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,

v.

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

Respondents.

BRIEF OF APPELLANTS

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

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INTRODUCTION

In 2016, the Charleston County Council put a referendum on the ballot to seek the voters' approval of Ordinance 1907 to fund various listed highway and infrastructure projects using Half Cent Sales Tax revenue. One project that was not listed in Ordinance 1907, and hence not on the ballot, was the extension of Interstate 526 ("**I-526**"), known as the Mark Clark Expressway ("**MCE**"). Council members knew that putting this complex, expensive, and controversial project on the ballot could cause the entire referendum to fail, and so assured voters in public meetings and in an editorial in the Post & Courier published immediately before the election,

that the extension of I-526 was not included in the ordinance and was not on the ballot.

Nevertheless, two years later, desperately searching for funds to match the South Carolina Transportation Infrastructure Bank's ("**SCTIB**") potential contribution in a ballooning project budget that was impossible without that match, Council pledged those same Half Cent sales tax funds in an intergovernmental agreement with the SCTIB and South Carolina Department of Transportation ("**SCDOT**") in an attempt to revive the long dormant project.

Elizabeth Smith and Abraham Jenkins are Charleston County residents, taxpayers and registered voters. SC Coastal Conservation League ("**CCL**") is a South Carolina statewide nonprofit with many supporters across the state, including in Charleston County. Together, they filed this action for declaratory and injunctive relief to challenge the County's unlawful and *ultra vires* action in pledging Half Cent Sales Tax proceeds as a County Match in the Intergovernmental Agreement with the SCTIB and the SCDOT.

Their Complaint alleges that the County's pledging of those Half Cent Sales Tax funds as a match to the SCTIB's funding violates the state statute and the county ordinances approved by countywide referendum elections that do not allow these funds to be used for any purpose other than for the construction of the projects specified in the county ordinance as required by the statute. This project was never listed, intentionally, by Council in either of the ordinances and so the sales tax proceeds may not be used to fund the project. To agree to do so is an *ultra vires* and

unlawful act by the County, and the plaintiffs asked the trial court to declare it as such and enjoin the County from making that agreement in the IGA.

The plaintiffs filed a detailed and comprehensive Complaint that states causes of action entitling it to declaratory and injunctive relief. The plaintiffs had and continue to have standing to bring this matter challenging the *ultra vires* acts of a local government and the misuse of public tax money to the court for redress of a wrong. The filing of this action that does not challenge the referendum ballot or its result, but rather the misuse of funds by the County, was timely filed following the execution of the First Amended Governmental Agreement.

Despite all of this, the trial court dismissed the Complaint on the County's Rule 12(b)(6) motion on the grounds that the plaintiffs did not have standing, their Complaint did not state a cause of action, and that it was an untimely election challenge. All of these conclusions are wrong, and the Appellants respectfully request that this court reverse the dismissal and remand this case to the Court of Common Pleas for discovery and trial.

STATEMENT OF THE CASE

On June 3, 2019, Abraham Jenkins, Elizabeth Smith, and the CCL brought this action against the County, the SCTIB, and the SCDOT in the Richland County Court of Common Pleas. Docket entry ("**DE**") June 3, 2019.

Subsequently, to accommodate the addition and withdrawal of parties and legal counsel, Jenkins, Smith, and the CCL filed a First Amended Complaint on August 2, 2019 and a Second Amended Complaint (the "**SAC**" or "**Complaint**"),

which is the operative Complaint for this appeal, on November 25, 2019. (R. p. 24-110). The SCDOT (R. pp. 131-134) and SCTIB (R. pp. 115-130) filed answers to the SAC, and the County (R. pp. 111-114) filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6).

The Respondents are all parties to the First Amended Intergovernmental Agreement for Charleston County Mark Clark Expressway Extension Project ("**Project"**) in Charleston County, South Carolina dated January 10, 2019 and signed by the County, the Bank, and the DOT (the "**Amended IGA**"). (R. p. 25, line 22 – p. 26, line 3).

The Complaint challenged (a) language in the Amended IGA authorizing transportation sales tax revenue to fund the Project, (b) language purporting to require future County Councils to allocate by ordinance transportation sales tax revenue to the Project, (c) certain County appropriations made pursuant to the Amended IGA to date, and (d) the County's authority to execute the Amended IGA in the first place. (R. p. 26, lines 8-13).

The County's motion to dismiss was heard on January 6, 2020, and the trial court issued its order on February 24, 2020 granting the County's motion to dismiss. Among the court's findings were that the plaintiffs lacked standing, even public importance and taxpayer standing, (R. pp. 5-11), and that none of the plaintiff's grounds for declaratory and injunctive relief stated facts sufficient to constitute a cause of action under Rule 12(b)(6). (R. pp. 11-19).

Jenkins, Smith and the CCL filed a motion to alter or amend the judgment on March 5, 2020, and the trial court denied that motion by order dated August 3, 2020. Jenkins, Smith and the CCL then timely appealed those orders. Notice of Appeal dated August 31, 2020.

