during the hearing. When announcing her ruling, the trial court stated "I think, in this case, the millage rate needs to be set at 4.8." Transcript, p. 24, l. 21-22. This immediately followed her indication that, despite statutory authority providing that the auditor, an executive branch employee, levies the tax for bond indebtedness, she thought that "County Council [a legislative body] gets to set it." Transcript, p. 24, l. 20-21 (bracketed language added).

Thus, the trial court did not have subject matter jurisdiction to issue its ruling because the issue presented in the motion for temporary relief involved a a political question.

II. The trial court abused its discretion by issuing a temporary injunction concerning the setting of the debt millage rate for the Rural and Critical Lands Bond debt

The trial court abused its discretion because the issuance of the Order was based upon erroneous legal conclusions. The erroneous conclusions include the authority to set debt millage rates for county bond indebtedness, the function of a county ordinance as a limitation on debt

millage rates and the determination of sufficiency in relation to the sinking fund. This Court should reverse the temporary relief granted in the Order because of these errors.

A) The authority to set debt millage rates for county bond obligations is exclusively vested in with the county auditor

The trial court's Order is controlled by an error of law because that ruling placed the determination as to the RCLB debt mill rate within the authority of Respondent Beaufort County's legislative body, county council, when state law is clear and unambiguous that this authority is vested solely with the county auditor.

As stated earlier, the General Assembly has assigned certain calculations as to mill rates to the legislative county government when these calculations concern operational budgeting. See SC Code Section 4-9-30 (providing the county government with the power to " ... levy ad valorem property taxes ... for functions and operations of the county ...") & *County of Lee v Stevens*, 289 SE2d 155, at 156 (SC 1982). However, without ambiguity, the General Assembly acted differently as to the mill rate for bond indebtedness by delegating that authority solely to the county auditor. See SC Code Section 4-15-150 ("there shall be levied by the county auditor ... a tax, without limit, on all taxable property in the county sufficient to pay the principal and interest of such bonds ... and to create such sinking fund as may be necessary.") The Supreme Court recognized this delegation of authority in the opinion in *Stackhouse v Floyd*, 149 SE2d 437 (SC 1966).

In *Stackhouse*, the Supreme Court stated that the auditor's job to set millage rate for bond indebtedness is an act reserved to the auditor in his ministerial duty as an agent of the General Assembly. *Stackhouse*, at 445-446. Specifically, the *Stackhouse* Court stated that an auditor is

compelled to levy annually "a tax sufficient to pay principal and interest of the bonds" and that the auditor "acts in a ministerial fashion as the agent of the General Assembly in this matter." *Id*.

Likewise, the South Carolina Supreme Court stated in recent dicta that it is the auditor who sets the millage rate for debt servicing. See *Horry Cty. Sch. Dist. v. Horry Cty.*, 552 S.E.2d 737, 739 (SC 2001). In *Horry County School District*, the Court delineated the various rolls in a case questioning the role of county council in school budgeting and debt affairs. Writing for the majority, Justice Burnett indicated that:

> "The Horry County Board of Education prepares an annual budget and determines the necessary millage for the operation of schools for the succeeding year. *The county auditor sets the millage for the school district's debt service*. The Myrtle Beach City Council and the Horry County Council also establish annual budgets and determine annually the millage necessary for their respective operations. The Horry County Council plays no role in setting, levying, or approving the budget or millage of the school district." Emphasis added.

This is also consistent with several other persuasive authority cited above such as an opinion from the South Carolina Office of the Attorney General and statements from the South Carolina Department of Revenue. In fact, undersigned has not located one authority indicating that county council or any other agent for the county possesses the authority to determine the appropriate millage rate for bond indebtedness.

In the Order at issue on appeal, the trial court's decision is controlled by an error in law as to this authority. In the Order, the trial court expressly stated that her decision was reached because the "County Auditor has not cited any authority that would allow him to substitute his own judgement for the County Council's on this subject."[4] Order, p. 5. In fact, not once does the

[4]This statement implicitly shifts the burden as to the showing necessary to grant a temporary injunction. It is the plaintiff, not the defendant, who bears the burden to show authority supporting the sought for relief.

trial court provide any authority for county council to pass any judgment as to the debt mill rate calculation.

Instead, the Order is deficient because it does not discuss and analyze the difference in the setting of mill rates between debt millage and operating millage. At least two times in the Order, authority concerning operating millage rates and debt millage rates are discussed interchangeably. When referencing the *In Re Elizabeth Kearse Gooding* (SC Atty Gen Informal Op., December 4, 1998) the Order never indicated that the quoted language cited in favor of Respondent Beaufort County was not on point and instead only discussed operating millage and not debt service millage.

The second time the Order reflects the error of law is the citation to the auditor's ministerial role to the General Assembly. Order, p. 5, ¶ 1. While such a statement of law is true and not in dispute, the Order treats this ministerial duty to the General Assembly as a statement of fealty towards Beaufort County Council's debt millage rate calculations. In fact, the question should be asked why the auditor would owe any ministerial duty to county council concerning debt millage rates if his duty is owed to the General Assembly. These are not interchangeable governing bodies.

This transference of duty is made clear in the very next paragraph when the trial court stated that "... County Council ... determined — based upon its policy decisions for the sinking fund — that the rate of 4.8 mils is sufficient" for the RCLB debt and that the auditor "did not have discretion to make policy determinations concerning" the proper levy." Order, p. 5, ¶2.

