THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper Jr., Circuit Court Judge

Appellate Case No.: 2018-000794

South Carolina Public Interest Foundation, Edward D. Sloan, Jr. and William B. DePass, individually, and on behalf of others similarly situated, ...Petitioner-Respondent,

v.

Richland County, ...Respondent-Petitioner,

and

Central Midlands Regional Transit Authority ....Intervenor-Respondent.
....

INTERVENOR-RESPONDENT'S RETURN TO THE PETITION FOR WRIT OF CERTIORARI FILED BY PETITIONER-RESPONDENTS AND THE PETITION FOR WRIT OF CERTIORARI FILED BY RESPONDENT-PETITIONER

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COUNTERSTATEMENT OF ISSUES ON APPEAL

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COUNTERSTATEMENT OF THE CASE

This case (the "SCPIF Case") is a legal challenge brought by Petitioner-Respondents South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr., individually and on behalf of all others similarly situated, (collectively, "SCPIF") against Respondent-Petitioner Richland County ("Richland County" or the "County") and Intervenor-Respondent Central Midlands Regional Transit Authority ("CMRTA") contesting whether CMRTA can use penny sales tax revenues for its operating and administrative expenses. [R. 106-115].

SCPIF is challenging the validity of Ordinance Number 039-12HR (the "Penny Tax Ordinance"), which was passed by the Richland County Council and approved by the residents of Richland County using the statutory procedure set forth in the "Optional Methods for Financing Transportation Facilities Act." ("Transportation Act"). *See* S.C. Code Ann. 4-37-30 (2021). The Penny Tax Ordinance states the Penny Tax "shall be expended for the costs" of several projects, including "[c]ontinued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements." [R. 390]. Of the approximate $1 billion in revenues to collected, CMRTA will receive approximately twenty-nine percent (29%) over the course of the twenty-two-year life span of the Penny Tax Ordinance.[1] [R. 390]. CMRTA has been receiving these revenues since 2013.

This action commenced on May 9, 2016. [R. 69-79]. On July 19, 2016, SCPIF filed its Amended Complaint, which challenged the legality of the Penny Tax Ordinance. [R. 106-15].

[1] CMRTA is dependent upon these proceeds, which make up a significant portion of the CMRTA operating budget. Without these revenues, CMRTA's service would be affected significantly.

Specifically, SCPIF asserts that the County had not complied with the Transportation Act, that the Penny Tax Ordinance exceeds the scope of the Transportation Act, and that the use of the proceeds for the "continued operation of mass transit services" is unlawful. [R. 109]. On July 7, 2016, CMRTA intervened in order to defend its interest in use of the Penny Tax funds. [R. 80-92].

As noted by SCPIF, while the SCPIF Case was proceeding before the circuit court, this Court was entertaining an appeal from a related case (the "DOR Case") captioned *Richland County v. S.C. Department of Revenue* 422 S.C. 292, 811 S.E.2d 758 (2018).

While the appeal in the DOR Case was pending before this Court but before an opinion had been rendered, Richland County filed a Motion to Dismiss or for Summary Judgment in the SCPIF Case, arguing in part that (1) the case should be dismissed under Rule 41(b), SCRCP for failure to prosecute and (2) that the statutory language in the Transportation Act permitted the spending at issue in Petitioners' Amended Complaint. [R. 174-80]. CMRTA also filed a Motion for Summary Judgment in the SCPIF Case, which incorporated Richland County's arguments regarding the statutory language of the Transportation Act by reference and reiterated that Penny Tax Ordinance adhered to the statutory requirements in the Transportation Act. [R.181-85].

On November 22, 2017, the circuit court issued an order granting Respondent CMRTA's Motion for Summary Judgment in the SCPIF Case, which found (1) the Transportation Act authorizes mass transit systems as a transportation related project, (2) the Penny Tax Ordinance does not exceed the scope of the Transportation Act, and (3) that the Transportation Act does not prohibit the use of Penny Tax revenues on operating and administrative expenses. [R. 10-18]. On November 30, 2017, the circuit court issued a second order granting the County's Motion to Dismiss for failure to prosecute. [R. 4-9]. In response to these orders, SCPIF timely filed separate motions to alter or amend under Rule 59(e), SCRCP. [R. 285-96].

While those motions to alter or amend were pending before the circuit court, this Court issued its opinion in the DOR Case on March 17, 2018. *Richland Cnty*, 422 S.C. at 292, 811 S.E.2d at 758. On March 26, 2018, SCPIF filed a Supplemental Memorandum in Support of Motion to Alter or Amend in the SCPIF Case, which quoted heavily from *Richland County*, relying on the same quotes Petitioners cite to in their current Petition. [R. 301-07].