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012), quoting *Rydde v. Morris,* 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the Complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (internal quotations omitted). If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. *Id*., quoting *Sloan Constr. Co. v. Southco Grassing, Inc.,* 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court should consider only the allegations set forth on the face of the plaintiff's complaint. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). The Court must deny a motion to dismiss under Rule 12(b)(6) "if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory." *Id*. (quotations omitted); *Baird v. Charleston Cnty*., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "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." *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192. "Pleadings in a case should be construed liberally so that substantial justice is done between the parties." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010) (quotations omitted). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192.

FACTS

As a threshold matter, the findings of facts in the trial court's order have no citations to any authority in the record, and only one statement in the factual findings section refers to the SAC. (R. pp. 3-5). As stated earlier in the prior Standard of Review section of this brief, review under Rule 12(b)(6) should be confined to the allegations of the Complaint, which are taken as true for purposes of deciding the motion. The trial court's order fails on both counts: it finds facts outside of those alleged in the Complaint and with no citation to the record at all. To the extent any of the holdings of the trial court are dependent on the findings of fact, those holdings should be reversed, as having no basis in the record.

Based on the SAC, the facts for purposes of this appeal are as follows.

The plaintiffs

Plaintiffs are two individual residents, registered voters and taxpayers of Charleston County, Jenkins and Smith, and two non-profit organizations, the CCL and the South Carolina Public Interest Foundation ("**SCPIF**"). (R. p. 24, ¶¶ 1-3, p. 36, ¶¶ 54-56).

The Amended IGA

The action arises out of the Amended IGA entered into by the defendants to fund the MCE extension project (the "**Project**"). (R. p. 25-26, ¶¶ 10-11). Section 3.2 (B) of the Amended IGA requires the County to pay the costs of the Project from the proceeds of a one-half percent sales and use tax ("**Half Cent sales tax**") that was adopted by referenda. (R. p. 26-27, ¶¶ 14-15).

The Half Cent sales tax referenda

The Half Cent sales tax was authorized by Charleston County voters through two public referenda, the First Half Cent and the Second Half Cent. (R. p. 27-29, ¶¶ 17-22). Both the First Half Cent and Second Half Cent ordinances included specific project lists, which did not include the Project. *Id.* Specifically, the ordinances did not include a description of the Project or the estimated capital costs of the Project to be funded by the proceeds of the tax, (R. pp.29-30) ¶ 23, both of which are required by state statute.

Charleston County Ordinance Number 1324, adopted August 11, 2004, authorized the County's first half-cent transportation sales tax and the issuance of $113 million in general obligation bonds -- subject to public referendum. Ordinance Number 1324 is attached as **Exhibit B** to the Complaint and incorporated therein by reference (the "**First Half-Cent**"). The language of the approved referendum is contained in Ordinance Number 1324. The referendum was approved by a majority of voters. *(*R. p. ¶ 17).

Ordinance Number 1324 specified the following project list for the $113 million in general obligation bonds associated with the First Half-Cent:

- $25,000,000 to begin the right-of-way acquisition and engineering process for the widening and improvement of Johnnie Dodds Boulevard from the Arthur Ravenel, Jr. Bridge to the I-526 overpass.
- $7,000,000 for Glenn McConnell Parkway/Bees Ferry Road Intersection improvements.
- $10,000,000 for road improvements on James Island (Folly Road and Maybank Highway intersection improvements, Harbor View Road Improvements, and an off-ramp interchange loop from the James Island Connector to Folly Road).
- $6,000,000 for a US Highway 17 access ramp onto the US Highway 61 connector near Wesley Drive.
- $29,000,000 for acquisition and construction of a roadway connecting Ashley Phosphate Road and the Palmetto Parkway through Spartan Blvd.
- $36,000,000 for Greenbelts.[1] (R. p. 27 ¶ 18).

Charleston County Ordinance Number 1454, adopted July 18, 2006, authorized the issuance of $205 million in additional bonds for specified road projects and $95 million in additional bonds for Greenbelt projects in connection with the First Half-Cent revenue – subject to public referendum. Ordinance Number 1454 is attached as **Exhibit C** to the Complaint and is incorporated therein by reference. (R. pp. 82-92). The language of the approved referendum is contained in Ordinance Number 1454. The referendum language specifies the following project list:

- Widening and improvements to US Route 17/Johnnie Dodds Boulevard from the Arthur Ravenel, Jr. Bridge to the Interstate I-526 Overpass.
- Folly Road (SC 171)/Maybank Highway (SC 700) Intersection Improvements.
- James Island Connector (SC 30) Interchange Loop to Folly Road (SC 171).
- Harbor View Road (S-1028) Improvements.
- Interstate I-526 Loop Ramp to Glenn McConnell Parkway (SC 61 Spur).
- Bees Ferry Road (S-57) widening from US Route 17 to Ashley River Road (SC 61).
- Folly Road (SC 171)/Camp Road (S-28) Intersection Improvements.
- Future Drive extension to Ladson Road and the extension of Northside Drive.
- Maybank Highway (SC 700) widening from proposed I-526/Mark Clark

[1] The County's Greenbelt Program began in 2004. At the time the Greenbelt Plan was created, it was determined that at a minimum of 200,000 acres of greenspace were needed to meet the anticipated future population of the County. The Greenbelt Plan set a goal to protect the additional 40,000 acres needed to meet the goal. As of this filing, Greenbelt funds from the First Half-Cent have been exhausted. (R. p. 27 ¶ 18, footnote 1).

interchange to Bohicket Road/Main Road (S-20); and
- Roadway Improvements in the Medical University area including Lockwood Drive (S404), Courtenay Drive (S-550), and Bee Street (S-551) with additional improvements at the Courtenay Drive intersections with Calhoun Street (S-404) and Spring Street.

