

THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Charleston County, South Carolina, Petitioner,

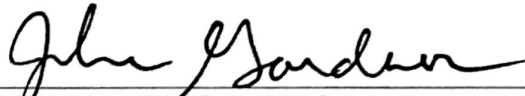
vs.

South Carolina Transportation Infrastructure Bank
and the South Carolina Department of Transportation, Respondents.

**NOTICE ADVISING RESPONDENTS OF
TWENTY (20) DAYS TO FILE A RETURN**

Please take notice that, pursuant to Rule 245(c), SCACR, Respondents have twenty (20) days from the date of service hereof to file an original and six (6) copies of its return with the Clerk of the Supreme Court and on all parties a copy of the return. Failure of a party to timely file a return may be deemed a consent by that party to the matter being heard in the original jurisdiction.

CHARLESTON COUNTY, SOUTH CAROLINA



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Charleston, South Carolina
July 27, 2017

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Charleston County, South Carolina, Plaintiff,

vs.

South Carolina Transportation Infrastructure Bank
and the South Carolina Department of Transportation, Defendants.

COMPLAINT

The Plaintiff Charleston County, South Carolina (“Charleston County” or “County”), complaining of the Defendant South Carolina Transportation Infrastructure Bank (“Bank”), alleges and will show unto this Honorable Court as follows:

1. The County is a body corporate and politic and a political subdivision of the State of South Carolina.

2. The Bank is a body corporate and politic and an instrumentality of the State of South Carolina, established pursuant to S.C. Code Ann. § 11-43-110, *et seq.*, the South Carolina Transportation Infrastructure Bank Act (“Act”). The corporate purpose of the Bank is to select and assist in financing major qualified projects by providing loans and other financial assistance to government units and private entities for constructing and improving highway and transportation facilities necessary for public purposes including economic development.

3. The South Carolina Department of Transportation (“SCDOT”) is a political subdivision of the State of South Carolina. The SCDOT is identified herein by virtue of an

intergovernmental agreement with the County, the Bank and SCDOT, and therefore, the SCDOT is a necessary party and named solely for that purpose.

4. This Court has jurisdiction over the parties and subject matter hereto.

FACTS

5. The planning of the Mark Clark/I-526 (“Mark Clark”) freeway began in 1960, and construction of the first section began in 1979. The Mark Clark begins at an uncompleted interchange with US 17/Savannah Highway and SC 7/Sam Rittenberg Boulevard in the West Ashley section of the City of Charleston and terminates in a partial flyover interchange onto US 17/Johnnie Dodds Boulevard in Mount Pleasant, South Carolina.

6. In 1993, the bridge section identified as SC 30, or the Robert B. Scarborough Bridge, opened connecting the downtown portion of the City of Charleston with James Island. The SC 30 connector terminates at Folly Road.

7. Approximately ten miles separates the Mark Clark from its termini at Highway 17 West Ashley to Folly Road on James Island. The Mark Clark Extension Project is the highway construction and improvement project in Charleston County consisting of extending the Mark Clark Expressway/Interstate 26 from U.S. Highway 17 to Folly Road (“Extension Project” or “Project”).

8. The uncompleted portion of the Mark Clark is the subject matter of this lawsuit.

9. On June 8, 2007, the County, the Bank, and the SCDOT entered into an Intergovernmental Agreement (“IGA” or “Agreement”) (attached as Exhibit A), whereby the Bank agreed to provide \$420 million in the form of grants to the County to be used to complete the Project. In 2007, the Extension Project was estimated to cost \$420 million. The IGA required the Bank to fund an initial grant of up to \$99 million to fund engineering, environmental work, and right-of-way

acquisition for the Project. The balance of funding for the Project (i.e., \$321 million) would be funded through revenue bonds available to the Bank at a future date.

10. As consideration for the Bank's \$420 million commitment, the County is required to provide a local match contribution of \$117 million on roads to be constructed or improved which directly relate to the Extension Project.

11. In addition, the IGA required the SCDOT to oversee all planning, design, engineering, right-of-way acquisition, contract administration, inspection, awarding of contracts, the review and approval of payment of contracts, construction for the Extension Project, and any related or necessary activities or functions of the Extension Project. See IGA Article V, Section 5.1, Extension Project Administration.