In sum, the Order erroneously asserted that the authority to determine the debt millage rate was not exclusively vested in the auditor. Instead, the Order was controlled by an error of

law because the Order put primacy of the County Budget Ordinance 2020/22 and its debt millage determination above the state statute issued by the very General Assembly to whom Appellant owed a ministerial duty.

B) A county ordinance may not function as a limit on the county auditor's authority to set a debt millage rate for a county bond

The Order erroneously treated the Budget Ordinance 2020/22 as a limitation on the amount of tax sufficient to pay principal and interest on the RCLB bond debt.

While an auditor's authority to set debt millage rate is limited to what he determines is sufficient for the payment of principal and interest, there is no statutory cap placed upon this amount. In fact, the statute providing the authority to determine debt millage rates specifically indicates that this tax is "without limit." SC Code Section 4-15-150. This contrasts with mill rate limits appearing in other taxation statutes.

In *Charleston County Public Schools, Inc, et al, v Moseley*, the South Carolina Supreme Court held that a state statute which provided that a school board would certify to the auditor "the tax levy to be imposed" required that the auditor levy a school district operation budget mill rate for 99.4 mils contained in school board certification even though a separate legislative enactment limited budget mill rates to 90 mills. 541 SE2d 533, at 538 (SC 2001). The Supreme Court found that the statute unambiguously limited the auditor's discretion as to the budget mill rate to that certified pursuant to the statute. The legislative limitation expressed in *Moseley* functions exactly opposite to the wording of authority expressed in SC Code Section 4-15-150.

In the Order *sub judice*, the trial court clearly limited the auditor's determination as to the RCLB bond debt mill rate to that "determined" by "County Council ... based upon its policy

decisions." Order, p. 5, ¶ 2. This limitation expressed in the Order contradicts the plain language of SC Code Section 4-15-150. Thus, to the extent the Order treated the Budget Ordinance 2020/22 as a cap upon the authority of Appellant to determine the sufficient debt millage rate, this ruling rests upon an erroneous conclusion of law.

C) The determination of the sufficiency of a debt millage rate for county bond debt may not be based upon consideration of money held in the sinking fund

The Order rests upon the erroneous conclusion of law that sufficiency as to debt mill rate should be determined by resorting to money held in the sinking fund. This is in direct contradiction to statute. Instead, the statute requires a debt mill rate to be sufficient to raise taxes to pay the principal and interest on debt and if any is left over that excess would be placed in the sinking fund.

Again, SC Code 4-15-150, indicates that the auditor SC Code Section 4-15-150 states that as to county bond debt "... there shall be levied annually by the county auditor and collected by the county treasurer in the same manner as other county taxes are levied and collected, a tax, without limit, on all taxable property in the county *sufficient to pay the principal and interest of such bonds* as they respectively mature and to create such sinking fund as may be necessary therefor." (emphasis added).

This statute indicates that the money raised must be sufficient to pay principal and interest and to create a sinking fund. The statute does not say what Respondent Beaufort County asserted and the trial court ordered - that Respondent's desired 4.8 mill rate is sufficient to pay principal and interest when "[t]he remaining approximately $600,000.00 required to service that debt would come from the sinking fund." Order, p. 3. That reading stretches the meaning of

sufficiency to include deficiencies.

Had the General Assembly desired to allow sufficiency to be determined by resort to money held in the sinking fund, it would have stated as much in statute. It did not and the statute is not ambiguous in this regard. Because the Order mis-interprets the statute, it rests upon an erroneous conclusion of law.

CONCLUSION

Thus, for the reasons stated above, this Court should vacate the temporary injunction because it is controlled by erroneous conclusions of law. This Court should also vacate the temporary injunction because the action against Appellant Beckert concerning the RCLB debt mill rate involves a nonjusticiable political question depriving the trial court of subject matter jurisdiction.

Respectfully submitted by,

/s/ James A. Brown, Jr. February 19, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen

Appeal Court Number: 2020-001522

Town of Hilton Head Island, South Carolina,
John J. McCann and Stephen G. Riley,..... Intervenors/Plaintiffs

v.

Beaufort County, South Carolina, ...Respondent

v.

James Beckert, in his official capacity as the Beaufort Co. Auditor, ...Appellant

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PROOF OF SERVICE

I, James A. Brown Jr, certify that, on February 19, 2021, I served a copy of the Initial Brief of Appellant, the Designation of Matter, and this Proof of Service upon the Intervenors/Plaintiffs, Town of Hilton Head Island, et al., and Respondent, Beaufort County, by attaching an electronic copy of these items to an email addressed to their attorneys of record, Curtis Coltrane at curtis@coltraneandwilkins.com, M. Dawes Cooke at mdc@barnwell-whaley.com and John W. Fletcher at jfletcher@barnwell-whaley.com.

Respectfully submitted by,

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February 19, 2021

VIA EMAIL ONLY:
ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Beaufort County v. James Beckert
Appellate Case No. 2020-001522

Ms. Kitchings:

Please find attached to this electronic mail correspondence one copy of the Initial Brief of Appellant, the Designation of Matter, and the Proof of Service for the same, all submitted in a pdf format, for filing in your office. Thank you for your assistance filing these items and please contact me with any questions or concerns.

Sincerely,

/s/ Jim Brown

w/ attachments as indicated

cc: M. Dawes Cooke, Jr. and John W. Fletcher, Attorneys for Beaufort County
w/ attachments

Curtis Coltrane, Attorney for Town of Hilton Head
w/ attachments

James Beckert,
w/ attachments