The referendum was approved by a majority of voters. (R. p. 28 ¶ 19).

Charleston County Ordinance 1907

Charleston County Ordinance Number 1907, adopted August 9, 2016, authorized the County's second half-cent transportation sales tax and the issuance of $200 million in general obligation bonds – subject to public referendum. Ordinance Number 1907 is attached to the Complaint as **Exhibit D** and is incorporated therein by reference (the "Second Half-Cent"). The language of the approved referendum is contained in Ordinance Number 1907. The referendum was narrowly approved by voters by a fifty one percent (51%) margin. (R. p. 28 ¶ 20)

Ordinance Number 1907 specified that $210 million of the Second Half-Cent revenue would be used for Greenbelt projects and the remaining $1.89 billion would fund the following transportation project list:

- Projects of regional significance:
    - Airport Area Roads Improvements.
    - Dorchester Road Widening.
    - Michaux Parkway to County line.
    - US 17 at Main Road flyover; and
    - Widening Main Road from Bees Ferry to Betsy Kerrison with Parkway type section at Bohicket.

- Projects of local significance:
    - Annual Allocation continuation.
    - Resurfacing.
    - Bike/Pedestrian Facilities.

- Local Paving and Intersection Improvements.
- Glenn McConnell Parkway Widening.
- James Island Intersection and Pedestrian Improvements.
- Northside Drive Realignment at Ashley Phosphate Road.
- Rural Road Improvements.
- Savannah Highway/Ashley River Bridges/Crosstown Congestion Infrastructure Improvements.
- Savannah Highway Capacity and Intersection Improvements, SC.
- 41 Improvements / US 17 to Wando Bridge; and
- US 78 Improvements from US 52 to County line.

(R. p. 29 ¶ 21)

Charleston County Ordinance Numbers 1324, 1454, and 1907 all share one very important thing in common: **NONE** of them mention, much less authorize, transportation sales tax funding for the Project. (R. p. 29 ¶ 22).

County Council's assurances to the voters

That the Project was not specifically identified in the Second Half Cent referendum was no accident. County Council's public deliberations prior to the Second Half Cent ordinance leave no doubt that the Project would not be funded with Second Half Cent revenue. (R. p. 30 ¶ 24). On July 19, 2016, County Council gave Ordinance Number 1907 its first reading. At that time, several projects of regional and local significance were identified in the ballot question. The Project was not included, and the Project was not discussed at this meeting. (R. p. 30 ¶ 25).

On July 21, 2016, Ordinance Number 1907 was up for second reading by County Council. Several important events germane to the claims at issue in this case took place at this meeting. They are as follows:

- Prior to deliberating on Ordinance Number 1907, County Council went into executive session to receive legal advice on the original intergovernmental agreement with the SCTIB regarding funding and managing the Project. Upon

information and belief, funding the Project by way of Second Half-Cent dollars was discussed during executive session.

- After emerging from executive session, Councilmember Teddy Pryor made a motion to add an additional ballot question to Ordinance Number 1907. This new question would specifically authorize funding the Project up to $200 million and reduce the funding for other road projects by that same amount. Councilmember Anna Johnson seconded that motion. After extensive debate among the councilmembers, the motion to specifically authorize funding for the Project failed by a five to four vote.

- Councilmember Herb Sass then made a motion to put a non-binding ballot question on the referendum to gauge public support for the Project. After extensive discussion, Councilmember Sass withdrew this motion.

- Councilmember Vic Rawl then made a motion to add the "Johns Island Connector" to the projects of regional significance list. Councilmember Elliott Summey asked what the "Johns Island Connector" meant, and Councilmember Rawl responded it was up for interpretation. Councilmember Joe Qualey reminded his colleagues that legal counsel for the County had advised against adding the Project to the referendum question.[2] Councilmember Rawl's motion failed by a vote of six to three.

- Councilmember Rawl next moved to amend Ordinance Number 1907 by removing the project list entirely. Councilmember Qualey seconded the motion. In the ensuing discussion, Councilmember Sass referred to the Project as the "elephant in the room" and noted his belief that Council was "deadlocked on this issue." The Chair stated that Council Members who said Council would put this project out to the public for referendum and then not honor it are being disingenuous. He pointed out that the second question on the referendum would be a vote to issue bonds. The Chair stated that he was disappointed with the situation with 526, but he hoped Council wouldn't let this "tar baby" saddle the rest of the needed projects. The motion failed by a vote of five to three and one abstention.

- Councilmember Qualey then moved for a non-binding ballot question as follows: "Do you want to complete the 526?" Councilmember Sass seconded the motion. The motion failed by a vote of five to four.

- Finally, Councilmember Summey called for the second reading of Ordinance 1907 with no amendments. The vote failed by a vote of five to four.