12. The IGA does not contain a termination date. Rather, the IGA provides that the agreement would be effective as of June 8, 2007, and "shall terminate . . . on the date when the last of the following events occur: (i) the last project of the local match contribution required from the County as set forth in Section 3.2 is completed; (ii) the Bank makes the final Disbursement on the Extension Project; (iii) the Bank certifies through a resolution adopted by its Board that it cannot provide any further financial assistance to the Extension Project as set forth in this Agreement; or (iv) the Extension Project is declared completed and accepted by the County, SCDOT, and the Bank." See IGA Article II, Section 2, Term of Agreement.

13. To date, the events necessary to terminate the IGA pursuant to Article II have not been met, notwithstanding the County's local match contribution of \$117 million.

14. Since the parties entered into the IGA in 2007, the SCDOT's estimated cost for the Extension Projects has escalated from \$558 million in 2012 to approximately \$750 million in 2015. See Summey Aff. ¶ 3.

15. The IGA provides, in part, that the County shall be responsible for obtaining or providing additional funding for the Extension Project if the available funds are not sufficient to complete the Extension Project within the scope of the Extension Project, reducing the scope of the Extension Project to conform to available funding, or some combination thereof. See IGA Article V, Section 5.5, Extension Project Delivery.

16. On August 17, 2012, due to the Extension Project's cost escalation and the County's responsibility to fund or provide additional funding or reduce the scope of the Extension Project, the County requested and the Bank voted unanimously to approve funding of the 2012 estimated shortfall of \$130-\$150 million. This brought the Bank's financial commitment for the Extension Project from \$420 million to \$550-\$570 million.

17. The funds would come from future financial capacity of the Bank, and the additional funds would be subject to Joint Bond Review Committee approval, pursuant to the Act. The Bank's approval was with the stipulation that prior to providing any additional funding for the Extension Project, the Bank will first fully fund the completion of the Florence County Projects estimated to be \$80-\$90 million.

18. To date, the Joint Bond Review Committee has not voted upon, or even considered, the Bank's approval of the \$130-\$150 million pursuant to the Act.

19. On or about December 2013, the County and the SCDOT negotiated and jointly proposed amendments to the Bank due to the increased estimated Project costs and a proposed increase in local match. The Bank rejected the amendments and proposed additional amendments and revisions, which imposed additional material and unlimited financial obligations and/or liability upon the County beyond those agreed to in the IGA and that were inconsistent with State law (e.g.,

the definition of eligible cost project costs pursuant to S.C. Code Ann. § 11-43-130(5)). See IGA Article IV, Section 4.1, Additional Documents and Actions.

20. On or about December 15, 2015, the Bank approved a resolution (“Resolution”) (attached as Exhibit B) requiring the County to 1) adopt a binding resolution by March 30, 2016, to fund or secure funding for the shortfall; 2) to approve a resolution or ordinance by April 30, 2016, of a new or amended Agreement between the parties; and 3) to adopt an ordinance by December 16, 2016, to place the funding plan into effect.

21. The County objected to the Bank’s December 15, 2015, Resolution because it unilaterally purports to direct the County to perform certain actions that the County is without the legal authority to do. Additionally, the IGA prohibits the Bank from imposing additional obligations and duties on the County, subject to additional penalty for failure to meet the demands of the Bank.

22. Although the IGA does not require or compel the County to provide a “plan” as required in the Resolution, on April 7, 2016, the County in good faith and the spirit of cooperation identified several potential funding sources that could be utilized if the County elected to provide additional funding as provided in the IGA, notwithstanding its right to reduce the scope of the Project to conform to available funding or seeking additional funding from the Bank. See Charleston County Resolution Number 16-07, April 7, 2016 (attached as Exhibit C).

23. The Bank’s Resolution required that if the County failed to meet any condition of the Resolution, the Project would terminate and the parties would have 60 days to develop, approve, and implement a plan to the end the Project.

24. On May 26, 2016, the Bank voted to terminate the IGA because it found that the County did not meet the conditions of the Resolution, and subsequently, the Bank initiated its 60-day workout period pursuant to the Resolution (May 26, 2016, resolution attached as Exhibit D).

25. Upon information and belief, although the County is not in default of any provisions of the IGA, the Bank has suspended funding for the Extension Project, voted to terminate the IGA, and intends to transfer/release its funding commitment for the Extension Project so that it can be used for other projects without the consent of the County and/or the SCDOT.

26. The Bank's Resolution states that "[i]n the event such a plan is not approved and implemented by those three parties within that sixty (60) day period, the Bank shall implement the plan it determines is appropriate to end its participation in the Project. In either event, the aforementioned reserved financial assistance will be released to be used on other projects approved by the Bank and JBRC." See Bank Resolution Section 4, December 15, 2015.