Per this Court's instruction in *Richland County*, the South Carolina Department of Revenue ("DOR") developed guidelines that specify what costs are eligible and ineligible under the Transportation Act.[2] [R. 321-26]. These guidelines were reviewed and approved by the circuit court in the DOR Case and were attached as an exhibit to the circuit court's order granting the temporary injunction. [R. 317-18]. In these guidelines, DOR included a standalone section regarding mass transit systems. [R. 325]. That section reads:

> **C. Mass Transit Systems Costs**
>
> "Mass Transit System" as used herein refers to only a mass transit system.
>
> Eligible Costs include costs incurred for the acquisition, design, construction, equipping, and ***operation*** of Mass Transit Systems, provided that such costs are consistent with the public purpose of the Transportation Act, the county's imposition ordinance and the referendum approved by voters.
>
> Eligible Costs for Mass Transit Systems must be tethered to the administration of the Mass Transit System and must be reasonable and not excessive. Eligible Cost include purchase of capital assets. ***Eligible Costs also include costs and expenses paid or incurred with the day to day operation of the Mass Transit System.***
>
> Additionally, Mass Transit Systems must comply with certain Federal and State requirements in the operation of the Mass Transit System. The expenditures necessary to fulfill these Federal and

[2] DOR later issued these same guidelines to the general public in the form of an information letter. S.C. DEP'T OF REVENUE, INFO. LETTER NO. 18-10, GUIDELINES FOR USE OF TRANSPORTATION TAX REVENUE (2018) (available at: https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/IL18-10.pdf).

> State requirements are also Eligible Costs, provided that such expenditures are reasonable and not excessive.

[R. 325] (emphasis added).

On April 17, 2018, the circuit court in the SCPIF Case issued an Order denying SCPIF's Motions to Alter or Amend. [R. 1-3]. SCPIF appealed the circuit court's order to the South Carolina Court of Appeals.

Following briefing and oral argument, the court of appeals issued an opinion affirming the grant of summary judgment in favor of CMRTA but reversing the circuit court's dismissal of Petitioners' claims against the County for failure to prosecute. *South Carolina Public Interest Foundation v. Richland County*, Op. No. 5865, (S.C. Ct. of App. Oct. 6, 2021) (Howard Adv. Sh. No. 35 at 35). In its analysis on whether Penny Tax revenues could be used to fund the operation of CMRTA's bus system, the Court of Appeals rejected the argument advanced by Petitioners, finding in relevant part:

> Appellants argue that funds from the penny tax may only be used for the Comet's "capital expenditures" and may not be used for its continued operation. They appear to define "capital costs" as generally constituting one-time costs incurred for the creation or improvement of property such as buildings, infrastructure, or equipment.
>
> We respectfully disagree. We begin with the statute's language. There is some textual support for Appellants' argument that the Act favors expenses tied to things like infrastructure and equipment. The Act's title refers to financing transportation "facilities." Still, the Act begins with legislative findings that the Act allows counties to finance the cost of "acquiring, designing, constructing, equipping and operating highways, roads . . . and other transportation-related projects." Act. No. 52, 1995 S.C. Acts 321 (emphasis added). And, those same findings are not limited to financing the cost of designing and building a project. They directly refer to "operating" the project. These legislative findings have never been changed. The 2000 amendment added "mass transit systems" and "greenbelts" to the list of allowable projects in section 4-37-30(A)(1)(a)(i). For these reasons, we agree with the circuit court that the statute's language

> authorizes spending penny tax funds on operating transportation-related projects, including mass transit systems.

Id. at 38. On November 17, 2021, Petitioners filed a Petition for Writ of Certiorari, seeking review of the Court of Appeals' affirmance of the grant of summary judgment to CMRTA. On December 6, 2021, Richland County also filed a Petition for Writ of Certiorari, seeking review of the Court of Appeals' reversal of the dismissal of the claims against the County based upon Petitioners' failure to prosecute.

RESPONSE TO RICHLAND COUNTY'S PETITION

With regard to the Petition for Writ of Certiorari filed by Richland County, the issues raised in the County's Petition do not impact CMRTA. Accordingly, CMRTA does not take any position as to whether this Petition should be granted or denied.

ARGUMENT IN OPPOSITION OF SCPIF'S PETITION

With regard to the Petition for Writ of Certiorari filed by SCPIF, CMRTA opposes this Petition for the reasons outlined in this Return. SCPIF seeks a writ of certiorari on the basis that the Court of Appeals' opinion in the SCPIF Case conflicts with this Court's decision in *Richland County*. SCPIF misinterprets *Richland County*. The quotes from the *Richland County* opinion relied upon by SCPIF are taken out of context and seek to impose additional restrictions on the use of Penny Tax funds that are not otherwise imposed under the plain language of the Transportation Act. The Court of Appeals properly found that the Transportation Act allows for the use of Penny Tax funds on the operation of transportation-related projects, including mass transit systems. For these reasons, as set forth more fully below, SCPIF's Petition should be denied.