[2] In so doing, Councilmember Qualey waived attorney-client privilege on this issue. SAC (R. p.30 ¶ 26, footnote 2).

(R. p. 30 ¶ 26)

The discussions, motions, and votes at the July 21, 2016 County Council meeting leave no doubt that County Council explicitly rejected the concept of funding the Project with Second Half-Cent funds. (R. p. 31 ¶ 27).

On July 27, 2016, a special meeting of County Council was called to reconsider Second Reading of Ordinance Number 1907. The question was called, and second reading was granted by a vote of six to one with two absent. The version of Ordinance Number 1907 approved at second reading mirrored the version that received first reading. (R. p. 31 ¶ 28)

On August 9, 2016, Ordinance Number 1907 received third reading. Several important events germane to the claims at issue in this case took place at this meeting. They are as follows:

- Councilmember Sass moved to amend Ordinance Number 1907 to remove the list of projects from the ballot question, but not the ordinance itself. Councilmember Condon seconded the motion. The County's attorney confirmed on the record that the project list, which did not include the Project, would remain in the ordinance. The amendment passed by a vote of six to two with one abstention.

- Prior to calling the question on third reading of Ordinance Number 1907, Councilmember Sass noted the project list contained in the ordinance, which did not include the Project, was a well thought out list and that every project was needed. Councilmember Pryor confirmed the Project was not under consideration. Councilmember Johnson lamented that the Project was not listed and would not support it for that reason.

- After calling the question, Ordinance Number 1907, as amended, was approved by a vote of six to three. Councilmembers Johnson, Darby, and Rawl voted "nay."

- Finally, after the adoption of Ordinance Number 1907, as amended, Councilmember Rawl moved to place a non-binding ballot question on the

referendum where the Second Half-Cent was to be voted on. The question would be "Do you want Charleston County to complete the Mark Clark/526 project?" Councilmember Summey seconded. The vote failed five to four. No question pertaining to the Project was ultimately placed on the ballot.

(R. pp. 31-32 ¶ 29)

On October 29, 2016, which was after the adoption of Ordinance Number 1907 and mere days **before** the Second Half Cent referendum vote, Councilmember Sass wrote an editorial in the Charleston Post & Courier assuring voters the Second Half-Cent *would not* be used to fund the Project. This editorial is attached to the Second Amended Complaint as **Exhibit E** and is incorporated therein by reference. Some notable comments from that editorial include the following:

- "**The half-penny sales tax program Charleston County Council passed this summer**, which is on the November ballot, was the result of careful study of our road and transit needs and **did not include funding for the Mark Clark** [the Project]." (Emphasis added)

- "The reason it could not include the Mark Clark was that those negotiations to complete or fund the completion had not been resolved and remain so. The Mark Clark is a three-party contract with the county, the Infrastructure Bank and the S.C. Department of Transportation. **That funding is a contractual matter and has nothing to do with the half-cent sales tax**." (Emphasis added)

- "Worries that council will not complete these projects as proposed are unfounded for several reasons. **The first is that we have voted and given our word to the voters.** Most of the current council was not serving when the first half cent was approved. But we have worked with staff, municipalities, and state and federal regulators to complete the named projects the voters approved." (Emphasis added)

(R. pp. 32-33 ¶ 30)

The Sass editorial clearly references and establishes a contract with voters, guaranteeing Second Half-Cent monies would not be spent on the Project. (R. p. 33 ¶

31)

The County's Transportation Development Department, tasked with overseeing transportation sales tax funded projects, said in a public presentation in January 2017 that, in reference to the project list contained in Ordinance Number 1907, "every penny of the 2016 sales tax referendum has been allocated." (R. p. 33 ¶ 32). The projects contained in the project lists found in Ordinance Numbers 1324, 1454, and 1907 have not been fully funded or completed, as the County promised to voters. (R. p. 33 ¶ 33)

The plaintiffs' reliance on the language of the ballot and Council's assurances

Plaintiffs Smith and Jenkins, as well as one or more members of CCL, voted for the referenda with the understanding that the authorized sales tax proceeds would not be used for funding the Project. (R. p. 37 ¶¶ 59, 63).

Required annual budgetary appropriations and lack of public notice

Section 3.2(C) of the Amended IGA requires County Council to adopt a budget for each Fiscal Year appropriating revenues of the Half Cent sales tax for the Project. (R. pp. 33-34 ¶¶ 36-37). This language purports to require future County Councils to adopt budget ordinances and supplemental appropriation ordinances committing First Half Cent and Second Half Cent revenue to the Project. *Id.* On January 10, 2019, the County approved and executed the Amended IGA. (R. p. 35 ¶ 47). The Amended IGA purports to commit specific funding levels from specific sources, making it an appropriations ordinance. (R. p. 35 ¶¶ 48-50). The County did not provide public notice of fifteen days and did not provide three ordinance readings. (R.

pp. 35-36 ¶ 51).

On February 12, 2019, County Council voted to appropriate $3,156,640 from the transportation sales tax fund to satisfy its Fiscal Year 2019 commitment to fund the Project called for in the Amended IGA. (R. p. 35 ¶¶ 42-43) The County provided notice of this supplemental appropriation ordinance thirty-two hours before the vote. (R. p. 35 ¶ 45).