27. The parties met in June and July 2016, but did not reach an agreement regarding a Plan that would end the Project. On or about July 26, 2016, the Bank voted to extend its 60-day workout period.

28. The parties met again in August 2016, and the County and the SCDOT agreed conceptually to a proposal that would end the Bank's participation in the Project but allow the Project to continue. See Summey Aff. ¶ 6.

29. The Bank has not agreed to the joint plan, and to date has not rescinded its May 26, 2016, vote to terminate the IGA. Although the Bank voted on December 14, 2016, to extend the workout period, seeking financial assurances from the County that it will fund cost overruns, Charleston County has provided those assurances in the form of a plan that includes Charleston County Ordinance Number 1926, adopted March 3, 2017 (attached as Exhibit E), pledging to fund up to \$150 million for the Project and the Charleston Area Transportation Study (CHATS) resolution, adopted February 13, 2017 (attached as Exhibit F), stating it has available bonding capacity in excess of \$200 million and its commitment to obligate a portion of its Federal

Guideshare funds to the Project. Notwithstanding this funding plan, the Bank has not agreed to reinstate the Project and its funding commitment.

FIRST CAUSE OF ACTION
(Declaratory Judgment Action - S.C. Code Ann. § 15-53-10 et seq. /
Breach of Contract)

30. The County re-alleges each and every allegation of the Complaint, where consistent herewith, as fully as if set forth herein.

31. The IGA provides in part that the County shall be responsible for obtaining or providing additional funding for the Extension Project if the available funds are not sufficient to complete the Extension Project within the scope of the Extension Project, reducing the scope of the Extension Project to conform to available funding, or some combination thereof. See IGA Article V, Section 5.5, Extension Project Delivery.

32. Notwithstanding this contractual provision, the Bank has determined that since the County has not provided a plan to fully fund the estimated Project shortfall, it has suspended funding, terminated the IGA and released the funding commitment for other projects.

33. The County contends that the Bank is without authority under the IGA to unilaterally terminate the IGA and release the funding commitment for other projects if neither party has breached the IGA and without the consent of the SCDOT and the County; therefore, a justiciable controversy exists between the parties.

34. The County contends that this Court should declare the rights, status, and other legal relationships of the parties as provided in the IGA because the Bank's actions exceed its rights and its authority under the IGA for the reasons to include, but not limited to, the following:

- (A) the Bank has no authority to terminate the Agreement before all of the conditions in IGA Article II, Section 2, Term of Agreement, have occurred;

- (B) the Bank has no authority to unilaterally mandate new terms and conditions of the IGA by resolution, requiring the County to set forth a plan to fund, or secure funding for shortfalls for the Project that are subject to approval by the Bank and requiring the County by resolution or ordinance to amend the IGA in a form and with contents the Bank determines are needed to protect the Bank's interest;
- (C) the Bank has no authority to compel material changes to terms and conditions of the IGA and to terminate the Agreement if it does not agree to the proposed changes;
- (D) the Bank cannot unilaterally change the definition of "Eligible Costs" in the Agreement, which refers to State law, and refuse to pay costs it deems are not "Eligible Costs" according to the Bank's definition of the term;
- (E) the Bank cannot unilaterally transfer and apply the Bank's funding commitment of \$420 million for the Extension Project to another state project;
- (F) the Bank's May 26, 2016, vote to terminate the IGA without an event of default is a breach of the IGA; and
- (G) notwithstanding the Bank's funding commitment, the County may construct the Project in phases.

35. The County is entitled to declaratory judgment by this Court, wherein the Court declares that the Bank is without authority to take the actions as stated herein and that its actions are a breach of the IGA.

36. Furthermore, this Court should find that as a direct result of the Bank's breach of the IGA and its unreasonable delays by withholding funding to advance the Extension Project, the County is entitled to damages in the amount \$750 million which is the estimated cost to complete the Extension Project.

**SECOND CAUSE OF ACTION
(Restitution)**

38. The County re-alleges each and every allegation of the Complaint, where consistent herewith, as fully as if set forth herein.

39. The County conferred a non-gratuitous benefit on the Bank when it completed State road projects valued at \$117 million as the County's local match. See IGA Article III, Section 3.2, Term of Agreement.

40. The Bank realized some value from the benefit in light of its corporate purpose to select and assist in financing major qualified projects by providing loans and other financial assistance to government units and private entities for constructing and improving highway and transportation facilities necessary for public purposes including economic development. See S.C. Code Ann. § 11-43-120(c).