I. The Court of Appeals properly held that use of Penny Tax funds to pay for costs for running the day-to-day operation of a mass transit system is permitted under the Transportation Act.

The plain language of the Transportation Act permits the spending at issue, as it allows for Penny Tax funds to be spent on "transportation-related projects," which is defined to include "mass transit systems." *See Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319-20, 731 S.E.2d 869, 872-73 (2012) ("Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

The Transportation Act is clear from its very beginning that it allows for spending on the operation of transportation related projects. As noted by the Court of Appeals, the preamble to the Transportation Act states that the purpose of the Act is to authorize counties to establish optional methods of financing certain transportation related projects, including "the acquisition, construction, equipment, and ***operation*** of highways, roads, streets, bridges, and ***other transportation-related projects***."[3] 1995 S.C. Act No. 52, § 2 (emphasis added). This is direct evidence of the legislature's intent to allow Penny Tax funds to be used for the operation of projects set forth in Penny Tax ordinances. *See State v. Thrift*, 312 S.C. 282, 306, 440 S.E.2d 341, 354 (1994) (noting the "preamble of an act may be used as a guide in determining legislative intent"); *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 158, 711 S.E.2d 895, 898 (2011) ("We believe this

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[3] The inclusion of the phrase "operation of . . . other transportation related projects" in this preamble is even more persuasive in light of the fact that the Transportation Act was later amended to specifically list "mass transit systems" as one of the projects covered by the Transportation Act. 2000 Act No. 368, § 1. The original language of Section 4-37-30(A)(1)(i) of the Transportation Act adopted in 1995 listed only "highways, roads, streets, bridges, and other transportation-related projects." 1995 S.C. Act No. 52, § 2. However, in 2000, the General Assembly amended this provision to add "mass transit systems" and "greenbelts" to the list of pre-approved "transportation related projects" listed under subsection (A)(1)(i). 2000 S.C. Act No. 368, § 1. Since the Penny Tax Ordinance was enacted in 2012, this amended language applies.

approach is in harmony with legislative intent, as expressed in the preamble to our FOIA statute."). Because "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature," this language is in the preamble serves as direct evidence of the legislative intent to permit spending on the operating costs of transportation related projects. *Montgomery v. Spartanburg Cnty. Assessor*, 419 S.C. 77, 81, 795 S.E.2d 866, 868 (Ct. App. 2016).

Further, the language in the controlling provisions of the Transportation Act plainly allows for the spending at issue. Section 4-37-30 of Transportation Act requires that the ordinance must specify "the project or projects" for which the tax is being collected and include "a description of the project or projects." S.C. Code Ann. § 4-37-30(A)(1)(a). This section then goes on to list the types of "projects" for which the tax may be collected, which include "highways, roads, streets, bridges, ***mass transit systems***, greenbelts, and other transportation-related projects." S.C. Code Ann. § 4-37-30(A)(1)(i) (emphasis added).

The plain and unambiguous language of subsection (A)(1)(a) permits the spending at issue. Section 4-37-30 permits funds to be raised for and spent on transportation related projects, which is defined to specifically include "mass transit systems." There is no language in the Transportation Act that limits this spending to facilities or capital costs. The only reference in the Transportation Act to "capital cost" is the requirement the imposition ordinance specify the estimated capital costs for the project to be funded by the proposed tax. *See* S.C. Code Ann. § 4-37-30(A)(1)(c). Requiring the imposition ordinance to include an estimate of capital costs in no way limits the permitted spending under the ordinance to only capital costs. *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (noting that courts should refrain from "subtle or forced construction to limit or expand the statute's operation").

Because the court of appeals properly found that the plain and unambiguous language of the Transportation Act permits the spending at issue, the SCPIF's Petition should be denied.[4]

II. SCPIF's reliance on language from this Court's *Richland County* opinion is misplaced.

SCPIF relies upon certain quotes from the *Richland County* decision to argue that this Court has already found that the spending at issue in this appeal is not permitted under the Transportation Act. This reliance is misplaced. Nothing in the *Richland County* decision is at odds with the court of appeals' opinion in this case.