ARGUMENT

1. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFFS DID NOT HAVE PUBLIC IMPORTANCE OR TAXPAYER STANDING IN A CASE CHALLENGING THE MISAPPROPRIATION OF TAXPAYER FUNDS AND *ULTRA VIRES* ACTIONS BY THE COUNTY GOVERNMENT.

a. Public Importance Standing

To demonstrate public importance standing, a party need not demonstrate concrete or particularized injury.[3] *S.C. Pub. Interest Found. v. S.C. Dep't of Transp*., 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017). South Carolina has repeatedly found that standing is "not inflexible," and that "public importance" standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. *Sloan v. Dep't of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878-79 (2005) (holding citizen had public interest standing to bring actions for alleged violation of statutory bidding violations by DOT); *Sloan v. Sanford*,

[3] Constitutional standing requires three elements: (1) the plaintiff must suffer an injury in fact; (2) causal connection between the injury and the challenged conduct; and (3) it is likely the injury will be redressed by a favorable decision. *See Youngblood v. S.C. Dep't of Social Servs.*, 402 S.C. 311, 317-18, 741 S.E.2d 515, 518 (2013). Plaintiffs have demonstrated constitutional standing as well by alleging direct injury caused by the County's unauthorized and unlawful commitment and diversion of Half-Cent revenue to the Project pursuant to the Amended IGA that would be redressed by the Court declaring the Half-Cent revenue may not lawfully fund the Project. (R. pp. 36-39 ¶¶ 57-69).

357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004) (plaintiff had public interest standing due to the importance of the issue raised which was the governor's holding of a commission in the Air Force Reserve as inconsistent with the eligibility requirements to serve as Governor).

The purpose of public importance standing is to "[a]llow [] interested citizens a right to action in our judicial system when issues are of significant public importance to ensure . . . accountability and the concomitant integrity of government action." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 551, 590 S.E.2d 338, 349 (Ct. App. 2003). Because of this purpose, the South Carolina Supreme Court has repeatedly held that public importance standing is especially appropriate in cases challenging illegal government action.

This court has found that the following issues were of such public importance that the plaintiffs had public importance standing to bring them:

- Whether the county illegally issued hospital bonds beyond the county's authority because allegations of illegal government action are of public importance and it affected public health and welfare. *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999).
- Whether DOT could use public funds to inspect bridges in private neighborhoods because it involved a government entity's use of public funds and it had far-reaching consequences. *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017).
- Whether "the public interest involved is the prevention of the unlawful

expenditure of money raised by taxation." *Sloan v. School Dist. of Greenville Cnty.*, 342 S.C. 515, 523, 537 S.E.2d 299, 301 (Ct. App. 2000).

- Whether the South Carolina Transportation Infrastructure Bank is constitutional and whether its enabling statute which governs the composition of the Bank's Board of Directors, violates both the dual office holding and the separation of powers prohibitions of the South Carolina Constitution is of such public importance that the plaintiff had public importance standing even though the plaintiff did not assert he suffered a particularized harm or injury. *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013).

Surely, the issues raised by this case are equally as important as those listed in these cases and others decided by this Court in favor of public interest standing. The Complaint alleges the SCTIB, the County, and SCDOT entered into a contract which unlawfully appropriates 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. (R. pp. 26-34 ¶¶ 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. (R. pp. 35-36 ¶¶ 42-52).

The illegal expenditure of public funds by government entities is an issue of vital public importance. *See e.g., S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. at 119, 804 S.E.2d at 859. The misuse of the transportation sales tax revenue

clearly impacts profound public interests, including public welfare, as other important infrastructure projects will be deprived of funding. (R. p. 37, ¶ 58). As a result of the Amended IGA, the Bank is also required to commit $420 million in state public funds to the Project, taking funding from other state transportation projects. (R. p. 39 ¶ 69). Accordingly, Plaintiffs' claims regarding the alleged misuse of transportation sales tax revenue present issues of overriding public concern.[4] Resolution of Plaintiffs' claims are needed to prevent the County from unlawfully appropriating Half-Cent revenue to the Project. R. p. 39 ¶ 70). More broadly and importantly, judicial resolution of Plaintiffs' claims is necessary to ensure that municipalities cannot engage in this type of deceptive conduct in the future.

The public also has a substantial interest in governments acting in a transparent manner and complying with state law. Without future guidance, County Council and other municipalities may continue to violate state public notice laws, unlawfully bind future county councils, and disregard the explicit will of the voters in future referenda. *Vicary v. Town of Awendaw*, 425 S.C. 350, 359-60, 822 S.E.2d 600, 604-05 (2018) (holding future guidance needed when Town intended to repeatedly use challenged letter as basis for annexations); *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

[4] The trial court's reference in its order (R. p. 9, footnote 4) to an amicus brief filed by CCL in an unrelated case based on an entirely different standard is not relevant for purposes of establishing public importance standing in this matter, nor was it proper for the court to consider, being outside the four corners of the complaint, and outside the record before the Court.

in the future).[5] Allegations of unlawful acts by the government with significant public interests at stake calls for judicial intervention. *See Baird*, 333 S.C. at 531, 511 S.E.2d at 75-76 ("[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 alleged violation of a contract with voters. Accordingly, Plaintiffs have public importance standing to pursue their claims.

b. Taxpayer Standing

The South Carolina Supreme Court has also repeatedly recognized that citizens may have standing based on their status as taxpayers. *See, e.g., Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985) (discussing taxpayer standing in South Carolina). "A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina." *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000) (holding that taxpayer had standing to bring declaratory judgment action challenging whether DOT properly authorized procurement for road construction project since issue was of great public importance and taxpayer alleged misuse of government authority).