41. It would be inequitable for the Bank to retain the benefit without paying the County its value. Therefore, this Court should award the County restitution of \$117 million.

**THIRD CAUSE OF ACTION
(Preliminary and Permanent Injunction)**

42. The County re-alleges each and every allegation of the Complaint, where consistent herewith, as fully as if set forth herein.

43. Since 2007, the SCDOT has been acquiring right of way for the Extension Project and applying for the necessary environmental, regulatory, and design permits through various state and federal agencies. Permits for the Extension Project are currently in the final stages of completion.

44. It has taken approximately nine years for the parties to reach this point in the design and permitting process.

45. Since the Bank has voted to stop funding the Project and terminate the IGA, the permitting process will end, and the County will irrevocably lose the work done to complete the Project. Therefore, the County has no adequate remedy at law and will suffer irreparable harm if the actions of the Bank are not enjoined.

46. The Extension Project is an important matter of public interest and promotes the health, safety, and welfare of Charleston County residents. The public will suffer irreparable harm if the Extension Project's permitting has to be reinitiated.

47. The County contends that there is a likelihood of success on the merits; therefore, the County is entitled to preliminary and permanent injunctive relief against the Bank enjoining it from terminating the Extension Project and/or suspending funding of the Project. Furthermore, the Bank should be enjoined from directing, using, or applying the Bank's funding commitment of \$420 million for the Extension Project for other state projects.

FOURTH CAUSE OF ACTION (Specific Performance)

48. The County re-alleges each and every allegation of the Complaint, where consistent herewith, as fully as if set forth herein.

49. The IGA is a binding agreement between the Bank, County and SCDOT.

50. The County and SCDOT have complied with and performed the terms and conditions of the IGA.

51. The Bank has breached the IGA and unjustifiably failed to perform its obligations thereunder including, but not limited to, unilaterally terminating the IGA.

52. The Bank's breach of and failure to perform under the IGA has caused harm and damage to the County, and the Bank must comply with and abide by its duties and obligations under

the IGA and must specifically perform the same. There is no adequate remedy at law for the performance of such duties and obligations. Additionally, the County is entitled to recover all monetary damages permitted by law.

**FIFTH CAUSE OF ACTION
(Anticipatory Breach)**

53. The County re-alleges each and every allegation of the Complaint, where consistent herewith, as fully as if set forth herein.

54. The Bank has not put the County on notice of any default of the IGA.

55. The Bank has unequivocally repudiated the IGA by its failure to rescind its May 26, 2016, resolution terminating the IGA and failure to reinstate the Bank's funding commitment.

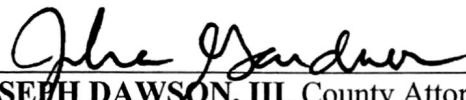
56. The Bank's repudiation of the IGA is a final and absolute declaration that the Agreement must be regarded as altogether off, unconditional, and does not rest on a partial breach and, in fact, goes to the whole consideration of the Agreement, relates to the very essence of the Agreement, and defeats the object of the parties in making the Agreement.

57. The Bank's December 15, 2015, Resolution and subsequent votes and resolutions evince an intention to refuse performance of the IGA in the future, and the Bank has refused to perform by failing to fund the costs necessary to obtain the permits required to complete the Project and has stated the reserved financial assistance for the Project will be released to be used on other projects. Therefore, this Court should find that the Bank repudiated the IGA and the County is not required to wait until the Bank exhausts the 60-day workout period, as extended, to end the Project and release the funds to be used on other projects before it initiates a breach of contract claim.

WHEREFORE, the Plaintiff Charleston County respectfully requests that this Honorable Court enter judgment in its favor on each of its causes of action and award the following relief:

- a) Declare that the Defendant South Carolina Transportation Infrastructure Bank cannot unilaterally terminate the Agreement;
- b) Declare that the Bank cannot suspend its funding for the Mark Clark Extension Project;
- c) Declare that the Bank cannot release the \$420 million funding commitment in the Agreement for other state projects;
- d) Award damages of \$750 million to the County on its breach of contract claim;
- e) Issue a preliminary and/or permanent injunction enjoining the Bank from directing, using, or applying the Bank's funding commitment of \$420 for the Mark Clark Extension Project for other state projects;
- f) Award the County \$117 million as restitution for the local match spent on State roads;
- g) Order the Bank to specifically perform its duties and obligations under the Agreement;
- h) Declare that the Bank has repudiated the Agreement; and
- i) Award the County such other and further relief that this Court may deem just and proper.

CHARLESTON COUNTY, SOUTH CAROLINA



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