To begin, the issues being analyzed in *Richland County*—DOR's standing to pursue counterclaims, whether a writ of mandamus was appropriate, the parties' cross motions for injunctive relief, and DOR's motion to appoint a receiver—are legally distinct from the issue on appeal in this case. This Court's analysis on the issues presented in *Richland County*, while admittedly related in some ways, did not reach the merits of the question on appeal here, which is whether CMRTA may use Penny Tax revenues to fund the operation and administrative expenses of its bus system. As such, there is nothing in the *Richland County* decision that is inconsistent with the court of appeals decision in this appeal. Because the quotes set forth and relied upon in

[4] Moreover, as argued by CMRTA in its briefing before the court of appeals, to the extent there is any ambiguity in the Transportation Act, this Court should defer to the interpretation of the administrative agency entrusted with administering the act, which in this case would require this Court to defer to the interpretation found in the guidelines recently developed and published by DOR. *See, e.g.*, *Montgomery*, 419 S.C. at 82, 795 S.E.2d at 868 ("The construction of a statute by an agency charged with its administration will be accorded most respectful consideration and will not be overturned absent compelling reasons." (quoting *Jasper Cnty. Tax Assessor v. Westvaco Corp.*, 305 S.C. 346, 348, 409 S.E.2d 333, 334 (1991))); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ."). For a full analysis of this argument, please see Section I.B of CMRTA's final brief submitted to the court of appeals.

SCPIF's Petition are not an interpretation of the controlling provisions of the Transportation Act, they are unrelated to the issue on appeal in this case.

Second, most of the language quoted by SCPIF from the *Richland County* opinion comes from this Court's detailed factual recitation found in the first section of the opinion, which outlined the procedural history and positions of the parties in that appeal. *See* [Pet. at 7-14]; *Richland Cnty.*, 422 S.C. at 298-305, 811 S.E.2d at 761-265. These quotes were not part of this Court's legal analysis of the issues in that case. Moreover, these quotes are not an interpretation or analysis of the types of spending that are permitted under the controlling provisions of the Transportation Act. To hold out these quotes as controlling law in this appeal is a misreading of the *Richland County* opinion.

Finally, the phrases quoted by SCPIF that are from the Court's analysis do not bar the spending at issue. Specifically, SCPIF quotes from this Court's analysis on DOR's motion for an injunction, which states in relevant part:

> It is axiomatic that the County's ordinance may not expand the scope of expenditures authorized in the enabling provisions of the Transportation Act, which requires a nexus between expenditures and a transportation related capital project. . . . ***proper expenditure of Penny Tax funds must be tethered*** *to* a specific transportation-related capital project or ***the administration of a specific transportation project.***
>
> In light of the County's many suspect expenditures of Penny Tax funds, DOR requested an injunction against the County prohibiting the further expenditure of Penny Tax funds until the County "adopts IRC 262/263A or some other acceptable alternative as a standard to be used to determine when expenditures are proper within the [Transportation] Act." Under these compelling circumstances, we find an injunction is appropriate. ***To ensure objective criteria establishing compliance with the Transportation Act, the County shall be subject to guidelines for determining whether expenses are properly allocable to a specific transportation project, or the direct administration of a specific transportation project***. Accordingly, the County is hereby enjoined from violating the Transportation Act. We direct the circuit court, no later than thirty

> days following remand, to enter the preliminary injunction in accordance with this opinion.

Richland Cnty., 422 S.C. at 312, 811 S.E.2d at 768-69 (emphasis added). As was noted by the court of appeals, the language from the first paragraph simply requires that expenditures of Penny Tax funds "must be tethered to a specific transportation-related capital project ***or*** the administration of a specific transportation project." *Id.* at 312, 811 S.E.2d at 768 (emphasis added). Here, CMRTA's expenditure of Penny Tax funds falls directly under the second category of spending: the administration of a specific transportation project. As a direct result of the *Richland County* decision, DOR created guidelines outlining what expenses are proper under the Transportation Act. [R. 321-26]. These guidelines specifically permit the spending at issue. [R. 325] ("Eligible Costs also include costs and expenses paid or incurred with the day to day operation of the Mass Transit System.").

Nothing in the *Richland County* decision imposes the additional restrictions being sought by SCPIF. SCPIF's strained interpretation of these quotes is an attempt to twist this Court's holding to force SCPIF's view of what is an appropriate limitation on Penny Tax spending. This restriction is not found in this Court's prior decision nor the controlling provisions of the Transportation Act.

CONCLUSION

At this point, SCPIF is the only entity to have examined this issue and interpreted the Transportation Act to not allow for the funding of daily operation of mass transit systems. At this point, the circuit court, court of appeals, and DOR have all examined this issue and reached the same conclusion: that the Transportation Act allows for Penny Tax funds to be used for operating mass transit systems. SCPIF has failed to demonstrate any compelling reason to overturn this interpretation. Because the Transportation Act is clear and unambiguous, there is no reason for

this Court to interfere with the projects that were approved by the Richland County voters who passed the Penny Tax Ordinance. For these reasons, this Court should deny the SCPIF's Petition for Write of Certiorari.

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