The Coastal Conservation League also has associational standing to bring claims

[5] Contrary to the trial court's findings, (R. p. 11) the Department of Revenue's oversight authority over the Transportation Act has no bearing on the need for future judicial guidance with respect to Plaintiffs' claims that the expenditure of Half-Cent revenue on the Project violates a contract with voters, that the Amended IGA unlawfully binds future county councils, or that the County violated state procedural laws. These claims are wholly beyond the scope of any Transportation Act oversight.

on behalf of its members. An organization has standing to bring claims on behalf of its members when: (1) at least one member would otherwise have standing (statutory, constitutional, or otherwise) to sue in his or her own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit. *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, 430 S.C. 200, 211-12, 845 S.E.2d 481, 487 (2020), citing *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citing the three-part test set forth in *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)). Associational standing advances some important objectives: it promotes judicial economy and efficiency by avoiding repetitive and costly independent actions by individual members, and it allows members who would have standing in their own right to pool their financial resources and legal expertise to help ensure complete and vigorous litigation of the issues. *Pres. Soc'y of Charleston*, 845 S.E. 2d at 487, citing *Save the Valley, Inc. v. Indiana-Kentucky Elec. Corp.*, 820 N.E.2d 677, 680-81 (Ind. Ct. App. 2005). An additional advantage noted in some jurisdictions is that organizations are generally less susceptible than individuals to retaliation by offices responsible for executing the challenged policies. *Id.* at 681.

Here, CCL is a non-profit organization representing thousands of supports who are citizens, residents, and taxpayers in Charleston County and throughout South Carolina, and one or more of its members voted for the referenda with the

understanding that the Project would not be funded with the revenue. Individual members of CCL have standing to bring these claims. The interests at stake are germane to the purpose of CCL. The claims asserted and relief sought do not require the individual participation of any individual member of CCL, do not rely on personal injury, and do not seek individualized relief for CCL's members. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) (associational standing appropriate where declaratory or injunctive relief is sought to the benefit of all injured members). The Complaint alleges that Plaintiffs and members of CCL are Charleston County taxpayers who have paid County taxes, including the Half-Cent sales taxes. (R. p.37 ¶ 60). As taxpayers, Plaintiffs possess standing to contest the County's alleged unlawful expenditure of County taxes, including the Half-Cent sales tax revenue used to fund the Project.

Accordingly, CCL meets all the requirements for associational standing to bring the asserted claims against Defendants.

2. THE TRIAL COURT ERRED IN FINDING THAT THE FILING OF THIS LAWSUIT WAS NOT TIMELY UNDER AN ELECTION CHALLENGE STATUTE WHEN THE PLAINTIFFS ARE CHALLENGING THE MISUSE OF TAXPAYER FUNDS, NOT THE RESULTS OF A REFERENDUM ELECTION.

The Courts held that Plaintiffs' claims are time-barred by S.C. Code Ann. § 7-17-30, which requires a "protest or contest" of an election to be filed the Wednesday after the election results are declared. However, none of the Plaintiffs' claims protest the outcome of the referenda. Plaintiffs do not even challenge the sufficiency of the referenda ballot questions or the imposition or collection of the Half-Cent tax.

Instead, Plaintiffs argue that the County cannot now utilize Half-Cent revenue, which was properly appropriated for other specified projects, to fund the Mark Clark extension project since it was not specified in the referenda or ordinances as required by S.C. Code Ann. § 4-37-30(A)(1). Plaintiffs take no issue with the County's use of the Half-Cent revenue for projects which were appropriately specified in the referenda or ordinances. Plaintiffs are only challenging the improper use of the Half-Cent revenue to fund this Project. Accordingly, the election law cited by the Court has no bearing on this case. Plaintiffs' claims are not time-barred.

3. THE TRIAL COURT ERRED IN FINDING THAT THE COMPLAINT DID NOT STATE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF WHEN THE COMPLAINT ALLEGES THAT THE COUNTY HAS USED TAXPAYER FUNDS CONTRARY TO THE ORDINANCE APPROVED BY THE REFERENDUM AND COUNCIL'S PLEDGES TO THE VOTERS PRIOR TO THE REFERENDUM ELECTION AND ITS ACTIONS SUBSEQUENT TO THE ELECTION VIOLATE ITS OWN PROCEDURES AND THE FREEDOM OF INFORMATION ACT.

For the purposes of reviewing the trial court's order dismissing this action under Rule 12(b)(6), assuming the allegations of the Complaint in the light most favorable to the Plaintiffs, the facts alleged by the Plaintiffs are sufficient to state causes of action for each of the following claims.

a. Plain Language of the Ordinance.

The Penny Tax Act, S.C. Code Ann. § 4-37-30, allows County Councils to raise "a limited amount of money" through a transportation sales and use tax, but the proposed ordinance submitted to the voters by referendum must "specify" the projects for which the proceeds of the tax are to be used and must include the "estimated

capital cost of the project." S.C. Code Ann. § 4-37-30(A). The Supreme Court interpreted and applied this statute in *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (2018) stating that:

> To implement a transportation penny tax, "[t]he governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance." *Id.* § 4-37-30(A)(1). The local ordinance must specify the projects for which the proceeds of the tax are to be used; the length of time for which the tax is to be imposed; "the estimated *capital cost* of the project or projects to be funded in whole or in part from proceeds of the tax;" and the "anticipated year the tax will end.

Richland Cty. 811 S.E.2d at 761.

The Supreme Court entered an injunction against Richland County, finding that "proper expenditure of Penny Tax funds must be tethered to a specific transportation-related capital project or the administration of a specific transportation project." Id., 811 S.E.2d at 768 (emphasis added).

Plaintiffs allege that the ordinance authorizing the collection of Half-Cent funds did not specify the Project, did not include a description of the Project, and did not include an estimated capital cost of the Project. (R. pp. 29-30 ¶ 23). Plaintiffs also allege that the Amended IGA entered into by the County purports to authorize funding the Project with Half-Cent revenue. (R. p. 33 ¶ 35). Based on these allegations, Plaintiffs have stated a valid claim against Charleston County that the use of Half-Cent sales tax revenue for the Project violates the Penny Tax Act.

The applicable enabling statute upon which the County proceeded provides in part:

> **(1)** The governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance. The ordinance must specify:
> **(a)** **the project or projects and a description of the project or projects for which the proceeds of the tax are to be used**, which may include projects located within or without, or both within and without, the boundaries of the county imposing the tax and which may include:
> **(i)** highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects;
> **(ii)** jointly-operated projects, of the type specified in sub-subitem (i), of the county and South Carolina Department of Transportation; or
> **(iii)** projects, of the type specified in sub-subitem (i), operated by the county or jointly-operated projects of the county and other governmental entities;
> **(b)** the maximum time, stated in calendar years or calendar quarters, or a combination of them, not to exceed twenty-five years or the length of payment for each project whichever is shorter in length, for which the tax may be imposed;
> **(c)** the estimated capital cost of the project or projects to be funded in whole or in part from proceeds of the tax and the principal amount of bonds to be supported by the tax; and
> **(d)** the anticipated year the tax will end.

S.C. Code Ann. § 4-37-30(A)(1) (emphasis added).

The language of the statute uses the term "must" and is not optional. The Half Cent sales tax ordinances complied with the statute and listed the projects as required. That the referenda questions that appear on the ballot (and that are set forth in the statute) do no list them again, outside of the ordinance language to which the referenda refer, does not disengage the ballots from the ordinances that the referenda are approving or disapproving. To say as the County does (and the trial court agrees) that the enabling legislation mandates the listing of specific projects in the local ordinance to be approved referenda but that once approved, the County may

spend the money unconstrained from the projects listed ignores the plain text of the statute. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). Given the foregoing, S.C. Code Ann. §§ 4-37-10 (1995), et seq., and the language of the aforementioned ordinances prohibit First Half Cent and the Second Half Cent revenue from funding the Project. (R. p. 33 ¶34).

b. Contract with Voters

Plaintiffs allege that Charleston County has broken a contract made with voters and taxpayers related to the Half-Cent referendum. The South Carolina Supreme Court has recognized that counties must abide by the terms of a referendum approved by voters. *See Cornelius v. Oconee Cnty.*, 369 S.C. 531, 537, 633 S.E.2d 492, 495 (2006) (holding county could not deploy its general taxing power to finance expansion of sewer system when referendum passed on condition that non-tax-based financing would be sued to construct sewer system). This has been referred to in court precedent throughout the country as the contract with voters doctrine. See, e.g., 16 MCQUILLIN MUN. CORP. § 44:238 (3d ed.).

The court in *Estes v. Berry*, C/A No. 2017-CP-17-351, at *8 (Ct. Comm. Pleas Sept. 11, 2017), looked beyond the text of the referendum at evidence of legislative intent in holding that representations by Dillon County created a contract with voters as to how money from the sales tax authorized by voters could be spent.

In *Estes*, the voters approved a referendum authorizing a sales tax based on the public agreement that Dillon County and the Dillon County Board of Education would split the revenue, even though the text of the referendum did not reference the agreement. *Id.* at *2-3. Dillon County later sought to retain all of the tax revenue, arguing that the text of the referendum gave the County "unencumbered flexibility" in using the revenues. *Id.* at *4-5, 7. The court rejected this argument and looked beyond the text of the referendum, to evidence such as a county advertisement, meeting notes, newspaper articles and witness testimony, in finding that the "manifest purpose" of the referendum was the split the revenues evenly. *Id.* at*8. "Therefore, County Council cannot subsume the Board share of revenues without annulling the wishes of the voter." Id. Because the agreement between the Board and the County "was expressly known to the voting public who approved" the referendum, the County could not "breach the understanding of its voters with respect to how the funds would be allocated." *Id.* at *10.

Here, the Complaint alleges that Charleston County made just such an agreement with voters in the passage of the Half-Cent referenda, and that agreement was violated by the Amended IGA. While the County argues that the referenda and ordinances do not prevent the expenditure of Half-Cent revenue on the Project, *Estes* shows that a contract with the voters claim requires the consideration of the totality of the circumstances and not just the text of the relevant referendum. The Complaint alleges the County Council's public deliberations and rejection of using Half-Cent revenue to fund the Project, (R. pp. 30-32 ¶¶ 24-29), the omission of the Project from

the referenda and ordinances, (R. pp. 27–29 ¶¶ 17-22) and the councilmember's editorial assuring voters that Half-Cent revenue would not fund the Project, (R. p. 32-33 ¶ 30), created an agreement with the voters which the County violated with the Amended IGA, (R. p. 26-27 ¶¶ 14-15), (R. p. 33 ¶35). These alleged facts provide a sufficient basis to state a claim that the County created and violated a contract with the voters by funding the Project with Half-Cent revenue.

c. Binding Future Councils

A municipal corporation may enter into a contract that extends beyond the terms of the contracting body to bind successor bodies if the contract involves the exercise of its business or proprietary power. *City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth.*, 325 S.C. 174, 178-79, 480 S.E.2d 728, 731 (1997) (citing *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 132, 459 S.E.2d 876, 880 (Ct. App. 1995). "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." *Id.* The question turns on whether the subject matter of the contract involves a governmental or proprietary function. *Id.* at 179.

Here, the issue is not whether the act of entering into the Amended IGA itself is an exercise of the Council's business or government powers, the question turns on whether the subject matter of the Amended IGA implicates the business or government powers of the Council. See *City of Beaufort*, 325 S.C. at 179, 480 S.E.2d at 731. The Complaint alleges that a specific provision in the Amended IGA binds future County Councils by requiring that the council "shall adopt a budget each Fiscal

Year appropriating revenues of the Sales Tax . . .." Compl. (R. p. 33-34 ¶ 36). The Complaint alleges that requiring future Councils to adopt budget and supplemental appropriation ordinances implicates the Council's legislative functions or governmental powers. (R. p. 34 ¶¶ 37-41). Accordingly, Plaintiffs have sufficiently alleged in the Complaint that the Amended IGA unlawfully binds future County Councils by implicating the legislative powers of the Council.

d. Violations of State Law Procedures

South Carolina law requires county council ordinances to be read at three public meetings on three separate days, and the council must provide public notice fifteen days in advance of public hearings. S.C. Code Ann. §§ 4-9-120 and -130. These notice provisions are applicable to appropriation ordinances, including supplemental appropriations. S.C. Code Ann. § 4-9-130(2). Here, the Complaint alleges that the County Council passed a supplemental appropriation ordinance to satisfy the Amended IGA's commitment and provided notice only thirty-two hours before the vote. (R. p. 35 ¶¶ 42-46). The Complaint alleges, that because the Amended IGA purports to commit specific funding levels from specific sources, it would be considered an appropriations ordinance and County Council executed the Amended IGA without providing the sufficient notice or ordinance readings. (R. p. 35-36, ¶¶ 47-52). These allegations provide a sufficient basis to state a claim that the County violated S.C. Code Ann. §§ 4-9-120 and -130.

e. Violation of Freedom of Information Act

The South Carolina Freedom of Information Act specifies instances when a public body may enter executive session. S.C. Code Ann. § 30-4-70(a), (b). Any actions

taken after an executive session must be properly noticed, and in the case of special meetings, such items may not exceed the scope of the purpose for which the meeting was called. *Brock v. Town of Mt. Pleasant*, 415 S.C. 625, 631, 785 S.E.2d 198, 202 (2016). "[I]t is sufficient for the agency to reflect that, upon returning to open session, action may be taken on the items discussed during the executive session." *Id.*

Here, the Complaint alleges that the agenda for the August 20, 2019 Special Finance Committee meeting included an item for an executive session titled "Transportation Sales Tax Budget" and the agenda failed to state that any action might be taken after the executive session. (R. pp. 42-44 ¶¶ 87-94). Transportation Sales Tax Budget is not an enumerated reason for going into executive session under S.C. Code Ann. § 30-4-70(a),(b). The Complaint has alleged that County Council failed to give notice that action may be taken on the matters discussed in executive session and that Council improperly discussed the Transportation Sales Tax Budget in executive session and then voted on it. (R. p. 42-44, ¶¶ 86-96). Accordingly, the allegations in the Complaint sufficiently state a claim that the County violated the Freedom of Information Act.

CONCLUSION

Plaintiffs have standing to bring all causes of action set forth in the Complaint because it is an issue of vital public importance in need of future judicial guidance involving taxpayer funds and compliance with an ordinance approved by the will of the voters in separate referenda elections. Plaintiffs' claims are not time-barred, being brough timely after the County purported to violate its own ordinances and

state statute through the Amended IGA. Plaintiffs have stated claims for which relief can be granted under the laws of this state. For the reasons stated, 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